Labor & Employment Law Update

July 23, 2013 • Volume 22, Number 6 • Heidi A. Guttau-Fox, Editor

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Eighth Circuit Bolsters Employers' Discretion in Determining Essential Job Functions Under the ADA

The Eighth Circuit Court of Appeals recently affirmed what employers have long known: certain job functions may be essential to an employment position, even if infrequently performed. The court's decision in *Knutson v. Schwan's Home Service, Inc.* clarifies the manner in which employers may comply with ADA requirements and enables them to take proactive steps to concretely identify essential functions of employment positions.

Jeffrey Knutson was employed as a Location General Manager of a Schwan's Home Service, Inc. ("Schwan's") depot. Schwan's primary business involved the use of commercial vehicles to deliver frozen food to end-user customers at home or work, and managers' duties involved training new drivers and occasionally driving the company's vehicles to deliver product. Schwan's job description required that managers meet federal DOT eligibility requirements as a condition of employment, including obtaining the appropriate driver's license and corresponding medical certification. Furthermore, Knutson's "Conditional Offer of Employment" mandated that he be DOT qualified for trucks weighing over 10,000 pounds. One such qualification was that he hold a Medical Examiner's Certificate (MEC) indicating he was physically capable of driving a commercial vehicle.

In March 2008, Knutson suffered a penetrating eye injury that impaired his ability to perform his job functions. DOT regulations required that Knutson be medically examined and certified, but he was unable to obtain an MEC or a waiver. In January 2009, Schwan's placed Knutson on a 30-day leave of absence to obtain either an MEC or an internal job with the company that did not require satisfying the DOT qualification requirements. Knutson failed to obtain either within 30 days, and Schwan's terminated his employment.

Knutson filed suit against

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Schwan's under the ADA, claiming that he was disabled within the meaning of the ADA, was qualified to perform the essential functions of his job, and suffered an adverse employment action because of his disability. Knutson argued that being DOT qualified to drive a delivery truck was not an essential function of his Manager's position. In particular, he argued that since he was rarely required to actually drive the company's trucks he could successfully fulfill his job functions even if he was not DOT qualified. Knutson additionally claimed that Schwan's could have reasonably accommodated his disability by assigning his driving responsibilities to other employees.

The Eighth Circuit emphatically rejected Knutson's essential functions argument, holding that "Knutson's specific personal experience is of no consequence in the essential functions equation." The court instead affirmed its prior precedent that "it is the written job description, the employer's judgment, and the experience and expectations of all [Managers] generally [that] establish the essential functions of the job."

Despite Knutson's claim that he could perform his employment duties without driving a truck, the court unequivocally held that being DOT qualified was an essential function of Knutson's position. The court emphasized the fact that both the job description for Knutson's position and the conditional offer of employment that he signed required him to be DOT qualified, indicating the company considered the ability to drive commercial vehicles to be an essential job function. The court also noted that, although Knutson may have infrequently driven a company truck, it was undisputed that Schwan's managers were sometimes required to perform this activity. Furthermore, since DOT regulations precluded non-qualified persons from driving commercial motor vehicles, Knutson's inability to meet the DOT qualifications prevented him from being able to perform a required function of his position. The combination of these facts persuaded the court that being DOT qualified was an essential function of Knutson's position, regardless of the frequency with which he drove Schwan's trucks.

The court also flatly rejected Knutson's reasonable accommodation argument for two reasons. First, "an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job." Second, an employer "is not required to reassign existing workers to assist the [the employee] in his essential duties." Knutson's demand that Schwan's reassign his driving duties to other employees was thus unreasonable since it would involve eliminating an essential function of his position.

Knutson v. Schwan's Home Service, Inc. represents a victory for employers and illustrates the advantages of carefully drafting job descriptions. The court's holding will be particularly important for employers who need employees to be able to respond to abnormal or emergency situations that may arise infrequently. This case indicates that courts stand poised to grant deference to employers who use reasonable processes for determining the essential functions of a position and who list these functions in position descriptions.

