Employment Law Briefing

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Who's watching the watcher?

Discrimination suit puts EEOC under scrutiny

Federal agencies are established to, among other things, oversee government programs and look out for the public's best interests. But what happens when one of those agencies steps beyond the boundaries of its authority? Who's watching the watcher? The case of *EEOC v. Agro Distribution LLC* provides one answer.

Enter the EEOC

Henry Velez worked as a truck driver for Agro Distribution. On July 15, 2002, Velez's supervisor scheduled all nonoffice personnel to load barrels on a trailer at 6:00 a.m. the next morning. Velez, who suffered from anhidrotic ectodermal dysplasia (the inability to sweat), informed his supervisor that he couldn't load the barrels in the morning because it would be too hot and he'd get sick.

The supervisor told Velez that if he didn't participate in loading the drums, he'd "suffer the consequences." He didn't tell Velez that he couldn't take breaks or that he had to participate nonstop — he just had to be there to help. When Velez didn't show up, Agro terminated him.

Soon thereafter, Velez filed a charge of disability discrimination with the EEOC. Several months later, an EEOC investigator performed an on-site investigation. The next day, Agro's attorney mailed a letter to the EEOC expressing concern about the investigation, stating that the investigator had:

- Made insulting remarks during interviews,
- Indicated disgust for the statements of management witnesses,
- Raised her voice,
- Rephrased witnesses' statements to favor the charge, and
- Selectively recorded portions of the statements.

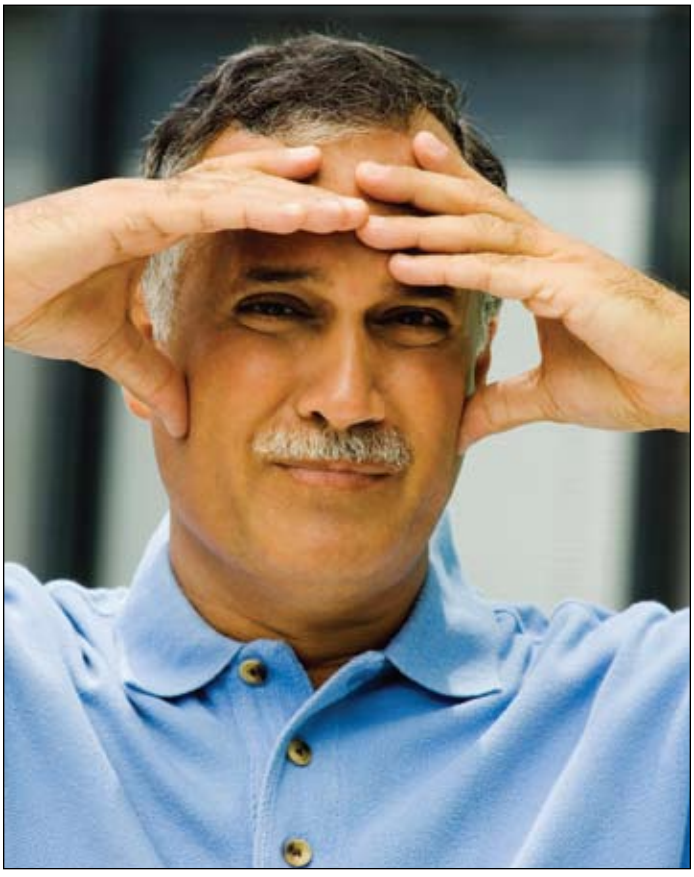
The EEOC didn't respond to this letter and left the investigator in charge of the investigation.

The investigator sent a letter to Agro summarizing the evidence obtained. The letter included factual inaccuracies, including statements that the work was performed on July 15, 2002; that the temperature exceeded 85 degrees (it was 70 degrees that morning); and that Agro made "no effort" to accommodate Velez. Agro responded to the letter, noting these errors and explaining that Velez "routinely performed manual labor in heat far worse than what was expected to accompany this assignment."

Efforts toward conciliation

Despite Agro's response, the EEOC issued a Letter of Determination stating that evidence obtained during the investigation established a violation of the Americans with Disabilities Act (ADA). The agency attached a "conciliation agreement" demanding that Agro reinstate Velez; post a notice; submit to EEOC oversight; and pay Velez $25,629 in back pay, $10,907 in out-of-pocket medical expenses and $120,000 in compensatory damages.

Agro requested a meeting to discuss conciliation. The EEOC sent a letter stating that it would commence conciliation but required that any settlement follow its "Remedies Policy."



