

# Employment Practices Liability

March 27, 2019

## Second Circuit Issues Ruling In Favor of Employee on Failure to Accommodate Resulting from Failure to Update Job Description

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On March 11, 2019, the Second Circuit Court of Appeals vacated and remanded in part a district court decision dismissing plaintiff's amended complaint for failure to state a claim. The Court concluded that the district court erred in its determinations as a matter of law regarding the plaintiff's essential job functions in *Noel v. Wal-Mart*, No. 18-1139-cv (2d. Cir. Mar. 11, 2019).

**Factual Background:** The Plaintiff, William Noel, was formerly employed as a pharmacist manager at Wal-Mart. In April 2016, Wal-Mart announced that all new pharmacy managers would be required to be certified to administer immunizations, and all current pharmacy managers would be required such certification by October 16, 2016. Noel, who suffers from needle phobia, sought an exemption of this alteration of his job description pursuant to the Vermont Fair Employment Practices Act ("VFEPA"). On July 19, 2016, he received a letter from Wal-Mart granting his request and specifically informing him that he was capable of performing the essential functions of his position. The letter further stated that a change in his job description could alter this determination; however, Noel contends that his job description was not altered.

In October 2016, Noel was informed by a Wal-Mart representative that he would be required to obtain the certification to administer immunizations in order to keep his job. Noel refused and claimed that he was subsequently constructively discharged. In November 2016, after Noel's employment had ended, Wal-Mart issued a new job description for his former position, which stated that the administration of immunizations was an essential function of the position.

Noel brought a lawsuit claiming, *inter alia*, wrongful discharge under the VFEPA. The district court granted Wal-Mart's motion to dismiss, concluding that Noel had failed to state a claim upon which relief could be granted because he had failed to allege that he could perform the essential functions of his job. The district court concluded that administering immunizations was an essential function of Noel's job, based upon the announcement in April 2016 and the job description issued in November 2016.

**Court's Analysis:** The Second Circuit vacated the dismissal. The Court concluded that the district court was incorrect in its holding that "even taking the factual allegations of the complaint as true, administering injections was an essential function of Noel's job." The district court erred in considering the November job description, which post-dated Noel's discharge and was neither referenced in nor relied upon by the complaint. Furthermore, the district court relied on a copy of the April 2016 announcement but discounted the July 19, 2016 letter to Noel. The district court erred by determining, on a motion to dismiss, that administering immunizations was an essential function of Noel's job as a matter of law.

The Second Circuit distinguished *Stevens v. Rite Aid Corp.*, 851 F.3d 224 (2d Cir. 2017), in which the plaintiff, also a pharmacist with needle phobia, asserted almost identical claims to Noel's, but whose termination was upheld on appeal. Rite Aid implemented a policy requiring pharmacists to administer immunization injections, and Stevens sought an exemption. Rite Aid refused to grant the exemption, and terminated Stevens for inability to perform an essential function of his job when he did not obtain the required certification. Unlike Wal-Mart, however, Rite Aid revised the applicable job description "to require certification and to include immunizations in the list of 'essential duties and responsibilities,'" and Stevens was not able to provide contradictory evidence.

Here, Noel alleged that his job description was not altered following his receipt of the July 19, 2016 letter. That letter "specifically states that administering immunizations was not an essential function of Noel's job." At the pleading stage, these allegations were sufficient to survive Wal-Mart's motion to dismiss.

**Conclusion:** This decision highlights the importance for employers of establishing the essential job functions of employees with clarity and consistency. An employee who is unable to perform his or her essential job functions with or without a reasonable accommodation can be separated from employment. Of course, it is critical for employers to characterize job functions as "essential" only when that term is accurate considering the employer's needs and how the job is performed in practice. Employers should seek legal advice if there is any question as to whether an employee's job function is essential and whether that is clearly understood by the employee.

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Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact us at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at [jsmith@ccm-ct.org](mailto:jsmith@ccm-ct.org).

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