ADA Case Law Update

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Presenters:

William N. Myhill, M.Ed., J.D.
Senior Research Associate, Burton Blatt Institute:
Centers of Innovation on Disability, Syracuse, NY
Phoebe Ball, Esq.
Attorney, Self-Determination Team, Advocacy Center for Persons with Disabilities, Inc., Tallahassee, FL

Major Topics

I. Retaliation – shifting standards
II. Pretext – prime examples
III. Reasonable Accommodations & the Interactive Process

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Retaliation

It is unlawful for an employer to fire, demote, suspend, or deny benefits of the workplace in retaliation because an employee has engaged in a protected activity, such as filing a disability discrimination complaint against the employer or a worker's compensation claim, requesting medical leave or an accommodation, or advocating on behalf of a co-worker with a disability.

45A Am. Jur. 2d Job Discrimination § 240

McDonnell Douglas Burden Shifting Analysis

1. Employee bears burden of proving a prima facie case of retaliation.
2. Employer then has the burden of proving a legitimate, nondiscriminatory reason for the adverse employment action.
3. To prevail, the Employee must show the employer's reason is pretext for discrimination

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Prima Facie Case of Direct Retaliation

(1) Engaged in protected activity

(2) Employer subjected plaintiff to an adverse employment action.

(3) there existed a causal connection between the protected activity and the materially adverse action."

Nilsson v. City of Mesa, 503 F.3d 947, 954 (9th Cir. 2007); *Garrett v. Univ. of Alabama,* 507 F.3d 1306, 1316 (11th Cir. 2007).

The causal connection must be temporally very close (*Garrett*, 507 F.3d at 1317), otherwise additional evidence will be necessary. *Proctor*, 502 F.3d at 1209 (10th Cir. 2007).

Prima Facie Case of Direct Retaliation

The Tenth Circuit has held that the Supreme Court decision in *White*, that Title VII retaliation claims include a materiality requirement and objective standard, apply to ADA retaliation claims:

(2) "a reasonable employee would have found the challenged action materially adverse" ("which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Proctor v. UPS, 502 F.3d 1200, 1208 (10th Cir. 2007) (citing & quoting *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006)).

Direct Retaliation

Yet, one month prior to *Proctor*, the Tenth Circuit in *Jarvis*, did not apply the "reasonable employee" standard, rather requiring an adverse employment action "either after or contemporaneous with the employee's protected action." *Jarvis v. Potter*, 500 F.3d 1113, 1125 (10th Cir. 2007) (citing *Doeble v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003).

Prima Facie Case of Indirect Retaliation

(1) Engaged in protected activity

(2) Employee subjected to an adverse employment action

(3) Employee performed job satisfactorily

(4) A similarly situated employee, who did not engage in the protected activity, was treated more favorably.

Bellino v. Peters, 530 F.3d 543, 551 (7th Cir. 2008).

Retaliation

Adverse actions may be retaliatory, even when not related to employment, if they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." (*White*, 2006).

Crawford v. Metropolitan Government of Nashville

Before the U.S. Supreme Court Oct. 6, 2008

The U.S. Supreme Court will decide whether an employee's participation in an employer's internal discrimination investigation:

- is the type of participation protected by Title VII of the Civil Rights Act, or

- is not protected participation because the internal investigation was not the result of a complaint filed with the EEOC.

Common Protections & Procedures under Title VII of Civil Rights Act and the ADA

Like Title VII of the Civil Rights Act, ADA Title I provides protection from retaliation for participation in a discrimination investigation (and for expressing opposition to discriminatory conduct).

42 U.S.C. § 2000e-3(a) (2008); 29 C.F.R. § 1630.12 (2008).

Common Protections & Procedures

These statutes also share administrative filing requirements prior to initiating a civil action.

- Must file complaint with EEOC within 180 days after the alleged discriminatory action unless the individual filed a complaint with the corresponding state agency. 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117.
- If filed complaint state agency, then the must file their EEOC claim within 300 days from the initial occurrence of the alleged discriminatory action, or within 30 days after notice from the state agency terminating the proceeding under state law—whichever occurs first. 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117.

Supreme Court Oral Arguments

Crawford v. Metropolitan Government of Nashville, Oct. 6, 2008

At oral argument, the majority of the Justices questions and comments were much less interested in determining whether the internal investigation was covered under the Act, than determining the types & boundaries of expressed opposition that would be protected, and whether the participation and opposition provisions overlap.

This may suggest, in essence, the Justices generally agreed that participation in an internal investigation is covered by the statute.

