



CASE REPORT

PERSONNEL — REASONABLE ACCOMMODATION OF DISABILITY. Davis v. Microsoft Corp., Ct. of Appeals, Div. I. No. 47887-7-I; Slip Op. January 7, 2002

The Court of Appeals' decision in an appeal from a \$2.3 million verdict in favor of a software engineer contains two important holdings:

- 1. Mandatory overtime may be an essential function of a position and therefore not subject to accommodation.**
- 2. An employer, as a part of the reasonable accommodations process, must first determine whether a disabled person may be accommodated in a position before requiring the individual to express interest in it.**

Facts. Thomas Davis was a software engineer with Microsoft. His workload required him to work 60 to 80 hours per week. Every systems engineer in his department worked a similar number of hours and had for many years. When Davis contracted Hepatitis C, he was unable to work the hours required and requested a 40-hour per week position. Microsoft determined that it could not alter his job requirements as a software engineer. Microsoft then reviewed other open positions with the plaintiff. The plaintiff asked what positions were available at Microsoft with a 40-hour work week that could accommodate him. Microsoft refused to determine whether other positions could accommodate his restrictions until Davis would have actually interviewed for the positions and been hired.

Holding: The Court of Appeals held that Microsoft was entitled to judgment as a matter of law, on the first issue, that overtime was an essential function of the plaintiff's position and reversing the trial court's holding. It made it clear, however, that Microsoft was required to determine whether the disabled employee could be accommodated in available positions before requiring the employee to express interest in it. The case was remanded for a determination on which of the two grounds the jury determination was based.

Discussion: The Court of Appeals reviewed plaintiff's claim that the Washington Law Against Discrimination (WLAD) had been violated. While the Washington courts looked to the Americans With Disabilities Act (ADA) for interpretative guidance, the WLAD has been given a broader interpretation by the Washington courts and is therefore favored by plaintiffs in bringing an action for disability discrimination.

Overtime as an Essential Function of a Position. An employer's duty to accommodate a disabled employee does not include elimination of an essential job function. In order to determine whether a particular function is essential to the performance of a specific job, the following criteria are considered: (1) the employer's judgment as to which functions are

essential; (2) written job descriptions; (3) the amount of time spent on the job performing the functions; (4) the consequences of not requiring the employee to perform the functions; (5) the terms of a collective bargaining agreement; (6) the work experience of past employees in the job; and (7) the current work experience of employees in similar jobs. This issue was one of first impression in Washington. The facts in this case clearly establish that, even though Microsoft did not include a reference to workload or overtime requirements in the written job description, all systems engineers within the department consistently worked 60 to 80 hours per week for years. Further, the structure of the position did not lend itself to a regular 40-hour week. Systems engineers were required to travel extensively and set up computer demonstrations under tight deadlines. Problems frequently occurred during the set up process requiring an engineer to work long hours to ensure that computers properly functioned in time for presentations. As the court noted, “reasonable minds could not differ that overtime in the systems engineers position were essential functions of the job that Microsoft was not required to eliminate.”

An employer’s best protection is always the inclusion of a reference to any essential function in the job description. Secondly, a provision of the collective bargaining agreement that overtime is “mandatory” will also serve the same function. Finally, a review of the actual workload of an employee and others in the same position provides direction.

Affirmative Duty to Accommodate: Microsoft also contended that it had reasonably accommodated the plaintiff in his search for a vacant position. The court did not agree. Under Washington law, an employer has an affirmative obligation to inform an employee of vacant job opportunities and determine that the employee is in fact qualified for those positions. Microsoft required plaintiff to apply for positions before it would review whether he could be accommodated in the position. The court clarified that since an employer is in a far better position to know or efficiently determine whether a vacant position can accommodate an employee’s disability, it must do so before requiring the employee to express interest in the position. As the court noted: “In this case, Microsoft refused to perform any functions assessment until after Davis applied for and was hired in another position. This forced him to attempt to discover his own accommodation among hundreds of vacant positions, with no tools with which to do it.” The court clarified that Microsoft was not required to guarantee a position, but only that it take reasonable steps to find an open position for which he was qualified. If there were no open positions, the employee was not qualified to fill it and/or the employee could not be reasonably accommodated in an open position, the disabled individual may be terminated.

Practical Applications: Overtime may be an essential function of a position. An employer’s best protection remains a job description and union contract which clearly specifies overtime as an essential function of the job.

In the accommodations process, the employer has an affirmative obligation to assess available positions and determine whether a disabled employee can be reasonably accommodated in such positions. An employer does not have to guarantee a job to a disabled person, nor offer a job for which an individual is not qualified or in which he or she cannot be reasonably accommodated. It is the employer’s duty, however, to assess the requirements of the job and to make an initial determination as to whether a disabled individual can be accommodated in an open position before asking the disabled person if he or she is interested in it.