Employment Law Briefing

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What can go wrong?

ADA decision shows importance of interactive process

When employees suffer permanent injuries, their ability to continue performing their job duties is often affected. In these situations, employers must step carefully to avoid liability for violations under the Americans with Disabilities Act (ADA). The recent case of *Kauffman v. Petersen Health Care VII* provides a salient example of what can go wrong.

Request denied

The plaintiff was a hairdresser at a nursing home. During two of her four workdays, she had to push residents in wheelchairs from their rooms to the beauty parlor. She performed the task without difficulty until she required a reconstructive procedure on her bladder, resulting in her doctor advising a pushing limitation. It was unclear from the record whether this limitation was ever formally rescinded, but evidence suggested that patients who had the procedure should never push more than 50 lbs. ever again.

The nursing home's administrator reportedly told the plaintiff that the facility didn't allow employees to work under restrictions. He also denied the plaintiff's request for an accommodation of having other employees push the wheelchairs. The administrator stated that it would be an undue hardship for the facility to hire someone merely to transport residents to the beauty parlor.

The court held that specifying the amount of time she spent transporting the residents was determinative as to whether it was an essential function.

Before quitting, however, the plaintiff was briefly accommodated by her colleagues. And even for a limited time after the plaintiff quit, staff members continued to help the other hairdresser transport residents to the beauty parlor.

Trial required

The district court granted summary judgment in favor of the nursing home, and the plaintiff appealed. But the U.S. Court of Appeals for the Seventh Circuit reversed, finding that the record on whether pushing the residents was an "essential function" of being a hairdresser was unresolved. The nursing home argued that wheeling residents occupied 60% to 65% of the plaintiff's time, while the plaintiff believed that doing so accounted for only 9% of her time — or less than two hours per week.

The court held that specifying the amount of time she spent transporting the residents was determinative as to whether it was an essential function. In addition, the Seventh Circuit found that there was a question as to whether her inability to wheel could reasonably be accommodated by assistance from other staff, because it

The value of time: A precursor to *Kauffman*

An interesting precursor to *Kauffman v. Petersen Health Care VII* (see main article) was the 2001 case of *Basith v. Cook County*. Here, a pharmacy technician in a county hospital, who had sustained knee and leg injuries, also sued his employer for discriminating against him in violation of the Americans with Disabilities Act (ADA).

When hired, the plaintiff was assigned to the "clean air" room to perform tasks such as preparing intravenous solutions and delivering and stocking medications. His employment was interrupted several times by various injuries, eventually resulting in permanent restrictions on walking, bending and lifting. The hospital offered the plaintiff a new position in a different room, but he believed that was an insufficient accommodation. He was then offered a different position in the clean air room but was still unsatisfied because he wasn't offered an opportunity to cover overtime shifts. The hospital countered that the overtime shifts required employees to deliver and stock medications.

The district court granted summary judgment in the employer's favor, concluding that the plaintiff was unable to perform the essential functions of his job (such as delivery and stocking) and, therefore, wasn't a qualified individual with a disability. The employee appealed, claiming that he *was* qualified and the hospital had failed to provide him with a reasonable accommodation.

The U.S. Court of Appeals for the Seventh Circuit affirmed. The appellate court held that, even though delivery and stocking took only a small amount of the employee's time, the time spent on a function was only one factor in determining a position's essential functions. The court stated that "an essential function need not encompass the majority of an employee's time, or even a significant quantity of time, to be essential." This was because someone — even if not the plaintiff — would have to devote time to the essential function, which could be an undue hardship on the hospital.

seemed to have temporarily worked for the other hairdresser after the plaintiff quit.

Assuming that the plaintiff's estimate of her transport time was accurate, the demand on other employees' time, divided over the rest of the staff, would be minimal. Thus, the Seventh Circuit ultimately held that a trial was required to assess the accuracy of the plaintiff's estimate.

Explanation needed

The court further held that the administrator's alleged statement that they don't allow people with restrictions to work could be found to be evidence of disability-based discrimination. What's more, the Seventh Circuit found that the nursing home failed to explain why:

- Other employees couldn't have helped the plaintiff with resident transport, and
- They hadn't participated in an interactive process to locate another alternative.

