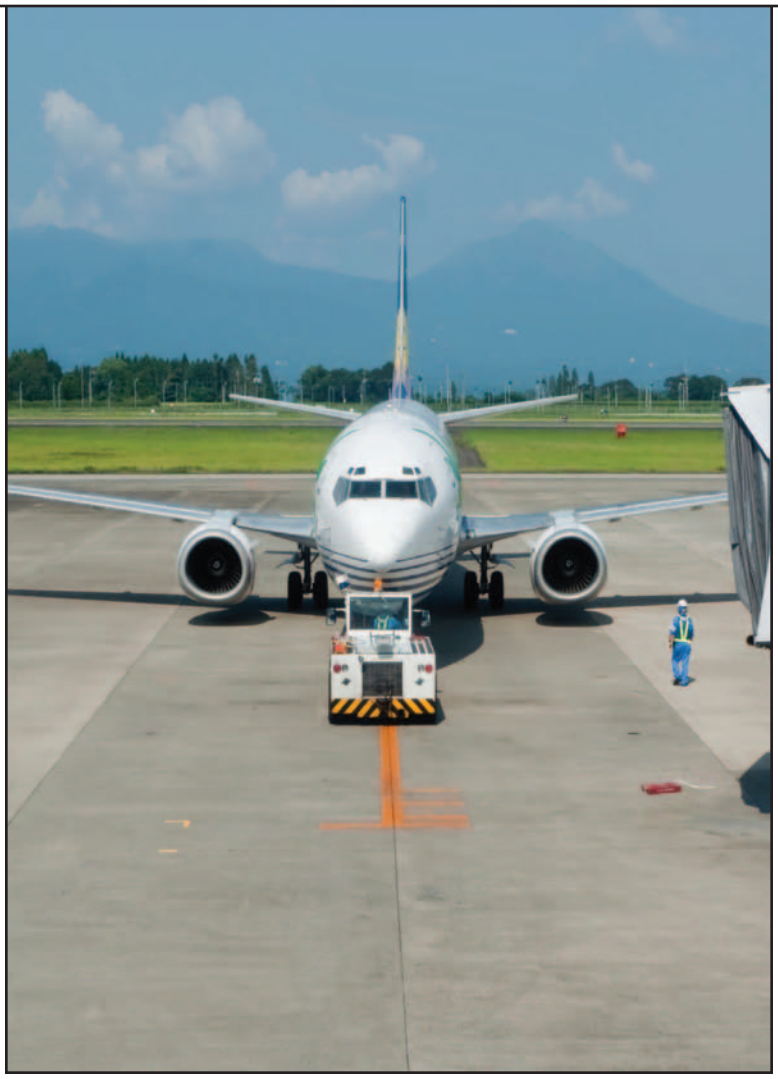
Employment Law Briefing



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Americans with Disabilities Act

Competitive transfer policy not cleared for takeoff

In trying to accommodate disabled employees under the Americans with Disabilities Act (ADA), employers have a variety of options. United Airlines endeavored to leverage one such option by placing disabled workers in vacant positions provided no better qualified candidates were in the running. The policy led to a lawsuit that reached the U.S. Court of Appeals for the Seventh Circuit as *EEOC v. United Airlines, Inc.*

Positional reassignment

The ADA requires employers to provide disabled job applicants and employees with reasonable accommodations where needed, provided such accommodations wouldn't place an undue hardship on the employer. The law includes "reassignment to a vacant position" as one possible reasonable accommodation.

In 2003, United Airlines introduced a "competitive transfer" policy whereby employees who could no longer perform essential job functions because of a disability (even with reasonable accommodation) were allowed to transfer to equivalent or lower-level vacant positions. The policy specified that these disabled individuals would be given preference over equally qualified applicants. But, as its name indicated, the transfer process was competitive and employees seeking accommodation wouldn't be granted a vacant position automatically.

2 influential decisions

Two previous cases critically influenced the Equal Employment Opportunity Commission's (EEOC's) decision to sue United Airlines for this policy. In 2000, the Seventh Circuit had held in *EEOC v. Humiston-Keeling* that competitive transfer policies didn't violate the ADA. Yet, two years later, the U.S. Supreme Court's decision in *US Airways, Inc. v. Barnett* stipulated that, in order to demonstrate that an accommodation is reasonable, an employee must show that the accommodation "is a type that is reasonable in the run of cases."

If an employee does so, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship on it under the case's particular circumstances. If the accommodation is then deemed unreasonable, the employee may still prevail by showing that special circumstances apply.

As its name indicated, the transfer process was competitive and employees seeking accommodation wouldn't be granted a vacant position automatically.

