

## REASONABLE ACCOMMODATION

### Federal judge resolves major ADA question for Minnesota employers

Since the enactment of the Americans with Disabilities Act (ADA), Minnesota employers have been unsure of their obligations to disabled workers who can not be accommodated in their present jobs. While many believed (with backing from some federal courts) that they only needed to allow these employees to compete with other applicants for vacant jobs, others felt (with support from other federal courts) that they were required to place these employees in vacant jobs ahead of more qualified applicants.

A ruling hot off the press from the Eighth Circuit Court of Appeals (which covers Minnesota) finally seems to have resolved this question. Read on to learn which side of this long-standing debate finally prevailed, and what questions still remain.

#### The accommodation issue

Pam Huber worked in the Wal-Mart grocery as an Order Filler earning \$13.00 per hour (including shift differential bonus). Unfortunately, she suffered an injury to her arm and hand that prevented her from performing the essential functions of the job, even with accommodations. As a result, she asked to be reassigned to the vacant Router job, a position of equivalent pay and status as the Order Filler. Wal-Mart refused to place her there automatically, citing its policy of hiring only the most qualified applicants for vacant jobs. Therefore, Huber had to compete for the Router job with other applicants, and ultimately lost out on the job to a non-disabled applicant. Wal-Mart did, however, place Huber into a maintenance job at another facility at roughly half the wage that she had been earning.

Huber sued under the Americans with Disabilities Act (ADA), claiming that she was entitled to be placed directly into the open Router job as a legally required accommodation. Wal-Mart filed a motion for summary judgment (early dismissal), contending that the ADA did not require them to abandon their

legitimate, non-discriminatory policy of hiring the most qualified applicant for all job vacancies.

Huber also filed a motion for summary judgment, which the Arkansas trial court granted. Wal-Mart then appealed to the Eighth Circuit.

Noting that they had never actually faced this question before, the Eighth Circuit Court of Appeals reversed the trial court and ruled in Wal-Mart's favor. They began their analysis by reviewing ADA's requirements for reasonable accommodation, which include:

[J]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

#### A question of balance

The judges then observed that other federal circuits had looked into this question and had come up with conflicting answers. For example, the Tenth Circuit, which covers the western plains states, ruled that the ADA required employers to place disabled workers directly into existing vacancies rather than making them compete with other applicants. The judges took particular note of the following excerpt from a Tenth Circuit decision:

[I]f the reassignment language merely requires employers to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant. . . .



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Thus, the reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position.

On the other hand, the Seventh Circuit, which covers Wisconsin, Illinois and Michigan, has ruled that direct placement is not required, as explained in this excerpt from one of their decisions:

The reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.

The judges also cited approvingly a Fifth Circuit decision (covering Texas and other southern states) observing that “[t]he [ADA] does not require affirmative action in favor of individuals with disabilities. It merely prohibits employment discrimination against qualified individuals with disabilities, no more and no less.”

The Eighth Circuit judges ultimately concluded that the ADA did not require direct placement into vacant jobs, thereby siding with the neighboring Seventh Circuit. The reiterated that the ADA is not an “affirmative action statute” and does not require an employer to violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate. Indeed, they observed that a contrary ruling would violate a basic premise of all discrimination laws since it would require an employment decision to be based on an employee’s protected classification. As such, Wal-Mart was not required to place Huber into a vacant Router job ahead of more qualified applicants.

The appeals court then ruled that Wal-Mart had actually satisfied its obligation to accommodate Huber

when they placing her into the maintenance job. Though not an ideal match, nor the accommodation that Huber desired, it was a reasonable decision (presumably since it was certainly preferable to no job at all). *Pam Huber, v Wal-Mart Stores Inc* (8th Circuit No. 06-2238, May 30, 2007).

**What do we learn?**

This long-awaited decision resolves an important issue for Minnesota employers, but it does not tell the whole story. While direct placement is not required, how much must an employer do for a disabled employee to meet the accommodation obligation? Is it enough to let them compete on an equal footing with other applicants or must we do something to facilitate the application for the vacant job? How long must an employer give the disabled employee to find a suitable vacancy? These questions await answers from future cases but at least we now know how much is too much.

Remember also that while this is the interpretation of federal law, the Minnesota courts may view things differently under our state Human Rights Act.

Minnesota courts look to federal interpretations for guidance but have been known to arrive at different conclusions so nothing is certain. Still, this case gives us a solid foundation for concluding that Minnesota employers may continue to follow a practice of hiring the best person for an open job regardless of protected class status, including disability.

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## Mark Your Calendars!

### Annual Fall Labor & Employment Seminar

Friday, November 9, 2007

**Mall of America Marriott Hotel, Bloomington, MN**

You will receive a seminar invitation if you are on the mailing list for the Labor & Employment Newsletter. To be added to this list, email your contact information to Karen Dyck at [kdyck@felhaber.com](mailto:kdyck@felhaber.com).

