

# Employment Law

## BRIEFING



SEPTEMBER/OCTOBER 2016

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## ADA claim

# Even accommodating employers may risk litigation

**E**mployers can offer a variety of accommodations to disabled employees and still be sued for violation of the Americans with Disabilities Act (ADA). Such was the case in *Kelleher v. Wal-Mart Stores, Inc.* The U.S. Court of Appeals for the Eighth Circuit was tasked with deciding whether, when an employee was transferred to a new position as an accommodation, it was an adverse action.

### REQUESTS MADE, SOLUTIONS OFFERED

The employee was an overnight stockroom worker at a retail store. Her job description included such requirements as ladder climbing, overhead lifting, and lifting, pulling and carrying merchandise of up to 50 pounds. The employee was diagnosed with multiple sclerosis and verbally notified her supervisor that she could no longer climb ladders. The employer accommodated her by eliminating this requirement from her job duties. The employee then requested other accommodations, such as extra time off during her shift to take her medication, and an extra 15 minute break. The employer accommodated these requests for 14 years.

Then the plaintiff took leave to have an appendectomy. When she returned to work she submitted a request for additional permanent accommodations, including no overhead lifting, no ladder climbing, no pulling of pallets and no lifting anything over 10 pounds. The Human Resources coordinator for the store rejected her request and informed the employee that the stocker position required moving, lifting and carrying merchandise of up to 50 pounds. In response, the employee had her doctor change the restrictions to only prohibit climbing ladders

and working in extreme hot or cold conditions. The employer accommodated these new restrictions.

A few months later, the employee requested an additional 15 minute break, which the employer accommodated. However, due to a corporate policy change, the employee was required to submit her accommodation requests to corporate headquarters. When she did so, she also submitted a doctor's note stating that she couldn't:

- ❑ Stand for 45 minutes before needing a break,
- ❑ Lift anything over 10 pounds,
- ❑ Lift overhead,
- ❑ Walk more than 300 feet, and
- ❑ Climb ladders.

During the time that corporate was reviewing the employee's accommodation request, the store assigned her to be a stocker in the cereal aisle. Corporate then decided to deny the employee's request and advised the store to place her on unpaid leave while it tried to find

a reassignment within her work restrictions. But the store didn't follow corporate's direction. The employee continued to work in the cereal aisle until the store transferred her to an overnight cashier position. This position was less strenuous than the stocker position and paid more money per hour.

### EMPLOYEE REJECTS NEW PLAN

Unfortunately for her employer, the employee didn't want the cashier position. She feared that customers would comment about her condition and that she



wouldn't be able to perform the job duties because of her speech and eyesight problems. The employee filed a claim against her employer alleging disability discrimination, failure to continue to accommodate, retaliation and harassment.

She claimed that her performance reviews indicated retaliatory treatment because she had received top ratings in her earlier performance reviews. However, after she submitted her accommodation requests to corporate, she received lower ratings. She also stated that, after she submitted the accommodation requests, members of the store's management began harassing her by rolling their eyes, forcing her to work alone and giving her difficult assignments as well as more work than other employees. The employee contended that the store held her to a higher standard than its other workers.

The trial court granted summary judgment in favor of the employer on all claims. The employee appealed.

### NOT ADVERSE

The appellate court affirmed, holding that transferring the employee wasn't an adverse employment action. The employee's fears of ridicule were insufficient to establish

a violation and she didn't present any evidence that as a cashier she was subjected to comments or harassment by customers. What's more, the employee failed to present medical evidence that she couldn't perform the job duties of a cashier. Therefore, she couldn't establish that the transfer wasn't a reasonable accommodation.

As for the employee's retaliation claim, the court found that the employer had *not* retaliated, because the lower performance ratings were a result of the employee's timeliness issues. The manager who reviewed her performance didn't know about her accommodation requests. The harassment claim also failed because the employee didn't identify specific discriminatory statements by her employer. Eye rolls and looks may be unpleasant, the court stated, but they aren't sufficiently severe to affect the terms, conditions or privileges of employment.

### INTERACTIVE PROCESS

Although the employer prevailed in this case, the disabled worker's complaint should remind other employers to be careful when attempting to accommodate employees. Finding a suitable accommodation for an employee with a qualifying disability should be an interactive process between the employee and employer. ■

## Unclear job descriptions can lead to ADA claim confusion

**W**as the employee in *Stephenson v. Pfizer, Inc.* driven out of her job when her employer failed to accommodate her disability? The trial court granted summary judgment in favor of her employer on an Americans with Disabilities Act (ADA) claim, but the U.S. Court of Appeals for the Fourth Circuit had a different opinion.

### ON THE ROAD

The employee was a pharmaceutical sales representative for 30 years. Her job required her to make in-person

presentations about pharmaceutical products to physicians with the goal of convincing physicians to prescribe those products to their patients. She met with physicians at their offices and spent most of her working days traveling to and from those offices. It was estimated that, out of 10 working hours, she spent eight of them on the road. The employer provided the employee with a company car to drive to and from sales meetings. She didn't maintain an office at her employer's facility.

