



# RIGHTS STUFF

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## Redbox Sued for Disability Discrimination

Redbox uses kiosks to rent DVDs to customers around the country. Very few of the movies available to rent from Redbox have closed-captioning. Redbox also offers Redbox Instant, allowing customers to stream movies or tv shows online. Most of these programs are not closed captioned.

Francis Jancik is a man with a hearing impairment. He would like to be able to rent movies from Redbox, either through its kiosks or via the internet, but has not done so because very few of the available programs are closed captioned. He sued, alleging discrimination on the basis of his disability in violation of the Americans with Disabilities Act (ADA).

Redbox said that nothing in the ADA regulates the content or characteristics of the goods a business provides. The ADA requires that bookstores be accessible to people with disabilities, but it does not require that bookstores sell books in Braille. The ADA does not require shoe stores to sell single shoes to a person with only one leg. The Court agreed, saying that the ADA "does not apply to the goods in a retailer's inventory."

Jancik said that it was hard to provide closed captioning on video tapes, but it's much easier to do on DVDs, and thus Redbox should do it. Again, the Court said the ADA does not tell businesses what products to sell. "The fact that it is now easier to

make a product 'accessible' does not alter the plain meaning of the regulation," according to the Court. The Court said that Jancik should make his argument to the U.S. Department of Justice (DOJ), which issues regulations on accessibility, and not to the Court. (DOJ is currently considering regulations on closed captioning for movie theaters, but apparently not for DVDs.)

Jancik did win a partial victory. Businesses that customarily make special orders on request for unstocked goods have to do so for people with disabilities, if the unstocked goods can be obtained from a supplier with whom the company has done business before. "In other words, a business that ordinarily takes special orders on unstocked DVDs must also take special orders on closed-captioned DVDs, if such DVDs can be obtained from a supplier with whom the business customarily does business."

The case is Jancik v. Redbox Automated Retail, LLC, 2014 WL 1920751 (C.D. CA 2014).



Don't forget to vote November 4th!

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## Professor Loses Race Discrimination Case But May Win Retaliation Case

DePaul University hired Jami Montgomery, an African American man, to be a visiting professor in 2002. A few months later, he became a tenure-track professor.

While working for DePaul, Montgomery urged the school to increase its efforts to achieve a racially diverse faculty. When his tenure application was under review, he said his efforts to improve diversity was one of his greatest services to DePaul. At a public meeting regarding Helmut Epp's possible promotion to provost, Montgomery asked Epp what mechanisms a university should use to make sure officials are held accountable for improving diversity. Epp said that improving diversity was an important goal, but he thought the term "accountable" was too strong. When Montgomery pressed him on the issue, Epp allegedly became red in the face, ignored Montgomery and took questions from other attendees.

DePaul's criteria for tenure decisions are the quality of the candidate's teaching, scholarship and research and service to the university. The faculty of Montgomery's department voted 26 to 7 in favor of awarding him tenure. But the committee at the next step of review voted 5 to 1 against him, noting that 7 members of his department had voted against him and only nine people in his department thought his scholarship was "strong." The committee concluded that Montgomery's strong record of service to the community did not make up for his teaching and scholarship, "which appear to be weak or, at the

best, minimally meeting requirements." He was denied tenure.

After being denied tenure, Kevin Stevens of DePaul's accountancy and management department hired Montgomery as an adjunct faculty member for a winter accounting course. Stevens did not know at the time that Montgomery had filed a race discrimination complaint against DePaul. When Stevens learned of the complaint, he sent an e-mail to an administrator that said, "I just heard about Jami's suit - this is news (and not good news) to me . . . Sorry about this. We will of course not hire him back in Spring." Stevens said in a deposition that he didn't want "to have a faculty member who felt so strongly about the university, who felt wronged by the university. We are a collegial school and it would be very difficult to have someone who's suing, who was that unhappy to be in the school."

Montgomery argued that he was qualified to receive tenure because he had been considered "strong" in two of the three criteria the school considers. But the Court said that DePaul had the right to have high standards and to refuse to grant someone tenure who only "minimally met" the scholarship requirements.

He argued that Epp was punishing him for his support of diversity efforts. But the evidence showed that Epp himself supported the diversity efforts, that Epp originally hired

Montgomery and that Epp played no role in the tenure decision.

Montgomery argued that the fact that none of the school's 85 tenured faculty members is African American established racism on the part of the school (one of the members is from Nigeria). The Court said that such statistics, standing alone, are not sufficient to establish racism.

He argued that he had assisted several DePaul employees who had been fired for allegedly discriminatory reasons, and DePaul retaliated against him for doing so by denying him tenure. Yet none of the officials knew of his assistance, and thus his "activity could not have had a causal connection to the tenure denial."

He argued that DePaul retaliated against him for pushing for increased diversity in hiring. The Court said that Title VII, the federal fair employment law, specifically does not require employers to engage in affirmative action. Pushing the school to do more than the law requires, the Court said, is not a protected activity under Title VII.

However, there was evidence that DePaul refused to hire Montgomery again for an adjunct faculty position because of his discrimination complaint, which would be a violation of Title VII. That issue will have to be resolved by a jury.

The case is Montgomery v. DePaul University, 2012 WL 3903784 (ND. Ill 2012).



## Is Working from Home Ever a Reasonable Accommodation?

Pamela Core worked for the Champaign County Board of County Commissioners in its Department of Jobs and Family Services. She has asthma and a severe chemical sensitivity to certain perfumes and other scented products.

