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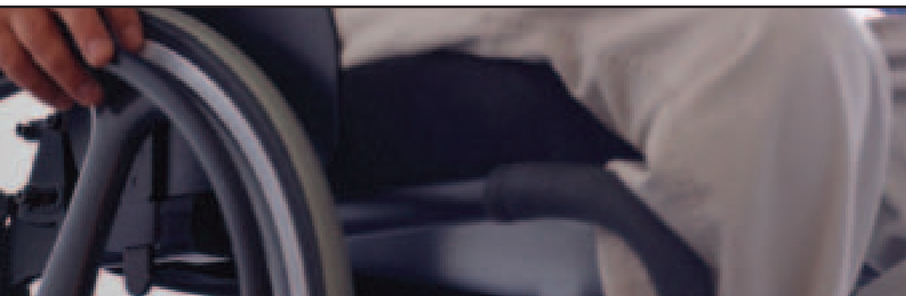
Employment Law Briefing

Insights on Legal Issues in the Workplace



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Complying with the ADA

Did an employer violate the Americans with Disabilities Act (ADA) when it discharged an employee with carpal-tunnel syndrome? That was the question before the Eleventh Circuit recently in *Carruthers v. BSA Advertising*.

Defining disability

When an art director at an advertising agency experienced pain and swelling in both hands, her doctor diagnosed bilateral hand strain/sprain. He prescribed various work restrictions — including any computer or mouse use — to be reviewed weekly. She notified her supervisor of her diagnosis and work restrictions. Five days later, the agency advertised for her replacement and, three days after that, terminated her employment.

The director alleged that the agency violated the ADA by discharging her because of a disability or a perceived disability. After a jury trial, the district court granted the agency's motion for judgment as a matter of law, based on the director's failure to show that the agency perceived her as having an ADA disability.

Establishing a prima-facie case

On appeal to the Eleventh Circuit, the director argued that the district court was wrong and that her evidence — viewed in the light most favorable to her — *did* establish a prima-facie case of employment discrimination in violation of the ADA. Specifically, she argued that the trial court erred when it found no reasonable juror could conclude that her evidence showed she was perceived to be disabled or was qualified to perform her essential job functions with or without reasonable accommodation.

The ADA forbids covered employers from discriminating against qualified persons "with a disability because of" their disabilities in regard to "discharge of employees." To establish a

prima-facie discrimination case under the ADA, the director had to show that she:

- Had — or was perceived to have — a "disability,"
- Was a "qualified" person, and
- Was discriminated against because of her disability.

The director claimed that she qualified as disabled under the part of the ADA that defines disability as "being regarded as having" an impairment. Under this prong, workers are disabled if their employers perceive them as having an ADA-qualified disability, even if employers lack a factual basis for that perception. But as with actual impairments, the perceived impairment must be one that would substantially limit a major life activity.

Perceiving a disability

The director had to prove that the agency perceived her as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."

ADA overview

The Americans with Disabilities Act bars employers from discriminating against qualified persons with disabilities in job-application procedures, hiring, firing, advancement, compensation, job training, and other employment terms and conditions. If you employ at least 15 employees, here's what you should know about the ADA's key provisions:

Reasonable accommodation. You must reasonably accommodate a qualified applicant's or employee's known disability if that doesn't impose "undue hardship" on operating your business. Courts will largely determine case by case what actually constitutes an undue hardship, but basically it includes any action that would fundamentally alter the business's nature or operation or is:

- Unduly costly,
- Extensive,
- Substantial, or
- Disruptive.

Forbidden questions. You can't ask job applicants about a disability's existence, nature or severity or require them to take medical exams before you offer employment. And you can condition job offers on medical-exam results only if you require them of all new employees. Finally, you must establish that your physical-qualification standards are job related and consistent with business necessity.

Uniform standards. You don't have to lower existing production standards applying to the quality or quantity of work for a given job in considering qualifications of a person with a disability. But you must apply these standards uniformly to all applicants for — and employees in — a given job.

Temporary disabilities. The ADA doesn't apply to employees with temporary disabilities that have no long-term effect, such as an employee with a broken arm that will heal.