Crawford v. Metropolitan Government of Nashville

Attention of Justices

Boundaries of Opposition	**Overlap of Provisions**	**Coverage of Internal Investigation**
Roberts	Roberts	Ginsburg ^
Alito	Alito	Breyer
Scalia	Kennedy	Alito
Souter		Souter
Stevens		Scalia / opposition *
Breyer		Kennedy

^ The only Justice who kept trying to bring the discussion back to this issue.
* "It seems to me 'investigation under this title' … is not an investigation by the employer"

Pretext

"Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.' "

Trujillo v. PacifiCorp, 524 F.3d 1149, 1158 (10th Cir. 2008) (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1023 (10th Cir. 1997 (citing *Olson v. General Elec. Astrospace,* 101 F.3d 947, 951-52 (3d Cir. 1996)); see also *Desmond v. Mukasey*, 530 F.3d 944, 962 (D.C. Cir. 2008) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

Pretext

Specifically, [t]o show pretext, the [plaintiff] must establish by a "preponderance of the evidence that the legitimate reasons offered by [the employer] were not its true reasons, but were a pretext for discrimination."

Trujillo, 524 F.3d at 1155 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Pretext

"[T]he relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs."

Proctor v. UPS, 502 F.3d 1200, 1211 (10th Cir. 2007) (quoting *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004)).

"Even a mistaken belief can be a legitimate, non-pretextual reason for an employment decision."

Piercy v. Maketa, 480 F.3d 1192, 1200 (10th Cir. 2007).

Pretext

"[T]he plaintiff must establish a basis to conclude that the employer has lied about the reason or, more directly, that the reason was discriminatory."

Desmond, 530 F.3d at 964 (D.C. Cir. 2008).

"The factfinder's disbelief of the reasons put forward by the defendant … may, together with the elements of the prima facie case, suffice to show intentional discrimination. … [and] *permit* the trier of fact to infer the ultimate fact of intentional discrimination."

Wilson v. Phoenix Specialty Mfg., 513 F.3d 378, 387 (4th Cir. 2008) (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993).

Pretext

Circumstantial evidence that is specific and substantial may create a genuine issue of material fact of pretext.

Nilsson v. City of Mesa, 503 F.3d 947, 954 (9th Cir. 2007).

"[V]igorously disput[ing] the validity of the reasons cited" may create a genuine issue of material fact.

Desmond, 530 F.3d at 963 (D.C. Cir. 2008) (quoting *Burdine*, 450 U.S. at 256 (1981)).

Wilson v. Phoenix Specialty Mfg. 513 F.3d 378, 387 (4th Cir. 2008)

The Fourth Circuit concluded that Phoenix's 6 reasons for firing Wilson were pretextual:

(a) Workforce reduction. With respect to Phoenix's claim that it engaged in a workforce reduction, the district court held it could not be considered a reduction since only two employees were involved.

(b) Financial difficulties. Phoenix's excuse that financial difficulties were the reason for the workforce reduction was rejected because the company had paid bonuses to most of its employees in 2002 (after the company fired Wilson in August 2002).

(c) Essential job functions. Phoenix argued they chose to eliminate Wilson's position because he delegated many of his managerial tasks to other employees and refused to master the new computer system. The district court held that both were false claims as Wilson attempted to master the computer system, but was instructed by his supervisors not to input information.

See also "Wilson v. Phoenix Specialty Mfg." Case Law Alert (2008), http://www.sedbtac.org/ada/publications/legal/Wilson_v_Phoenix_Specialty.doc

Wilson v. Phoenix Specialty Mfg.

(d) Hourly position. The district court disagreed with Phoenix's excuses that Wilson could not have received an hourly position because there were no openings. The court held that the other employee impacted by the purported workforce reduction was moved to an hourly position; the company needed a shipping clerk because it posted an opening; and Wilson applied for the position but did not receive a response.

(e) Shipping supervisor position. The district court rejected Phoenix's claim that the new shipping foreman position did not replace Wilson's former position as shipping supervisor. The court held that Phoenix had not eliminated Wilson's position, but rather changed the name of the position and promoted a new employee with limited experience to fill it.

(f) False allegations. The court rejected Phoenix's claim that on Wilson's final day of work (after notification of his termination), an independent basis for discharge arose. Phoenix claimed that Wilson ordered ten years worth of packing supplies. The court held that he was set up; Wilson ordered enough supplies to get the company through the transition period after his departure, but someone wrote over his notes to make it look like he ordered excess supplies.

Reasonable Accommodations & the Interactive Process

- The Employee must show that they are:
  - A "qualified individual with a disability"
  - The employer knew of the disability
  - The employer did not make a good faith effort to accommodate the disability (interactive process)
  - That an accommodation existed.

Buboltz v. Residential Advantages Inc. 523 F.3d 864 (8th Cir. 2008)

Legally blind employee worked providing residential services for people with disabilities for 5 years without incident. However, employer eventually prohibits her from working alone with clients and dispensing medications due to concerns that licensing organization would take issue with her performing these functions.

Buboltz Issues

- Did these constitute adverse employment actions?
- Did the employer fail to accommodate her disability?

Buboltz Holding

- Removal of some job functions was not adverse employment action.
- Employee did not request an accommodation.
  - When told about limits to job functions, employee argued that she had "numerous devices" that she could use to help her perform her job, but did not request accommodation.
  - Absent a request by employee, employer is not required to provide an accommodation.

Interactive Process

EEOC Interpretive Guidance

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, *should*:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer (29 C.F.R. pt. 1630, App. § 1630.9).