Therefore, a trial was necessary to determine whether a reasonable accommodation was available. The court stated that, if at trial it was determined that the only accommodation needed was to have other staff provide transport a couple of hours weekly, the nursing home would have a hard time proving that such an accommodation was an undue hardship.

Discuss, don't deny

This case demonstrates the need to engage in an interactive process with employees once you're aware of a disability. Never flatly deny an accommodation because the disability in question is permanent. Rather, discuss — exhaustively, if necessary — all possible accommodations. ♦

Respect the record

Retaliation case turns on documentation

The importance of keeping a thorough record of every employee's disciplinary infractions and performance history can't be overstated. *Collazo-Rosado v. University of Puerto Rico*, a decision recently handed down by the U.S. Court of Appeals for the First Circuit, shows why.

Accommodations and reminders

The plaintiff suffered from Crohn's disease. In 2006, she was hired by the university as the mentorship coordinator of the academic support development center. At her interview with the co-director, the plaintiff stated that, if hired, she'd need reasonable accommodations of frequent, unfettered bathroom access as well as use of accumulated sick leave for medical tests and doctor visits. The co-director agreed to provide these.

A few months after the plaintiff's hire, the co-director sent out a staff memo instructing everyone to notify the administrative assistant before missing work, coming in late or leaving early. She also reminded staff members to punch in and out, and not to handwrite unauthorized changes on their time cards. The plaintiff later admitted that she'd handwritten changes on her time card many times before and after receiving the memo.

New supervisor

In August 2008, the plaintiff was given a new immediate supervisor. She informed this person of her medical condition and the agreed-on accommodations, which she hoped would remain in place. The new supervisor told her not to worry but asked the plaintiff to inform center personnel — by telephone, e-mail or text — when she would be away from her desk for a long time, as well as when she arrived late or left early. The reason for this was that the plaintiff's job required that she be physically present at the center to supervise mentors and tutors.

In 2009, the supervisor became worried about the center's performance after receiving complaints from professors and being compared negatively to another center. In response, she asked the plaintiff to stage more and different workshops. The supervisor also distributed another staff memo regarding the use of time cards and the importance of giving advance notice when modifying work schedules.

Thereafter, the supervisor noticed that the plaintiff was arriving late, departing early and leaving her work area for long periods without giving anyone advance notice. So she issued the plaintiff a written warning. The plaintiff explained that, when she called in, no one would pick up because other staff members recognized her number on the caller ID. She also claimed that she had doctor's notes for her leaves, though she provided only one.

The First Circuit held that there was no law requiring employers to list each and every reason for termination.

The plaintiff felt she was being treated unfairly because of the written warning, as well as because she'd overheard a co-worker's boyfriend laugh when she went to the bathroom. She complained to her supervisor about the boyfriend, but nothing was done about it. The plaintiff never accused any of her co-workers of teasing her.

Eventually, the plaintiff filed a complaint with her union and formally asked the university for the reasonable accommodations she'd requested at her job interview. She also filed charges of disability-based discrimination and retaliation with the Equal Employment Opportunity Commission.

Contract nonrenewal

In June 2009, the plaintiff received a poor performance evaluation from her supervisor. The supervisor stated that the plaintiff:

- Performed unsatisfactorily while training and supervising tutors,
- Ran workshops that didn't meet the university's needs,
- Failed to conduct a required survey, and
- Didn't comply with the center's stated attendance policy.

In August 2009, the plaintiff was informed that the university wouldn't be renewing her contract because it needed to restructure the tutoring and mentoring program. Two replacements were later hired to take over the plaintiff's job and the center's performance improved.

Credible and consistent

The district court granted summary judgment in favor of the university, finding that legitimate, nonpretextual reasons existed for the contract nonrenewal. The plaintiff appealed.

And on that appeal, the First Circuit affirmed — holding that the plaintiff had failed to meet her burden of creating a triable issue of fact on the pretext issue.

The plaintiff argued that the university's reasons *were* pretextual because the attendance and performance issues cited at trial weren't stated in the contract nonrenewal notice. Therefore, the plaintiff contended, attendance and performance issues were conjured to bolster the university's defense.