Miscellaneous restrictions. You can't discriminate against persons with AIDS or HIV or against recovering drug addicts and alcoholics. But you may ensure that your workplace is free from the illegal use of drugs and alcohol, and you must post a notice describing ADA provisions.

Furthermore, when the major life activity at issue is working, the statutory phrase "substantially limits" requires plaintiffs to at least allege they're unable to work in a broad class of jobs. But the inability to perform one particular job doesn't constitute a substantial limitation in the major life activity of working. Thus, an impairment must preclude — or at least be perceived to preclude — a person from more than one type of job, even if the foreclosed job is the person's job of choice.

Answering the critical question

The Eleventh Circuit found that the critical question was whether an impairment prevents or severely restricts the "performance of activities of central importance to most people's daily lives." The court agreed with the trial court that no reasonable jury could find she had established that the agency perceived her impairment as substantially limiting the major life activities of working or performing manual tasks. She failed to show that the agency perceived her limitations in performing manual tasks as permanently affecting or severely restricting her from performing activities centrally important to most persons' lives.

Indeed, she admitted at trial that she was able to dress and groom herself and put on makeup — albeit with some pain — and that she could perform all major life activities.

She offered no evidence showing the agency believed she couldn't perform these tasks.

Perception is key

What can employers learn from this case? That even when employees aren't actually disabled, the ADA protects them if their employers perceive them to be disabled. Thus, management must be discreet in discussing the status of employees who are ill or infirm. Managers shouldn't openly speculate about these employees' physical or mental conditions.

Having this sensitivity when they first learn of an employee's impairment is just as important for employers as when they are ready to change personnel. Employers also shouldn't assume about what any particular illness may entail. Rather, they should rely solely on medical opinions, letters and certifications to avoid being accused of "perceiving" a disability.

Employer response to harassment claim is key to outcome

The issue in *Schut v. Visteon Automotive Systems* was whether an employer was responsible for its employees' conduct toward a female African-American supervisor. Let's take a look at how the Seventh Circuit ruled.

Hostile conduct begins

After working for about three months as a factory supervisor, an African-American woman resigned, claiming she was the victim of many hostile encounters with co-workers. The hostility began when a co-worker told her that her group leader had ridiculed her by rhyming her name (which was Schut) with "slut." Later, the group leader, a recently divorced African-American man, told her "black women will take you to the cleaners."

Another group leader reprimanded the supervisor in front of other employees for a work-related incident. She believed his screaming at her was unprofessional and that he didn't treat male employees that way.

The supervisor claimed that a white male subordinate tried to intimidate her by saying he didn't like women and women didn't like him and leaving her a business card from the shop where he bought guns. She felt that he was insubordinate and openly hostile to her and she felt physically unsafe in his presence. Later, in a meeting to discuss another incident involving him, she thought he derogated her race and intended to portray her as a stereotypically ignorant black female.

Another employee told her that plant employees held a competition to see who would be first to have sex with her.

The supervisor also experienced more serious and disturbing incidents, including needing medical attention at a hospital after a falling tray injured her ankle. Co-workers told her that the employee who she believed had thrown the tray said, "That nigger should not have been in the way." On her first day back to work after her injury, a second tray was thrown at her but missed.

Safety not assured

The last straw occurred when the supervisor found a derogatory caricature taped to her work area's refrigerator with these captions: "Please show me how to run my dept. the right way," "Nigger Bitch" and "I need help!" She immediately reported this to the plant's human-resources manager. He sent a human-resources employee to interview those who worked directly with her. When she told that employee that she feared for her safety, she was told human resources couldn't guarantee her safety at the plant. She resigned and sued the company, alleging a hostile work environment in violation of Title VII.

The trial court threw out her case without a trial and she appealed. The Seventh Circuit noted that to state a claim

under Title VII for a hostile work environment, plaintiffs must show that:

- They were subjected to unwelcome harassment,
- The harassment was based on their race or gender,
- The harassment was sufficiently severe or pervasive to alter the conditions of their environments and create hostile or abusive working environments, and
- A basis existed for employer liability.

