Employment Law Briefing

SEPTEMBER/OCTOBER 2014

MARTIN | PRINGLE
ATTORNEYS AT LAW

MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, L.L.P.

Wichita
100 N. Broadway,
Suite 500
Wichita, KS 67202
T 316.265.9311
F 316.265.2955

Overland Park
6900 College Boulevard,
Suite 700
Overland Park, KS 66211
T 913.491.5500
F 913.491.3341

Kansas City, Missouri
4700 Belleview,
Suite 210
Kansas City, MO 64112
T 816.753.6006
F 816.502.7898

www.martinpringle.com

Dropped connection

Telecom employee's ADA claims get hung up in court

Sometimes, even when an employer offers an ostensibly reasonable accommodation under the Americans with Disabilities Act (ADA), the employee in question isn't satisfied. Such was the circumstance in *Hamedl v. Verizon*, an appellate court decision that likely left the plaintiff with an even greater sense of dissatisfaction.

Shifting shifts

The plaintiff suffered from back pain. So, to spend less time sitting in traffic, he requested to work the night shift — from midnight until 8 a.m. His employer, Verizon, tentatively agreed.

Pursuant to a collective bargaining agreement (CBA) with the plaintiff's union, however, employee shift preferences were to be assigned according to seniority. And, after recalculating his service time, the company realized that the plaintiff didn't have adequate seniority to qualify for the midnight shift.

Rather than override its seniority policy in violation of the CBA, Verizon reassigned the plaintiff to the 8 a.m. to 5 p.m. shift. It did, however, offer to modify the shift so that the plaintiff could start at 6 a.m., thereby avoiding the morning rush.

The employee sued anyway, claiming that the company had failed to accommodate him under the ADA. The 6 a.m. start time, he contended, still resulted in an extended commute. But there was no dispute that the plaintiff would avoid all traffic by arriving at the office at 5:30 a.m., only thirty minutes before his modified shift.

Establishing a case

To establish a prima facie case of failure to accommodate for a disability, a plaintiff must show that:

1. He or she is a person with a disability as defined under the ADA,
2. His or her employer had notice of the disability,
3. He or she could perform the essential functions of the job in question with a reasonable accommodation, and
4. The employer failed to make such an accommodation.

Verizon argued that the plaintiff couldn't establish a prima facie case because it had indeed provided him with a reasonable accommodation. The district court agreed. It found that the company's offer to reassign the plaintiff to a specially modified day tour was a reasonable accommodation. What's more, the plaintiff hadn't shown why he *had* to work the midnight shift rather than the proffered modified day shift.

Employers can provide any accommodation for a disability as long as it's **reasonable.**

The court also held that the plaintiff hadn't shown how the minor inconvenience of arriving to work thirty minutes early to avoid traffic made Verizon's accommodation unreasonable. Meanwhile, his employer had shown that an assignment to the midnight shift would be unreasonable because it would violate the CBA. The plaintiff appealed.

Providing no evidence

The U.S. Court of Appeals for the Second Circuit affirmed the district court's decision. It found that the employer had offered the plaintiff a reasonable accommodation, and the plaintiff's preference for the night shift in no way rendered that accommodation unreasonable.

The plaintiff also claimed on appeal that Verizon had retaliated against him for taking Family and Medical Leave Act (FMLA) leave. He asserted that his reassignment from the midnight shift to the day shift upon returning from said leave was an adverse action.

The district court had held that, even if the reassignment was considered adverse, the plaintiff's reassignment occurred only after Verizon discovered that it had miscalculated his seniority. Thus, there was no causal connection between the employee's reassignment and the medical leave. The Second Circuit agreed, holding that the plaintiff failed to provide any evidence of a causal connection between his taking FMLA leave and Verizon reassigning his shift.

