Employment Law Briefing

Insights on Legal Issues in the Workplace

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ADA mandates effective employer-employee communication

The Seventh Circuit's ruling in *EEOC v. Sears, Roebuck & Co.* shows what can happen to an employer that fails to engage in an interactive process to accommodate a worker's disability under the Americans with Disabilities Act (ADA).

Asking for accommodation

A sales associate at a Sears store began to experience numbness in her right leg that didn't prevent her from walking short distances during her shift. But it did preclude her from walking longer distances, such as getting to the employee cafeteria. She explained the problem to her immediate supervisor, who gave her permission to eat lunch in her department's stockroom but later withdrew it.

When the employee's condition worsened, she asked permission to take a shortcut when walking between the time clock and her department that would cut in half the distance she had to walk before and after each shift. Sears denied her request.

More requests

After a few months, she was diagnosed with nerve damage and noninsulin-dependent diabetes. She gave her supervisor a note from her neurologist instructing her to avoid walking long distances or for prolonged periods. The supervisor didn't respond, assuming — without inquiring — that the employee's walking was sufficiently limited because her hours had been reduced after the holiday season ended. In fact, reducing her hours was no help because walking to and from her work area caused her problem, not her shift's length.

The employee then asked the store manager to allow her to park nearer the time clock. He denied her request but suggested she use a space outside her department reserved for people with disabilities. This didn't help because she still had to walk across the store to clock in and out.

Physician's form completed

By the following spring, the employee had lost sensation in both feet when walking and at times had to hold on to the wall to

avoid falling. The store manager asked her to have her doctor complete a Sears' Physician Certification Form.

The doctor stated on the form that the employee suffered from diabetes and neuropathy and recommended that she avoid excessive walking and be allowed "easy/short access to [her] job site." But when the manager got the form, he assumed that allowing her to use the disabled-only parking space near her department fulfilled her request for accommodation.

An inhospitable work environment

The following month, the employee's supervisor gave her a new work schedule that required her to work on Thursday evenings and Fridays, which she hadn't been able to do before. Feeling that Sears had failed to accommodate her disability and was trying to make her work environment inhospitable, she told her supervisor she had to resign because the walking was too much.

The employee filed a complaint with the EEOC. It sued Sears, alleging it had failed to reasonably accommodate the employee's disability in violation of the ADA. To establish the claim, the EEOC had to show that:

1. The employee was a qualified person with a disability,
2. The employer was aware of the disability, and
3. The employer failed to reasonably accommodate the disability.

The ADA defines a qualified person with a disability as a person who — with or without reasonable accommodation — can perform the essential functions of the position he or she holds or desires. The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more" of a person's major life activities.

No disability?

The trial court held that the employee's impairment didn't constitute a disability that "substantially limited" her ability to walk while at work and threw out her case without a trial. The court relied on *Toyota v. Williams*, in which the Supreme Court held that, "to be substantially limited in performing manual tasks," a person must have an impairment that prevents or *severely restricts* him or her from engaging in "activities that are of central importance to most people's daily lives."

But the Seventh Circuit disagreed with the trial court's use here of the "severely restricted" test. The court found that *Toyota* dealt only with the issue of performing manual tasks (a major life activity separate from walking) and didn't hold that all people claiming a disability must show an inability to perform the variety of tasks required in most people's daily lives. To be disabled with regard to the major life activity of walking, the court held that:

- Employees must be substantially limited in their ability to walk, and
- The limitation must be permanent or long term and considerable — compared to the walking most people do in their daily lives.

The court found that — under this definition — a reasonable jury could find that the employee was disabled and entitled to reasonable accommodation.

> ***The Seventh Circuit found that* Toyota v. Williams *didn't hold that all people claiming a disability must show an inability to perform the variety of tasks required in most people's daily lives.***

Reasonable accommodation?

