Employment Law Briefing

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The summary judgment standard

Fourth Circuit makes important points in ADA case

The case of *Jacobs v. N.C. Administrative Office of the Courts* involved a plaintiff claiming violations of the Americans with Disabilities Act (ADA). The proceedings ultimately didn't go well for the employer. But, just as significant, the U.S. Court of Appeals for the Fourth Circuit made important points about whether the trial court had properly applied the summary judgment standard.

Requesting a transfer

The plaintiff was hired as an office assistant by the elected clerk of court. She was eventually promoted to deputy clerk, where she was assigned to customer service. But the public contact was difficult for her because she suffered from an anxiety disorder. Nonetheless, the plaintiff was never written up or disciplined for performance issues.

There were thirty deputy clerks; about five provided customer service while the others performed record keeping. The plaintiff requested a transfer out of the customer service from her supervisor. The supervisor relayed the request to the elected clerk of court who took handwritten notes for the file that included phrases such as "anxiety disorder" and "might have to go back to [the doctor]."

The plaintiff sent an email to her supervisor and two other managers, again requesting a transfer and disclosing her disability. She forwarded the email to the elected clerk of court after she was told by one of the other managers that the elected clerk of court had the power to make a decision but was away on vacation.

Inconsistent testimonies and a lack of documentary evidence of the plaintiff's alleged poor performance precluded summary judgment, found the appeals court.

The elected clerk of court alleged that she hadn't checked her email during vacation but had received a call from her assistant that the plaintiff was sleeping at her desk. When she returned, the elected clerk of court called the plaintiff into her office for a meeting and terminated her, stating that the plaintiff wasn't "getting it" and there were no available positions to which she could transfer.

Filing a complaint

The plaintiff filed a complaint alleging that her employer had:

- Failed to reasonably accommodate her under the ADA,
- Terminated her because of her social anxiety, and
- Retaliated against her because she'd requested an accommodation.

The trial court granted summary judgment in the employer's favor. It held that the plaintiff wasn't disabled under the law. Furthermore, the trial court found that the person who'd made the termination decision — the elected clerk of

court — wasn't informed of the plaintiff's accommodation request before terminating her. So she couldn't have retaliated against her. The plaintiff appealed.

Precluding summary judgment

On that appeal, the Fourth Circuit vacated the trial court's summary judgment and remanded the case for trial. The appeals court held that the trial court had:

- Misapplied the summary judgment standard of analyzing facts in the light most favorable to the nonmovant (that is, the party that didn't file a motion),
- Impermissibly credited the employer's evidence, and
- Failed to acknowledge the employee's evidence.

With regard to her disability discrimination claim, the trial court had failed to provide deference to the Equal Employment Opportunity Commission regulation identifying "interacting with others" as a major life activity. The appeals court held that the plaintiff needed to show only that she endured interactions with the public with intense anxiety. Additionally, the elected clerk of court's note to the file, inconsistent testimonies and a lack of documentary evidence of the plaintiff's alleged poor performance precluded summary judgment.

The appeals court also addressed the retaliation claim. It held that the plaintiff created a genuine issue of material fact about causation because she was terminated just three weeks after asking for an accommodation.

In addition, the appeals court found that there were genuine issues of material fact about whether the plaintiff could perform the essential functions of the deputy clerk position with an accommodation. The court held that there was no evidence that customer service was an essential part of the job or that a transfer of the plaintiff would negatively affect her employer.

Last, the court found that, by firing the plaintiff at a meeting rather than discussing accommodations, the employer may have failed to engage in an interactive process with the plaintiff as required by the ADA.

Remaining cognizant

This case sheds important light on the standard for summary judgment. It also demonstrates that nonphysical ailments, such as social anxiety disorders, can be considered disabilities under the ADA. Be sure to remain cognizant of all aspects of the law, engage in an interactive process with employees who request accommodations and abide by your obligation to provide reasonable ones. ♦

The importance of good faith

An important part of complying with the Americans with Disabilities Act (ADA) is engaging in a good-faith interactive process with those who request accommodations. In *Rorrer v. City of Stow*, the U.S. Court of Appeals for the Sixth Circuit provided a salient example of what *lack* of good faith might look like.