Engaging in a process

As this case illustrates, when employees request an accommodation for a disability, their employer doesn't necessarily have to provide that specific, preferred accommodation. Employers can provide any accommodation for a disability as long as it's *reasonable*. That said, employers should always engage in an interactive process with disabled employees to try to arrive at a mutually agreeable accommodation. ♦

Exceptions to seniority rules may affect reasonability

In *Hamedl v. Verizon,* the U.S. Court of Appeals for the Second Circuit affirmed a district court's decision that the plaintiff's desired accommodation under the Americans with Disabilities Act (ADA) would have been unreasonable because it would violate a seniority rule established under a collective bargaining agreement. (See main article.) When considering similar circumstances, employers should be mindful of the U.S. Supreme Court's decision in *U.S. Airways v. Barnett.*

Here, the plaintiff had been assigned to a new position within the company after becoming disabled. But when senior employees sought the position, he lost his job. The plaintiff claimed the employer should have made an exception to its seniority rule as a reasonable accommodation. The district court rejected the claim, stating that an exception would be an undue hardship for the employer. The U.S. Court of Appeals for the Ninth Circuit disagreed and reversed, stating that the seniority rule was only one factor in the undue burden analysis.

The Supreme Court disagreed with both lower courts and held that an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to prove that the accommodation is unreasonable. But an employee may present evidence of "special circumstances" that makes an exception to the seniority rule feasible. The Court cited several examples, including the employer's retention of the right to change the seniority system unilaterally, along with its exercise of that right "fairly frequently." It also cited instances when a system already contained exceptions "such that, in the circumstances, one further exception is unlikely to matter."

Thus, even though an accommodation that requires superseding a seniority rule is ordinarily considered unreasonable, an employer who has made exceptions to a seniority rule in the past should be prepared to do so again as a reasonable accommodation.

Confidentiality clause meets labor rights in NLRA case

Today's business data is more at risk than ever. As such, confidentiality clauses are increasingly common. Combine a dispute over just such a clause with a disagreement over an employee's labor rights and you've got the recent case of *Flex Frac Logistics, LLC v. NLRB*.

Clash over a clause

Flex Frac Logistics LLC, a nonunion trucking company, required its employees to sign a confidentiality clause. The clause stated in part that confidential information is that related to the company's "financial information, including costs, prices … personnel information and documents." Workers were forbidden from sharing confidential information outside the organization and warned that anyone who did so could be terminated and possibly subject to legal action.

Flex Frac fired an employee for violating this clause. In turn, the employee filed a charge with the National Labor Relations Board (NLRB) alleging that, by terminating her for violating the confidentiality clause, the company unlawfully interfered with and restrained her exercise of rights protected by Section 7 of the National Labor Relations Act (NLRA). Sec. 7 provides for an employee's right to self-organize and collectively bargain or refrain from doing the same.

The NLRB then issued a complaint alleging that Flex Frac maintained a rule prohibiting employees from discussing employee wages in violation of Section 8(a)(1) of the NLRA. Sec. 8(a)(1) provides that it's an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their Sec. 7 rights.

The NLRB found that, even though there was no reference to wages in the confidentiality clause, the clause still violated Sec. 8(a)(1) because it contained language that could reasonably be construed by employees as restricting their Sec. 7 rights. Flex Frac filed a petition for review with the U.S. Court of Appeals for the Fifth Circuit, seeking that the decision be reversed.

One could construe

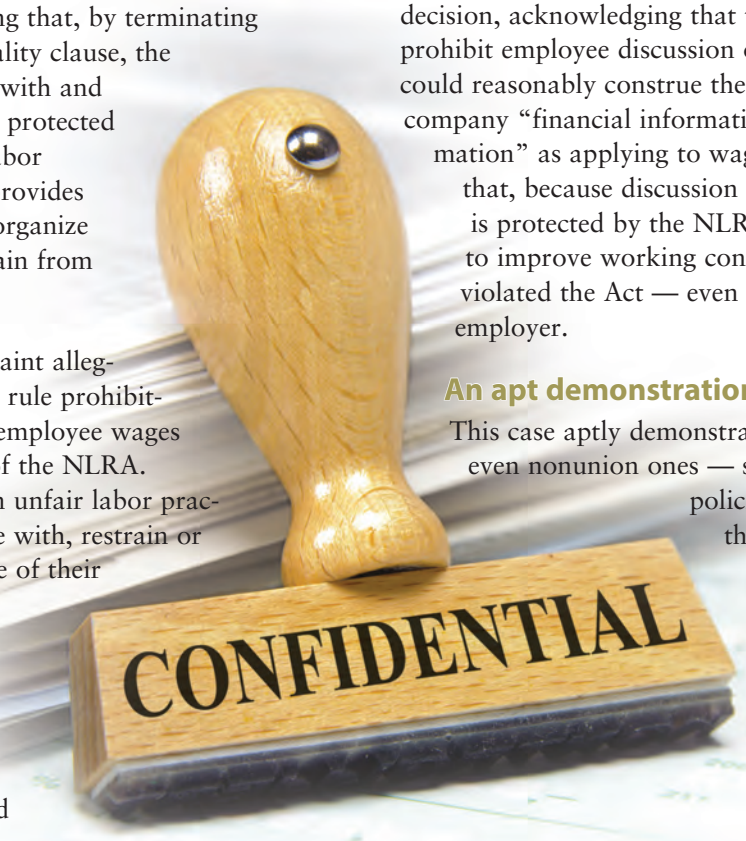
The Fifth Circuit had previously held that workplace rules that forbid discussion of confidential wage information between employees clearly violate Sec. 8(a)(1). The issue in this matter was whether the confidentiality clause signed by Flex Frac employees actually prohibited that kind of wage discussion.

