



Recent Developments In Employment Law

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**SUPREME COURT RULES THAT
SENIORITY SYSTEMS NEED NOT BE DISRUPTED
TO ACCOMMODATE EMPLOYEES UNDER ADA**

The United States Supreme Court has ruled in a 5-4 split opinion that *ordinarily* a disabled employee’s ADA request for an accommodation that would disrupt established seniority rules is not “reasonable.” The opinion creates a presumption that such an accommodation is not “reasonable.” However, the presumption can be rebutted upon a showing of special circumstances.

In *US Airways v Barnett* (April 29, 2002), Barnett injured his back while working as a cargo handler for the airline. Barnett then transferred to a less demanding mailroom position. When this mailroom job became open to all U.S. Airways employees for bid, in accordance with the employer’s established seniority system, Barnett learned that he was in danger of losing the mailroom job because two employees with more seniority planned to bid for it.

Barnett asked the airline, as an accommodation to his disability, to exempt the mailroom job from bid. The airline declined because another employee had seniority rights to that job and the proposed accommodation would disrupt its seniority system. As a result, Barnett lost his mailroom job to a worker with more seniority. Barnett sued US Airways under the Americans With Disabilities Act (ADA), asserting the requested exemption constituted a “reasonable accommodation” that the employer was required to make to its seniority system to accommodate his disability.

The Supreme Court ruled that requests for accommodation by disabled workers that conflict with an employer’s seniority program ordinarily will not be considered to be reasonable under the ADA. The

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court was reluctant to allow the ADA to trump an employer's seniority rules because "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." The court observed that an employer's showing that a requested accommodation violates set seniority rules is ordinarily sufficient to show that an accommodation is not reasonable.

Notwithstanding this general rule, an employee remains free to present evidence that special circumstances in his case render his request reasonable. For example, an employee might be able to show that the employer, having retained the right to change the system unilaterally, exercises the right fairly frequently, reducing employee expectations that the system will be followed, to the point where the requested accommodation will not likely make a difference. Or, an employee might demonstrate that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.

There were two dissenting opinions, one of which expressed concern about the likelihood that established seniority systems would be under constant attack by disabled workers. The other dissenting opinion expressed the view that seniority systems enjoy no special protection under the ADA. Both opinions criticized the majority ruling as having left unanswered more questions that it answered, "the Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation..."

SUPREME COURT INVALIDATES AN FMLA PENALTY REGULATION

On March 19, 2002, the United States Supreme Court invalidated an FMLA regulation that required employers who failed promptly to designate leave as FMLA leave to grant

additional leave. The regulation concerned employers with leave policies more generous than required by the FMLA leave. The invalidated regulation penalized such employers if they did not provide individualized notices to employees explaining that company-provided leave counted as FMLA leave. Under that regulation, if an employer with a more generous leave policy failed to designate leave as FMLA leave, the employer could not also count the leave time against the employee's twelve weeks of FMLA leave. In its opinion, the court found the regulation to be contrary to the statute's penalty provisions, which require an employee to show that the employer's FMLA violation interfered with the employee's FMLA rights and prejudiced the employee. In the case, *Ragsdale v Wolverine World Wide, Inc*, 122 S Ct 1155 (2002), the employee could not meet either requirement.

After eleven months of employment, the employee was diagnosed with cancer and she underwent surgery and months of radiation therapy. The employer provided employees with seven months of job-protected leave and employer-paid health insurance, so long as the employee had at least six months of service and the employee requested an extension of the leave every 30 days. The employer's leave policy was more generous than the FMLA requirements, because it provided up to seven months of job-protected leave with benefits, not just twelve weeks.

The employee complied with the leave policy, but after she exhausted the seven months of leave, asked either to receive more leave or to return to work in a part-time position. The employer told her that unless she returned to work in a full-time capacity, her employment would be terminated and her health insurance benefits would end. She did not return to work and the employer terminated her employment.

She sued, claiming that she was entitled to twelve more weeks of job-protected leave

because the employer had never notified her that her seven months of leave would count as FMLA leave. The regulation which is central to this case provided:

“If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.”
29 CFR 825.700(a).