The plaintiff was a firefighter who was terminated after an accident unrelated to his job left him with monocular vision. He filed an ADA-based lawsuit against the city and the fire chief. The trial court granted summary judgment in the employer's favor, and the plaintiff appealed.

The appeals court held that the trial court had erred when rejecting the plaintiff's claim that his employer had failed to engage in a good-faith interactive process (or "individualized inquiry" in the court's words). In fact, the plaintiff had proposed two reasonable accommodations:

1. **Authorization to continue working as a firefighter without driving a fire apparatus during an emergency, and**
2. **Transfer to the Fire Prevention Bureau to serve as a fire inspector.**

What's more, the appeals court pointed out, during a meeting with the plaintiff, city officials "refused to discuss" reassignment. Taking these and other factors into consideration, the appellate court reversed the trial court's grant of summary judgment and remanded the case for further consideration.

Shifting sands

Consistency important when handling FMLA leave

An employee requesting leave under the Family and Medical Leave Act (FMLA) puts a heavy burden of administrative responsibility on an employer. Should the organization later decide to take an adverse action against that employee, its reasons for doing so must be rock solid. Unfortunately for the defendant in *Hudson v. Tyson Fresh Meats, Inc.*, its defense appeared to be built on shifting sands.

Absence reported

On December 28, 2011, the plaintiff didn't show up for work. He asked his girlfriend, a co-worker, to tell his supervisor that he was sick and would be late or absent. The plaintiff also texted his supervisor that he was having health issues and would be out for a few days.

The company's attendance policy, which the plaintiff had signed, stated that employees were expected to personally call their direct supervisors to report unplanned absences or lateness. The plaintiff, however, claimed he'd often notified his supervisor of an absence via text.

On January 3, 2012, the plaintiff went to the company with a doctor's note saying he'd be under a doctor's care from December 28, 2011, to January 7, 2012, and couldn't work. The plaintiff also signed a "leave of absence application" and later argued that someone other than him had checked the non-FMLA box on the form rather than the box requesting FMLA leave. The employer granted him non-FMLA leave.

The plaintiff stated that, when he returned to work on January 9, 2012, he was instructed not to perform his duties. He was terminated the next day for allegedly failing to notify his employer that he was going to miss work. The plaintiff sued, claiming that the termination violated his FMLA rights and the company had retaliated against him for taking FMLA leave. A trial court granted the company's summary judgment motion to dismiss the case, and the plaintiff appealed.

> *There was evidence that the plaintiff was discriminated against for taking FMLA leave because his employer had shifted its explanation for why it had terminated the plaintiff.*

Decision reversed

The U.S. Court of Appeals for the Eighth Circuit reversed the trial court's decision and remanded the case for further consideration. It found that there was evidence that the plaintiff was discriminated against for taking FMLA leave because his employer had shifted its explanation for why it had terminated the plaintiff.

Originally, the company claimed it had fired the plaintiff for failing to notify his supervisor that he was going to be absent. But it later modified this claim to say that he'd notified the supervisor but failed to do so *correctly*.

There was also a dispute about whether the company enforced its call-in policy. As mentioned, the plaintiff stated that he'd previously notified his supervisor of absences via text and these notifications had been

accepted. In doing so, he presented sufficient evidence to raise a genuine issue of fact as to whether he'd adequately notified the company and was terminated for taking FMLA leave.

Regarding reinstatement, the trial court had concluded that the plaintiff had been restored to his position when he returned to work. Therefore, summary judgment in the employer's favor was deemed proper on his FMLA-entitled claim. But the appeals court found that, because he wasn't permitted to work and was recommended for termination that same day, there was a dispute of material fact about whether the plaintiff was actually restored from leave before being terminated.

