

Accommodating Asperger's Syndrome and Other Autism Spectrum Disorders in the Workplace

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The Supreme Court of the United States recently declined review of an Americans with Disabilities Act ("ADA") case from the U.S. Court of Appeals for the Sixth Circuit ("Court"), *Jakubowski v. Christ Hospital*, 627 F.2d 195 (6th Cir. 2010). The Court's decision addresses several legal issues that are especially important to health care providers, which must balance obligations to accommodate disabled employees with legitimate business and ethical concerns – most importantly, patient safety.

The plaintiff in the case, Martin Jakubowski, has Asperger's Syndrome ("Asperger's"), a developmental disorder on the autism spectrum characterized by, among other things: peculiarities in speech and language (such as speaking in a monotone or overly formal manner), socially and emotionally inappropriate behavior, and the inability to interact successfully with peers. The degree of individual impairment of those with this disorder naturally may affect employment and career options. Some individuals with Asperger's are successful professionals, notwithstanding some degree of difficulty with social interaction, while others require highly structured and predictable jobs in which they can work autonomously.

In light of the increasing number of adults diagnosed with Asperger's, as well as the movement to integrate individuals with autism spectrum disorders into mainstream employment and educational settings, employers increasingly may be faced with decisions about the feasibility of accommodating employees or applicants who have Asperger's or autism. This is especially true because under the ADA Amendments Act, which expansively interprets the concept of disability, individuals with Asperger's and autism very likely will be treated as disabled. The *Jakubowski* case highlights some of the competing considerations for employers inherent in these circumstances.

Difficulties Performing the Job of a Family Practice Resident

Jakubowski began a family practice residency with Christ Hospital in Cincinnati ("Hospital"). He experienced performance difficulties almost immediately, during his orientation. While he scored in the ninetieth (90th) percentile nationally on a medical

knowledge exam, he performed poorly on an emotional intelligence exam. Supervisors noted his weak communication skills with patients, and identified as areas of deficiency self-awareness, social competence, and relationship management. In a clinical setting, Jakubowski was unable to keep up the necessary pace in seeing patients, and had difficulty properly relaying instructions between medical professionals and staff. He was observed to have difficulty communicating on the phone. Supervising and attending physicians became concerned that these communication deficiencies would result in harm to patients unless Jakubowski was closely monitored at all times.

Suspecting that Jakubowski suffered from a cognitive disorder, the director of the residency program referred him for a psychological evaluation. Eventually, Jakubowski was diagnosed with Asperger's. Before formally learning of this diagnosis, however, the Hospital decided to discharge Jakubowski because of his deficient performance.

Jakubowski appealed the discharge, asking the Hospital to accommodate his disability by treating him "with knowledge and understanding." He contended that he could perform successfully if other physicians and nurses were made aware of his condition and its symptoms and "triggers." He agreed that his communication skills with patients required improvement but did not propose any specific solution to address this problem, other than promising to work on his own to improve these skills. The Hospital did not view this as a feasible accommodation, and instead offered to assist Jakubowski to find a residency in pathology, a field in which little or no patient interaction takes place. Jakubowski declined this offer, appealed the Hospital's decision, and ultimately sued, alleging discrimination in violation of the ADA.

Under the ADA, a determination of disability discrimination must take into consideration the essential functions of a job, whether the individual can perform those functions with or without reasonable accommodation, and, if accommodation is needed, the feasibility of finding an accommodation that simultaneously satisfies the employer's business concerns and places the disabled individual on an equal footing with others who perform the same job.

The Court agreed with the Hospital that an essential function of the job of being a physician (and, particularly, a family practice doctor) is the ability to communicate with patients and professional colleagues in ways that ensure patient safety. Asperger's indisputably impairs communication skills. Thus, the parties agreed that Jakubowski suffered from a disabling impairment. However, the critical legal issue was whether he was "qualified" within the meaning of the ADA: someone who could perform the essential functions of the job, with or without reasonable accommodation. Jakubowski's poor performance as a resident was evidence that he could not perform the essential job functions without reasonable accommodation. The inquiry then shifted to whether there existed a reasonable accommodation that would allow Jakubowski to perform the essential functions of the job.

Reasonable Accommodation and the Interactive Process

The Court found that Jakubowski's request for "understanding and awareness" of the symptoms of Asperger's was not a proper accommodation, because it left open the crucial question of how he would improve his communication with patients and co-workers. In the course of the lawsuit, however, Jakubowski's expert witness proposed a more extensive set of accommodations, including, among other things, assigning an attending physician or a medical faculty member to monitor his interactions with patients. The Hospital's expert witness responded that this was unreasonable; the Hospital did not have the resources to assign physicians and medical faculty to monitor Jakubowski and still provide the other residents with necessary supervision and training. The Court agreed that Jakubowski's proposals were not reasonable.

Jakubowski also challenged the Hospital's good faith in attempting to find a reasonable accommodation. He argued that, by steering him toward another specialty (pathology) instead of proposing other possible accommodations, the Hospital did not fulfill its obligation to engage in the "interactive process" contemplated by the ADA regulations. Here, the Court placed the burden of proposing reasonable accommodations on the employee, and held that the Hospital was not required to propose a counter-accommodation. Be aware that other courts and the EEOC may require a more proactive effort from the employer.

Patient Safety: The Bottom Line

Ultimately, the decision in *Jakubowski* rested on the crucial issue of patient safety. Although the Court did not directly discuss the issue of whether Jakubowski was a "direct threat" to patients, it concluded that, if he could not communicate with and about patients without the assistance of another medical professional, he could not be trusted to care for patients alone – an essential function of a physician's job. His proposed accommodations did not adequately remediate this concern.

What Employers Should Do Now

- Review job descriptions to ensure that they accurately reflect the extent to which communication and related skills are an essential function of a job. Be prepared with examples of the significance of effective communication skills to the position in question. In the health care field, make sure job descriptions identify and stress the importance of communication and related skills to patient care and safety.
- When revisiting your job descriptions for health care professionals, consult technical standards that medical school applicants and candidates must meet in order to obtain a medical degree. Many medical schools have adopted such technical standards. Based on guidelines produced by the Association of American Medical Colleges, these standards set forth the specific visual, oral-auditory, motor, cognitive, and social skills required to practice medicine.

- As always, proactively engage in discussions regarding accommodation of disabilities, and document all such efforts. While you are not required to give employees the precise accommodations they request, your good faith may be more easily established if you advance possible accommodation(s) rather than merely “shooting down” an employee’s proposals.

If you have any questions about this Advisory or other ADA employment or public accommodation issues, please contact:

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