

Is An Adverse Employment Consequence A Necessary Element For A Failure To Accommodate Claim In New Jersey?

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The New Jersey Supreme Court recently said maybe not. In *Victor v. State*, 2010 N.J. LEXIS 834 (Sept. 13, 2010), the Court refrained from determining if an identifiable adverse employment consequence is an essential element of an employee's failure to accommodate claim under the New Jersey Law Against Discrimination ("LAD"). After a lengthy analysis of the history of LAD and discrimination case law, the Court decided to leave this important question unresolved for the time being.

The Facts

Roy Victor began his career as a New Jersey State Police officer in 1986. In 1995, Victor sustained a back injury. Due to this back injury and a stress-related disorder that Victor attributed to a racially discriminatory job site transfer in 1998, he was on medical leave, was off-duty, or was on limited-duty status for

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lengthy periods from 1995 to late 2003. When Victor reported for duty in December 2003, three days after being cleared medically to return to full-duty status, he told the assistant station commander that he re-injured his back in the last few days. Victor requested that he be assigned administrative tasks rather than go on road patrol, because he thought that the protective vest required for road patrol would aggravate his back injury. Victor had not requested a medical leave, consulted with a personal physician, or contacted any New Jersey State Police medical personnel about a change in his duty status.

The assistant station commander was willing to agree to Victor's request, even though he did not have the authority to



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alter Victor's duty status. The station commander who had such authority refused Victor's request. Victor performed the work of a full-duty road trooper for four of the six hours that remained on his shift. He then returned to the station and took sick leave for the final two hours of his shift and for the next three days. Victor was subsequently seen by two New Jersey State Police physicians and then placed on off-duty status based on a complaint relating to his pre-existing depression and stress disorder. Although that complaint was supported by a report from his treating physician, there was no evidence that Victor produced documentation supporting his claim that he had re-injured his back.

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The Trial Court

Victor sued the State of New Jersey, the New Jersey State Police, and individuals who were either supervisors or medical personnel employed by the New Jersey State Police for race and disability discrimination under the LAD. The suit included claims for failure to promote, disparate treatment, hostile work environment, and retaliation. Victor also claimed that defendants failed to accommodate his back injury for the four-hour period when he was ordered to return to full duty as a road trooper after telling his supervisor that he had re-injured his back.

Defendants requested that the jury be instructed that an adverse employment consequence is one of the required elements of a failure to accommodate claim. The trial judge refused, reasoning that an adverse employment consequence was merely the means through which Victor proved damages. The jury found for Victor on his retaliation claim, failure to accommodate claim, and disparate treatment claim that was based on disability. The jury rejected his other race-based claims and all the claims directed to the individual defendants. The jury awarded him \$65,000 in damages and \$250,000 in punitive damages.

Defendants moved for a new trial or for judgment notwithstanding the verdict and again raised the argument about the required elements of a failure to accommodate claim. The trial judge denied the requested relief, holding that a failure to accommodate is, in and of itself, an adverse employment consequence. Defendants appealed.

The Appellate Division

The Appellate Division rejected the trial judge's reasoning, concluding that proof of an adverse employment action was a required element of a failure to accommodate claim under the LAD. Because the jury charge was in error, the Appellate Division remanded for a new trial on all claims. Victor's petition for certification was granted but was limited to one issue: "whether a plaintiff must prove he suffered an adverse employment action as a result of his employer's failure to accommodate a physical disability under the Law Against Discrimination, N.J.S.A. 10:5-1 to - 49."

The New Jersey Supreme Court

The Court engaged in a lengthy and thorough analysis of (i) the history of the LAD and its interpretative regulations as they related to handicaps or disabilities, (ii) the elements of the *prima facie* case of discrimination in general and disability discrimination in particular, and (iii) decisions by courts in New Jersey and elsewhere that touched upon the issue presented. None of these avenues, however, provided a definitive answer to the Court.

Central to the Court's analysis was its recognition of the LAD's broad remedial purpose and the wide scope of coverage for disabilities, which supported an expansive view of protecting the rights of disabled individuals in the workplace. That broad purpose suggested to the Court that it "chart a course to permit plaintiffs to proceed against employers who have failed to reasonably accommodate their disabilities or who have failed to engage in an interactive process even if they can point to no adverse employment consequence that resulted." The Court, however, acknowledged that such cases would be "unusual, if not rare," because a disabled employee who had been unsuccessful in securing an accommodation would ordinarily suffer an adverse employment action.

The Court found that the record before it was "a poor vehicle in which to find the definitive answer to that important question" and hence it refrained from resolving whether a failure to accommodate claim that is unaccompanied by an adverse employment consequence is actionable. The Court held, however, that Victor could not recover for failure to accommodate independent of his concession that he suffered no adverse job action. First, there was no record evidence that Victor was in fact disabled due to a back injury on the date when he asserted that he was not accommodated.

Second, there was no evidence that Victor sought a reasonable accommodation. According to the Court, Victor had a number of accommodation options available to him (*e.g.*, he could have reported himself sick, he could have reported to a New Jersey State Police physician, or he could have requested a leave), but he did

not take advantage of them.

The Supreme Court concurred with the judgment of the Appellate Division, reversing the jury's verdict and remanding the matter for a new trial. The Court did so, not because it concluded that there can be no claim for failure to accommodate absent an adverse employment consequence, but because on the record presented, Victor could not meet the proofs required on a *prima facie* case for failure to accommodate.

"Even if the Court eventually decides that a disabled employee need not establish that he or she suffered an adverse employment consequence as part of the *prima facie* LAD case, that employee plaintiff will be hard-pressed to succeed where the evidence shows that the employer engaged in the interactive process and offered a reasonable accommodation, which the employee declined."

Conclusion

Although in *Victor v. State*, the New Jersey Supreme Court declined to determine whether a failure to accommodate claim can proceed absent an identifiable adverse employment consequence, the Court's dicta suggests that presented with the right facts, it may recognize such a cause of action. Even if the Court eventually decides that a disabled employee need not establish that he or she suffered an adverse employment consequence as part of the *prima facie* LAD case, that employee plaintiff will be hard-pressed to succeed where the evidence shows that the employer engaged in the interactive process and offered a reasonable accommodation, which the employee declined.