Employment Law BRIEFING

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Mark this: Consistency is key to avoiding Title VII suits

Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from violation of their sincerely held religious beliefs. But that doesn't mean employers have to accommodate every faith-based request. In *EEOC v. Consol Energy Inc.*, the Fourth Circuit Court of Appeals considered whether an employer did enough to accommodate an employee or whether accommodation would have caused the employer undue hardship.

EMPLOYEE REFUSES TRACKING

An employer decided to track its coal miner employees by having them clock in using biometric hand scanners. An employee who had worked 37 years for the company without complaint refused to use the scanner. He informed the employer that his religious beliefs as an evangelical Christian prevented him from using the tracking system because it would "mark" him, and thereafter cause him to do the work of the Antichrist. The employer provided employees with hand injuries who couldn't use the tracker with alternative methods of clocking in and out. But it failed to do the same for the employee who refused to use it on religious grounds.

The employee was put in a position to choose between his religious beliefs and his continued employment, so he retired under protest. The United States Equal Employment Opportunity Commission (EEOC) brought suit on his behalf, alleging constructive discharge by failing to accommodate the employee's sincerely held religious beliefs. A jury returned a verdict in favor of the employee. The employer appealed.

As long as there's sufficient evidence that the employee's beliefs are sincerely held and that they conflict with a job requirement, an accommodation needs to be made.

EMPLOYER OFFERS ONE ALTERNATIVE

The employee believed that using the hand scan system with either hand would result in being marked by the beast and could lead to his identification with the Antichrist. The employee submitted a letter from his pastor explaining his deep dedication to his religion. He also wrote his own letter to the employer clarifying his view of the hand scanner. The employer provided the employee with a letter from the scanner's manufacturer stating that the scanner couldn't place a mark. The letter also stated that, because the mark of the beast was only associated with the right hand or forehead, using his left hand would obviate any religious concerns.

The employer didn't offer the employee the same accommodation it provided employees with hand injuries and insisted that, if the employee didn't scan with his left hand, he would be disciplined and eventually discharged. The employer argued on appeal that it hadn't failed to reasonably accommodate the employee's religious beliefs, because there was no conflict between his beliefs and using the tracker on his left hand.

NO UNDUE HARDSHIP

But the appeals court disagreed with the employer. It held that it's not an employer's place to question the correctness of an employee's religious understandings. As long as there's sufficient evidence that the employee's beliefs are sincerely held (which the jury found they were and the employer didn't dispute), and that those beliefs conflict with a job requirement, an accommodation needs to be made if such an accommodation isn't an undue hardship for an employer. In this case, the employer couldn't fruitfully argue an undue hardship because it *was* able to accommodate employees with hand injuries without hardship.

The appeals court affirmed the trial court's failure-to-accommodate verdict. In its view, the employer had failed to make available the same reasonable accommodation it offered other employees, thus violating Title VII. The court also decided that sufficient evidence existed for a jury to find that the employee was subjected to discriminatory conduct and circumstances so intolerable that a reasonable person would have resigned as a result.

A REMINDER

This case should remind employers that, when evaluating an accommodation request and determining whether it would be an undue hardship, consistency is critical. If you're able to accommodate employees for nonreligious reasons without hardship, you're expected to make the same accommodation for an employee with sincerely held religious beliefs. ■

EMPLOYER DOESN'T HAVE TO MODIFY ITS POSITION

In a case similar to *EEOC v. Consol Energy Inc.* (see main article), the First Circuit Court of Appeals considered whether an employer had failed to accommodate the sincerely held religious beliefs of an employee in violation of Title VII. But in *Cloutier v. Costco Wholesale Corp.*, it was the employer that ultimately prevailed.

The employer had a policy prohibiting food handlers from wearing facial jewelry. The employee had an eyebrow piercing and requested that she be transferred to another position that didn't restrict facial jewelry. She didn't mention any religious beliefs at that time. The employer agreed to transfer her. However, it later prohibited facial jewelry for all positions to maintain a professional appearance. At that point, the employee refused to remove her piercing, stating that it was part of her religion.

The employee provided her supervisor with information from the Church of Body Modification (CBM) website, which taught that body piercings strengthened the bonds between mind, body and soul. The site didn't state that members' modifications had to be visible at all times. The employee's supervisor reviewed this information and instructed the employee to remove her piercing. The employee then requested that she be able to cover the piercing with a band-aid, but the employer refused. Thereafter, the employer agreed to allow the employee back to work if she wore a band-aid over the piercing. However, even though the employee herself had suggested the accommodation, she now thought it would be inadequate and filed a lawsuit alleging that her employer had failed to offer her a reasonable accommodation for her sincerely held religious practice.

The trial court granted summary judgment for the employer, concluding that it had reasonably accommodated the employee's religious beliefs. The appeals court affirmed, but on the basis that the employer had no duty to accommodate the employee. The only accommodation the employee considered reasonable was an exemption from the policy. The court decided that granting an exemption was an undue hardship because the employer had a legitimate business interest in maintaining a professional image.

Promotion or bust

How far must employers' ADA accommodation efforts go?

