



# Employment

## Law Briefing

Insights on Legal Issues in the Workplace



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# Pretextual reason for job reassignment leads to inference of discrimination

The questions before the District of Columbia Circuit in *Czekalski v. Peters* were: When does a job reassignment constitute a demotion? And when can gender discrimination be inferred from an employer's explanation for an adverse employment action?

## The reassignment

A senior career official at the Federal Aviation Administration was responsible for several hundred employees, multiple programs and a \$400 million annual budget. Her supervisor reassigned her to a new position and called it a lateral reassignment even though she then supervised fewer than 10 employees, managed a single program, reported to a former peer and lacked a separate budget. His proffered reason was substandard performance.

The official alleged that the reassignment was effectively a demotion resulting from her supervisor's gender bias. After exhausting her administrative remedies, she sued the agency, alleging that gender discrimination had motivated her reassignment in violation of Title VII of the Civil Rights Act of 1964.



## Failing the prima facie test?

To establish a prima facie discrimination case, the official had to meet a three-prong test. She had to prove:

1. She was a member of a protected class,
2. She suffered an adverse employment action, and
3. The unfavorable action gave rise to an inference of discrimination.

A magistrate judge ruled for the agency without a trial. The judge found that the official hadn't met the second prong of the prima facie case, because a lateral reassignment couldn't constitute an "adverse action" as a matter of law. And she had failed to meet the third prong because she hadn't shown that a similarly situated person outside her protected class was treated differently.

## Reversal on appeal

The D.C. Circuit reversed and reinstated for trial. The court rejected the agency's argument that, because the official was transferred laterally, the transfer couldn't constitute an adverse employment action. It found that a lateral transfer that resulted in significantly diminished responsibilities could constitute an adverse action. And the official had introduced substantial evidence showing that her new responsibilities were less important to the agency than her previous job responsibilities.

The court also held that, although one way to satisfy the third prong is to demonstrate that she was treated differently from similarly situated employees who weren't part of the protected class, this wasn't the only way.

Another way is to show that the nondiscriminatory explanation the employer proffered was false. In appropriate circumstances, a jury can reasonably infer from an explanation's falsity that an employer is dissembling to cover up a discriminatory purpose. So a trial was necessary to resolve whether the supervisor's stated reason was a pretext for discrimination.

## Backpedaling

Here, the official could meet the third prong by showing that her reassignment wasn't attributable to unsatisfactory performance but rather that the supervisor's stated reason was a pretext for discrimination. The supervisor outlined his nondiscriminatory explanation in the memo he sent her notifying her of the reassignment. He advised her that he was reassigning her because she had "not performed up to the standards I expect from my direct reports." She rebutted his assertions in a memo to the Office of Inspector General (OIG), which investigated and largely confirmed her rebuttals.



Indeed, the OIG's report noted that the supervisor withdrew several of his assertions in the course of his OIG interview. The court held that a reasonable

jury could find that his later clarifications represented nothing more than backpedaling, so the employer's stated reason was pretextual and the true reason was discriminatory.

## Additional arguments and evidence

The agency also argued that the supervisor was an equal-opportunity abuser who "treated both men and women harshly." But the official offered independent evidence showing that he harbored discriminatory attitudes toward women.

Finally, the agency argued that her supervisor was the one who had initially promoted her. The court conceded that this tended to disprove the claim that he harbored a general animus against female employees. But the court held that his having once promoted her couldn't immunize him from liability for later discrimination, and that alone wasn't sufficient to keep her case from a jury.

## Reasons must withstand scrutiny

The court concluded that, in light of all the evidence, a reasonable jury could conclude that the supervisor had reassigned her for a discriminatory reason. This case demonstrates the importance of making sure that reasons offered for adverse employment actions can withstand scrutiny by a court or jury. Failure to withstand scrutiny can lead to an inference of discriminatory motive even absent any other discrimination evidence. 🏠

## Accommodating religious beliefs

# What constitutes an undue employer hardship?

That was the question before the Seventh Circuit in *Noesen v. Medical Staffing Network*. The court had to decide how far a pharmacy had to go to accommodate the religious beliefs of a pharmacist who refused to fill or handle birth-control prescriptions.