The court considered the NLRB's decision in *Lutheran Heritage Village–Livonia*. Here, the NLRB held that, when a rule doesn't explicitly violate Sec. 8(a)(1), it will still be considered a violation if employees could reasonably construe the language to prohibit Sec. 7 rights.

In light of this, the Fifth Circuit affirmed the NLRB's decision, acknowledging that the policy didn't explicitly prohibit employee discussion of wages. But an employee could reasonably construe the prohibition on sharing company "financial information" and "personnel information" as applying to wages. The court determined that, because discussion of wages among employees is protected by the NLRA to allow employees to try to improve working conditions, Flex Frac's policy violated the Act — even though it was a nonunion employer.

An apt demonstration

This case aptly demonstrates that all employers — even nonunion ones — should review their current policies to determine whether they're in compliance with the NLRA. It's important to avoid violations of employees' protected Sec. 7 rights, or even the potential of being construed to violate them. ♦



Scrutinizing a pension plan for age discrimination

The prevalence of pensions has decreased markedly in recent years as more and more employers have turned to defined-contribution plans, such as 401(k)s. When the County of Baltimore stuck by its pension plan, the government entity eventually found itself on the receiving end of a lawsuit.

In *EEOC v. Baltimore County*, the U.S. Court of Appeals for the Fourth Circuit scrutinized whether the county discriminated against older employees by requiring them to pay higher plan contribution rates than younger participants.

Rates remained the same

The county's pension provided that employees were eligible for retirement at age 65 and would receive pension benefits regardless of the length of their employment. Each participant's contribution rate was determined by the person's age when he or she joined the plan. This method was adopted because older employees' contributions would earn interest for fewer years than those of younger participants.

The pension was amended a few times, decreasing the retirement age for certain employees and allowing others to retire after a specific number of service years, regardless of age. But participants' contribution rates remained the same.

In 1999 and 2000, two county correctional officers filed charges of discrimination with the EEOC, alleging that the pension discriminated against them in violation of the Age Discrimination in Employment Act (ADEA). The plan, the plaintiffs contended, required them to pay higher contribution rates than younger employees. The EEOC filed a complaint against the county on behalf of the correctional officers and other similarly situated employees who were in the protected age group of 40 years and older when they enrolled in the pension.

Court examines claim

For plaintiffs to prevail on an age discrimination claim, they must establish that the employer in question engaged in disparate treatment because of the employees' age. They also need to show that termination wouldn't have occurred "but for" the discriminatory motive.

In this case, the district court initially determined that the plan didn't violate the ADEA. The court held that the disparate rates were based on permissible financial objectives involving the number of years an employee would work before reaching retirement age. On remand following an earlier appeal, however, the district court found that the plan *did* violate the ADEA.

Motivation determined

The county filed an interlocutory appeal arguing that age wasn't the "but for" cause of the discriminatory treatment. Rather, the county argued, the difference was based on the reasonable factor of the "time value of money." The county contended that older employees' contributions earned less interest because they were invested for less time, so the pension justifiably required higher contribution rates for older employees.

The Fourth Circuit affirmed the district court's decision. The appellate court held that, if the only possible basis for retirement was reaching a certain age, the plan may have been justified. Because the county amended the retirement plan to allow certain employees to retire based solely on years of service, however, there was no longer a reasonable factor other than age for the different contribution rates. After all, the court pointed out, an older worker who retired after five years of service would have contributed more because of his or her age than a younger worker who also retired after five years of service.