Warning served

This case should serve as a warning to employers that inconsistencies in their reasons for taking an adverse action against an employee, as well as in enforcing their own employment policies, could lead to a lawsuit *and* a trial. Be sure to have sound, legally reviewed procedures and policies in place and to enforce them consistently. Doing so is particularly important when FMLA leave is involved. ♦

Definition of a salesman: An FLSA case

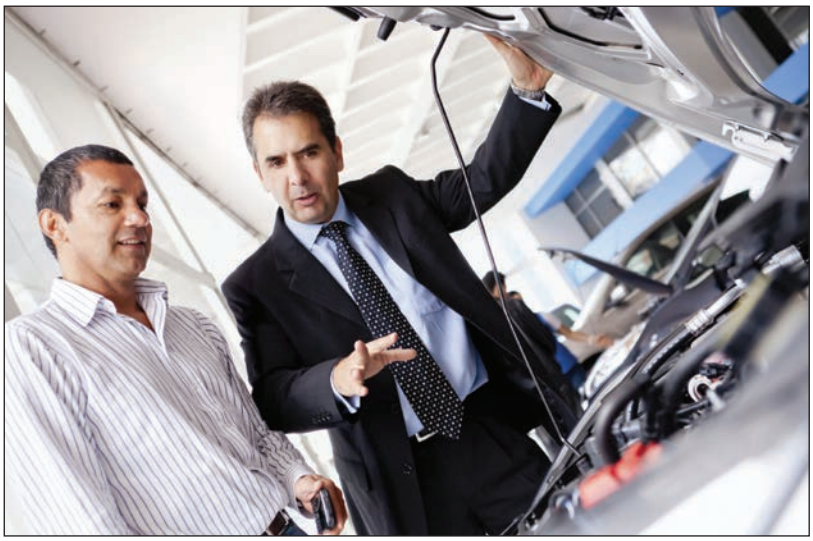
The Fair Labor Standards Act (FLSA) exempts from overtime pay "any salesman, partsman, or mechanic primarily engaged in the selling or servicing of automobiles." But does this apply to "service advisors" employed by an auto dealership? So went the engine of uncertainty driving the case of *Navarro v. Encino Motorcars, LLC.*

Action brought

Department of Labor (DOL) regulations define a car salesperson as "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles … that the establishment is primarily engaged in selling."

Meanwhile, the regulations define a partsman as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts," and a mechanic as "any employee primarily engaged in doing mechanical work … in the servicing of an automobile.…"

The plaintiffs, who were service advisors for an automobile dealership, brought an FLSA action alleging they were entitled to overtime compensation. The trial court dismissed the action, finding that the employees were exempt from overtime. The plaintiffs appealed.



Steps followed

On that appeal, the employees argued that the court should defer to the DOL regulations and find that service advisors didn't fall within the exemption. The employer conceded that these employees didn't fit within any of the definitions noted but nonetheless asserted that the court shouldn't defer to the DOL regs.

To make its determination, the U.S. Court of Appeals for the Ninth Circuit applied the two-step deference test established under *McMaster v. United States*. Step one of

the inquiry was whether Congress had directly spoken to the precise question at issue. If so, the court would have to defer to the expressed intent of Congress.

If the statute was silent or ambiguous, the court would have to proceed to step two and decide which level of deference applied. If *Chevron* deference was applicable, rather than a lower standard of deference, the court would defer to the DOL's interpretation as long as it was "based on a permissible construction of the statute." (The higher standard refers to the U.S. Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. NRDC.*)

Regarding step one, the appeals court stated that it was unclear from the statute's text and canons of statutory interpretation whether Congress intended to include service advisors within the exemption. Therefore, Congress hadn't directly spoken on the issue and the statute was ambiguous.

Next, the court needed to determine whether *Chevron* or a lower standard of deference applied. Because of the fact that the DOL regulations were implemented after a notice and comment period, the court held that the *Chevron* standard indeed applied.

Under this standard, if the DOL's interpretation is a reasonable one based on a permissible construction of the statute, the court may not substitute its own construction of the statutory provision. The DOL's interpretation doesn't need to be the *best* construction, just a reasonable one.

The appeals court found that the DOL chose a narrow definition of "salesman," which excluded service advisors. In the court's view, this interpretation aligned with the presumption that these exemptions should be construed narrowly.