The trial court also held that Sears had reasonably accommodated the employee's limitations. Again, the Seventh Circuit disagreed. It found that a reasonable jury could conclude that Sears — while not obligated to provide the plaintiff's requested accommodation — couldn't simply deny her requests and take no further action. Sears thus failed to meaningfully engage in the interactive-accommodation process, despite the employee's repeated requests. So the Seventh Circuit reversed and sent the case back to the trial court for proceedings consistent with its opinion.

An interactive process

What is most striking about this case is the lack of effective communication between the employee and her supervisors. Under the ADA, an employer must engage in an interactive process with the disabled employee to mutually determine what accommodation is necessary and what can be provided. The supervisors here made unfounded assumptions and seemingly failed to listen to the employee. Surprisingly, these managers didn't seek guidance from their human resources department or counsel.

If an employee doesn't take advantage of antiharassment procedures, can the employer still be liable?

The case of *Hardage v. CBS* involved a male sales manager at a Seattle TV station who alleged that the station's female general manager (GM) sexually harassed him. When he rebuffed her advances, he alleged CBS retaliated against him by constructively discharging him, in violation of Title VII.

Multiple incidents

The Seattle sales manager alleged that when the GM, who worked out of the station's Tacoma office, visited the Seattle station, she repeatedly flirted with him, made inappropriate sexual comments and engaged in playful banter.

In April 2000, the plaintiff and the GM were in a group that started drinking at brunch, continued drinking at a sports bar and then went out to dinner. The GM sat across the table from the plaintiff and allegedly touched him inappropriately. When someone expressed concern that the GM was too drunk to drive home, she asked the plaintiff if she could stay overnight at his apartment. When he refused, one witness reported that the GM became "livid" and "stormed off" to drive herself home.

When the HR rep offered to talk to the alleged harasser and to treat his complaint anonymously, the plaintiff insisted on handling the situation himself.

Two days later, the GM invited the plaintiff to meet her for drinks after work, engaged in sexual talk and told him that she hadn't been able to sleep. When she asked him if he felt the same way about her, he said he didn't want to damage his career by having a relationship and wanted to go no further than friendship.

Four months later, the plaintiff and the GM sat next to each other on a flight to Texas. He claimed that she again touched him inappropriately, even after he asked her to stop. Later, the plaintiff said she offered him a "life altering" sexual experience.

Two months after that, at a baseball game with clients, the GM again sexually touched him. He told her to stop because her conduct was inappropriate in the presence of clients, but she continued. After the game, he invited her to join him for drinks with his friends. When he greeted several female acquaintances at the bar, she shouted inappropriate sexual comments and said, "Don't [expletive deleted] talk to me. You're finished."

Handling the situation himself

The next day, the plaintiff complained to his immediate supervisor that "last night, things went way too far," but he didn't mention any sexual touching. At a meeting HR set up the following week, the plaintiff stated that he had rebuffed the GM's unwanted sexual advances, but he provided no harassment details.

When the HR rep offered to talk to the alleged harasser and to treat his complaint anonymously, the plaintiff insisted on handling the situation himself. When the rep phoned him

two weeks later, the plaintiff reported that nothing new had happened and that he still didn't want HR to intervene.

Resignation

At about the same time, the station questioned the plaintiff's work performance and disciplined him for insubordination for failing to return to work after a charity event. The station then counseled him and another local sales manager about failing to meet sales goals.

Ten months later, the plaintiff submitted his letter of resignation, claiming these actions taken against him constituted retaliation for having complained about the harassment. The employee sued CBS, arguing that his resignation constituted a constructive discharge. That is, that he quit because of intolerable and discriminatory working conditions.

Why CBS wasn't responsible

The trial court threw out his suit without a trial on the ground that he had failed to avail himself of CBS's sexual-harassment-complaint procedure.

The Ninth Circuit affirmed. First, it found that the last reported inappropriate sexual comments took place several months before he resigned. Thus, even if the sexual harassment had created a hostile work environment, the harassment ceased well before he quit.

Next, the court found that CBS had proffered legitimate nonretaliatory reasons for its discipline and counseling and that the plaintiff hadn't shown that its reasons were pretextual. So the court rejected his argument that the alleged retaliation justified a conclusion of constructive discharge.