The Seventh Circuit conceded that the plant incidents might have been severe or pervasive enough to rise to an actionable level. But no basis existed for employer liability because the employer had responded reasonably on the few occasions when she alerted it to the hostile conduct directed toward her.

Liability not found

The Seventh Circuit noted that courts evaluate employer liability on two levels in Title VII cases. First, an employer may be liable if a supervisor is responsible for the harassment. That argument was not raised here. Second, an employer may be liable if a co-worker harasses a worker and he or she can show that the employer negligently failed to prevent the harassment. An employer is deemed negligent if it fails to take reasonable steps to discover and remedy harassment.

The first step in determining whether the supervisor met the second claim was whether she had notified the employer of the harassment and given enough information to make a reasonable employer think some probability existed that she was being sexually or racially harassed. The Seventh Circuit found that one of the main failings of her reporting was that most of her conflicts with co-workers were work-related and didn't involve racial or sexual insults, nor did she report that she believed them to be racially or sexually motivated.

The employer responded reasonably on the few occasions it was alerted to the hostile conduct.

While the employer may have been on notice of the friction between the supervisor and her co-workers, it had no reason to believe that most of these problems fell under the more serious race- or sex-discrimination umbrella. Although she began experiencing problems with co-workers during her first month of employment, she didn't report these problems immediately. When she finally reported them, the court found that the employer's response of immediately conducting multiple interviews with the workers involved constituted a reasonable response and wasn't negligent.

What employers can learn

Some observers could disagree with the court's conclusion that the harassment here was work-related as opposed to gender- or race-related. But this case demonstrates the importance of employers' having harassment- and discrimination-claims procedures in place and properly using them to avoid liability. Also essential is training supervisors on how to use the procedures and how to comply with the policies.

Can a church discriminate on the basis of sexual orientation?

That was the question before a Minnesota appellate court when a church music director alleged illegal discrimination based on his sexual orientation. Here's what happened in *Egan v. Hamline United Methodist Church*.

No apology, no job

A Minnesota Methodist church hired the music director in 1994. His responsibilities included managing and rehearsing the church choirs, selecting and preparing music for regular Sunday services, playing the organ, and supervising other church music groups.

Five years later, after protracted and contentious debate, the church committed itself to being a "reconciling congregation" that openly welcomed gay, lesbian and bisexual parishioners. A year after that, the director, who was bisexual, was present when a choir member criticized the church's decision and expressed her strong disapproval of homosexuals. The music director commented that he hadn't been aware that she "was so homophobic."

The next day, the choir member demanded in a letter to the pastor that the music director apologize for referring to her as "homophobic." The pastor told the music director that unless he apologized in writing, he would be discharged. He refused and was discharged. He sued in Minnesota state court, alleging discrimination based on sexual orientation in violation of the Minnesota Human Rights Act (MHRA). The trial court granted the church's motion to dismiss on the ground that the MHRA doesn't apply to churches, and the director appealed.

Religious purposes, no discrimination

First, the appellate court found that the MHRA generally bars discrimination based on sexual orientation except for religious associations' employment actions. But the exception applies only to employees involved in a church's religious and educational purposes — not to those involved in its secular business activities. The MHRA defines a secular activity as an activity "unrelated to the religious and educational purposes" that a religious association is organized for.

Next, the appellate court examined federal Title VII opinions in which employment relationships between religious associations and their "ministerial staff" are exempt from Title VII. For example, the Fifth Circuit in *Starkman v. Evans* denied a church music director's claims of discrimination and retaliation because the position fell within the Title VII ministerial exception. To determine whether a position falls within the exception, the Fifth Circuit applied this three-prong test:

- Was the employment decision largely based on religious criteria?
- Was the employee qualified and authorized to perform church ceremonies?
- Did the employee engage in activities traditionally considered ecclesiastical or religious — including tending to the congregation's religious needs?

The last question was the most significant. Using this test, other courts have also found that the role of music director has a religious significance and isn't secular. One court noted that "music is a vital means of expressing and celebrating beliefs that a religious community holds most sacred."