# EEOC ISSUES GUIDELINES ON CAREGIVERS AND DISCRIMINATION



The Equal Employment Opportunity Commission (EEOC) recently published new guidelines explaining their view that adverse treatment of caregivers (e.g. working parents) can contribute to findings of illegal discrimination under Title VII and the Americans with Disabilities Act of 1990 (ADA). These new guidelines do not have the force of law and the EEOC was quick to point out that they do not create a new protected classification. Instead, the EEOC simply wants to announce their view of “best practices” regarding treatment of caregivers, and to alert employers to circumstances when stereotyping or other differential treatment might influence their decisions on claimed violations of law.

## Sex-Based Disparate Treatment of Female Caregivers

The majority of guidelines focus on sex-based disparate treatment of female caregivers, specifically the usage of sex-based stereotypes. For a female caregiver to bring a valid discrimination claim against her employer, the adverse action taken against her must be “based on sex.” These new guidelines set out a non-exhaustive list of factors that their investigators will take into account when determining whether a female has a legitimate claim that her negative treatment was based on her gender. The highlights of this list are:

- Whether the employer asked female and not male applicants whether they were married or had young children, or about other caregiving responsibilities;
- Whether decision makers or officials made stereotypical or derogatory remarks about pregnant women, working mothers or female caregivers;
- Whether the employer subjected women to less favorable treatment soon after becoming aware of their pregnancy;
- Whether the employer steered or assigned caregiver women to less prestigious or lower-paid positions;
- Whether male caregivers were treated more favorably than female caregivers;
- Whether the employer deviated from workplace policy when it took the challenged action.

While recognizing that females do assume the bulk of caregiving responsibilities, EEOC nevertheless asserts that acting upon stereotypical assumptions that caregiving female employees will be less committed to their jobs will result in violations of Title VII. The guidelines offer the following examples:

- Gender-Based Assumptions About Future Caregiving Responsibilities

If a female employee is not pregnant nor suggested she will become pregnant, employers may not make employment decisions based on the assumption that future childcare responsibilities she may incur will make her less dependable than male employees.

- Assumptions About Work Performance of Female Caregivers

Stereotypical assumptions, such as women with young children will not (or should not) work long hours or are less committed to their jobs than before they had children, may not be the basis of employer’s adverse employment decisions. Decisions based on such assumptions, and not the specific work performance of a particular employee, violate Title VII. However, decisions based solely on unsatisfactory work performance, even if ultimately attributable to the employee’s caregiving responsibilities, do not violate the law.

- “Benevolent” Stereotyping

Employers may not make adverse employment decisions based on gender stereotypes even if the decisions are “well-intentioned”, or perceived to be in the employee’s “best interests”. Such decisions are still based on sex, and still violate Title VII, regardless if the employer is not acting out of hostility towards the employee. For example, an employer should not deny a promotion to a new mother based on the belief that the employee will find the increased travel, hours and stress less desirable than being home more with her baby.

## Pregnancy Discrimination

Beyond gender discrimination, employers may also violate Title VII by making adverse employment decisions based on assumptions about pregnancy. Employers may not treat pregnant workers less favorably than other workers whose performance is similarly restricted, even if the employer believes it is acting in the employee's best interest.

Also, the EEOC will construe pregnancy related inquiries, prior to an adverse employment decision, as direct evidence of pregnancy discrimination, noting that they "strongly" discourage such inquiries.

## Discrimination Against Male Caregivers

When it comes to gender discrimination, women are not the only potential victims. Common stereotypes that men should be the "bread winners" in the family may lead to the presumption that males with caregiving responsibilities are not good fathers. Adverse employment decisions, harassment or ridicule based on this unfounded presumption would violate Title VII.

Further, employers may not treat either sex more favorably in regards to leave time for various medical or pregnancy conditions. Thus, employers must carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that pregnancy leave is expressly limited to periods where the woman is actually incapacitated by pregnancy.

## Unlawful Caregiver Stereotyping Under the ADA

The guidelines note that stereotyping of caregivers may implicate the ADA's ban of discrimination based on an employee's relationship with a disabled individual. Employers may not give that caregiver less favorable treatment based on the assumption their responsibility to the disabled person will adversely impact their job performance.

## Hostile Work Environment

Illegally differential treatment of caregivers reaches beyond adverse employment decisions. Employers may also be liable if workers with caregiving responsibilities are singled out for

offensive comments or other harassment based on the fact they are a female (or male) caregiver, or because of any other protected factor. EEOC cautions employers to be on guard for such behavior.