At one point, the employee developed an eye condition and was unable to drive due to poor vision. She went





on disability leave and then requested that her employer provide her with a driver, magnifying software for her computer and other magnifying tools. The employer agreed to the request for computer software and magnifying tools but denied the request for a driver.

The employer maintained that the ability to drive was an essential function of the job that the employee had to perform personally. The employer didn't discuss with the employee an accommodation that would enable her to meet with prospective customers. But it did direct her to other positions within the company that didn't require traveling.

The employee sued, alleging that the employer had violated the ADA by denying a reasonable accommodation that would have allowed her to continue her position as a sales representative. The trial court granted summary judgment in favor of the employer. It found that the ability to drive was an essential job function and that the defendant hadn't violated the ADA because the plaintiff couldn't drive with any accommodation.

## LICENSE TO DECIDE

The appellate court reversed the trial court's ruling. For the plaintiff to succeed on a failure to accommodate claim, the plaintiff would have to establish that:

1. She had a disability,
2. Her employer had notice of the disability,
3. She could perform the essential functions of her job with a reasonable accommodation, and
4. Her employer failed to make an accommodation.

If the employee established all four, the employer could still avoid liability if it could prove that the proposed accommodation was an undue hardship.

There was no dispute that the first and second elements had been established by the employee. Analyzing the third element, the court focused on whether driving was an essential function of the job. In its analysis, the court considered the:

- ❑ Employer's judgment of the job's essential functions,
- ❑ Written job description,
- ❑ Amount of time spent performing the function,
- ❑ Consequences of not requiring the performance of that function,
- ❑ Terms of any collective bargaining agreement,
- ❑ Work experience of past employees with the same job, and
- ❑ Work experience of current employees with that job.

*The appellate court found that summary judgment was improper and that there was a factual dispute for a jury to decide.*

It wasn't clear from the record whether the ability to drive was an essential function of the job, because the job description didn't specify anything about driving or possessing a driver's license. For that reason, the appellate court found that summary judgment was improper and that there *was* a factual dispute for a jury to decide.

## KEY TO AVOIDING TROUBLE

To avoid a similar outcome, employers should ensure that their job descriptions are detailed and list all essential functions of each position. That way, the description can help determine whether an accommodation is necessary — or even possible. ■

# The administrative exemption: When is an employee owed overtime?

**I**n courts across the land, the great overtime debate — whether employees are exempt or nonexempt — shows no signs of abating. The good news for employers is that decisions such as *Lutz v. Huntington Bancshares, Inc.* can provide them with valuable tips for avoiding litigation in the future.

## UNDERWRITERS UNDERPAID?

In this case, the U.S. Court of Appeals for the Sixth Circuit determined whether residential loan underwriters were exempt from overtime under the administrative exemption of the Fair Labor Standards Act (FLSA). The plaintiffs, who were former residential loan underwriters for a bank, brought a class action suit against their employer alleging that the bank had failed to pay them overtime compensation in violation of the FLSA. The employees' job duties included reviewing loan applications by confirming that the information provided was accurate and deciding whether applicants qualified for loans.

The software the employees used initially recommended whether to approve or deny a loan. They then reviewed that recommendation by applying the bank's many guidelines and regulations. Next, they determined whether the loan would fall within their employer's acceptable risk level. If they thought they needed to, the employees could use their personal experience or judgment to take actions beyond the bank's guidelines.

Their employer argued that the employees were exempt from overtime under the administrative exemption. The trial court agreed and granted the employer's motion for summary judgment. The former employees appealed.

*Department of Labor regulations state that administrative employees "perform work directly related to assisting with the running or serving of the business."*

## 3 ELEMENTS

The appellate court affirmed that the employees were exempt because they exercised independent discretion beyond the bank guidelines and made decisions that significantly affected its business. Under the FLSA, employees are considered to be working in a bona fide administrative capacity and exempt from overtime if:

1. They're compensated on a salary basis,
2. Their primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers, and
3. Their primary duty includes the exercise of discretion and independent judgment in significant matters.

In this case, the parties didn't dispute that the employees satisfied the first element. However, the employees argued that they didn't satisfy the second and third elements.

## DISPUTED POINTS

In considering the second element, the appellate court relied on Department of Labor regulations stating that administrative employees "perform work directly related to assisting with the running or serving of the business" and that "the work of an administrative employee is thus





considered ancillary to an employer's principal production activity."

The court found that the employees had performed administrative work. They assisted in running and servicing the business by making decisions about when their employer should take on certain kinds of credit risk and this work was ancillary to the employer's principal activity of selling loans.

As for the third element, the employees argued that, because they were required to adhere to guidelines and manuals, they weren't able to exercise independent discretion and judgment. However, the court decided that, even though the employees were directed by guidelines

and manuals, they could exercise discretion and judgment because those materials didn't answer substantive questions that could arise.

