

PUBLICATION

Sixth Circuit Revives ADA Claim of Deaf Lifeguard

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In *Keith v. County of Oakland*, the U.S. Court of Appeals for the Sixth Circuit reversed summary judgment to a county pool that denied employment to a deaf lifeguard. Setting aside the issue that seems to have captivated the internet about this case (whether it is safe to swim in a pool with a deaf lifeguard) the implications of this case for employers are profound.

The Plaintiff, Mr. Keith, successfully completed lifeguard training with the assistance of a sign language interpreter. Upon completion of the training, he was offered a part-time lifeguard position contingent upon passing a pre-employment physical. The doctor who performed the pre-employment physical expressed concern about Mr. Keith's ability to perform the essential functions of the lifeguard position since he was deaf. As a result of the physician's concerns, the employer consulted with an aquatic safety and lifeguard training consultant. The consultant also expressed concern that Mr. Keith could perform the lifeguard's duties safely, by himself. In light of the doctor's concerns and the aquatic safety expert's concerns, the employer revoked the offer of employment to Mr. Keith.

The District Court granted summary judgment to the employer on Mr. Keith's ADA claim, and the Sixth Circuit reversed. The Sixth Circuit found three questions of fact that precluded summary judgment:

1. The ADA requires an "individualized inquiry" of whether a disability disqualifies an individual from performing the essential functions of a job. The Court found that there was a question of fact as to whether the employer performed a sufficient "individualized inquiry" because the experts that the employer relied upon did not speak with each other, did not physically examine the Plaintiff, and did not allow the Plaintiff an "opportunity to demonstrate his abilities." This raises the question of whether the employee/applicant must be given a trial period to "demonstrate his abilities?"
2. The Sixth Circuit also found a question of fact as to whether Mr. Keith was qualified for the position. In litigation, Mr. Keith offered the testimony of three experts that specialize in the field of deaf lifeguards. Not surprisingly, they opined that he was qualified for the position. The practical problem for employers is that they cannot anticipate that the applicant or employee will track down a more qualified expert in litigation. In this case, the employer relied on a physician and an aquatic safety expert. That should be sufficient.
3. Finally, the Court held that the reasonableness of Mr. Keith's requested accommodation was a question of fact. The Court noted that the reasonableness of a requested accommodation is generally a question of fact that precludes summary judgment. Part of the requested accommodation involved shifting job duties to other employees. While the concept of reasonable accommodation does not require an employer to shift essential job duties, and employer may be required through "job restructuring" to shift "marginal" job functions. Whether a job duty is "essential" or "marginal" is a question of fact.

The problem with this case is that it sends a message to employers who are making good faith attempts to comply with the ADA that they may be second guessed with the benefit of hindsight in expensive litigation.