This case also provides guidance for employers in determining what constitutes reasonable accommodations for employees with disabilities. Employers who proactively identify and document essential functions in job descriptions will provide themselves with concrete guidance in evaluating what accommodations they do and do not need to make for employees with disabilities. ■

Heidi A Guttau-Fox and Marty Demoret, Summer Associate

Eighth Circuit Finds Pretext When Employer Fires Employee For Yelling But Did Not Ordinarily Fire Other Employees For the Same Reason

An employer can generally avoid liability in an age discrimination lawsuit if it can articulate a legitimate, non-discriminatory reason for its actions. Examples of legitimate non-discriminatory reasons for terminations are poor performance, misconduct and insubordination. Articulating a legitimate, non-discriminatory reason is an effective way to win summary judgment in a lawsuit and get the case dismissed. Once the employer provides this reason, it is up to the employee to demonstrate that the employer's stated reason is a

disguise or "pretext" for unlawful discrimination, which is often difficult for the employee to establish.

A district court concluded that Lyle Ridout failed to show that his former employer's non-discriminatory reasons for terminating his employment were a pretext for age discrimination. As a result, the district court granted the employer's motion for summary judgment. Ridout was successful, however, when he appealed his case to the Eighth Circuit in *Ridout v. JBS USA, LLC*.

Ridout worked as a rendering superintendent at a pork processing plant owned by JBS. One day, during the first shift, an employee who operated a machine called a prehoger, which was used to grind scraps and bones of pork in order to create a material known as crackling, reported to Ridout that there were problems with the machine. Ridout instructed the maintenance department to work on the machine during the overnight shift break, a common time to do maintenance work. The machine broke down entirely before the repairs could be made, however. The second shift supervisor had to shut down production for several hours, and a significant backlog of product piled up before the prehoger was restored to operation by the end of the third shift.

The next day, the plant engineer, plant manager, general manager, and Ridout went over to the prehoger on the factory floor to discuss its failure from the previous day. The general manager claimed that Ridout became visibly upset and raised his voice during their discussion and that he complained that management wanted to "point fingers." Ridout admitted that he was frustrated with his supervisors; however, he denied that he ever behaved in an aggressive manner. He claimed he raised his voice because the conversation took place directly next to a large piece of equipment and employees in that area had to speak loudly to be heard over the noise. He also noted that he had experienced considerable hearing loss due to working in the JBS factory for over 40 years and that his hearing loss caused him to speak loudly.

Ridout was subsequently suspended without pay. When he met with the plant manager and human resources a few days after the incident, he expressed remorse regarding the conversation, agreed that he could have handled the situation differently, and asked to come back to work. He said that if he could no longer be the rendering superintendent, he would accept a demotion. Rather than demote Ridout, his supervisors decided to terminate his employment.

The general manager replaced Ridout with an employee who was between the ages of 35 and 38 years old. This employee was demoted a year and a half later due to inadequate performance. Thereafter, the general manager hired a 33-year-old former employee. JBS had fired this employee five years earlier for making a mock Ku Klux Klan hood out of industrial materials and displaying it to a black employee.

Ridout alleged JBS discriminated against him on the basis of age in violation of the Age Discrimination in Employment Act and the Iowa Civil Rights Act when it terminated his employment. JBS presented two non-discriminatory reasons for terminating Ridout's employment: (1) he had raised his voice to his supervisors; and (2) his performance had declined. The district court concluded that Ridout did not demonstrate that JBS' non-discriminatory reasons were pretext for age discrimination and ruled in favor of JBS by granting summary judgment.

Ridout appealed to the Eighth Circuit. The court first noted that it was undisputed that Ridout successfully made out a *prima facie* case of age discrimination.

He produced evidence that: (1) he was over 40 years old when JBS terminated is employment (Ridout was 62 years old); (2) he had been meeting JBS's reasonable expectations when he was terminated; and (3) he was replaced by a younger individual. Second, the court determined that JBS met its burden of articulating a legitimate non-discriminatory reason for terminating Ridout: declining performance and insubordination. Finally, the court considered whether JBS's proferred reasons were a mere pretext for age discrimination.

The Eighth Circuit concluded that a jury/trier of fact could find that declining performance was not a true reason for his termination. Ridout presented evidence that JBS considered his performance satisfactory until he was suspended without pay. He had never been counseled or warned about any declining performance prior to his termination. In fact, his performance was rated as "meets expectations" in his last review.

The Eighth Circuit came to the same conclusion regarding the claimed reason of insubordination. The court noted that an employee may demonstrate pretext by showing that "it was not the employer's policy or practice to respond to such problems in the way it responded in the plaintiff's case." Ridout's supervisors admitted it was common to raise one's voice on the factory floor where the noise may drown out quieter voices. Additionally, although heated arguments involving swearing were relatively common among employees, none of the supervisors could recall a single other instance where any employee had been terminated for yelling or swearing.