The First Circuit held that there was no law requiring employers to list each and every reason for termination. The record — including the memos, disciplinary write-ups and performance evaluations — established that the plaintiff had exhibited verifiable attendance and performance issues and, at least partly because of these problems, the university had to restructure the center's program. Therefore, the letter and reasons for termination were credible and consistent.

Straightforward lesson

The lesson of this case is fairly straightforward: The record matters. Be sure to thoroughly document all disciplinary warnings given to employees and meticulously maintain these files. If you're sued for discrimination, the record you've created will serve as evidence of poor performance or attendance problems, which are legitimate and nondiscriminatory reasons for taking an adverse action such as termination. ♦

Age Discrimination in Employment Act

Superintendent's comments propel case to trial

When supervisors make remarks about an employee's age, a direct hit isn't always necessary to send an employer reeling into court. Sometimes even a glancing blow, rhetorically speaking, could propel a lawsuit — and the employer under fire — all the way to trial. Case in point: *Scheick v. Tecumseh Public Schools*.

Troubling evaluation

The plaintiff was hired in July 2004 as a school principal. In 2010, at the age of 56, his employer decided against renewing his contract.

The school alleged that the decision was based on his poor performance as well as budget cuts. It had received

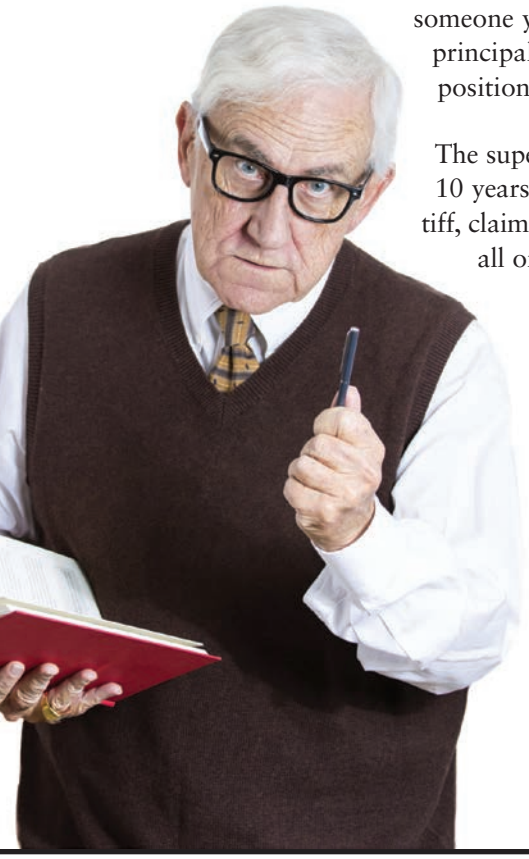
complaints from parents, staff and school board members regarding the plaintiff's job performance and lack of leadership. Also, one of his performance evaluations noted that the school had failed to meet state-mandated requirements for two years because of clerical errors on the plaintiff's watch. His attendance at school functions was deemed deficient, too.

Some of these issues were raised formally with the plaintiff. But no further disciplinary actions had been taken at the time of the evaluation in question.

Making statements

The plaintiff argued that his contract wasn't renewed because of his age. He claimed that the school's superintendent, who decided against renewing the contract, made statements to him suggesting age-based animus on three occasions.

First, during a performance review, the superintendent stated that the school board wanted the plaintiff to retire so it could hire a principal who would take over as superintendent after a few years. The superintendent also asked the plaintiff how long he intended to work. The second incident occurred in a conversation between the plaintiff and superintendent before the plaintiff received the contract nonrenewal notice. Here, the superintendent allegedly said the board wanted someone younger as principal. In the third incident, the superintendent allegedly commented that the board wanted someone younger in both the principal *and* superintendent positions.



The superintendent, who was 10 years older than the plaintiff, claimed that he had made all of these comments with respect to his own job, not the plaintiff's position. He further stated that the contract nonrenewal decision had nothing to do with the plaintiff's age.

The district court granted summary judgment in the defendants' favor, holding that the plaintiff failed to present direct evidence that age was the "but for" cause of his nonrenewal. (In age discrimination cases, the standard for finding a violation is that the adverse action would not have occurred "but for" the plaintiff's age.) The plaintiff appealed.

