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November 2012

DISABILITY DISCRIMINATION

Seeing the forest for the trees: Forest worker's claim goes to trial

by Lance Rich

If a disabled employee can perform the essential functions of her current position, must an employer grant her job transfer request for medical treatment or therapy if it's reasonable and not unduly burdensome? In the following case involving a U.S. Forest Service (USFS) employee with a permanent vision impairment, the U.S. 10th Circuit Court of Appeals (whose rulings apply to all Utah employers) answered the question in the affirmative, providing the big picture for these types of disability claims. Read on to see the court's vision for how employers should consider such requests.

A limited field

Clarice Sanchez, a longtime secretarial employee of the USFS, suffered irreversible brain damage after falling down a flight of stairs at the Lufkin, Texas, USFS office. Her fall caused a nerve condition called homonymous hemianopsia, which resulted in the loss of the left half of her field of vision. As a result of her condition, she complained that she struggled to read documents, couldn't tolerate bright lights, and suffered eye strain that prevented her from reading or working on a computer for more than 45 minutes at a time. Transportation to work was also a challenge. Sanchez initially relied on family and friends to get her to work and eventually began driving herself on back roads to avoid traffic despite her doctor's orders not to drive.

Shortly after the accident and her return to work, Sanchez requested a hardship transfer to the Albuquerque, New Mexico, office because no doctors in Lufkin were qualified to provide the specialized therapy she needed to help her adjust to her injury. She explained that she had family and friends in Albuquerque who could support her and noted the lack of public transportation in Lufkin.

Sanchez's supervisor made several inquiries about open positions in Albuquerque, but to no avail. Eventually, the USFS assigned Sanchez to a 120-day detail in Albuquerque. However, employees in the Albuquerque office felt she was disruptive and inefficient, and at least one employee recommended that she not be assigned to that office. At the end of her 120-day stint, the USFS didn't select Sanchez for either of two equivalent-pay positions in Albuquerque for which she was qualified.

When Sanchez returned to Lufkin, her work environment allegedly began to deteriorate. She claims her supervisor and coworkers mocked her brain injury, stating she was "crazy," "not all there," and "not right in the head." She also claimed that her supervisor made gestures to that effect. Eventually, Sanchez took a pay cut to accept an accounting technician position with the USFS in Albuquerque.

Sanchez filed suit in federal district court in New Mexico, alleging that the USFS discriminated against her in violation of the Rehabilitation Act of 1973 by failing to accommodate her and subjecting her to a hostile work environment. The district court dismissed her claims without a trial because it agreed with the USFS that she wasn't substantially limited by her impairment. Sanchez appealed the decision to the 10th Circuit.

'Oh, say, can you see?'

The Rehabilitation Act prohibits the federal government from discriminating against an otherwise qualified individual with a disability. Although the Act applies only to federal government employees, the court used the same analysis it does for claims raised under the Americans with Disabilities Act (ADA), which applies to private-sector employees. Thus, the court's analysis and decision are important for all employers.

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To prevail on a failure-to-accommodate claim, an employee must show the following:

- (1) She is disabled.
- (2) She is otherwise qualified for the job.
- (3) She requested a reasonable accommodation.

To show a disability under the first prong of the test, an employee must show that she has a physical or mental impairment that substantially limits one or more major life activities. Because it was undisputed that Sanchez had a recognized impairment and that the life activity she identified—seeing—falls within the Act, the court focused on whether her condition substantially limits her ability to see.

The court concluded there was enough evidence for a jury to find that when compared to the average person, Sanchez's homonymous hemianopsia substantially limits her ability to see, thus warranting a trial. In reaching its conclusion, the court reviewed the factors necessary to determine whether an impairment significantly restricts a major life activity. Those factors are:

- (1) The nature and severity of the impairment;
- (2) The expected duration of the impairment; and
- (3) The permanent or long-term effects resulting from the impairment.

The court noted that Sanchez presented evidence that (1) her field of vision was half of what it was before her injury, (2) the vision loss was permanent and couldn't be improved by lenses or surgery, and (3) persons with her condition often find it difficult to accommodate for their loss of vision, instead ignoring the side of their bodies on which vision was lost.

The court stated that the evidence was sufficient to allow a jury to determine whether, when compared to the average person, Sanchez was substantially limited in her ability to see. In so doing, the 10th Circuit concluded that the district court had mistakenly focused on the activities Sanchez could perform (e.g., driving, reading, walking, bicycling, and caring for herself) instead of focusing on the major life activity she had identified (seeing) and whether she had shown a substantial limitation in that activity.

Court sees through USFS's accommodation argument

The USFS argued that the 10th Circuit nevertheless should uphold the district court's dismissal because an employer isn't required to provide a transfer as an

accommodation to an employee who needs medical treatment despite being able to perform the essential functions of her job. But the court disagreed, concluding that a reasonable accommodation may include reassignment to a vacant position if the employee is qualified for the job and the transfer doesn't impose an undue burden on the employer.

In doing so, the court departed from previous 10th Circuit decisions requiring transfer accommodations only when the employee can no longer perform the essential functions of the job. Instead, it joined other circuit courts in ruling that transfer accommodation requests for medical care or treatment are not unreasonable, even if the employee is able to perform the essential functions of her job without it. Therefore, the facts of each case will determine whether a job transfer is a reasonable accommodation and will not unduly burden the employer. *Sanchez v. Vilsack*, 2012 WL 4096250 (10th Cir., Sept. 19, 2012).

Only you can prevent wildfires

If you want to avoid problems similar to what the USFS experienced in this case, you may want to heed the advice of USFS mascot Smokey Bear and find out what you can do to prevent potential wildfires in the workplace caused by transfer requests. If an employee requests a transfer to an available position for the purpose of seeking better treatment for a medical condition, her employer should seriously consider the request.

Undoubtedly, situations exist in which a transfer request would be unduly burdensome. If an employer denies a request for a transfer on that basis, the reasons should be well documented. It may help to seek the advice of competent employment counsel regarding the likelihood that the employee's impairment is severe enough to cause concerns and whether the employer's reasons for denying the transfer are legally sound.

However, even if the employee seeking reassignment isn't the best-qualified employee for the job, the employer risks liability if it denies transfer requests to qualified employees when the requests aren't unduly burdensome. Consequently, it is prudent to exercise extreme caution when considering transfer requests to avoid getting burned by a potential disability discrimination claim.

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