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Coughing in the Kitchen: Coping with AIDS and Other Communicable Diseases in Vermont Food Service Establishments

By Frank V. Petrosino, Esq.

You are short one sous-chef de cuisine at your Vermont restaurant and have been searching a while to fill the position. You have finally found a culinary school graduate who has experience working as a sous-chef. She appears to fit the bill exactly and would be a perfect addition to your restaurant. Just when you are about to offer her the position, however, she tells you she is infected with HIV, AIDS, tuberculosis, or another potentially communicable disease. What to do?

Discrimination Restrictions and Direct Threats

The Americans with Disabilities Act (the "ADA") is a 1990 federal anti-discrimination law that is enforced by the Equal Employment Opportunity Commission ("EEOC"). The ADA generally prohibits discrimination based upon a person's disability. In the employer-employee context, the ADA applies to private and public employers with 15 or more employees.

Vermont's Fair Employment Practices Act ("FEPA") also prohibits discrimination based upon a person's disability. In the employer-employee context, FEPA applies regardless of the number of employees the employer employs.

A disability under both the ADA and FEPA is a physical or mental impairment that substantially limits one or more major life activities. Physical impairments include hearing loss, blindness, and illness from pathogens transmissible through food. Whether such impairment limits a major life activity is another question. Clearly, hearing and seeing are major life activities. Whether a pathogen limits a major life activity depends upon the severity and duration of the impairment. Someone who contracted hepatitis A and has been bed-ridden for a year waiting for a liver transplant is likely to be limited in one or more major life activities (e.g., caring for oneself). Someone who contracts salmonella and recovers in a few days (and is not otherwise disabled), probably is not limited in one or more major life activities for purposes of the ADA and FEPA.

With regard to communicable diseases in the workplace, the employer may refuse to hire or may terminate or exclude from the employer's premises any person who poses a direct threat to himself or others in the workplace. The ADA defines a direct threat as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation." The determination of whether a direct threat exists is

made on a case-by-case basis and turns on the disability involved and the requirements imposed by the specific job function. A prep cook with infectious tuberculosis would likely pose a direct threat when fulfilling her food preparation duties. A diabetic prep cook who normally wears a medical bracelet (health regulations generally prohibit food preparers from wearing jewelry on exposed arms and hands) would not pose a direct threat when fulfilling her food preparation duties if she instead wore a medical necklace.

Vermont's Food Service Establishment Rules

The Vermont Department of Health has issued Food Service Establishment Rules (go here to find a link to the rules: <http://healthvermont.gov/regs/index.aspx>). These rules are designed to be in compliance with ADA and FEPA anti-discrimination rules. Section 5-206 of the rules requires food service establishment employers to ask job applicants to whom a conditional offer has been made about any diseases they have, had, or have been exposed to that are transmissible through food. In addition, if a food service employee is diagnosed with a disease transmissible through food, or otherwise suffers from symptoms that may be caused by a gastrointestinal illness, he is required to tell his employer.

The Vermont rules list the four big causes of illness transmissible through food. They are salmonella Typhi, Shigella spp., shiga toxin-producing Escherichia coli, and hepatitis A virus. Notice that human immunodeficiency virus ("HIV") is not listed. Acquired immune deficiency syndrome ("AIDS"), which is caused by HIV, is also not listed. Consequently, a food service establishment employer cannot take away a conditional job offer to an applicant with HIV or AIDS if the person can do the job safely, with or without a reasonable accommodation.

If a food service employer reasonably concludes that an employee or post-conditional offer applicant poses a direct threat due to a communicable disease, the employer may (and in many cases, must) usually exclude such employee or applicant (as the case may be) from the food service establishment. Before making any exclusion determination, however, the employer must generally first consider whether there is a reasonable accommodation that could be made or whether the employee could be assigned and fulfill a vacant non-food handling position. If an employee has been excluded from the food service establishment, the employer may need to keep the position open for when the employee recovers and returns. The employee's reinstatement rights may stem from the ADA or could arise from the Family Medical Leave Act (federal law) or the Parental and Family Leave Act (Vermont law).

Conclusion

Keeping communicable diseases out of Vermont food-service establishments is of paramount concern to the owners of such establishments and to the public at large. Such concern, however, cannot drown out the rights of the infected or potentially infected job applicant or employee. An employer's prevention techniques must be executed efficiently, fairly, and tactfully.

This article provides a brief overview of the topic of communicable diseases in Vermont food service establishments and is by no stretch of the imagination an exhaustive treatise on the subject. I strongly encourage food service employers to read the Vermont Department of Health Food Service Establishment Rules (go here to find a link to the rules:

<http://healthvermont.gov/regs/index.aspx>) and the EEOC's Guide for Restaurants and Other Food Service Employers (http://www.eeoc.gov/facts/restaurant_guide.html), which are invaluable resources on the subject. If you need guidance on a specific situation, please contact your attorney (preferably prior to taking action).

Frank Petrosino is an attorney in the law firm of Paul Frank + Collins, located in Burlington, VT and Plattsburgh, NY. Nothing in this article constitutes legal advice; if you are seeking legal advice about your specific situation, please contact your attorney.