At issue in *Barnett* was the reassignment of a disabled employee over two senior, but nondisabled, workers. The Supreme Court noted that, though the plaintiff's request for assignment to the mailroom was a "reasonable accommodation" within the meaning of the statute, the violation of a seniority system "would not be reasonable in the run of cases."

Plaintiff's argument

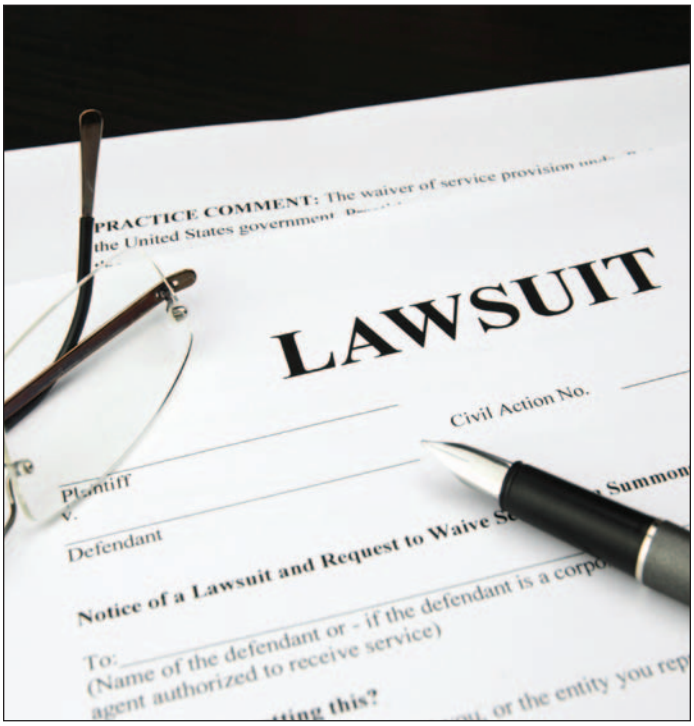
The EEOC believed that United's best-qualified selection policy wasn't an undue hardship on the employer because it differed from a seniority system. So it brought its suit alleging that United's competitive transfer policy violated the ADA. The plaintiff also asked the Seventh Circuit to overturn its decision in *Humiston-Keeling* and hold that "reassignment" under the ADA *requires* employers to appoint employees who can no longer perform their current positions because of a disability to vacant positions for which they're qualified.

Agreeing with the EEOC, the Seventh Circuit overruled its decision in *Humiston-Keeling* and returned the case to the district court.

Best course of action

In light of *Barnett* and *United Airlines*, employers in the Seventh Circuit may no longer rely solely on the presence of a "best qualified" selection policy when staffing its positions. Unless the employer can prove that the reassignment would impose an undue hardship on it, and that no special circumstances apply, the organization must place requesting, disabled employees into vacant positions for which those individuals qualify.

That said, a wide variety of circumstances may constitute undue hardship. So employers should consult with an employment attorney immediately upon receiving an employee's request for accommodation under the ADA. ♦



Refusing reassignment: A related case

As seen in *EEOC v. United Airlines, Inc.* (see main article), a court may deem reassignment to a vacant position a reasonable accommodation under the Americans with Disabilities Act (ADA). But what happens if the plaintiff refuses the reassignment? Such was the circumstance in *Kallail v. Alliant Energy Corporate Services, Inc.*

Here the plaintiff worked as a Resource Coordinator (RC) in the Distribution Dispatch Center (DDC). The DDC provided 24/7 service, with RCs working rotating schedules. After the plaintiff was diagnosed with diabetes, she asked for an ADA accommodation, with her physician recommending that the plaintiff work only straight day shifts. Because Alliant considered an RC's ability to work a rotating schedule an essential job function, it denied this request.

The employer did, however, offer the plaintiff reassignment to one of three vacant positions with straight day shifts. But the plaintiff rejected them all and went on medical leave. Upon her return, the plaintiff worked a temporary light-duty shift. Alliant still wouldn't reinstate her to the RC position, citing a second physician's letter reiterating that working a rotating schedule would be potentially life threatening. She then filed charges under the ADA.

The district court granted Alliant's motion for summary judgment, but the plaintiff appealed. The U.S. Court of Appeals for the Eighth Circuit noted that, once an employer has offered reassignment as a reasonable accommodation, "the employee must offer evidence showing both that the position offered was inferior to [her] former job and that a comparable position for which the employee was qualified was open." The only evidence the plaintiff presented was that of an open administrator's position. But it was at a higher organizational level than the RC position was. Because employers aren't required to promote employees to satisfy the ADA, the court affirmed the district court's grant of summary judgment.