In addition, the former employees argued that their exercise of discretion and judgment didn't concern matters of significance because they didn't bear any responsibility for financial loss. The court disagreed. It found that, while the employees didn't dictate the bank's overall risk, their work significantly affected the business because they determined how much risk the bank would accept for any particular loan. Therefore, the employees' job duties fulfilled all three elements of the administrative exemption, and they were exempt from overtime.

### DESCRIPTIONS AND DUTIES SHOULD MATCH

To avoid costly lawsuits related to the overtime exemption, employers need to ensure that employees' job descriptions and job duties match. They should confirm that any employees who are labeled administrative and exempt actually exercise independent discretion and judgment in areas of great importance. Also, these employees must primarily perform nonmanual work that's directly related to the employer's business or its management. ■

## COURT FINDS INVESTIGATORS AREN'T BONA FIDE ADMINISTRATORS

The U.S. Court of Appeals for the Fourth Circuit came to a different conclusion than the Sixth Circuit did in *Lutz v. Huntington Bancshares, Inc.* (see main article) regarding an employee's administrative exemption under the Fair Labor Standards Act (FLSA). At issue in *Calderon v. GEICO General Insurance Company* was whether security investigators for an insurance company were exempt from overtime.

The employees worked in the company's claims department primarily investigating potentially fraudulent claims. They brought an action against their employer alleging that it failed to pay them overtime wages. The employer argued that the security investigators weren't eligible for overtime under the administrative exemption.

The district court granted judgment in favor of the employees on their overtime claims, finding that the employer wasn't able to prove that the employees' primary duty included the exercise of discretion and independent judgment. The appellate court affirmed as to liability. However, it decided that the employees didn't meet the definition of a bona fide administrative employee because their primary duty wasn't directly related to the management or general business operations of the company or its customers.

After being referred matters by insurance adjusters, the employees' primary duty was to conduct investigations and determine whether claims submitted were fraudulent. They had no supervisory responsibility and didn't develop business policies. They reported to supervisors, who then reported to managers, who in turn reported to the company's Assistant Vice President of Claims.

The court stated that the employees' work was important in that they assisted the adjusters in the company's day-to-day affairs. But their work wasn't part of the company's management; therefore, the employer couldn't establish that the employees were exempt from overtime under the administrative exemption.

# Reductions in force may be warranted; discrimination never is

**R**ecently, the U.S. Court of Appeals for the Second Circuit considered whether a trial court had properly granted summary judgment in favor of an employer. The court's decision in *Friedman v. Swiss Re America Holding Corp.* is instructive for employers that must conduct reductions in force without triggering lawsuits under the Age Discrimination in Employment Act (ADEA).

## MAKING A CASE

When he was terminated, the 50-year-old employee claimed that he was discriminated against because of his age and religion. The employer argued that his discharge was part of a reduction in force. The trial court granted summary judgment in favor of the employer on both claims, but the appellate court reversed as to the plaintiff's age claim.

To establish a prima facie case of discrimination, plaintiffs must provide that:

- ❑ They belong to a protected class,
- ❑ They are qualified for the position,
- ❑ They suffered an adverse employment action,
- ❑ The adverse employment action occurred under circumstances giving rise to an inference of discrimination.

In this case the plaintiff argued, as evidence of age discrimination, that he was terminated and replaced by someone who was in his thirties. Of the 37 people who were laid off, 31 were older than 40. Before the termination, the employee's pay increases had dwindled. Also, at a meeting a year before the reduction in force, his supervisor asked everyone how old they were and told the employee that his "hair and teeth would be falling out soon."

## COURT REVIEWS EVIDENCE

The appellate court held that the employee established a prima facie case of age discrimination because he was over 40 years old, was qualified for his position, was fired and was allegedly replaced by a younger, less qualified employee. But the court also found that the employer

had set forth a legitimate nondiscriminatory reason for the employee's termination — a reduction in force. Thus, the burden shifted back to the employee to prove that his employer's reduction in force was pretext for age discrimination.

The appellate court further held that the trial court had erred when deciding that the employee couldn't establish pretext. The lower court had determined that certain ageist comments made by the employee's supervisor were impermissible hearsay. However, the appellate court decided that they weren't hearsay because the employee was introducing them to show bias on his supervisor's part, not for the truth of the comments.

In addition, the appellate court found that the trial court had looked at all of the employee's evidence in isolation, rather than considering the record as a whole, to determine whether a jury could reasonably find pretext on the employer's part. For example, the trial court had disregarded the employee's allegation that his employer had replaced him with a younger employee, finding that replacement by a younger employee itself doesn't prove discrimination.

The appellate court stated that the employee didn't make his allegation in isolation but provided additional evidence consisting of comments from his supervisor, declines in his compensation and data regarding the reduction in force. Combined, these facts could establish pretext. Therefore, the court held that the plaintiff had created material issues of fact making summary judgment improper.

## OBJECTIVE REASONS

Even if you're terminating employees as part of a reduction in force, your organization could face unlawful discrimination claims if the reduction disparately impacts one class of employees. Ensure that you're choosing the employees for termination based on objective reasons, such as job seniority. ■