No discrimination, no reinstatement

After analyzing these opinions, the appellate court refused to reinstate the case, finding the music director's work was related to the religious and educational purposes for which the church was organized. The court found that he had admitted that his responsibilities included "selecting and preparing" music for religious services.

Thus, he had to be familiar with the corpus of church music and theology to select the proper music for services. He had to consider the church calendar, the scripture readings, the sermon topic, the church's basic faith principles and other religious matters. Under these circumstances, the court agreed with the trial court's decision that the music director was a religious employee.

No license to discriminate

This case is interesting because it reveals a little-known loophole in antidiscrimination statutes. Religious associations can engage in conduct against their religious employees that would be unlawful for nonreligious organizations to engage in. But religious institutions lack a blanket license to discriminate. They are subject to the same statutes when it comes to their secular employees.

Draft employment contracts with care to avoid lawsuits

A New York trial court had to decide whether a hospital could legally fire an employee for insubordination. *Trieger v. Montefiore Medical Center* hinged on what constitutes insubordination under the law and sheds light on what employers should put in employment contracts.

The case arises

A 72-year-old doctor stepped down after 30 years as chairman of a hospital's dental department. But he continued to perform clinical and teaching functions as a full-time hospital employee under a three-year employment contract. Six months later, he criticized hospital management in a memo to other department chairmen. Among other things, he complained that the department-chairman role had "eroded over the past decade, largely through autocratic, unilateral decision-making and administrative micro-management." He urged the chairmen to meet to try to set things right and reclaim their prerogatives and responsibilities as chairmen.

> *The court held that insubordination encompasses a broad range of conduct — including making rude and disparaging remarks aimed at management.*

The hospital terminated his employment contract on grounds that his memo constituted insubordination, was contrary to the hospital's best interests and violated his senior-management obligations. He sued for breach of employment contract and age discrimination. The court threw out his case without a trial.

The court decides

The court found that New York state law allows employers to cancel stated-term employment contracts only for just cause and that insubordination constitutes just cause. The court

found this to be especially true for top managers who need a high degree of trust and cooperation among themselves to run an enterprise efficiently.

The doctor claimed that he had not been insubordinate because he hadn't disobeyed any hospital rule, order, request or policy. But the court rejected this definition of insubordination as too narrow. Rather, the court held that insubordination encompasses a broader range of conduct — including making rude and disparaging remarks aimed at management. The court ruled that his memo was clearly insubordinate on its face and cited a hospital rule that specifically provided for dismissing employees for insubordination.

As for the doctor's age-discrimination claim, the court found that he had produced enough evidence to permit a jury to infer the facts that would support his claim, absent adequate contrary evidence. But the hospital had provided a legitimate nondiscriminatory reason for firing him, namely, insubordination, so its reason for firing him wasn't an excuse for discriminating against him.

The lesson to be learned

What can employers learn from this case? Could the hospital have avoided being sued? Probably, if it had carefully drafted its employment contract and spelled out in detail grounds for employment termination. "Just cause" and "insubordination" can mean different things to different people. The hospital would have been on safer ground if it had set forth in the contract that it could terminate employment for "any conduct detrimental" to the hospital's reputation or image.

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We hope you enjoy this edition of the Employment Law Briefing. Our goal is to provide you with articles and information that will assist you in managing the employer/employee relationship, whether you are in the public or private sector. Should you have any questions regarding the topics in this newsletter, or any related employment matter, I would ask that you contact us.

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- Guidelines for Drug and Alcohol-Free Environments
- Confidentiality/Non-Compete Agreements
- Employment Downsizing (RIF Agreements)
- Sexual/Racial/Religious harassment training/prevention and policies
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We welcome feedback from you about this newsletter. We believe it is important to continue to apprise our friends, colleagues and clients of legal issues and ongoing changes in this most volatile and important area of law. You may also visit our website, which has recently been modified to include several helpful employment-related pages and sites at **www.hl-law.com**.

If you have any questions or comments about this publication, or if you know someone who would like to be included in our mailing list, please call **Michael J. Rose** at 860-249-1361 or e-mail me at **mrose@hl-law.com**.

Very truly yours,

Michael J. Rose