Offering evidence

The U.S. Court of Appeals for the Sixth Circuit reversed and remanded the lower court's decision. The appellate court found that the plaintiff had, in fact, offered direct evidence of age discrimination in the form of the superintendent's statements alleging an existing desire to find someone younger for the job of principal.

The superintendent allegedly commented that the board wanted someone younger in both the principal and *superintendent positions.*

The Sixth Circuit held that these statements weren't ambiguous and, if believed, would require the conclusion that age was the "but for" cause of the school's decision not to renew the contract. Uncertainty over whether the superintendent was referring to the plaintiff's position or both his *and* the plaintiff's positions didn't prove ambiguity, the court stated. In either case, the superintendent was at least partly referring to the plaintiff's position.

The court concluded that the evidence, taken as a whole and in the light most favorable to the plaintiff, was sufficient to permit a reasonable juror to conclude that age was the "but for" cause of the contract nonrenewal. Therefore, a genuine issue of fact *did* exist for trial.

Doing enough

It's not enough to train managers and supervisors to refrain from making age-related comments to employees specifically about their respective jobs. As this case shows, you also must instruct and remind management to avoid such statements even when the words in question aren't directed solely toward an individual employee. ♦

Defending a claim made under the Equal Pay Act

Signed into law in 1963, the Equal Pay Act (EPA) forbids wage disparities based solely on gender. In *E.E.O.C. v. Port Authority of New York & New Jersey*, the U.S. Court of Appeals for the Second Circuit considered whether an EPA claim was sufficiently pled based on the evidence presented.

EEOC complaint

After a discrimination claim was filed by a female attorney in the Port Authority of New York and New Jersey's law department, the Equal Employment Opportunity Commission (EEOC) began a three-year investigation into the Port Authority and its pay practices. The EEOC then filed a complaint pursuant to the EPA against the Port Authority alleging that female and male nonsupervisory attorneys working for the Port Authority received unequal pay for performing equal work. The EEOC alleged that the work was equal because the attorneys shared the same:

- Job code,
- Amount of required effort and skill, and
- Working conditions.

Yet female attorneys were paid less than male attorneys.

The district court dismissed the complaint, holding that the EEOC hadn't alleged any facts supporting a comparison of the actual job duties of the attorneys. Rather, the court found, the EEOC had relied on conclusory allegations, such as that the attorneys all had the same law degree and were performing equal work. The EEOC appealed.

Broad generalizations

On appeal, the Second Circuit affirmed the district court's decision. In doing so, the appellate court clarified the pleading standard for employment discrimination claims, holding: "While a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss, it must at a minimum assert nonconclusory factual matter sufficient to nudge the claims across the line from conceivable to plausible."

An EPA claim must allege substantially equal work on jobs requiring equal skill, effort and responsibility performed under similar conditions. The court further held that specific job content had to be pled and that broad generalizations — such as a claim that all nonsupervisory Port Authority attorneys had the same job — don't adequately support the "substantially equal" element.

The EEOC argued that it was sufficient to plead that the comparators were all attorneys, paid under the same job code, given raises under the same maturity curve and subject to similar job requirements — including bar admission and compliance with the Professional Rules of Conduct. The Second Circuit disagreed, noting that "the complaint provides no guidance as to whether the attorneys handled complex commercial matters or minor slip-and-falls, negotiated sophisticated lease and financing arrangements or responded to employee complaints, conducted research for briefs or drafted multimillion-dollar contracts."

The court held that, even after a three-year investigation, the EEOC hadn't alleged a single nonconclusory fact to support its assertion that the female attorneys and their male comparators' jobs required substantially equal skill and effort. As pled, the EEOC complaint suggested only the possibility, not the plausibility, of an EPA violation. Therefore, dismissal of the case was proper.

Clear message

The EPA's message is clear. Employers must pay employees who are performing substantially similar work — requiring equivalent skill, effort and responsibility, and performed under similar conditions — equally and can't discriminate based on gender. To help avoid costly litigation and establish optimal defensive positioning, be sure to maintain detailed job descriptions that account for the differences among your organization's various positions. ♦

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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