Determining the damages

In determining the monetary damages in *EEOC v. Agro Distribution LLC* (see main article), the United States Court of Appeals for the Fifth Circuit noted that, in dealing with Agro Distribution, the EEOC hadn't attempted conciliation in good faith.

Rather, the EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro had violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement. The appeals court explained that the EEOC's take-it-or-leave-it demand for $250,000 represented the coercive, "all-or-nothing approach" previously condemned by the Sixth Circuit.

Although the court noted the deficiencies in the EEOC's investigation and conciliation, in an effort to "give the EEOC the benefit of every doubt," the court awarded attorneys' fees only from the date of Henry Velez's deposition — May 6, 2006.

Agro requested clarification as to whether the EEOC meant that it would be unwilling to settle without reinstatement, full back pay and compensatory damages. The EEOC didn't respond. Agro then offered $3,500 in settlement.

Nearly 10 months later, the EEOC replied to Agro, rejecting the offer and insisting upon reinstatement or front pay, back pay, medical expenses and compensatory damages. A couple of months later, the EEOC filed suit seeking $250,000 in damages.

Following Velez's deposition, the EEOC offered to settle for $42,000, but Agro rejected the offer. The district court granted summary judgment to Agro and awarded attorneys' fees to Agro that accrued from the time of Velez's deposition — "the cut-off date for which the EEOC could be given any consideration for acting with any justification." The court found that the EEOC should have dropped the case then, because the deposition established that the EEOC didn't have a viable claim. The EEOC appealed.

On appeal

Under EEOC regulations, a "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." The EEOC contended that Velez's anhidrotic ectodermal dysplasia substantially limited his body's ability to regulate its temperature, a major life activity.

Velez testified that he'd adopted a variety of strategies to regulate his body temperature — including drinking cold liquids, sitting in front of a fan, spraying himself with water, resting when laboring on hot days and using air conditioning — which allowed him to do manual labor.

The U.S. Court of Appeals for the Fifth Circuit noted that the recent amendments to the ADA provide that such mitigating measures cannot be considered in determining whether someone is substantially limited. But the court explained that these changes didn't apply retroactively and, thus, weren't applicable to this case.

The appeals court also explained that, even if Velez were substantially limited in the major life activity of regulating body temperature, no reasonable jury could find that Agro had failed to grant his request for a reasonable accommodation. The ADA provides a right to reasonable accommodation — not to the employee's *preferred* accommodation.

During his deposition, Velez testified that the only accommodation he needed was "air movement and clean water." He also stated that, with sufficient opportunities to cool off, he was fully capable of performing manual labor. The court of appeals explained that Agro had provided Velez with these opportunities in the past and there was no reason to believe it wouldn't have provided them on July 16.

Thus, the appeals court concluded that Velez wasn't denied an accommodation and affirmed summary judgment for Agro.

The ADA provides a right to reasonable accommodation — not to the employee's preferred *accommodation.*

No different

Like other litigants, federal, state and local governmental agencies sometimes act inappropriately in pursuing legal cases against those they accuse of having violated the law. This case reminds us that governmental agencies can be held accountable for their inappropriate conduct by the courts — just like those other litigants. ♦

Independent contractor vs. employee

Another battle is fought in the IT realm

The independent contractor vs. employee battle has been fought in many sectors. Among the most common is the IT realm, where contract work often goes on for prolonged periods. One recent example is *Estate of Suskovich v. Anthem Health Plans*, in which the U.S. Court of Appeals for the Seventh Circuit examined a widow's claim that her deceased husband, a computer consultant, was an employee of the defendants, not an independent contractor.

On the job

In 1995, Anthony Suskovich formed his own computer analyst corporation. The next year, Anthem Health Plans retained Suskovich and other professionals to work on its IT team.

Although no record exists of any contractual agreement between Suskovich and Anthem, Suskovich stated on a form he used to access Anthem's computer system that he was a "contractor." Moreover, he billed Anthem for his time on a self-created invoice that stated he was a "salesperson" who sold "computer consulting" to Anthem.

He was paid at an hourly rate of $60, resulting in an annualized salary of about $200,000, and received no benefits. For tax purposes, his salary was reported on a 1099 form rather than a W-2.

Suskovich was retained for limited durations, usually about six months, though these limited engagements were often rolled over into new engagements. In 1999, Anthem stopped retaining Suskovich. But it brought him back in 2000 through a preferred vendor agreement with Trasys, where he served as part of an IT team working with Anthem.