## Retaliation

Employers are not allowed to retaliate against employees who avail themselves of EEOC remedies, complain about or oppose the unlawful discrimination of working caregivers, or testify on behalf of another worker who has filed a charge. Retaliation against workers such as these could also result in a violation of the EEO statutes. Those statutes prohibit any act of retaliation that is reasonably likely to deter someone from engaging in a protected activity.

## Conclusion

The principles set forth in the EEOC guidelines are not groundbreaking – employers have been aware of these issues for many years. However, the fact that the EEOC felt obligated to publish these guidelines seems to indicate their increased and perhaps more aggressive focus on these issues. Employers should evaluate their policies and practices to be sure that they are can withstand EEOC scrutiny if and when an employee claims that their caregiver status enables them to legal protection.

For more information contact Brian Benkstein at our Minneapolis office.

You can read the entire  
EEOC guidelines article here:  
<http://www.eeoc.gov/policy/docs/caregiving.html>



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## WAGE DISCRIMINATION

### Supreme Court Says No More Eternal Pay Discrimination Claims

*Workers claiming unequal pay have generally had a right that no other discrimination claimants ever had – the right to pursue those claims even after the legal time frame for filing charges or lawsuits had expired. Now, the United States Supreme Court has ruled that most such claims are not indefinite and must be pursued within the same time frame as all other discrimination actions.*

#### A series of unfortunate events

Over Lilly Ledbetter's 19 years of work for Goodyear Tire, she received several negative performance reviews that resulted in diminished wage increases and lower earnings than many of her co-workers. Ledbetter thought that her gender was the reason for the poor reviews and that she should not have to earn lower wage because of it. She therefore sued the company for a violation of Title VII and received a jury verdict in the amount of nearly \$4 million (although the judge later reduced the award to \$360,000). Goodyear appealed to the 11th Circuit U.S. Court of Appeals and was successful in getting the \$360,000 verdict overturned. Ledbetter then appealed to the United States Supreme Court.

In seeking dismissal of the claim, Goodyear argued that Ledbetter had not filed the required charge with the EEOC in a timely fashion. Ledbetter countered that courts had always treated pay discrimination claims differently from other discrimination cases. Unlike hiring, promotion or discharge cases, where the act of discrimination can be pinpointed to a single decision, Courts had frequently viewed pay discrimination cases as a series of discriminatory acts that renewed Title VII's charge-filing period each time the claimant received a paycheck. As a result, the time for filing such claims was indefinite and employers would be unable ever to "close their books" on pay decisions.

#### It's about the decision, not the effects

The Supreme Court rejected this approach and ruled that claims of unequal pay under Title VII must be brought within the same statutory time frame as all other discrimination claims. The

judges based their decision on a review of a number of their previous decisions addressing the basic principle that charges must be brought when the discriminatory act occurs, not when its effects are felt most painfully. In the past, they had disallowed a claim by a college professor who waited to challenge a tenure denial until after his one-year "terminal teaching assignment" ended, and had rejected claims from airline employees challenging seniority decisions years after they were made because those decisions had only recently resulted in layoffs. The justices ruled that the establishment of an employee's wage rate is no less a separate and complete act than a termination or refusal to hire.



Simply stated, the Court ruled that pay discrimination is not a continuing act, but rather a singular act that can be traced to a particular point in time. In this instance, the discriminatory acts occurred when Ledbetter received her performance reviews and reduced wage increases, *not* when she got the paychecks reflecting those decisions. The Court therefore ruled that Ledbetter failed to bring her claim in a timely fashion and that the lawsuit should be dismissed. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (U.S. Supreme Court, May 29, 2007).

#### Bottom Line

This was definitely a win for employers but a few cautionary notes are in order:

- This case was decided only under Title VII, and does not affect claims under the Equal Pay Act of 1963 or other federal or state laws. Therefore, workers still can challenge pay claims under other laws and benefit from extended filing periods. Remember, though, the Equal Pay Act only applies to claims of differential pay based on sex and not on any other protected classification.
- Second, the majority in *Ledbetter* was a razor thin 5-4 ruling, with Justice Ginsburg taking

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the unusual step of reading her vehement dissent aloud from the bench. One new appointee to the bench could change this outcome.

- Third, this decision assumes that employees will immediately recognize that they have been victimized by possible discrimination when their pay rate is set. Unlike other employment decisions, a pay discrepancy is “often hidden from sight” (as the dissent asserts) and workers may not comprehend the discriminatory act until the legal filing period has expired. Future cases will probably resolve whether this is a valid excuse for not complying with the statutory filing period.

Still, this decision seems to recognize the fundamental reality that discrimination law addresses employer *decisions*. Experience tells us that employees do not wait very long to file a discrimination charge if they feel they have been wronged, and they don't need a perpetually renewing filing period to assist them. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*



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## Labor & Employment Report

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