## Precluded activities

Wal-Mart hired a Roman Catholic pharmacist to work at a Wisconsin pharmacy. The state had restricted his license after he refused to fill a woman's contraception prescription or to refer her to another pharmacy. The restriction required him to tell potential employers what services he wouldn't perform



and how he would ensure that patients' medication access remained unimpeded.

The pharmacist informed Wal-Mart that his religious convictions precluded him from performing "any activity related to the provision of contraceptive articles," including "complete or partial cooperation with patient-care situations that involve the provision of or counsel on contraceptive articles."

## Manager accommodates

The pharmacist's manager understood these limitations to mean that the pharmacist wouldn't fill birth-control prescriptions. So, the manager relieved him from:

- Filling birth-control prescriptions,
- Taking birth-control orders from patients or physicians,
- Handing birth-control medications to customers, and
- Checking birth-control orders.

The manager also arranged for birth-control prescriptions to be sorted into a separate basket so that the pharmacist wouldn't have to touch them. In addition, the manager ensured that someone else would be available to fill orders and respond to patients' birth-control inquiries.

## Pharmacist demands more

Despite these accommodations, the pharmacist refused to perform general customer-service duties that involved even talking briefly to patients seeking contraception. The pharmacist explained that, if required to speak to patients seeking birth control, he would always counsel them against it and refuse to fill their prescriptions.

So, he didn't speak to these customers. For example, when he answered phone calls from patients or physicians trying to place birth-control orders, he put them on hold and refused to alert other pharmacy staff that someone was holding. And when patients came to the counter with birth-control prescriptions, the pharmacist walked away and refused to tell anyone that a customer needed assistance.



The manager suggested that the pharmacist assist only males or customers not of childbearing age. The pharmacist rejected this offer, insisting that the only acceptable accommodation was to relieve him of all counter

and phone duties unless another employee first screened out those seeking birth control.

The manager agreed that he and the pharmacy intern would assist all walk-in customers. But because of high caller volume, the pharmacist, like all other staff, had to answer the phones, though he could refer callers with birth-control issues to others.

When the pharmacist rejected this accommodation, the manager fired him. He sued, alleging religious discrimination, and the trial court threw out the suit without a trial.

## Impact on other employees

Title VII of the 1964 Civil Rights Act requires employers to reasonably accommodate employees' religious beliefs unless that would subject the employer to undue hardship. A reasonable accommodation "eliminates the conflict between employment requirements and religious practices."

The pharmacist argued that Wal-Mart's efforts to accommodate him didn't resolve this conflict. He insisted that only relieving him of all counter and phone duties would eliminate the conflict.

*The pharmacist refused to perform general customer-service duties that involved even talking briefly to patients seeking contraception.*

The Seventh Circuit held that the pharmacist wasn't entitled to that accommodation because it would impose an undue hardship on Wal-Mart. A hardship is undue when a religious accommodation would cause more than minimal hardship to an employer or other employees. An accommodation that requires other employees to assume a disproportionate workload (or diverts them from their regular work) is an undue hardship as a matter of law.

The pharmacist's proposed accommodation would require diverting other employees from their responsibilities and require them to do extra work to cover for him. So the Seventh Circuit concluded that Wal-Mart wasn't obliged to rearrange staffing and incur these costs to accommodate an inflexible employee.

## Lesson learned

This case is instructive for employers because it shows how far the manager went in trying to accommodate the pharmacist. By going the extra mile, the company was able to show that the pharmacist was an inflexible employee and that it had acted reasonably. 🏠

# Avoiding liability for hostile-work-environment claims

**E**mployers generally are liable for a supervisor’s sexual harassment if it is severe and pervasive enough to result in a hostile work environment. But an affirmative defense is available to employers.

In *Baldwin v. Blue Cross/Blue Shield of Alabama*, the Eleventh Circuit had to decide whether an employer’s affirmative defense could prevail.

