HR Tip of the Week
P•A•S ASSOCIATES
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"100% Healed" Policies Violate Duty to Accommodate

The California Department of Fair Employment and Housing (DFEH) recently obtained a settlement that highlights a mistake that employers often make: requiring employees to be 100-percent healed before they can return to work after an injury.

In fact, blanket policies that say an employee must be 100-percent healed before he/she can return to work after an injury are unlawful. Instead, you must assess whether the employee can perform the essential functions of the job with or without reasonable accommodation.

In this instance, an employer's actions resulted in a $290,000 settlement obtained by the DFEH on behalf of a school district custodian.

Following a back injury, the custodian returned to work with no change to his duties and allegedly performed all of his duties for several months until the school district informed him that he was unqualified for the position due to physical restrictions.

During an investigation by the DFEH, the district reported that it relies on a test of physical capabilities to determine if someone can perform custodial duties. Under this test, an individual must be able to exert "maximal force." Because the custodian had a lifting restriction preventing him from exercising "maximal force," he was considered ineligible.

After attempts to mediate the dispute were unsuccessful, the DFEH filed a civil lawsuit alleging violations of the Fair Employment and Housing Act (FEHA). The FEHA prohibits discrimination against employees with disabilities and requires employers to provide a reasonable accommodation to allow qualified employees with disabilities to perform their jobs.

"Whenever an employee with a disability seeks an accommodation, the employer has a duty to provide an individual assessment to determine if that employee can perform the duties of the job, with or without an accommodation," said DFEH Director Kevin Kish.

"The testing requirements in this case meant, in practical terms, that the employee had to be 100% healed from an injury before he would be permitted to take a test for a job he was already successfully performing. That doesn't make sense. Policies requiring employees to be '100% healed from injury' in order to work deny employees their right to an individual assessment and violate the FEHA."

In addition to the monetary settlement, the district also offered reinstatement to the employee and made several policy changes:

- Noting that a lifting restriction does not prevent applicants from taking the screening test for a position.
- Stating that applicants can pass the test so long as they can safely lift the weight deemed necessary for the duties of that position while staying within any medical restrictions.
- Clarifying that the screening test is strictly for use in pre-employment inquiries by new applicants and should never apply to employees returning from injury.
- Providing disability accommodation training for a number of supervisors and human resources personnel.

Tip: Initiate a good faith, interactive process to identify a reasonable accommodation for a disabled employee returning from a medical or workers' compensation leave of absence.

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