In January 2006, Suskovich died. Two months later, Suskovich's widow filed a lawsuit against Anthem and Trasys, claiming he was a regular employee who hadn't been paid overtime or enrolled in benefit programs for which he was eligible. The district court granted the defendants' motion for summary judgment, and the estate appealed.

In the courtroom

The appeal centered on a handful of factors traditionally examined in determining employment status. These include:

Extent of control. The estate argued that Suskovich was an employee because the defendants had mandated that Suskovich work from at least 8:30 a.m. to 4:00 p.m., controlled the number of hours he could bill in a given day, required that he attend project meetings, monitored his progress on projects and asked him to train a replacement. The estate also argued that Anthem and Trasys had "disciplined" Suskovich for tardiness and receiving personal telephone calls.

The appeals court explained that the key question was whether the details of the work had been controlled by Suskovich or by Anthem and Trasys. The court found that facts showed that Suskovich had controlled the details of his work, and that he'd been accountable to Trasys and Anthem only for the results.

Instrumentalities and length of employment. The estate argued that Suskovich was an employee because he'd been required to do his work on site and had been given a desk, computer, filing cabinet and other supplies. The appeals court explained that these factors shouldn't weigh heavily

for computer consultants because their work is generally done on computers.

The appeals court also explained that, where a person is engaged to work for a company for a limited period of time with no expectation of contract renewal, such as Suskovich had been with both Anthem and Trasys, it favors independent contractor status.

A key question faced by the appeals court was whether the details of the work had been controlled by Suskovich or by Anthem and Trasys.

Method of payment. The estate argued that, because Suskovich had been paid by the hour, he was an employee. The appeals court noted that Suskovich had been issued 1099 forms from both Anthem and Trasys and had never been added to either company's payroll.

Instead, to get paid, he had to invoice his hours. On his own tax returns, Suskovich also listed his income as coming from a sole proprietorship, and he claimed business deductions related to that proprietorship.

Beliefs of the parties. Suskovich's widow testified that he'd considered himself an employee of Anthem and Trasys. The appeals court, however, noted that Suskovich's tax returns, which he'd signed under penalty of perjury, claimed he was a sole proprietor of a consulting business and listed no wages from employment. In addition, Suskovich's resumés listed his occupation as an "independent computer consultant."

The appeals court went on to note other factors — such as "distinct occupation or business," "type of occupation" and "skill required" — that favored the defendants because Suskovich's advanced computer skills had allowed him to contract work out to a number of companies.

Part of regular business. The estate argued that Anthem's business of providing and administering health plans depended on computers and computer networks, so Suskovich's work had been part of the company's regular business and thus he was an employee. The estate also maintained that Trasys provides IT professionals to various businesses and, therefore, Suskovich's work had been in line with *that* company's core operations.

Regarding Anthem, the appeals court noted that, if the estate's argument were accepted, an employer-employee relationship would exist between just about *any* company and its IT personnel. The court also explained that, though Suskovich may have been engaged in the same fundamental operations as Trasys, his work hadn't been part of its regular business: He hadn't been hired or compensated in a typical manner, and he'd been brought on to accommodate Anthem.

In the clear

The companies in this case wound up in the clear — the appeals court affirmed the district court's granting of summary judgment in favor of Anthem and Trasys. But employers still must exercise caution before treating a worker as an independent contractor. ♦

Workforce reduction cuts along gender lines

The recession has made layoffs a fairly common occurrence, so knowing how to reduce the risk of discrimination claims when laying off workers is more important than ever. In *Shollenbarger v. Planes Moving & Storage*, the U.S. Court of Appeals for the Sixth Circuit examined whether an employer had engaged in gender discrimination when it imposed layoffs and 92% of those affected were female.

Employing a RIF

In September 2001, Planes Moving & Storage determined that a reduction in force (RIF) was needed at its Cincinnati facility. Before the RIF, Planes' nonmanagement workforce comprised 120 women and 86 men. And, of the 101 employees in the departments targeted for layoffs, 90 (89%) were women.

Ultimately, Planes laid off 12 women and one man. Four of the laid-off female employees sued Planes in federal court, alleging gender discrimination on the theory of disparate impact. The district court granted a directed verdict to Planes, and the plaintiffs appealed.

Establishing a case

To establish a prima facie case of disparate impact, a plaintiff must identify a "particular employment practice," show a disparate impact on a protected group and prove that the employment practice caused the disparity. The plaintiff must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities."

If the plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate business justification for the challenged practice. And, if the defendant establishes such a justification, the burden shifts back to the plaintiff to prove an equally effective alternative.