The Fourth Circuit found that the number of years until an employee reached retirement age wasn't the basis of the disparate rates. Thus, the rates weren't motivated by the "time value of money" but by age.

Mind the details

Whether you offer a pension or a defined-contribution plan, regularly and carefully review your plan's details to ensure it doesn't discriminate on the basis of age. Also verify that any age-based differences are related to actual financial variations in benefits received. ♦

Vacation time or FMLA leave?

Eleventh Circuit grapples with a question of qualification

An employee requesting leave under the Family and Medical Leave Act (FMLA) may appear to be a relatively straightforward event. He or she needs time off to address a medical condition and you, the employer, will need to follow certain rules in granting it.

But, as *Hurley v. Kent of Naples, Inc.* shows, not every leave request is quite so clear. In this case, the U.S. Court of Appeals for the Eleventh Circuit had to grapple with a question of whether an employee, who provided sufficient notice of leave, was truly qualified for FMLA protection.

Sending an e-mail

The case arose from the plaintiff's decision to send his employer an e-mail with the subject line "Vacation Schedule." The message stated: "Attached is my vacation schedule going forward. The dates are subject to change." The schedule listed eleven weeks of vacation over the next two years.

After his employer denied the request, the plaintiff sent a follow-up e-mail stating that his previous message hadn't been a request but notice of medically required time off. The plaintiff attempted to clarify that he'd been "advised by medical/health professionals" that his need to avail himself of earned vacation time was "no longer optional."

The following day, the two parties discussed the e-mail and the plaintiff was terminated. His employer claimed that he was fired because of insubordination and poor performance.

A week after he was terminated, the plaintiff went to his doctor and received an FMLA form which stated that he suffered from depression for which he'd received treatment. The doctor, however, couldn't determine a duration or frequency of incapacity because of this illness. Furthermore, the physician wasn't notified that the plaintiff had been terminated.

Making the arguments

The plaintiff filed suit alleging that his employer had:

1. Interfered with the exercise of his right to unpaid FMLA leave because they terminated him after he exercised that right, and
2. Retaliated against him for exercising his right to FMLA leave by terminating him.

In turn, his employer argued that the plaintiff's leave request wasn't protected under the FMLA because it was for vacation and he didn't have any periods of incapacity. The plaintiff countered that his leave *was* protected because he had a chronic serious health condition.

Both parties moved for summary judgment, and the lower court denied both applications. After trial, a jury found that the plaintiff's leave request didn't cause his termination. But the jury also awarded the plaintiff damages for his termination. As a result of this inconsistent finding, his employer made a motion for either a new trial or to remit the case to another court for a decision. The district court denied these motions, and the employer appealed.

Qualifying for protection

The Eleventh Circuit found that the district court had erred by denying the employer's motion for judgment as a matter of law. It reversed and vacated the district court's holding.

Notice to an employer of unqualified leave doesn't grant a plaintiff FMLA protection.

Specifically, the appellate court was unmoved by the plaintiff's argument that he didn't have to actually qualify for leave because he'd provided sufficient notice of said leave to his employer. The Eleventh Circuit stated that his causes of action for interference and retaliation both required the plaintiff to establish that he was, in fact, qualified for FMLA leave in the first place. Notice to an employer of unqualified leave doesn't grant a plaintiff FMLA protection.

The court held that the plaintiff hadn't shown that his vacation request qualified for FMLA protection. The act doesn't extend its protections to leaves that are medically beneficial only because the employee in question has a chronic condition. Although the plaintiff here suffered from

depression and anxiety, his requested leave wasn't alleged to be for a period of incapacity. The plaintiff even admitted that his vacation wasn't for a period of incapacity, and that he and his wife had randomly picked the dates.

Furthermore, the plaintiff's doctor testified that he hadn't seen the scheduled vacation dates and that he wouldn't have certified FMLA leave for any future dates. Thus, the Eleventh Circuit determined that, because the plaintiff had failed to establish a specific connection between the vacation and either treatment or a period of illness, his vacation request didn't qualify for FMLA protection and he was entitled to no damages.

Asking for evidence

This case makes clear that mere notice of a potentially qualifying leave generally won't be enough for an employee to assert a claim of interference if the leave isn't granted. Notice must address *FMLA-protected* leave; otherwise, any notice by an employee for vacation could trigger protection under the act.