On notice (or not)

False Claims Act case reveals critical requirement

The False Claims Act (FCA) has been around for a long time. Its initial version was enacted in 1863 and was originally referred to as the "Lincoln Law" after the sitting president at the time. Still very much a part of today's legal landscape, the FCA is now typically associated with protecting whistleblowers who report claims of fraud against the federal government.

Case in point: *McBride v. Peak Wellness Center, Inc.* In this recent ruling, the U.S. Court of Appeals for the Tenth Circuit determined whether a district court had erred when it granted a defendant summary judgment on a plaintiff's claim that she'd been terminated in violation of the FCA.

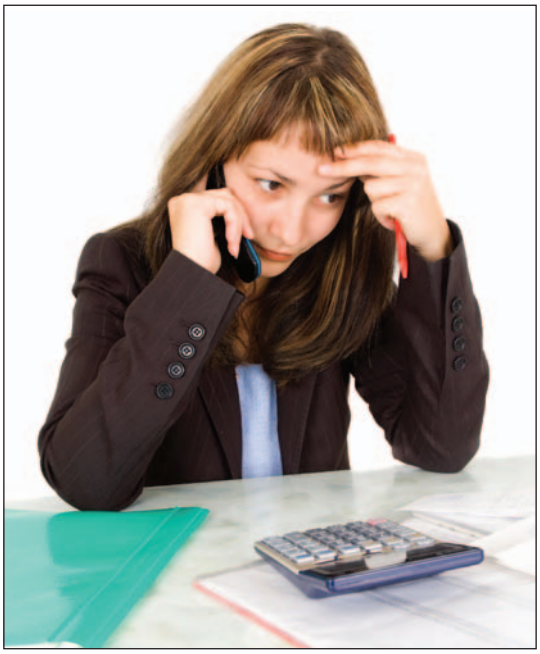
Generally disliked

The Peak Wellness Center, a nonprofit drug rehabilitation facility, received much of its funding from federal and state grants. The plaintiff worked as its business manager for about nine years. One of her job responsibilities was to ensure that Peak's use of grant money complied with all necessary accounting principles. Another one was to set up periodic audits conducted by outside firms.

The plaintiff was generally disliked by her co-workers, who viewed her as "meddlesome." She also had a poor relationship with her supervisor, Peak's Executive Director.

After an external audit turned up possible improprieties in the use of grant money, the plaintiff went over the Executive Director's head and raised these concerns directly with Peak's Board of Directors. Some time after her appearance before the Board, the plaintiff was terminated. It should be noted, however, that she had received several negative performance reviews in the years leading up to her termination.

The plaintiff requested that the Board review her termination. She also accused several Peak employees, including the Executive Director, of committing fraudulent acts. The Board commenced an investigation and found no evidence of fraud and upheld the employee's termination.



The plaintiff then sued Peak, claiming that her termination violated the FCA. The district court granted Peak's motion for summary judgment, and the plaintiff appealed.

Clear intentions

The FCA imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government … a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."

Employees often are in the best position to spot their employer's fraudulent behavior. So the FCA authorizes individuals to bring "qui tam suits" (lawsuits initiated by private citizens) on behalf of the government and allows these individuals to keep a percentage of any amount recovered.

Those who bring qui tam suits (generally referred to as "whistleblowers") are granted certain protections by the FCA. These include:

- Reinstatement,
- Double back pay, and
- Attorneys' fees.

An individual need not actually file a qui tam action to gain FCA protection. But a plaintiff claiming retaliatory discharge in violation of the act must show that the defendant-employer was put on notice that the plaintiff was either 1) taking action in furtherance of filing a qui tam suit; or 2) assisting in an FCA action brought by the government.

Merely informing the employer of regulatory violations doesn't provide sufficient notice. Doing so

fails to adequately inform the employer that the employee is either going to report the violations to the government or file a qui tam action. Whistleblowers must clarify their intentions to win FCA protection.

Insufficient evidence

In *McBride*, the Tenth Circuit concluded that the plaintiff never provided sufficient notice to Peak that she was going to bring an FCA action or assist the government in bringing such an action. The court did note one e-mail from Peak's Technology Director to the Executive Director explaining that it appeared the plaintiff was planning on making a presentation on behalf of Peak's auditors about how "terrible" the organization was. But the court deemed this insufficient to establish McBride's burden for several reasons.

First, statements claiming that Peak was "terrible" don't amount to accusations of illegal, let alone fraudulent, conduct. Second, communicating with auditors was part of the plaintiff's job. And, third, Peak used private outside auditors, so there was no reason to infer that McBride would be reporting possible violations to the government.