Running the numbers

Here the plaintiffs challenged Planes' "particular employment practice" of selecting only predominantly female departments for the RIF. The appeals court explained that Planes' reasons for selecting certain departments were immaterial; the only questions were whether there was an identifiable disparity and, if so, whether the challenged employment practice could have caused the disparity.

Statistical analysis showed that the odds of selecting 12 women from the affected departments were 23%; whereas the odds of selecting 12 women from the entire nonmanagement labor pool were 0.1%. The court of appeals found this to be a sufficient disparity to demonstrate a disparate impact from the decision.

Planes explained that its declining business necessitated the RIF and that its customer-service-oriented departments were most affected. In addition, the unaffected departments that were predominantly male were staffed largely with seasonal workers who had already left at summer's end. And there was no decline in the business being done by the warehouse. Thus, the appeals court found that Planes had a legitimate business justification for subjecting only certain departments to the RIF.

The burden then shifted back to the plaintiffs. And though they offered alternatives, the appeals court explained that the purpose of this step wasn't to second-guess the employer's business decisions. It was to show — by pointing to obviously ignored alternatives — that the "particular employment practice" was actually a pretext for discrimination.

The appeals court explained that the same statistics that established the prima facie case disproved this claim. Given that Planes' targeting of certain departments was legitimate, it had an 89% random chance (90/101) of selecting a woman for the layoff. The RIF was 92% female (12/13), which is consistent with a random selection from an 89% pool.

The appeals court looked into whether Planes had a legitimate business justification for subjecting only certain departments to the layoffs.

Minimizing the threat

In planning a RIF, employers must analyze how the planned reduction will affect employees in protected groups and be prepared to justify the choices made. The threat of litigation can be minimized by, whenever possible, using seniority as a criterion for layoffs and by conditioning severance on the execution of valid releases. ♦

Regarding guns, OSHA and the workplace …

Guns in the workplace is an issue fraught with controversy. The presence of firearms on company grounds was at the center of a recent Oklahoma case, *Ramsey Winch Inc. v. C. Brad Henry*.

A matter of state law

In March 2004, after several Oklahoma employees were discharged for storing firearms in their vehicles on company parking lots, the Oklahoma legislature amended its firearms laws. Specifically, the legislature amended the Oklahoma Firearms Act of 1971 and the Oklahoma Self-Defense Act of 1995 to prohibit property owners from banning the storage of firearms locked in vehicles located on their property.

A number of Oklahoma employers subsequently brought legal action seeking an injunction against enforcement of the amendments. In November 2004, the district court entered a temporary restraining order against enforcement of the amendments, finding they were likely preempted by various federal laws.

In October 2007, the district court ruled that the amendments were preempted by the Occupational Safety and Health Administration's (OSHA's) general duty clause, which imposes upon employers a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Holding that gun-related workplace violence was a "recognized hazard" under the general duty clause and, therefore, that an employer that allows firearms in the company parking lot may violate the clause, the district court permanently enjoined enforcement of the amendments. The State of Oklahoma appealed.

The appellate perspective

The U.S. Court of Appeals for the Tenth Circuit explained that OSHA didn't indicate in any way that employers should prohibit firearms from company parking lots. In fact, in a recent Standard Interpretation Letter, OSHA had declined a request to promulgate a standard banning firearms from the workplace.

In declining this request, the agency stressed reliance on its voluntary guidelines and deference "to other federal, state, and local law enforcement agencies to regulate workplace homicides." The appeals court noted that the agency is aware of the controversy surrounding firearms in the workplace and has consciously decided not to adopt a standard. Thus, the appeals court explained that, because a standard hasn't been promulgated for an "unanticipated hazard," the general duty clause didn't apply.

In addition, the appeals court found that the broad meaning of "recognized hazard" espoused by the district court was too speculative and, instead, reasoned that it should be restricted to the types of hazards Congress had in mind.

Finally, the appeals court disagreed with the district court's reasoning that the amendments thwarted OSHA's overall purpose and objective, explaining that the law isn't meant to interfere "with states' exercise of police powers to protect their citizens."

Moreover, the appeals court noted that the amendments didn't conflict with any OSHA standard. Thus, it concluded that the district court's decision interfered with Oklahoma's police powers and essentially promulgated a court-made safety standard.

Not a closed matter

Despite the absence of an express standard, OSHA could still be used to cite employers for permitting guns in the workplace in other locales. If such an eventuality were to come to pass in Oklahoma, this issue would have to be revisited there. ♦