Under the Americans with Disabilities Act (ADA), employers must try to accommodate disabled but otherwise qualified employees. How far employers should go in their accommodation efforts can become a point of contention. Recently, in *Brown v. Milwaukee Board of School Directors*, the Seventh Circuit Court of Appeals mulled the issue.

EMPLOYEE IN LIMBO

The employee, an assistant school principal, injured her knee while restraining a student and had surgery to repair it. When she returned to work, her doctor advised her employer of certain work restrictions, including that the employee wasn't allowed to be in the "vicinity of potentially unruly students." The doctor also specified that this restriction was permanent.

The employer removed the assistant principal from her position and put her on sick pay while it tried to find her a new position. During this process, the employer conveyed to the employee that it believed her restriction barred all contact with students — which the employee didn't deny. After three years of trying to find her a new position and being unable to do so, the employer terminated the employee.

She filed suit, alleging that her employer had violated the ADA by failing to accommodate her disability and then discharging her. The trial court granted summary judgment in favor of the employer and the employee appealed.

DEFINING REASONABLE ACCOMMODATION

The ADA requires employers to make reasonable accommodations for qualified individuals with disabilities so that they're able to perform the essential functions of their jobs. Reassigning employees to vacant positions for which they are qualified can be a reasonable accommodation. The employee doesn't have to be the most qualified applicant for such positions. However, the ADA doesn't *require* an employer to promote employees to accommodate them.

What the ADA does require is that the employer and employee take part in an interactive process to identify an accommodation. An employer can't be held liable for a failure to accommodate if the employee fails to provide sufficient information to help the employer find an accommodation.

> *The assistant principal identified jobs that would accommodate her disability, but most required her to be in the vicinity of potentially unruly students.*

INFORMATION WAS INSUFFICIENT

Failing to provide sufficient information became central to the appeals court's eventual decision. Although the employee identified potential jobs that would accommodate her disability, four of the five positions required her to be in the vicinity of potentially unruly students. Therefore, they were positions the employer believed the employee was restricted from working. The employer conveyed this belief to the employee.

The court held that being in the vicinity of potentially unruly students was an essential function of the assistant principal position and of the other positions identified by the employee. Thus, the employer wasn't liable for failing to move her to a position which required such proximity. The court further found that, if the employee was arguing that her restrictions were less severe than what her employer believed, she had failed to clarify her work restrictions and properly take part in the interactive process.

The fifth position identified by the employee didn't involve proximity to students. But the employer considered the position a promotion and didn't think the employee was the most qualified person for it. The position would have involved a pay increase (the employee would have to work 12 instead of 10 months annually) and additional responsibilities. The employee didn't agree and argued that, even though she wasn't the most qualified for the position, it wouldn't have been a promotion.

According to the court, however, an employee's perception of a reassignment doesn't determine whether it's a promotion. Also, the employee didn't deny that her salary would have increased and that she would have had more responsibilities. Therefore, the court held that a reasonable jury would find that the position would have been a promotion and that the employer wasn't required to promote an employee as an ADA accommodation. The appeals court affirmed the trial court's decision.

DUTIES ON BOTH SIDES

While employers need to accommodate qualified employees who are considered disabled under the ADA, they don't have to promote them to positions that the employees wouldn't otherwise qualify for. For their part, employees have a duty to work with employers to find a reasonable accommodation. This includes providing accurate information about what they are and aren't capable of doing. ■

Right to associate

Employees' off-duty conduct isn't always protected

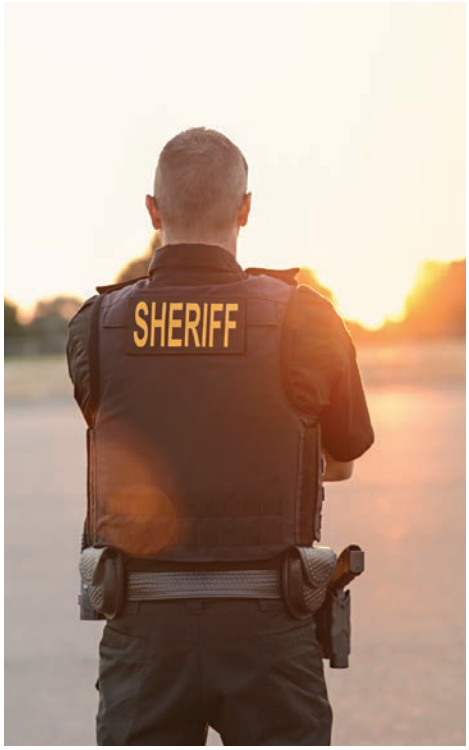
When wife-swapping employees were threatened with the loss of their jobs, they claimed the threat violated their First Amendment right to associate. Normally, such rights might be protected, but there was a twist in this case: The employees were sheriff's deputies. In *Coker v. Whittington*, the Fifth Circuit Court of Appeals weighed the rights of the employees to live as they wished when off duty and the rights of their employer to protect its reputation and maintain the public's trust.