## Unsubstantiated complaint

After several months of allegedly being subjected to sexually harassing incidents by her supervisor, an employee finally informed human resources. It investigated but could find no one to substantiate her complaints.

The company offered on four separate occasions to transfer the employee to another office or to have a counselor oversee her interactions with her supervisor. When she refused to accept either solution, the company fired her. She sued for sex discrimination, alleging that her boss’s harassing behavior created a hostile work environment amounting to discrimination barred by Title VII of the 1964 Civil Rights Act.

## Undisputed facts

The trial court ruled for the company without a trial because the facts were undisputed and the company was entitled to judgment as a matter of law.

The Eleventh Circuit affirmed. It found that no one disputed that she was fired because she refused to work with her boss, accept a transfer or resolve the problem through counseling. Firing an employee because she won’t cooperate with her employer’s reasonable efforts to resolve her complaints doesn’t constitute discrimination based on sex — even if the complaints are about sex discrimination.

The Eleventh Circuit found that, because the employee hadn’t suffered any tangible employment action as a result of the claimed sexual discrimination, her only basis for recovery was hostile-environment discrimination. To recover on this claim, she had to show that she was harassed because of her sex, that the harassment was “sufficiently severe or pervasive to alter

the terms” of employment, and that some basis existed for holding the employer liable.

## The *Faragher-Ellerth* defense

An employer can avoid liability for hostile-environment discrimination under the *Faragher-Ellerth* defense if:

1. It “exercised reasonable care to prevent and correct promptly” any sexually harassing behavior, and
2. The employee “unreasonably failed to take advantage of any preventive or corrective opportunities” provided.

Here, the employee didn’t dispute that the company had a valid antidiscrimination policy barring harassment that was effectively communicated to all employees. Nor did she dispute that she was fully aware of its reasonable reporting requirements and procedures. The question was whether the company — after she complained — exercised reasonable care to promptly correct any sexually harassing behavior.

The court explained that requiring a reasonable investigation doesn’t require an employer to credit uncorroborated statements a complainant makes if the alleged harasser disputes them. The employer isn’t required to credit the statements on the “she-said side” absent circumstances indicating that not to do so would be unreasonable.

Further, the court noted that nothing in the *Faragher* or *Ellerth* opinions requires an employer to conduct a full-blown due process trial-type proceeding in response to sexual-harassment complaints. All that is required of an investigation is reasonableness in all of the circumstances.

## Meeting investigation standards

The Eleventh Circuit concluded that the employer’s investigation met at least the minimum standards for this type of case. The lesson for employers here is to conduct harassment investigations so that the process and results can withstand court scrutiny. Failure to meet these standards can result in employer liability for a supervisor’s unlawful conduct. 🏠

# ADA's interactive process clarified

**W**hat is required of employers in the interactive process that they must engage in with employees seeking accommodations under the Americans with Disabilities Act (ADA)? That was the question before the Sixth Circuit in *Kleiber v. Honda of America*.

## Worker is injured

A Honda worker's job required him to read inspection cards describing necessary repairs, determine the method for performing the repairs, use fine-motor skills in executing the repairs and drive cars across the shop floor.



After 10 years on the job, the employee suffered serious head injuries while off the job. About 13 months after the accident (and substantial hospitalization and therapy), the employee approached Honda about returning to work, submitted his doctor's evaluation of his limitations and asked Honda to deal with his proxies.

## Evaluation, review and discharge

Honda met with his proxies and asked the employee to be evaluated by its doctor. The doctor concluded that the employee was unable to:

1. Work independently,
2. Perform a job requiring balance,
3. Perform a job requiring more than light gripping and simple slow hand movements, and
4. Handle a job requiring multiple processes.

Based on this report and a thorough review of the shop floor, Honda's placement committee determined that the employee's limitations precluded him from performing his old job. So, consistent with its policy of releasing employees who have been unable to work for 12 consecutive months, Honda discharged him.

The employee sued, alleging that Honda had violated the ADA by failing to accommodate his disabilities. Finding that the facts were undisputed and that Honda was entitled to judgment as a matter of law, the trial court threw out the case without a trial.