Further statements made

The court further noted that other courts — including the Fourth and Fifth Circuits — have held that service advisors are exempt because their duties and pay structure are functionally similar to those of exempt salespeople, partsmen and mechanics. But, the court said, nothing in the statute suggests that Congress meant to exempt employees with functionally similar job duties and pay structures, as the text only exempts certain salespeople, partsmen and mechanics.

Also, the court held that the DOL's interpretation was reasonable because a reading of the statute indicates that Congress didn't intend that both verb clauses ("selling" and "servicing") would apply to all three subjects (salespeople, partsmen and mechanics). The court reasoned that Congress probably intended that employees in sales be connected only to selling and mechanics be connected only to servicing.

Nothing in the statute suggests that Congress meant to exempt employees with functionally similar job duties and pay structures.

Last, the DOL's interpretation wasn't unreasonable because it didn't make any term meaningless or superfluous. Moreover, the legislative history was inconclusive and none of the reports or hearings mentioned service advisors. The appeals court held that, even though there was more than one reasonable way to interpret the statute, the agency chose one interpretation. So the court needed to defer to that choice and, therefore, it held that the service advisors in this case didn't fall within the FLSA overtime exemption.

Future uncertain

This decision hasn't been met with universal agreement among other Circuits. Therefore, it's uncertain how other courts may rule when faced with the same issue. Regardless, if your company employs positions that may fall within a gray area similar to that of the service advisors in this case, review your overtime pay practices and discuss the legal implications with your attorney. ♦

Critical comments lead to age discrimination lawsuit

Critical thinking is an important skill for every employee, including managers. But a supervisor's ill-timed disapproving remarks about his employer's hiring process can be misconstrued and may expose the organization to legal repercussions.

Such were the circumstances in *Chapotkat v. County of Rockland*. In this case, the U.S. Court of Appeals for the Second Circuit considered whether a supervisor's critical comments demonstrated age-based stereotyping in violation of the Age Discrimination in Employment Act (ADEA).

Promotion interview

The plaintiff, a 50-year-old county employee, brought an action alleging that his employer refused to promote him because of age discrimination. The trial court entered summary judgment in the county's favor, and the employee appealed.

On that appeal, the plaintiff argued that his supervisor's comments to him during a promotion interview showed the discriminatory intent. The supervisor had stated that he didn't "like when people in their late fifties and sixties come and they don't stay here." The supervisor further stated that he didn't "like the process of selection," and that he "preferred someone who could stay here for a long time."

But, contrary to the plaintiff's assertions, the appeals court didn't find that the exchange with the supervisor demonstrated age-based stereotyping using age as a proxy for productivity and competence. The comments, the court explained, didn't indicate any "inaccurate and stigmatizing stereotypes" of older employees. Although the supervisor had mentioned age, his words expressed a concern with the inefficiency of a frequently occurring hiring process.

Additionally, when the supervisor asked the plaintiff his age during the interview, the plaintiff replied and then added that he intended to work for 15 more years. Thus, the plaintiff was presented with evidence that the supervisor's concern wasn't with his age but rather how long he might remain in the position — a legitimate inquiry.

Plus, the supervisor had previously hired employees older than the plaintiff, and the employee who did receive the promotion was as qualified for the job as the plaintiff. What's more, the "late fifties and sixties" comments didn't even apply to the plaintiff because he was 52.

Insufficient evidence

Ultimately, the appeals court affirmed the trial court's ruling and held that summary judgment was appropriate because the plaintiff had failed to present sufficient evidence to create a genuine issue as to whether age was a "but for" cause of the county's decision to deny him the promotion.

The appellate court held that, even if an employment decision is driven by factors intertwined with age, the decision isn't a violation of the ADEA so long as it's motivated by some factor other than age. So, even though the county may have unfairly chosen someone instead of the plaintiff for promotion, the record didn't suggest that age was the "but for" cause for its doing so.

Important reminder

This case serves as an important reminder that the "but for" standard of liability under the ADEA is a more difficult standard of causation for a plaintiff to prove than the "mixed motive" standard applied to discrimination claims based on sex, race, color, national origin and religion under Title VII. Nonetheless, you should still carefully and thoroughly train management on how to properly communicate with staff. Although the employer here emerged victorious, it still had to endure lengthy and costly legal proceedings. ♦