The plaintiff never put Peak on sufficient notice that she was either going to file a qui tam action or report fraud to the government. Therefore, the Tenth Circuit affirmed the district court's decision granting Peak's motion for summary judgment.

Record amount

Successful FCA plaintiffs generally receive between 15% and 25% of any recovered damages, and the Justice Department secured a record $5 billion in 2012 from FCA-related claims. This financial incentive provides tremendous motivation for employees to bring claims under the act. So employers that work with the federal government should familiarize themselves with the FCA's provisions and consult an attorney if a potential claim arises. ♦

When it comes to retaliation claims, severity counts

For a plaintiff to successfully argue a retaliation claim, a variety of requirements must be fulfilled. One particularly critical factor is the severity of the alleged harassment. *Alvarado v. Donahoe*, a decision handed down this past July by the U.S. Court of Appeals for the First Circuit, provides an informative example.

Filing charges

The plaintiff began working for the U.S. Postal Service (USPS) in 1991 and became a full-time mail carrier in 2000. In 1992, he was diagnosed with schizoaffective disorder, for which the plaintiff took medication that made him drowsy and slowed his work pace. As a result, he'd occasionally deliver mail late.

The plaintiff alleged that he was subjected to harassment and discrimination from his supervisors almost immediately upon informing them of his condition sometime between April 2006 and January 2007. In response to this alleged harassment, the plaintiff filed Equal Employment Opportunity (EEO) charges in February 2007.

Although he notified several of his supervisors of the filing in April 2007, the harassment continued. After the filing, the plaintiff's performance began to slip even more. His slow pace often caused him to return from his delivery route after his branch closed at 5:00 p.m. This problem was exacerbated during the holiday season when mail volume increased.

One of the plaintiff's supervisors instructed him to leave any undistributed mail, keys or equipment in a storage room outside the branch office if he arrived after 5:30 p.m. The plaintiff claimed that the supervisor's instructions caused him more anxiety and fear. He worried that, if any mail were to be stolen, he would be held responsible and likely fired.

Tendering a resignation

In January 2008, one of the plaintiff's supervisors discovered a large container filled with undelivered mail for which he believed the plaintiff was responsible. About a week later, the plaintiff was issued a 14-day suspension for improper conduct relating to the container.

Shortly after returning from his suspension, the plaintiff took until 6:00 p.m. to get back to his branch office and found it closed. He claimed that this incident reminded him of a similar one in which he was reprimanded for a late return. As a result, he began feeling anxious and broke down in tears. The plaintiff didn't return to work and officially resigned two months later.

Making a claim

The plaintiff sued the USPS, alleging discrimination on the basis of disability and retaliatory harassment leading to constructive discharge. After the district court granted the employer's motion for summary judgment against both claims, the plaintiff appealed — but only regarding his claim of retaliatory harassment.

In order to make a prima facie claim of retaliation, plaintiffs must show:

1. They engaged in some protected activity,
2. They suffered a materially adverse employment action, and
3. There is a causal relationship between the two events.

Among the main issues on appeal was whether the plaintiff suffered any *materially* adverse employment actions. These are defined as actions that, when taken together, would "dissuade a reasonable worker from making or supporting a charge of discrimination." The alleged harassment must be severe or pervasive, and any abuse must be both objectively and subjectively offensive.

After making his EEO complaints, the plaintiff's supervisors would harass him with comments mocking his medication intake and call him "crazy." The USPS opposed this claim, arguing that these comments and actions weren't materially adverse. The First Circuit agreed, noting that "[a]s callous, distasteful and objectionable as these … comments and actions may have been, they do not constitute the severe or pervasive adverse conduct that the case law recognizes." Because the plaintiff couldn't establish his prima facie claim, the court affirmed the lower court's grant of summary judgment.

Treading carefully

Although the actions in *Alvarado* weren't found to be materially adverse, comments referring to an employee's membership in a protected class could end up being used as direct or indirect evidence of a discriminatory bias. Employers need to ensure supervisors are trained to discourage inappropriate behavior. ♦

Disciplinary consistency: A Title VII case

Employers face a number of risks when severely disciplining an employee. One particular danger is demonstrated in *Ondricko v. MGM Grand Detroit*, a recent case heard by the U.S. Court of Appeals for the Sixth Circuit.

Bad shuffles

The plaintiff, a white woman, began working as a casino dealer-trainee for MGM Grand Detroit in September 2003 and was promoted to supervisor in October 2005. In April 2008, a dealer at a blackjack table under the plaintiff's supervision used an unshuffled deck of cards. The plaintiff was suspended pending investigation and terminated in May for violating company policy.