In 2008, Core began experiencing problems breathing at work. She said that the perfume her co-workers wore, Japanese Cherry Blossom, triggered her breathing problems. She asked her supervisor to ask her co-workers not to wear that perfume. Nothing was done, however, and her breathing problems got worse. She said that in 2010, exposure to the perfume required her to go to the emergency room for treatment.

After Core's ER visit, her co-workers mocked her in posts on Facebook and allegedly intentionally wore the perfume to work, knowing what her reaction would be. Her nurse practitioner wrote a letter to her supervisor, recommending that Core's co-workers be advised of her allergy. The

supervisor asked for more information and noted that given that the public visited Core's work site, it would be impossible to completely remove Core's exposure to the perfume. The nurse said that Core's exposure "could be controlled simply by requesting all staff to avoid some of those major triggers for her out of respect."

The department chose to provide a different accommodation, telling Core's co-workers not to go into her office and to communicate with her only by telephone or e-mail. Core was told not to go into their offices and to have discussions with co-workers only in better ventilated areas such as conference rooms.

Core asked to be allowed to work from home instead, so she could totally avoid exposure to the perfume. The department said she could not work from home, but she could use an inhaler at work and go outside if necessary. It said it would ask her co-workers not to wear this perfume at work and would consider any additional recommendations

of a pulmonologist. She did not think the department was adequately accommodating her disability and sued under the Americans with Disabilities Act (ADA).

In 1995, a federal court had held that "it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home." In other words, allowing an employee to work at home would almost never be a reasonable accommodation required under the ADA for an employee with a disability. But the Core Court noted that technology has changed a lot since 1995, and it no longer "may take a 'very extraordinary case'" for an employee to be able to show that working from home is reasonable. Of course, the answer to this question depends upon the nature of the job, and in this case, will be decided by further judicial proceedings.

The case is Core v. Champaign County board of County Commissioners, 2012 WL 3073418 (S. D. Ohio 2012).

## Poster Requirements for Employers

Covered employers are required to post notices describing federal laws prohibiting discrimination on the basis of race, color, sex, national origin, religion, age, equal pay, disability or genetic information. The posters must be displayed in a conspicuous place in the workplace. The Equal Employment

Opportunity Commission (EEOC), which enforces this requirement, recently raised the fine for failure to post the required notice from \$100 to \$210.

Many companies sell these posters, but you can also order

up to five free copies from the EEOC. The poster is available in English, Spanish, Arabic and Chinese. Just go to [eeoc.gov](http://eeoc.gov) and search for "poster."



## May Employers Prohibit Drinking, On and Off the Job?

A nuclear power plant had an agreement with its employees' union that employees could be subject to "random, for cause and follow-up" alcohol and drug testing. If an employee had two confirmed positive alcohol tests, he or she could be fired.

Employees could be referred to the Employee Assistance Program (EAP) for counseling based on these tests; some employees voluntarily went to EAP. EAP counselors had the power to, if appropriate, deem employees who sought counseling as alcoholics or as people who had ongoing problems with alcohol. These employees would be issued a letter recommending that they permanently abstain from alcohol, on and off

the job, as a condition for maintaining unescorted security status at the nuclear facility. An employee who was given a "permanent alcohol abstinence letter" could be fired for off-duty drinking, even if he had never been impaired at work or had a problem doing his job.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the Americans with Disabilities Act (ADA), said in a recent informal discussion letter that such a practice might violate the ADA. There is no evidence that the employees had any problems doing their jobs. The policy allowed an employee who reported to work under the influence of alcohol to be

written up, while an employee perceived to be an alcoholic and who had one drink after hours but who never reported to work under the influence could be terminated. The EEOC said that the employer needs to be able to show that it has done an individualized assessment of the risks that a particular employee might pose. It might be easier to meet that test in a nuclear power plant than, say, a fast food restaurant, but it still has to be done.

The EEOC emphasizes in its informal discussion letters that the letters do not constitute a finding of discrimination, which can be made only following the full investigation of a charge.

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## Prohibiting Pay Secrecy Policies

It's illegal, of course, to pay employees less because of their sex, race, religion, etc. But some companies prohibit employees from talking about their pay with co-workers, making it difficult if not impossible for employees to know if they are being paid less than their male counterparts doing the same job.

Some members of Congress have proposed the Pay Fairness Act, which would prohibit employers from implementing such pay secrecy policies. Until that Act is passed - and with a divided Congress, that may take some time - the U.S. Department of Labor (DOL) has proposed rules that would address the issue to a limited extent.

The rules would implement Executive Order 13665, signed by President Obama in April, and would prohibit federal contractors from discharging or discriminating in any way against employees or applicants who inquire about, discuss or disclose their own compensation or the compensation of another employee or applicant. These rules would apply to the 28 million employees of federal contractors and subcontractors, but not to other employees. These employees would be able, according to the DOL press release, "to discuss their compensation without fear of adverse action." Removing this fear can "contribute to reducing pay discrimination and ensuring that

qualified and productive employees receive fair compensation."

Bureau of Labor Statistics studies have shown that women make 77 cents for every dollar that men make. African American women earn 68 cents for every dollar earned by non-Hispanic, white men. Many factors contribute to this wage gap, but DOL believes that pay discrimination remains a significant problem for the working poor and the middle class.

To learn more about the proposed rule go to [www.dol.gov/ofccp/PayTransparency/NPR](http://www.dol.gov/ofccp/PayTransparency/NPR).