The five-justice majority ruled that this regulation imposed a disproportionate penalty that was inconsistent with one of the FMLA’s purposes, which is to encourage more generous leave policies. While the court invalidated this penalty provision, it left in force the regulation that requires employers to provide employees who take FMLA leave with an individualized notice that designates the leave as FMLA leave and provides information about FMLA rights.

The four-justice minority opinion argued that the individualized notice to the employee was important because it alerted employees to certain options provided by FMLA, such as requesting intermittent leave or reduced work schedules, and requesting that paid vacation or sick leave be substituted for unpaid time.

Although not the issue in this case, employers whose leave policies are not more generous than the FMLA requirements also must provide an individualized notice to employees once they have made known their need for FMLA leave. Typically employers satisfy this requirement by using the DOL Employer Response Form. If an employer fails to give individualized notice to an employee and is found to have violated that FMLA regulation, the penalty for such a failure must be “justified by the facts of a particular case.” (Penalties include reinstatement, payment of lost wages and benefits, etc.). This penalty provision only imposes sanctions and remedies which are appropriate for the particular employee’s

situation. In contrast, the penalty provision that was invalidated by the Supreme Court in *Ragsdale* would apply even if the individualized notice to the employee would not have made any difference in her choices or benefits.

Regardless of how generous your leave policy is, you should provide individualized notice to the employee that the leave will count as FMLA leave and it is best to use the DOL Employer Response Form. The regulations requiring individualized notice are still valid. By using the DOL Form for notice, you should avoid any penalty concerning notices.

INCONSISTENT EXPLANATION FOR TERMINATION PRECLUDES DISMISSAL OF DISCRIMINATION CLAIM

The Sixth Circuit has ruled that an employer was not entitled to dismissal of its 53 year old former human resources manager’s age discrimination claim because its explanation for discharging him shifted over time.

In *Cicero v Borg-Warner Automotive, Inc.*, (January 2, 2002), the employer told the employee at the time of his termination that his job loss was due to a reorganization. At deposition, the employer asserted it fired the employee due to poor work performance. The employee rebutted this claim by showing that he was well qualified for his job, he was never criticized contemporaneously, and he was sometimes praised for his work, and he received regular bonuses during his employment. In seeking dismissal, the employer claimed poor performance and corporate politics motivated the discharge. In denying dismissal the court noted, “[w]hile the Court does not question business decisions, the Court does question [an employer’s] proffered justification when it shifts over time.”

Most likely in this case, the employer sought to spare the employee’s feelings by characterizing his discharge as a “reorganization,” when in fact, the

reorganization was motivated by deficiencies in the employee's performance. Rather than addressing the issue head on, perhaps due to a lack of documentation regarding the dissatisfaction, the employer decided to "reorganize" the job and terminate the employee.

In this case, trying to spare the employee embarrassment is a mistake because any inconsistency in the employer's explanations for adverse action discredit the employer or undermine the employer's stated reasons to avoid dismissal of a discrimination claim. The courts have agreed that such "duplicitous" is sufficient to require jury review of an employee's claim. The lesson to be learned is: use the true reason and be consistent.

OSHA ANNOUNCES NEW ERGONOMICS PLAN

On April 5, 2002, OSHA announced its new four-pronged plan to reduce ergonomics injuries. This plan replaces the November 2000 ergonomics rule, which President Bush rescinded in March 2001. Unlike the rescinded rule, the plan does not include any mandatory provisions and instead seeks to reduce injuries through industry-specific guidelines and compliance assistance. The four prongs of the current plan are: industry-targeted guidelines designed to reduce musculoskeletal disorders ("MSDs"); enforcement measures; outreach and compliance assistance; and advanced research regarding ergonomics and related injuries.

OSHA expects to issue guidelines for selected industries in the next six months. On April 18, OSHA announced that the nursing home industry will be the subject of the first new guidelines. To assist with this plan, OSHA named ten regional coordinators to guide enforcement and outreach efforts. The nearest coordinator is Dana Root, located in Chicago, and her telephone number is (312) 353-2220. More details regarding OSHA's plan are available at www.osha.gov/ergonomics.

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