

# BOSTON BUSINESS JOURNAL

**DAVID C. HENDERSON**

## *Persistence, good faith efforts help counter discrimination claims*

**K**ohl's Department Stores recently confronted a situation that employers face all too often – claims by an employee of unlawful failure to reasonably accommodate a disability. How Kohl's prevailed in that case before the U.S. Court of Appeals for the First Circuit underscores yet again the value of persistence when an employer tries to find a reasonable accommodation.

Equal Employment Opportunity Commission v. Kohl's Department Stores Inc. involved a sales associate with type I diabetes who wanted to change her working hours because of her condition. After initial discussions with the employer did not lead to quick agreement on a solution, the sales associate resigned.

The store manager was undaunted. Instead of breaking off discussions after the abrupt resignation, the manager continued trying to engage the employee about other possible accommodations. In the end, the associate would not reconsider and instead filed claims with the Equal Employment Opportunity Commission alleging both unlawful failure to accommodate and constructive discharge. Even at that point, however, the store manager again contacted the associate, asked her to rethink the resignation, and proposed alternative accommodations for both part-time and full-time



*David C. Henderson is a partner at the law firm of Nutter McClennen & Fish LLP.*

work. And only then, after days in which the associate still did not respond, did the store finally treat the associate's departure as voluntary and terminate her employment.

The reasonableness and persistence of the store manager caught the attention of the courts. In its affirmation of the District Court ruling for the employer, the Court of Appeals emphasized that, while an employee's request for accommodation sometimes

creates a duty for an employer to engage in an interactive process, bilateral cooperation and communication are required. An employer cannot violate the Americans with Disabilities Act when the employee causes a breakdown in communications.

The court also reasoned that, even though the store's initial response to the accommodation request may have been "ham-handed," that did not mean its subsequent overtures to the associate were empty gestures. An employer's refusal to provide a specifically requested accommodation does not necessarily amount to bad faith as long as the employer tries to discuss with the employee other potential accommodations. Further, an employee cannot prove a "failure to accommodate" a claim when she fails to engage in a good faith effort to work out potential solutions prior to bringing suit.

Finally, the court upheld the dismissal of the associate's constructive discharge claim. In such a claim, an employee must prove that his or her working conditions were "so onerous, abusive, or unpleasant that a reasonable person in that position would have felt compelled to resign." In the Kohl's case, however, it was the employee who failed to behave reasonably when she assumed the worst about the employer and jumped to conclusions (and litigation) too quickly.