Before and after the plaintiff's termination, six other supervisors had engaged in shuffle-related misconduct — but only two had been terminated:

1. In January 2004, a black male was disciplined for failing to remove a specific card from playing decks in a game that required their omission.

2. In October 2007, a black male was given a three-day suspension after approving an unshuffled deck.
3. In December 2007, a black female was terminated after helping a dealer remove unshuffled discards from the shuffle machine but then returning those same cards to the dealer who put them in play.
4. In July 2008, a black male was disciplined for his involvement in two shuffle procedure violations in a two-week span.
5. In January 2009, a white male was terminated for allowing a dealer to use an unshuffled deck.
6. In February 2009, a white male was given a five-day suspension for supervising tables that put unused — but unshuffled — cards into play.

Before the plaintiff was notified of her termination, a Tables Games Assistant Shift Manager asked MGM's Vice President of Operations (VPO) why the plaintiff was to be fired while the black male involved in the October 2007 incident was merely suspended.

A mixed-motive analysis asks whether an adverse employment decision "was the product of a mixture of legitimate and illegitimate motives."

The VPO attempted to draw a distinction between the plaintiff's conduct and the black male employee involved in the October incident. He also explained how the attorney representing the black female terminated in December 2007 had contacted him and asked what he was planning to do about the plaintiff. The VPO then allegedly told the Tables Games Assistant Shift Manager, "I didn't want to fire [the plaintiff, but] how could I keep the white girl?"

The plaintiff filed an action against MGM, alleging gender and race discrimination in violation of Title VII. Finding that the plaintiff admitted to the conduct that had gotten her fired and that "nobody was treated differently whatsoever," the district court granted MGM's motion for summary judgment. The plaintiff appealed.

Mixed-motive claims

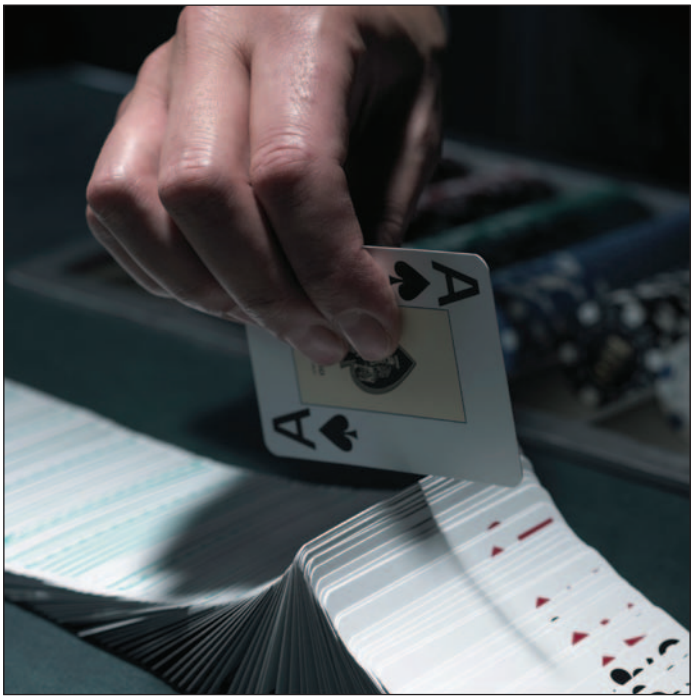
The Sixth Circuit analyzed the case using a mixed-motive analysis. This approach asks whether an adverse employment decision "was the product of a mixture of legitimate and illegitimate motives." Plaintiffs may proceed on a mixed-motive claim by using both direct and indirect evidence to demonstrate that their protected status was a motivating factor in their terminations — even though other factors also motivated the discharge in question.

The plaintiff's direct evidence was the VPO's aforementioned statement to the Tables Games Assistant Shift Manager. Her indirect evidence was the fact that, of the seven supervisors disciplined, both women were terminated while the only terminated man was fired almost a year after the plaintiff's discharge.

Relying on this evidence, the Sixth Circuit reversed the district court's order. A reasonable jury could conclude, found the appellate court, that the plaintiff's race and gender were motivating factors in MGM's decision to fire her.

Prepared to justify

Ondricko demonstrates the importance of disciplinary consistency. Even if an employee is guilty of misconduct, a court may find unlawful discrimination if the punishment in question is inconsistent with that meted out to others guilty of similar offenses. Employers must stand prepared to justify any such inconsistencies. ♦



A message to our clients and friends …

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

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