Finally, the court considered whether CBS had failed to adequately investigate his complaint. The court rejected the argument that CBS had a duty to investigate even though he had insisted on handling the matter himself. The court concluded that he had unreasonably failed to take advantage of CBS's antiharassment procedures and policies. Thus, under federal law, CBS couldn't be held responsible for the harassing conduct. But note that, for claims brought under state law, the "failure to avail" defense may not be available.

Lesson for employers

This case demonstrates the danger that mixing socializing and drinking with business can lead to blurred boundaries. Savvy employers warn their employees to avoid such situations.

Make sure ADEA waivers are valid

When employers reduce their work forces, they routinely ask employees to waive their right to file age-discrimination suits. Recently, the Tenth Circuit upheld a challenge to these waivers in *Kruchowski v. Weyerhaeuser Co.*

Age discrimination alleged

A mill selected salaried employees for a reduction in force (RIF) and required them to sign a release in exchange for severance pay. The employees later alleged age discrimination on the ground that the releases violated the Older Workers Benefit Protection Act (OWBPA).

The employer asked the court to throw out the suit without a trial because the signed releases precluded filing a lawsuit. The trial court agreed, finding no OWBPA violation. But the Tenth Circuit reversed, holding that the releases were invalid under OWBPA.

Knowing and voluntary waiver

OWBPA provides that a person may not waive any right or claim under the Age Discrimination in Employment Act (ADEA) unless the waiver is knowing and voluntary. But for a release offered in connection with an exit incentive or group-termination program to be knowing and voluntary, the ADEA requires more: Employers must disclose job titles and ages of

Minimum standards apply to ADEA waivers

Obtaining a valid claims waiver requires an employer to comply with the minimum standards specified in the Age Discrimination in Employment Act (ADEA) as amended by the Older Workers Benefit Protection Act.

A valid ADEA waiver needs to satisfy a number of prerequisites. For starters, it must be written in a manner that the employee signing the release or the average eligible participant can easily understand. It should also specifically refer to rights or claims arising under the ADEA and not purport to encompass claims that may arise after the execution date.

Moreover, the employer needs to provide consideration for the waiver or release above and beyond that to which the employee would otherwise already be entitled. And the waiver must counsel the employee to consult an attorney before signing the agreement.

Finally, the employer should grant the employee at least 21 days to consider signing the release (45 days for a group layoff) and at least seven days to revoke it after signing. Failing to meet any of the requirements can invalidate a release and permit an employee to sue under the ADEA.

those eligible for the program, and the ages of those in the same job titles who were not eligible or not selected for the program.

The burden of proof is on the employer to show that employees executed releases knowingly and voluntarily. Here, the employer gave each affected employee a group-termination notification. Attached was a list of employees selected for discharge and eligible for severance pay and a list of those not selected and therefore not eligible for severance pay. But the employer omitted 15 employees — more than 10%.

The Tenth Circuit held that, because the information provided by the employer failed to meet OWBPA's "strict-and-unqualified requirement," the releases were ineffective as a matter of law. The court noted that the informational requirement's purpose was to give employees enough information regarding the severance program to allow them to make informed choices whether to sign a waiver or to pursue age-discrimination claims.

The burden of proof is on the employer to show that employees executed releases knowingly and voluntarily.

Eligibility factors

The employees also argued that the releases were defective under OWBPA because the employer had failed to provide any eligibility information. OWBPA requires employers to inform affected employees about the "class, unit or group of individuals covered by [the] program, and eligibility factors for such program, and any time limits applicable to such program."

The employer claimed it had provided that information by stating that all salaried employees at the mill were eligible for discharge. The employees argued that this was insufficient, and the Tenth Circuit tended to agree. It found that, in answering interrogatories, the employer stated that the eligibility factors it used in analyzing each salaried employee for inclusion in the RIF were each employee's leadership, abilities, technical skills and behavior — and whether these skills matched the employer's business needs.