## A flawed interactive process

ADA rules require an employer to "initiate an informal, interactive process" with an employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." Accordingly, the "interactive process requires communication and good-faith exploration of possible accommodations."

The employee argued that Honda had denied him a reasonable accommodation by failing to participate in good faith in the informal interactive process required to identify a suitable position. This led to the premature breakdown of the process before the parties identified a job he was qualified for. Specifically, the employee faulted Honda for not providing specific information regarding other jobs.

The Sixth Circuit found that, while the interactive process here was flawed, the employee offered no evidence that Honda was to blame for the shortcomings. The record contained no suggestion that he had tried to directly participate in the interactive process and was rebuffed. Instead, it showed that Honda had allowed him to use proxies and had participated in good faith.

*The employee faulted the employer for not providing specific information regarding other jobs.*

### Evidence favors employer

In a deposition, one proxy stated that he had no reason to believe that Honda was not trying in good faith to accommodate the employee's disability. And he described the Honda personnel he interacted with as being "professional" and "open to talking about things."

Additionally, two Honda representatives visited the production line to identify appropriate jobs. They concluded that he could perform none of them because of his limited dexterity and inability to work on uneven surfaces.



These efforts undercut the employee's claim that Honda had participated in bad faith. Further, the record contained no evidence that he or his proxies had asked for any information during the interactive process.

### Good-faith efforts

The Sixth Circuit, concluding that Honda's failure to provide *unrequested* information about other positions wasn't tantamount to bad faith, affirmed the trial court's decision. Here, Honda clearly made a good-faith effort to accommodate the employee's disability. The duty to accommodate doesn't require employers to create new jobs or displace others from theirs. 🏡

## Same outcome, different facts

In another case involving how far employers must go to accommodate employees' disabilities, *Novella v. Wal-Mart Stores*, a deaf employee alleged that Wal-Mart's failure to provide an interpreter at his termination interview violated the Americans with Disabilities Act (ADA).

The Eleventh Circuit first found that "discrimination" includes failure to reasonably accommodate otherwise-qualified persons' known disabilities. EEOC rules define "reasonable accommodation" to include modifications that enable employees "to perform the essential functions" of their jobs and modifications that enable them to "enjoy benefits and privileges of employment" that are equal to those of abled employees.

The employee argued that the ability to communicate effectively at his termination meeting was both an "essential function" of his job and one of the "privileges and benefits" of employment requiring a reasonable accommodation — specifically, an interpreter's presence.

The Eleventh Circuit had never before addressed whether the ability to understand charges and defend oneself at a termination interview qualified as an employment benefit and privilege. But the court had previously held that an "accommodation" is "reasonable" and "therefore required under the ADA" *only* if it enables an employee to perform essential job functions. The court found that communication at a meeting whose purpose was to notify the employee of his termination wasn't an "essential function" of his job, so no ADA accommodation was required.

# 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.

*“Above all, we are at your service ...”*



Steve Lyman  
(317) 977-1422  
slyman@HallRender.com



Greg Moore  
(248) 457-7858  
gmoore@HallRender.com



Sam DeShazer  
(502) 568-9361  
shdes haz@HallRender.com



John Ryan  
(317) 977-1423  
jryan@HallRender.com



Michael Kim  
(317) 977-1418  
mkim@HallRender.com



Robin Sheridan  
(414) 721-0469  
rsheridan@HallRender.com



Laura Napiewocki  
(586) 753-0496  
lnapiewo@HallRender.com



Craig Williams  
(317) 977-1457  
cwilliams@HallRender.com



Carrie Turner  
(414) 721-0458  
cturner@HallRender.com



Jon Bumgarner  
(317) 977-1474  
jbumgarn@HallRender.com



Kevin Stella  
(317) 977-1426  
kastella@HallRender.com



Dana Stutzman  
(317) 977-1425  
dstutzma@HallRender.com



Kevin Gfell  
(317) 977-1479  
kgfell@HallRender.com



Jennifer Handel  
(317) 977-1477  
jhandel@HallRender.com

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