

## **Record Setting \$6.2 Million ADA Settlement Impacts Workers' Compensation**

What began as an on-the-job injury for a single individual has turned into a \$6.2 million settlement between Sears & Roebuck Co., Inc (Sears) and the Equal Employment Opportunity Commission (EEOC). The implication is that Sears may have focused on its workers' compensation leave policy to the exclusion of potential obligations under the American's With Disabilities Act (ADA).

### **Background**

A Chicago-based employee apparently injured himself while working for Sears as a Service Technician. Although the employee was determined to be substantially impaired with regard to his original job duties, he allegedly sought to return to work in at least two less physically demanding positions for which he felt he was qualified. Sears did not place him in either position and he was terminated once his one year of leave expired. Sears' workers' compensation policy apparently required termination for employees on workers' compensation in excess of one year.

Ultimately, the employee filed a complaint with the EEOC. The EEOC took up the case and, during pre-trial discovery, the EEOC determined that more than one hundred other employees who had been on workers' compensation leave had been terminated by Sears, apparently without Sears considering reasonable accommodations that may have allowed these employees to return to work.

### **Settlement**

As a result of the September 29, 2009 settlement, this case will not go to trial so there are still many unanswered questions about the specifics of this particular situation. However, according to the EEOC, Sears has agreed to a \$6.2 million monetary award, it will amend its workers' compensation leave policy, provide written progress reports to the EEOC, train employees regarding the ADA and post the EEOC consent decree at all of Sears' locations.

### **Impact**

Workers' Compensation is designed to compensate employees both for lost wages and necessary medical care due to on-the-job-injuries. It is generally designed to encourage the employee and the employer to attempt to return the employee to work. Title I of the Americans With Disabilities Act (and the ensuing 2008 amendments to the ADA) is civil rights laws intend to provide equal employment opportunities for qualified individuals with a disability. To this end, the employer is required to make reasonable accommodations to the known disability of a qualified individual with a disability. Sometimes an on-the-job injury may also qualify as a disability under the ADA.

Many employers lose sight of one law or regulation when dealing with another. In this case, the employer most likely adhered to the applicable state workers' compensation requirements and forgot about its obligations under the ADA. These obligations may have been expanded with the ADA Amendments of 2008 which potentially expanded the definition of disability.

In this instance, the employer allegedly did not consider reasonable accommodations that may have allowed the employee to return to work, even if in a different position. The risk with an inflexible leave policy of any kind is that the employer may forget it has an obligation under the ADA to at least consider whether an individual may have a disability and if so, whether a reasonable accommodation will allow the individual to return to work. Not only should the employer review the employee's ability to perform his or her original position, but must examine other positions that are open and for which the employee is qualified. The employer is not required to create a position.

### **What Should You Do?**

In light of this settlement, employers should review their workers' compensation policies. Before terminating an employee who has been injured on the job, even if done within the parameters of the applicable workers' compensation requirements, it is imperative that the employer has considered the potential impact of the ADA as well.

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The EEOC provides enforcement guidance on reasonable accommodation and undue hardship that indicates the employer must consider reassigning a disabled employee, as a reasonable accommodation, to a vacant, equivalent position for which he or she is qualified and can perform the essential functions of the job with or without a reasonable accommodation. If no vacant equivalent position is available, the employer is required to offer reassignment to a vacant position at a lower level for which the employee is qualified and can perform the essential functions of the job with or without reasonable accommodations. Note that the employer need only provide a reasonable accommodation if it does not create an undue hardship for the employer.

EEOC guidance materials include Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act and is available at:

<http://www.eeoc.gov/policy/docs/accommodation.html>. Another good resource is the Enforcement Guidance: Workers' Compensation and the ADA available at:  
<http://www.eeoc.gov/policy/docs/workcomp.html>.

Remember, although an individual may be considered temporarily or permanently impaired under the applicable workers' compensation statute, this is determined without regard to the concept of reasonable accommodations. If an on-the-job injury resulted in a condition that could be considered a disability under the ADA, the employer has the obligation to determine whether a reasonable accommodation would allow the employee to return to work. Although workers' compensation and the ADA appear to have competing requirements, they can actually work to the same end; return to a productive position for the injured employee with the pre-injury employer.

Ben C. Graves  
Associate Director Research & Compliance  
Hays Companies