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Sixth Circuit Clarifies Employee's Burden of Proof for ADA Association Discrimination Claim Under the Distraction Theory

***Executive Summary*:** The Sixth Circuit Court of Appeals recently affirmed the decision of a lower court holding that a plaintiff was not entitled to trial on his associational disability claim under the Americans with Disabilities Act (ADA) because he could not establish that he was terminated because of his association with his disabled wife. *See Stansberry v. Air Wisconsin Airlines Corp.* (July 6, 2011). The Court's decision clarifies what a plaintiff must show to prove a "distraction" theory claim under the ADA.

Background

Eugene Stansberry managed Air Wisconsin's operation at the Kalamazoo Airport from 1999 through July 2007. For a variety of performance reasons, Stansberry's employment was terminated at the end of July 2007. After his discharge, Stansberry sued, alleging his termination was a violation of the ADA. He claimed he suffered job discrimination because of his association with a disabled person (his wife). The trial court granted summary judgment to Air Wisconsin and dismissed Stansberry's lawsuit because Stansberry failed to establish an associational disability cause of action. Stansberry appealed the trial court ruling, but the Court of Appeals affirmed the dismissal.

ADA's Associational Protections

An infrequently litigated provision of the ADA prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (2006). Importantly, non-disabled workers are not entitled to reasonable accommodation under this provision. Under this associational discrimination provision, one of three theories under which liability can be established is referred to as the "distraction" theory.

Courts have described the distraction theory as based on the employee's being perceived as at risk for being inattentive at work because of the disability of someone with whom he or she is associated. For the first time, setting forth the *prima facie* case for a distraction theory claim, the Sixth Circuit held that a plaintiff must prove: (1) he is qualified for the position; (2) he was subjected to an adverse employment action; (3) he was known to be associated with a disabled individual; and (4) the adverse action occurred under circumstances that raise a reasonable inference that the disability of the relative or associate was a determining factor in the decision.

While Stansberry met the first three prongs, the Court held that he failed to establish the fourth prong. Principal to his claim, Stansberry asserted that a jury could infer that he was terminated "on account of his wife's disability because he was discharged shortly after her condition worsened." However, the Court rejected this argument, noting that the airline had been aware of Mrs. Stansberry's illness for many years. "Because Air Wisconsin knew of her disability for a long period of time, this undercuts the inference that Stansberry's termination was based on unfounded fears that his wife's disability might cause him to be inattentive at work." The Court further noted that "far from unfounded fears that Stansberry might be distracted, the record contains extensive evidence that Stansberry was not performing his job to Air Wisconsin's satisfaction." Stansberry failed to produce evidence refuting Air Wisconsin's reasons or present evidence of any pretext.

The significance of the Court's holding lies in its narrow interpretation of the fourth prong. "Importantly, while Stansberry's poor performance at work was due to his wife's illness, that is irrelevant under this provision of the Act. Stansberry was not entitled to a reasonable accommodation on account of his wife's disability. Therefore, because his discharge was based on actually performing his job unsatisfactorily, and not fears that his wife's disability might prevent him from performing adequately," his termination was not discrimination.

Employers' Bottom Line

The Sixth Circuit's decision in *Stansberry* finally articulates the parameters of "distraction" theory discrimination under the ADA's associational protections. Significantly, it does so without creating a windfall for plaintiffs. As employers are reeling from Congress's sweeping amendments to the ADA and the EEOC's expansive regulations (neither of which affect Section 12112(b)(4)), *Stansberry* ensures (at least in the Sixth Circuit) that this movement will not extend to associates of a disabled person. While an employee may very well be distracted at work because of concerns over a disabled relative, that employee will not be insulated from discipline for his actual poor performance simply because of his association with his relative. Employers considering taking an adverse employment action against an employee whose performance has declined while of caring for a disabled relative must make sure that the basis for this decision is actual poor performance, rather than anticipation that the employee's performance will be poor in the future.