CONDUCT CODES ARE VIOLATED

The employees, former sheriff's deputies, moved in with each other's wife and family before divorcing their current wives. When the Chief Deputy Sheriff learned about the living situations, he placed the deputies on administrative leave for violating the Sheriff's Code of Conduct. The Code stated that employees shouldn't "engage in any illegal, immoral, or indecent conduct, nor engage in any legitimate act which, when performed in view of the public, would reflect unfavorabl[y] upon the … Sheriff's Office." The deputies also violated a rule requiring them to inform their supervisors of an address change within 24 hours so that they could be contacted in the event of an emergency.

The deputies were given a deadline to stop living with each other's wife, but they failed to move by that deadline. Instead, they filed suit against the Sheriff and Deputy Sheriff, alleging that their employer's

termination threats violated their First Amendment rights to associate with whom they wish.



TWO COURTS CONCUR

The trial court entered judgment for the Sheriff and Deputy Sheriff, finding that, contrary to the deputies' argument, the Sheriff's Code of Conduct wasn't vague and it preserved the reputation of the police and upheld the public trust in the police department. The court also determined that case law supported the employer's termination decision because firing police officers for sexually inappropriate conduct was unanimously upheld. Furthermore, there were no cases finding that public employees had constitutional rights to "associate" with each other's spouses before obtaining a legal divorce. Finally, the court stated that public employees lose some of their constitutional rights in exchange for the privilege of their positions.

The appeals court agreed with the trial court. It pointed out that, because the plaintiffs were law enforcement officers, their involvement in relations that violate the "legally sanctioned relationships of marriage" could damage the reputation and credibility of the Sheriff's Department. The court also determined that the living arrangements of the deputies could be adversely used in litigation regarding their official conduct.

The appeals court made a point of stating that its decision didn't conflict with the Supreme Court's 2015 ruling in *Obergefell v. Hodges.* In that case, the Court held that same-sex couples had a fundamental right to marry pursuant to the Due Process and Equal Protection clauses of the Constitution. However, the appeals court clarified that the Supreme Court's *Obergefell* decision was premised on the special bond created by the formal marital relationship and did *not* create rights for relationships that "mock" marriage. The trial court's judgment was upheld.

WHY IT MATTERS

The *Coker* decision is important because, in siding with the sheriff's department, it gives public employers the ability to broadly regulate their employees' off-duty conduct. Indeed, the case may have turned out differently had the employees not been public employees. ■

Court looks beyond face value in age discrimination decision

When a terminated employee took the comments of his company's CEO at face value, he concluded that age discrimination was at work. It was up to the Eighth Circuit Court of Appeals to put those comments in context and decide whether the employer had indeed violated the Age Discrimination in Employment Act (ADEA).

"THE JOB IS YOURS TO LOSE"

The plaintiff in *Aulick v. Skybridge Americas, Inc.* was an IT professional. One year after he was hired, his company's CEO issued a memo expressing disappointment with the employee's department and his leadership. The memo stated that the employer should look for alternatives for management of the employee's department.

After conducting an external audit, the employer decided to combine two separate IT departments into one and hire one Chief Technology Officer to manage the combined IT department.

When the employee interviewed for the Chief Technology position he was told "the job is yours to lose," but that he wasn't guaranteed the position. Someone outside of the company was selected instead. The CEO stated that this decision was aligned with the company's desire for a "new face." (The employee later claimed that the CEO had used the phrase "new face" multiple times.)

The employee's argument centered on who made the decision to terminate him, but determination of pretext focuses on why the decision was made.

A few months later, he and two other employees were terminated. The plaintiff was 63 years old and the other two employees were also over 60 years old. The 63-year-old employee brought suit against his employer, alleging that he was denied a promotion and terminated because of his age, in violation of the ADEA. The trial court granted the employer's motion for summary judgment and the employee appealed.

"WHO" VS. "WHY"

The employer defended its hiring decision, stating that the new Chief Technology Officer had call center experience, which the employee did not have. It defended its firing decision, saying that, once the new department and new position were created as a result of an external audit, the employee was no longer needed.

The employee contended that the CEO's use of the phrase "new face" was direct evidence of discriminatory animus based on age. However, the appeals court determined that the comment was facially and contextually neutral because "new face" could be interpreted as meaning someone outside the company. The employee also argued, as evidence of pretext, that no one at the company had claimed responsibility for the decision to terminate him. Various executives had made contradictory statements as to who had terminated the employee. Nonetheless, the court found that no reasonable juror could infer pretext from the executives' statements, because the reason for his termination remained the same.

It explained that the employee's argument centered on *who* made the decision to terminate him, but determination of pretext focuses on *why* the termination decision was made. In addition, three other executives who had been hired by the company were over the age of 57. The court concluded that the employee had failed to show a genuine issue of material fact as to pretext, and affirmed the trial court's determination.

WATCH YOUR LANGUAGE

Aulick shows that comments which, on their face, may suggest age discrimination can lead to opposite findings when considered in a larger context. However, employers need to be careful to avoid using seemingly discriminatory language when discussing hiring, promotion and termination decisions. Even benign phrases such as "new face" can lead to costly lawsuits. ■