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# FLORIDA

## EMPLOYMENT LAW LETTER

Part of your Florida Employment Law Service

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#### Accommodations

The ADA requires you to provide reasonable accommodations to enable disabled applicants or workers to perform the essential functions of a job unless it would impose an undue hardship on you. At www.HRHero.com, you can find the following tools to help make sure you are following the ADA:

- HR Sample Policy—Equal Employment, www.HRHero.com/lc/policies/203.html
- HR Sample Policy—Temporary Modified Duty, www.HRHero.com/lc/policies/603.html

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### EVIDENCE

## Small Things Matter: How to avoid a failure-to-hire discrimination lawsuit

*A Jamaican man who had worked as a contractor for the U.S. military for 20 years applied for a job that involved providing customer service over the phone to the employer's corporate clients. His interviewer thought he gave a really bad answer to a question about his customer service experience and decided not to hire him because he had a "bad attitude." The interviewer also thought the applicant's accent made his speech difficult to understand. Because of the way the decision not to hire him was handled by several of its HR people, the company is now saddled with significant litigation costs. The court's ruling in this case shows the importance of careful and consistent decision making in the hiring process.*

Derrick Roberts applied for a CSR job with West in 2008. Roberts was born in Jamaica, finished high school there, moved to the United States in 1989, and became a citizen 10 years later. His first and only language is English, but he speaks with an accent.

Before moving to the United States, Roberts worked for 11 years on the U.S. military base in Guantanamo Bay, Cuba, both as a mechanic and in a laundromat. After he arrived here, he worked as a mechanic for more than a decade. He also worked for Escambia County transit before he was placed on permanent work restrictions because of a job-related injury. He then went back to school, taking a four-month course in information technology (IT) and receiving a certification in IT.

### Background

Corporations contract with West Customer Management Group, LLC, when they need people to handle their customer service calls. According to West, successful customer service representative (CSR) applicants must complete an online computer skills test and have a high-school diploma or general educational development (GED) certificate, previous customer service experience, familiarity with a keyboard and mouse, a flexible schedule, and an ability to communicate in a clear, distinct voice. In late 2008, West was doing a lot of hiring.

### Not such a good interview

Roberts arrived at West's office to interview with employment specialist Steven Henry one day after submitting an on-line application. Henry asked him prepared questions about his experience with computers and how he had dealt with customers in specific situations in the past. The employment specialist took notes during and after the interview.

In one particular question, Henry inquired how Roberts had dealt with a challenging customer situation in a former job. According to his notes, Roberts recalled a time when he was working as a mechanic

and diagnosed a mechanical problem, but the customer disagreed with his conclusion and thought the problem was something else. He apparently told the customer that he could fix only what he saw, and “if someone thinks it is something else, let them fix it.”

Henry saw Roberts’ behavior toward the customer as rude and a red flag for his candidacy for a CSR position. However, he left part of the story out of his notes. Roberts’ customer was the daughter of the car’s owner, and she was just relaying erroneous instructions from her father about what the mechanic should be asked to do. Given the fuller picture that was absent from Henry’s notes, doesn’t it seem like a less problematic response?

Henry stated that he couldn’t understand Roberts’ answers throughout the interview. As a result, he asked one of his coworkers to interact with Roberts to see if she shared the same opinion. When she was later asked by Roberts’ lawyers about the encounter, she indicated that she had trouble understanding him. Henry also had a supervisor speak with Roberts. The manager asked the applicant more questions and came to the same conclusion.

Roberts was never asked if he was Jamaican, but his nationality was on the high-school diploma that Henry was required to review. He said that Henry never asked him to repeat any answers, but a woman asked him the same questions about computers after Henry had finished interviewing him. Roberts claimed that Henry told him he didn’t have the necessary computer skills and remarked that he had a “deep accent.” Henry allegedly told him that his accent “would make matters worse to a customer.”

Henry testified that Roberts got very loud after he was told that he wouldn’t be considered for a job but he could reapply in six months. Roberts denied that he was offered an opportunity to reapply.

### ***Tons of interviews points to arguable inconsistency***

According to its representative, Penny Majeski, West hired more than 1,400 CSRs in the last eight months of 2008 and in early 2009. In November, when Roberts interviewed for a job, Henry and others were meeting with 10 to 15 people in a typical day. Majeski said that West hired no one with all three of the problems that Roberts presented: weak computer skills (he opted to “reboot” instead of force-closing programs when asked about dealing with a frozen computer, indicating deficient knowledge of basic troubleshooting procedures), problems with customer service ability, and difficulty communicating with others.

However, the Equal Employment Opportunity Commission (EEOC)—the agency Roberts filed a discrimination charge with—dug through West’s records and found some potentially glaring inconsistencies the court was forced to take note of during the litigation. According to interviewers’ post-interview comment sheets, West *had* hired people with shortcomings in computer troubleshooting and customer service. The company also had invited people who had been rejected for communication skills deficiencies to reapply in six or 12 months. (Remember, Roberts stated that he was told he couldn’t reapply.)

### ***National origin discrimination based on failure to hire***

As you know, the Florida Civil Rights Act (FLCRA) and Title VII of the Civil Rights Act of 1964 prohibit employers with at least 15 employees from discriminating against employees *and applicants* on the basis of their race, color, sex, religion, and national origin. Those laws prohibit employers from taking “adverse action” on the basis of any of those protected categories, and adverse action includes failure to hire, as was the case in this situation.

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