

## **CLIENT ALERT: Second Circuit Holds that Employer's Failure to Engage in Interactive Process for Reasonable Accommodation Is Immaterial to ADA Claim**

A recent decision of the United States Court of Appeals for the Second Circuit, *McBride v. BIC Consumer Products Mfg. Co., Inc.*, has important implications for employers confronted with issues under the Americans with Disabilities Act of 1990 (the "ADA"). In short, it holds that if an employee cannot demonstrate that there is some possible reasonable accommodation that would allow the employee to perform the essential functions of the job, the employee cannot prevail on a disability discrimination claim merely because an employer failed to engage in an interactive process to discover an accommodation.

The plaintiff, Sandra McBride, worked as a utility operator in the cartridge assembly area of BIC's ink systems department. In June 2001, McBride reported to her employer that she had become ill and was suffering from a respiratory ailment as a result of exposure to various chemical fumes at work. Additionally, she reported having anxiety and panic attacks. McBride took a leave of absence and, after approximately one year, was cleared to return to work with the restrictions of avoiding fumes and "inappropriate hassles or threatening confrontations."

BIC offered to provide McBride with a respirator that would allow her to avoid fumes. McBride rejected this offer, and neither party discussed any alternative accommodations. BIC terminated McBride upon the conclusion of her medical leave for her failure to accept BIC's proposed accommodation. McBride brought suit alleging disability discrimination under the ADA. The Second Circuit found that McBride failed to show any evidence that with the aid of a reasonable accommodation, she was qualified for her pre-disability position or a suitable vacant position to which she could have been reassigned. Moreover, the Court held that in the absence of such evidence,

the employer's failure to engage in an interactive process intended to discover an accommodation suitable to both parties was immaterial.

This case is significant because the Court held, for the first time, that an employer's failure to engage in an interactive process does not form the basis of an ADA claim in the absence of evidence that an accommodation was possible. Further, the Court held that evidence of an employer's failure to engage in a sufficient interactive process does not allow a plaintiff to avoid summary judgment unless she also establishes that, at least with the aid of some identified accommodation, she was qualified for the position at issue.

While this decision may be useful to employers facing ADA issues in the workplace, employers should proceed cautiously because by failing to engage in a sufficient interactive process, an employer risks not discovering a means of accommodating an employee's disability. Where accommodation is possible, an employer will likely commit an ADA violation when it fails to engage in a sufficient interactive process. On the other hand, this Second Circuit decision will benefit employers where it is clear that an accommodation is not possible. Finally, this decision is only binding upon courts interpreting the ADA within the Second Circuit (Connecticut, New York, Vermont), and does not impact any claims outside of this Circuit, or any claim under state law.

If you have any questions about the implications of this decision, disability accommodation issues, or any other concerns regarding the ADA or state disability statutes, please contact your MBJ attorney.

*Laura E. Coltin is an attorney with Morgan, Brown & Joy, LLP. Laura may be reached at (617) 523-6666 or at [lcoltin@morganbrown.com](mailto:lcoltin@morganbrown.com). Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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