Interactive Process

When the interactive process breaks down, "responsibility … lies with whichever party failed to participate in good faith or make reasonable efforts to help the other party determine what specific accommodations are necessary."

Bad faith may include, for instance, obstructing or delaying the process, failing to communicate concerns

"In assigning responsibility for the breakdown in communication, courts should look to the objective circumstances surrounding the breakdown, and not the subjective beliefs of the parties."

5 Employment Coordinator, Employment Practices § 9:58 (2008).

Brady v. Wal-Mart Stores, Inc. 531 F.3d 127 (2d Cir. 2008)

- 19 year old with CP had worked for 2 years dispensing prescription drugs at local pharmacy, applies for and gets similar job at Wal-Mart pharmacy. His supervisor immediately decides that he is not capable of doing the job and transfers him to job in parking lot.

Brady Issues

- Did the employer have a duty to accommodate the disability?
- Did transfer to parking lot constitute adverse employment action?
- Did the district court err in admitting Consent Decree requiring employer not to engage in ADA violations?

Brady Holding

- Employer has a duty to accommodate known disabilities (duty to engage in interactive process)
- Transfer was adverse employment action: although wage was the same, diminished title and duties.
- Admitting CD was okay when court offered limiting instruction that it was only to show that employer was aware of obligations under Federal Law.

Duty to Engage in the Interactive Process

Rosenthal (2007) concluded the Courts of Appeals can be divided into three camps:

1. those requiring an interactive process (3rd, 5th, 7th & 9th); *Brady* adds the 2nd Circuit.
2. those finding no duty to interact (10th, 11th)
3. those taking a case-by-case approach to determining whether a party is liable for failing to engage in the interactive process (1st & 8th).

J.L. Rosenthal, The Interactive Process Disabled: Improving the ADA and Strengthening the EEOC Through the Adoption of the Interactive Process, 57 Emory Law Journal 247 (2007).

EEOC v. Fed. Express Inc. 513 F.3d 360 (4th Cir. 2008)

- Deaf package handler who was never provided with interpreters or other accommodations so that he could understand what was said at meetings, including those regarding important safety information, is awarded punitive damages.

EEOC Issues

- Were Punitive damages justified by evidence?
- Did 12.5 to 1 ratio between compensatory damages and punitive damages render the award of punitive damages unconstitutionally excessive?

EEOC Holding

- Evidence was sufficient to find:
  - Manager perceived risk of ADA violation
  - Employer failed to implement ADA compliance policy
  - Employer's highest officials acted "reprehensibly"
- "reasonable relationship" between punitive and compensatory damages awards is only one factor in determining constitutionality.

Bellino v. Peters
530 F.3d 543 (7th Cir. 2008)

Air Traffic Controller who injured knee at work sues for failure to accommodate when the only accommodation he is offered is to return him to a job he had previously performed which was less physically strenuous, which had the same salary and benefits, but with a lower annual bonus.

Bellino Holding

- Court determines that Bellino turned down the transfer which was a reasonable accommodation.
  - However, Bellino denies on appeal that the lower bonus was the reason he turned down the transfer, so the decision that the lower bonus does not change the fact that this was a reasonable accommodation is expressed in dicta.

Dargis v. Sheahan
526 F.3d 981 (7th Cir. 2008)

- Corrections officer who suffered stroke and is ordered by doctor to avoid direct contact with inmates due to threat to his safety sues when his request to be transferred to position with no inmate contact is denied.

Dargis Issues

- Could he still perform the essential functions of being a corrections officer if he had to avoid all contact with inmates?

Dargis Holding

- Although there was evidence that some officers were assigned to positions with limited inmate contact for health reasons, none was required to avoid <u>all</u> inmate contact.
  - Employer had legitimate reasons for requirement that all officers be able to rotate through all positions for reasons of safety and inmate control.

Filar v. Board of Education
526 F.3d 1054 (7th Cir. 2008)

- 69 year-old substitute teacher is displaced from full-time position in one school to roving status. She requests that she only be assigned to schools near bus stops due to her hip problem, which prevents her from driving and from walking distances.

Filar Holding

- Requirement for being a substitute teacher was that one accept assignments at any and all schools as they become available, request for limited assignments was not reasonable.
  - Collective bargaining agreement did not allow school board to force teacher on principal
  - Burden of researching which schools were close to bus stops was overly burdensome.

Garg v. Potter
521 F.3d 731 (7th Cir. 2008)

- Postal service employee begins having breathing trouble after working at large mail-sorting facility where paper fibers and dust pollute the air.
  - She requested shift change to less busy and dusty day shift, which was temporarily granted in violation of collective bargaining agreement.
  - She was returned to night shift, but 2 emergency room visits later a doctor contracted by USPS determined that she was unfit to return to work until she underwent allergy testing.
  - She did not undergo testing or return to work and was eventually fired.

Garg Issues

- Was postal worker a qualified individual with a disability?

Garg holding

- She failed to perform the essential functions of her job by failing to undergo allergy testing to determine cause of her symptoms, or respond to an “options letter” that lead to her final termination.