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Disabilities

Job Coach Not Required to Accommodate Worker for Workplace Profanity, 7th Cir. Says

A food store wasn't required to accommodate an intellectually disabled employee it fired for swearing in front of customers even though the worker's parents had unsuccessfully asked that he be given a job coach for a separate workplace problem, the U.S. Court of Appeals for the Seventh Circuit ruled July 17 (*Reeves v. Jewel Food Stores, Inc.*, 2014 BL 198732, 7th Cir., No. 13-3782, 7/17/14).

Affirming summary judgment to Jewel Food Stores Inc., the court found the company had no duty under the Americans with Disabilities Act to accommodate Sean Reeves, who has Down syndrome, before firing him after he said "fuck you, you stupid blonde" to a cashier while a customer was standing nearby.

Reeves had previously violated company policy by cursing in the workplace. His parents previously requested that he be provided with a job coach after he took an American flag pin from a shelf without realizing he needed to pay for it. But Reeves's supervisor told his mother that coaching wasn't necessary for the theft issue.

"A tentative request for an accommodation to address minor theft does not imply a request for an accommodation for inappropriate verbal outbursts that violate the employer's anti-harassment policies," Judge Michael S. Kanne wrote.

Plaintiffs' attorney David L. Lee in Chicago told Bloomberg BNA July 18 that the court's view of Reeves's accommodation request was "unduly narrow," particularly since it was made by a lay person, not a lawyer. He said the lesson for plaintiffs is that they need to state accommodation requests broadly to cover all foreseeable issues.

The case provides several practical pointers for employers and management counsel, Aaron R. Gelb of Vedder Price PC in Chicago said. Among other things, it's a useful reminder that employers need to meet employees with disabilities half way in an effort to identify job accommodations, he told Bloomberg BNA July 18.

Company Provided Some Accommodations. Reeves worked for Jewel, a supermarket chain, as a bagger from June 1997 until he was fired in April 2005. According to the court, he received "an array of vocational tutoring early in his tenure with Jewel" to help him perform his essential job duties.

The tutoring included job coaching provided by a social service agency and individual training on daily tasks provided by Jewel's service manager. The service manager also helped Reeves calm down whenever he felt frustrated, the court said.

In addition, Reeves's supervisor completed a daily evaluation form, which was sent to Reeves's parents. Reeves also was exempted from the usual bagger duty of collecting shopping carts from the parking lot.

The cursing incident that resulted in his discharge wasn't the first time Reeves had used profane language in the workplace. Previously, he had cursed at a manager when the table at which Reeves usually ate lunch was used for a wine tasting, and he cursed within earshot of a customer about a woman who complained that Reeves ate her grapes while he was bagging them.

His workplace theft occurred a month before his discharge, when he took an American flag pin from a store shelf without paying for it. He apparently didn't know that the pins were for sale, the court said.

Under Jewel policy, Reeves could have been fired for theft of store merchandise, but the company instead decided to just write up the incident and to notify his parents. Reeves's parents responded by asking if Jewel could bring in a job coach, but Reeves's supervisor believed coaching was unnecessary.

When an accommodation is requested under the ADA, the employer must meet the employee halfway "in a 'flexible, interactive process,' " the court said. But if insufficient information to determine the necessary accommodations is provided, the employer "cannot be held liable for failing to accommodate."

Following Reeves's discharge, his parents sued on his behalf under the ADA. The U.S. District Court for the Northern District of Illinois granted summary judgment to Jewel and he appealed.

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Request Didn't Provide Sufficient Information. Reeves argued that the district court erred by dismissing his failure-to-accommodate claim, but the Seventh Circuit found otherwise.

When an employee requests accommodation under the ADA, the court said, the employer is obligated to meet ''the employee half way and engage in a 'flexible, interactive process' to identify the necessary accommodations.'' Both parties are then responsible for determining what accommodations are necessary, it added.

However, ''[w]here the employee does not provide sufficient information to the employer to determine the necessary accommodations, the employer cannot be held liable for failing to accommodate the disabled employee,'' Kanne wrote, citing *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 5 AD Cases 304 (7th Cir. 1996).

The court found that the request by Reeves's mother that he be provided with a job coach following the flag pin incident didn't provide sufficient information for Jewel to determine what type of accommodation might have been necessary for his problem with using profanity in the workplace. And when Reeves's supervisor said a job coach wasn't necessary for the theft issue, she didn't press the matter and ask again, the court said.

''She did not suggest that a job coach would help prevent future profane outbursts; indeed, she did not request a job coach after any of Sean's previous infractions that involved cursing in front of customers,'' and thus didn't make a request for accommodation for that disability-related problem, the court ruled.

Should Request Have Been Viewed More Broadly? Lee told Bloomberg BNA that the request for a job coach might have been viewed more broadly.

''One way to look at it is that a job coach would help someone with Down syndrome with a variety of problems that might come up on the job,'' he said. He added that he hopes the court wouldn't take the same ''cramped'' view of a similar request made by someone with a physical disability.

Gelb noted that the district court placed more emphasis than the appeals court on the numerous prior accommodations Jewel had provided to Reeves. He said there is ''good advice'' in that for employers.

Creating an overall picture of having provided helpful assistance to an employee with disabilities should leave an employer in a good situation from a potential liability standpoint, he said. In that regard, he said it's good practice for companies to leave ''no stone unturned'' and perhaps go beyond the half-way point referenced by the Seventh Circuit.

Creates Affirmative Defense. Doing so will enable an employer to assert the affirmative defense to compensatory and punitive damages available in failure-to-accommodate cases under the Civil Rights Act of 1991, Gelb said.

That's another ''huge'' incentive for employers to do things the right way, as Jewel did here, he said.

He also noted the ''potentially complicating factor'' of having the accommodation request come from a third party—Reeves's mother.

Some employers have a ''knee-jerk reaction'' when they receive accommodation requests from third parties, especially when the third party is the worker's lawyer, Gelb explained. ''They take the stance that they won't deal with anyone but the employee.''

Employers need to be careful about how that might be perceived down the road, he said. ''A court may not view that as going half way,'' he said.

Court Rejected Pleading Argument. The Seventh Circuit did, however, reject the district court's alternative finding that Reeves waived his failure-to-accommodate claim by never specifically asserting it in his complaint.

Reeves's complaint alleged a discrimination claim under the ADA, ''and ADA discrimination includes a failure to accommodate,'' Kanne wrote. He said plaintiffs aren't required to plead legal theories, just facts.

Lee said there was some solace for plaintiffs' counsel in that portion of the court's opinion.

''It's nice to see the court admitted that the ADA has different prongs and that pleading'' discrimination was sufficient to plead non-accommodation, he said.

Judges John Daniel Tinder and David F. Hamilton joined the opinion.

Arthur Gold of Gold & Associates Ltd. in Chicago represented Reeves. Gwendolyn B. Morales and Michael A. Warner of Franczek Radelet PC in Chicago represented Jewel.

BY PATRICK DORRIAN

To contact the reporter on this story: Patrick Dorrian in Washington at pdorrian@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com

Text of the opinion is available at http://www.bloomberglaw.com/public/document/SEAN_REEVES_by_his_parents_and_next_friends_JOHN_AND_DIANA_REEVES.

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