Ridout also produced evidence that younger employees were treated more leniently. For example, the younger individual who immediately replaced Ridout was similarly accused of poor performance and was demoted, not terminated. Moreover, JBS was lenient when it rehired the employee previously fired for racist behavior. He also showed that a number of other older employees were terminated around the same time as him, and four of the five salaried, supervisory employees JBS terminated during that same year were over 40 years of age.

Ultimately, the Eighth Circuit found that Ridout's evidence was sufficient to allow a rational factfinder to find that JBS's proffered reasons for terminating him were pretext for unlawful discrimination. The court found that the determination of whether Ridout's termination was the result of unlawful discrimination was not one for summary judgment as his evidence was entirely consistent with a reasonable inference of age discrimination. Consequently, the court reversed the grant of summary judgment and remanded the case to the district court.

This case demonstrates that an employer may not win summary judgment if the employee can establish that the employer responded to the employee in an atypical manner or provides evidence that the employer treated younger employees more leniently. ■

D. Ashley Robinson

Supreme Court Issues Two Pro-Employer Title VII Decisions

On June 24, 2013, the United States Supreme Court, in two 5-4 decisions, narrowed the scope of employer-liability under Title VII of the Civil Rights Act of 1964 in retaliation and harassment claims. In each case, the Court rejected the broader standard for which the Equal Employment Opportunity Commission advocated.

In *University of Texas Southwestern Medical Center v. Nassar,* the Court held that a plaintiff must prove that retaliation was the "but-for" cause of the adverse employment action. This is a stricter standard for proving causation than is applied to race, color, religion, sex or national origin cases brought under Title VII. The Court found this because the statute specifically applied a "motivating factor" standard for such status-based discrimination claims. However, because the language of the retaliation provision does not contain similar language on the standard, the Court found that the statute does not indicate any intent to depart from the "but for" standard generally used in tort law. The Court also explained that the stricter standard of proof made practical sense in retaliation cases, given the "ever-increasing frequency" with which such claims are being filed. The Court expressed concern that an employee who anticipated being terminated could make a baseless discrimination claim in an attempt to set up a retaliation claim.

In *Vance v. Ball State University,* the same majority narrowly defined who constitutes a "supervisor" for purposes of vicarious employer liability under Title VII. Under the Court's earlier *Burlington Industries v. Ellerth and Faragher v. Boca Raton* decisions, plaintiffs can more easily prove a harassment claim against their employer if the alleged harasser was a "supervisor" rather than a co-worker. The Court found that a "supervisor" is someone "the employer has empowered" to "take tangible employment actions against the victim, i.e. to affect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Court asserted that this tangible employment action standard is easier to apply and, in many cases, can be resolved by a court prior to trial.

These cases will provide judges greater authority to decide retaliation and harassment cases on summary judgment and prevent the cases from being heard by a jury. Employers should be aware, however, that these legal standards may not apply to state and local employment laws. ■

Alison D. Balus

Other State-Specific Developments:

Iowa: The Iowa Civil Rights Commission recently prevailed in a district court action alleging an apartment complex's management company's employees subjected two former tenants to harassment and other discriminatory treatment based on their sexual orientation. After a maintenance technician discovered the two men were sharing a one-bedroom apartment, he verbally harassed them by calling them derogatory terms and slurs and making offensive gestures on an almost daily basis during March and April 2011. He also referred to the two men using derogatory terms to other employees and residents. Both the property manager and an employee in the corporate office failed to take any corrective action when the men complained about the harassment. The jury awarded the men $147,000 in damages) $22,000 for economic damages, $50,000 for emotional distress, and $75,000 for punitive damages. The Commission will also seek equitable remedies including changing the management company's complaint process and training staff regarding their obligations to prevent and appropriately address discrimination complaints.