Also bear in mind that you don't have to grant leave to an employee for a chronic condition unless the leave is specifically connected to a period of incapacity or to treatment. To help determine whether leave will qualify for FMLA protection, ask the employee for evidence that he or she will be treated for the serious condition during the leave or will be specifically incapacitated during the period in question. And, as always, consult your attorney when assessing the validity of requested leaves. ♦

Brought to you by:

MARTIN | PRINGLE
ATTORNEYS AT LAW

MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, L.L.P.

Wichita
100 N. Broadway,
Suite 500
Wichita, KS 67202
T 316.265.9311
F 316.265.2955

Overland Park
6900 College Boulevard,
Suite 700
Overland Park, KS 66211
T 913.491.5500
F 913.491.3341

Kansas City, Missouri
4700 Belleview,
Suite 210
Kansas City, MO 64112
T 816.753.6006
F 816.502.7898

www.martinpringle.com

Employment Practice Group

Our focus is on taking a proactive approach with our business clients by keeping them up to date on the latest relevant changes in the law through this newsletter and educational seminars. Please call any of the following employment group attorneys with comments or questions.

Employers sometimes find it frustrating that they spend so much time trying to comply with a variety of complex federal and state laws and regulations, when all the other demands of successfully running a business in today's environment are so pressing. Our lawyers have expertise in a wide variety of employment-related services, and can help ensure that our business clients' employment applications, contracts, performance evaluations, job descriptions and employee handbooks conform to all applicable laws. In addition, we try to help our clients avoid costly and disruptive litigation with timely advice about layoffs, harassment and discrimination claims, wage and hour laws, OSHA issues, workplace violence, drug testing programs, employee discipline and other problems that arise all too often in today's workplace.

We have broad experience with state and federal agencies, including the Equal Employment Opportunity Commission, the Kansas Human Rights Commission, the Kansas Department of Human Resources, the Department of Labor and OSHA. If litigation is necessary, we also have significant litigation experience in both state and federal court.

Employment Group Attorneys

Wichita, KS
Jeff C. Spahn, Jr.
Terry L. Mann
Terry J. Torline
Richard K. Thompson
Anna C. Ritchie
Matt A. Spahn

Kansas City, MO
Douglas D. Silvius

Overland Park, KS
Lora M. Jennings
Matthew T. Kincaid

Martin Pringle Law Firm

Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. is a regional firm with offices in Wichita and Overland Park, Kansas, and Kansas City, Missouri. Formed in Wichita in 1951 by the late Robert Martin and Kenneth Pringle, the firm has always had a strong practice in products liability law and oil and gas law. From that foundation, the firm has grown to more than 45 lawyers with expertise in a wide range of litigation and transactional practices. Martin Pringle is AV Peer Review Rated.

The litigating partners at Martin Pringle have tried hundreds of cases, including many of the most complex in their fields. Our litigators' vast trial experience results in more focused strategies, and a more disciplined, cost-effective discovery and preparation process. Our willingness to go to trial, and ability to realistically assess the merits of a case, can also increase the chances for a favorable settlement. As our records show, we are accustomed not only to trying cases, but delivering the results our clients want.

"A law partnership should be more than just a set of technical skills. It should be a compatible group of people providing legal resources their clients need, all at the highest standards of excellence and at reasonable cost. For more than 60 years, a wide variety of businesses and individuals have found Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. to offer not only the expertise but also the people, values, and style of operation that give them comfort and confidence."

Martin Pringle engages in general, civil, trial and appellate practice in a wide range of areas, including aviation law, business and commercial law, employment law (including workers compensation defense), banking, creditor's rights, medical malpractice defense, environmental law, insurance defense law, insurance coverage disputes, energy law, products liability, construction law and personal injury (including automobile defense). Lawyers in the firm also have experience in the areas of bond failure and condemnation. The firm's practice includes a considerable amount of litigation in federal and state courts, including many proceedings outside the state of Kansas.

In addition to the litigation practice, Martin Pringle has a significant business and regulatory compliance practice. The services provided include counseling and representation in the areas of business planning, business incorporations and reorganizations, taxation, real estate, communications, franchising, health law, intellectual property issues, mergers and acquisitions, bankruptcy, immigration, municipal finance, and technology law.

We also provide counsel and representation to individuals in adoptions, estate planning, and elder law.