If you have any questions regarding this decision, please contact the author of this article, Blake Martin, bmartin@fordharrison.com, an attorney in our Atlanta office, who represented Air Wisconsin in preparing its Appellate Court brief. Ford & Harrison attorneys Chad Shultz, cshultz@fordharrison.com, and Raanon Gal, rgal@fordharrison.com, represented Air Wisconsin at the trial court level and at oral argument before the Sixth Circuit.

Wrongful Discharge Claim Preempted by the RLA

Executive Summary: A federal trial court in Puerto Rico recently held that American Airlines was entitled to summary judgment on a former employee's wrongful discharge claim brought under Puerto Rican law because the claim was a minor dispute that was preempted by the Railway Labor Act (RLA). *See Martinez-Gonzalez v. AMR Corp.* (May 17, 2011).

Background

The plaintiff in this case worked for American as a fleet service crew chief. During his

employment, fleet service employees were represented by the Transport Workers Union (TWU). American discharged the plaintiff in September 2008 because of unsatisfactory attendance in violation of the company's attendance control policy.

The collective bargaining agreement (CBA) between American and the TWU, among other things, included a provision recognizing American's authority to manage the workplace, set rules of conduct, and maintain discipline and efficiency. The CBA also set limitations on when an employee can be disciplined, who must be notified and permitted to participate in disciplinary proceedings, and required that a discharge be justified under the CBA if challenged by an employee.

During the plaintiff's employment, American had an attendance policy that set forth attendance requirements, procedures for absence, and progressive corrective action steps if an employee failed to correct an unsatisfactory attendance record. In August 2007, in accordance with the attendance policy, the plaintiff's supervisor requested a doctor's note for each of his absences in the prior 90-day period because he was suspected of abusing his sick leave. In September 2007, the plaintiff was given a "first advisory" (the first step in the corrective action procedure) for unsatisfactory attendance. American gave the plaintiff a second advisory in December 2007. In September 2008, when American discharged the plaintiff, his attendance record reflected that he had been absent from work on ten occasions, for a total of over 260 hours, since his last advisory.

The plaintiff filed a grievance over his discharge, in accordance with the CBA. The Chief Operating Officer denied the grievance and the plaintiff appealed it to the Board of Adjustment. However, the TWU ultimately withdrew the case and the plaintiff did not pursue it after the TWU withdrew.

RLA Preemption

The plaintiff subsequently sued American under Puerto Rico Law 80, which prohibits the dismissal of employees without just cause. American filed a motion for summary judgment, claiming the plaintiff's wrongful discharge claim is preempted by the RLA. The court agreed and granted American's motion.

Under the RLA, disputes that deal with the interpretation or application of agreements covering "rates of pay, rules, or working conditions," are considered "minor disputes" and are subject to the exclusive jurisdiction of the board of adjustment. When a complaint filed under state law is determined to constitute a minor dispute under the RLA, the state law cause of action is preempted. The key issue in this case was whether the plaintiff's Law 80 claim required the application or interpretation of the collective bargaining agreement between American and the TWU.

In finding that the plaintiff's claim was a minor dispute, the court noted that courts "have consistently resorted to the interpretation of employment contracts and a company's rules of conduct to determine whether a dismissal was for just cause under Law 80." The court found that the rules American relied on as the basis for discharging the plaintiff, the ones he challenged as unjust in his Law 80 complaint, were adopted pursuant to the CBA between American and the TWU. Because any analysis of these rules would "necessarily entail interpretation of the" CBA, the court held that the plaintiff's "situation is a minor dispute for purposes of the RLA, and jurisdiction only lies with appropriate board of adjustment" pursuant to the CBA.

Former Airline Employee's Disability Claims not Barred by the RLA

Executive Summary: A federal trial court recently held that a former airline employee's retaliation and disability discrimination claims under the Americans with Disabilities Act (ADA) and state law exist independently of the collective bargaining agreement (CBA) covering his employment and, thus, are not barred by the Railway Labor Act (RLA). *See Stockton v. Northwest Airlines* (March 30, 2011).

Background

The plaintiff was employed by Northwest Airlines (NWA) in various positions such as an engine test cell technician, 747 mechanic, and sheet metal shop technician. His employment with NWA was governed by the CBA between NWA and the Aircraft Mechanics Fraternal Association (AMFA). The CBA contained a mandatory grievance procedure applicable to disputes arising out of the CBA or disciplinary and discharge actions.