Kansas: Topeka City Councilman Chad Manspeaker filed legislation on Monday, July 1, 2013, to push the city's Human Relations Commission to launch an educational campaign promoting tolerance towards LGBT residents and gay rights. Topeka already prohibits discrimination in government employment based on sexual orientation, but the city no longer provides funding to its Human Relations Commission to investigate discrimination complaints. Instead, Topeka's Human Relations Commission administers educational campaigns aimed at preventing discrimination on the basis of race, religion, nationality, disability, and sex. Councilman Manspeaker told the Huffington Post that his legislation "is a small step, but a giant first step, in showing the world that this is not a town of bigotry and hate, but a town of inclusion." Currently, Lawrence is the only city in Kansas to maintain laws prohibiting LGBT discrimination. Salina and Hutchinson had similar protections in place, but voters repealed them in referendums last year.

Minnesota: In the case of *Lube-Tech Liquid Recycling Inc. v. Lee's Oil Serv. LLC,* (D. Minn. June 3, 2013), the federal court held that an employee's alleged download of her former employer's customer and pricing information for the purpose of sharing it with her new prospective employer did not violate the Computer Fraud and Abuse Act, without evidence showing that she was forbidden from accessing that data.

Missouri: Missouri Governor Jay Nixon vetoed a bill that would have expanded employers' ability to prevent employees from collecting unemployment benefits. The bill would have expanded the type of "misconduct" that would disqualify a terminated employee from unemployment compensation. The bill defined "misconduct" as "conduct or a failure to act demonstrating knowing disregard of the employer's interest or a knowing violation of the standards that the employer expects." The Governor reasoned that the bill went "too far" because it would allow employers to terminate employees for "misconduct" that occurs outside of the workplace.

Montana: The Montana Supreme Court recently affirmed a jury verdict for a Montana retailer under the Montana Wrongful Discharge from Employment Act ("WDEA"). The employer terminated a lead assistant manager because of the effects his affair had on his assistant management team. Additionally, the other assistant managers had lost trust in him as the lead assistant manager, and he swore at the store manager when asked about the affair. The Court specifically rejected the assistant manager's argument that it should have granted summary judgment because he won his unemployment claim and appeal, given that the employment statute strictly prohibited such binding impact of an unemployment decision.

North Dakota: In *Spirit Lake Tribe of Indians v. NCAA,* the United States Court of Appeals for the Eighth Circuit affirmed the North Dakota district court's determination that the National Collegiate Athletic Association ("NCAA") had no discriminatory intent in sanctioning the University of North Dakota ("UND") for its use of the "Fighting Sioux" name, logo and imagery, so summary judgment in the NCAA's favor was proper on the tribe's race-discrimination charges. In 2005, the NCAA began prohibiting the display of Native American mascots, nicknames, and images at championship events. UND challenged the NCAA policy, and the parties entered a settlement agreement allowing UND to retain the name without sanctions if two regional tribes granted approval by November 2010. One tribe did not approve the name, UND retained it nonetheless, and the NCAA sanctioned UND, prompting the approving tribe to sue the NCAA. In affirming the summary judgment in the NCAA's favor, the Eighth Circuit emphasized that the race-discrimination charges that the Spirit Lake tribe pleaded required proof of a "discriminatory intent on the part of the defendant," and the NCAA policy's clear and stated purpose—to "eliminate the use of 'hostile and abusive' mascots and imagery"—was not discriminatory as a matter of law.

South Dakota: A federal court in South Dakota this month granted in part and denied in part an employer's summary judgment motion in a case involving claims of hostile work environment and retaliation. In denying summary judgment on the retaliation claim, the court rejected the argument by the defendant-employer that the plaintiff had failed to exhaust her administrative remedies on such a claim because "her original charge contemplated the involuntary transfer rather than termination of employment." The court noted that exhaustion of administrative remedies requires that the claims brought in federal court by the claimant must be "like or reasonably related to" the claims brought in the administrative proceedings. The court found that in this case, the plaintiff's "termination, whether it consisted of resignation or dismissal, is of a 'like kind' to a proposed involuntary transfer" and therefore requiring the plaintiff to file another administrative charge subsequent to her termination would create "needless procedural barriers."

Wyoming: The death of 32-year-old Carl Jordan in a drilling rig accident north of Baggs on May 15 may be Wyoming's eighth workplace fatality of 2013. It is unclear, however, whether Wyoming is on pace to experience fewer workplace fatalities in 2013 than in recent years. According to the Bureau of Labor Statistics, there were 32 workplace fatalities in Wyoming in 2011 and 33 in 2010. Wyoming ranks among the leading states for workplace fatalities per 100,000 workers. The Occupational Safety and Health Administration's investigation into Mr. Jordan's death remains open. ■

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