But the company failed to provide this information to the RIF-selected employees. The court held that, because this information was vital to assessing a potential ADEA claim's viability, this also invalidated the releases as a matter of law.

The ruling's consequences

The Tenth Circuit's ruling allows the 16 plaintiffs to proceed with age-discrimination claims against the employer. Although the opinion technically binds only federal courts in the Tenth Circuit — as the only federal appellate ruling on the issue — it could influence other courts as well.

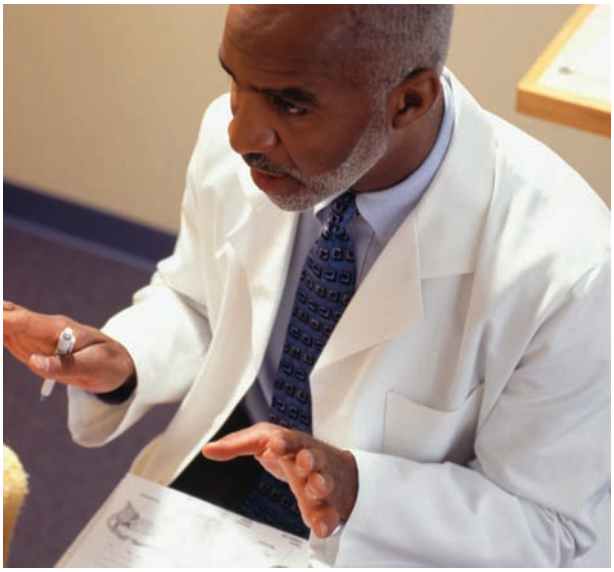
All employers seeking waiver of age-discrimination claims should ensure their OWBPA notices provide legally sufficient information, including the criteria used to designate employees for discharge — especially when a RIF affects many employees.

Reinstating employees who take FMLA leave

What can an employer require under the Family and Medical Leave Act (FMLA) from employees before reinstating them? That was the issue before the Sixth Circuit recently in *Brumbalough v. Camelot Care Centers*.

Interference with rights

A supervisor for a social-services agency worked more than 60 hours a week and was on call 24/7. She informed the agency that health problems forced her to cut her weekly hours to 40 or 45. Her doctor later certified to the agency that she was incapacitated and would need about two to three months to recover, and the agency approved FMLA leave.



About six weeks later, she told her employer that she felt ready to return to work in a week or so. The agency asked her to provide a fitness-for-duty certificate. A few days later, she sent the agency a note written by her doctor on a prescription pad stating she could return to work in two weeks but only for 40 to 45 hours a week and with out-of-town travel limited to one day a week. The agency claimed it never received this note and discharged her.

She sued, alleging interference with her FMLA rights. The trial court threw out her case without a trial, finding that the agency would have been entitled to fire her even if it had received the doctor's note, because it didn't constitute proper fitness-for-duty certification. Alternatively, the court held that the agency could fire her because she would have been unable on reinstatement to perform her job's essential functions.

Duty to reinstate triggered

The employee appealed to the Sixth Circuit. It found that, though the FMLA permits employers to require a fitness-for-duty certification before reinstatement, the relevant rule provides that:

> The certification itself need only be a simple statement of an employee's ability to return to work.... No additional information may be required, and clarification may be requested only for the serious health condition for which FMLA leave was taken.

The Sixth Circuit held that the employee's submission of her doctor's statement allowing her to return to work triggered the agency's duty to reinstate her, and it should have asked her doctor to clarify if it thought the note was insufficient.

The trial court had also found that the agency wasn't required to offer reinstatement because she wouldn't have been able to perform the essential functions of her job, based on the doctor's note limiting her hours and travel. Again, the Sixth Circuit disagreed, finding that whether the supervisor could perform her job's essential functions was a material issue of fact that required a trial to determine.

Watch out for FMLA rules

This case demonstrates the importance of reviewing and following FMLA rules whenever deciding to discharge an employee on FMLA leave. Courts won't allow company policies and procedures to supersede the FMLA's specific rules.