While he was employed, the plaintiff suffered injuries to his neck, back, knee and foot and was placed on medical leave at different times. In 2007 he was released to return to work with restrictions on his abilities to lift, bend, kneel and squat. The plaintiff bid on and was awarded two different positions; however, he could not perform the essential functions of these positions and it was determined that there were no reasonable accommodations that would enable him to do so. The plaintiff applied for other positions but was not hired. Eventually, NWA discharged the plaintiff "because he had been on layoff status for 24 months" in accordance with the CBA.

Discrimination Claims Not Barred by the RLA

The plaintiff subsequently sued NWA in federal court alleging violations of the ADA and the Minnesota Human Rights Act (MHRA). The airline filed a motion for summary judgment, arguing, among other things, that the plaintiff's claims were barred by the RLA. Under the RLA:

Preemption occurs if the claims are inextricably intertwined with consideration of the terms of the labor contract so as to require interpretation of the CBA. The RLA requires parties to arbitrate "minor" disputes. Minor disputes are those arising out of the application or interpretation of the collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement.

Bloemer v. Northwest Airlines, 401 F.3d. 935, 938-39 (8th Cir. 2005).

The court denied the airline's motion, holding that the plaintiff's claims arose out of alleged violations of the ADA and MHRA that existed independently of the CBA. The court noted that claims are not precluded by the RLA simply because a plaintiff may have to prove that he was eligible and qualified under a CBA for a certain position or because the alleged discrimination is based on a denial of rights provided for by the CBA, such as bumping rights. The court found that the CBA's language in this case was not inextricably intertwined with the plaintiff's claims, thus RLA preemption did not apply.

The court also denied summary judgment on the merits of the plaintiff's discrimination claims. The court held that there were issues of fact regarding whether Northwest, in good faith, assisted the plaintiff in seeking accommodations and whether the plaintiff could have been reasonably accommodated but for Northwest's asserted lack of good faith.

Recent Election Results - August 2011

Atlantic Southeast Airlines

TWU won an election to represent Dispatchers. Out of 107 eligible employees, 95 valid votes were cast. There were 60 votes for TWU, 33 votes for PAFCA, 1 vote for other and 1 no vote. Certification August 19, 2011.

Sky King Airlines

IBT lost an election to represent Pilots. Out of 36 eligible employees, 27 valid votes were cast. There were 14 no votes, 9 votes for IBT, and 4 votes for other. Dismissal August 18, 2011.

JetBlue Airways

In an election bought by ALPA to represent Pilots, JetBlue won. Out of 2,108 eligible employees, 2,050 valid votes were cast. There were 1,193 no votes, 834 votes for ALPA, and 23 votes for other. Dismissal August 17, 2011.

United Air Lines/Continental Airlines

IAM won an election to represent Fleet Service Employees. Out of 14,039 eligible employees, 11,122 valid votes were cast. There were 5,572 votes for the IAM, 5,258 votes for IBT, 287 no votes and 5 votes for other. Certification August 12, 2011.

Citation Air

IBT won an election to represent Pilots. Out of 369 eligible employees, 352 valid votes were cast. There were 186 votes for IBT and 166 no votes. Certification July 7, 2011.

United Air Lines/Continental Airlines

AFA won an election to represent Flight Attendants. Out of 24,539 eligible employees, 21,780 valid votes were cast. There were 11,942 votes for AFA, 9,745 votes for IAM, 65 no votes and 28 votes for other. Certification June 30, 2011.

Republic Airlines, et al/Frontier

IBT won an election to represent Pilots of Republic Airlines, Chautauqua, Shuttle America, Midwest, Lynx and Frontier. Out of 2,946 eligible employees, 2,463 valid votes were cast. There were 1,692 votes for IBT, 747 votes for other, and 24 no votes. Certification June 28, 2011.

AirTran Airways

IAM won an election to represent Fleet and Passenger Service Employees. Out of 2,904 eligible employees, there were 978 votes for IAM, 870 no votes and 16 votes for other. Certification March 29, 2011.