



RIGHTS STUFF

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Beautician Wins ADA Suit

Debra Kauffman worked as a beautician for Petersen Health Care, a nursing home. She regularly moved residents who use wheelchairs from their rooms to the beauty shop and back again. Her other duties included cleaning out birdcages, carrying breakfast trays to residents and helping out in the laundry.

After an operation, Kauffman's doctor put her on medical restrictions, saying she could not push more than 20 pounds. He told her she should not be pushing and pulling people in wheelchairs over a repetitive time because that could injure her. The residents who use wheelchairs weigh from 75 to 400 pounds. When she told her supervisor about her restriction, he allegedly said, "We just don't allow people to work with restrictions, and you have a restriction on here . . . [A]s long as you've got the restriction we can't employ you." She asked if someone else could move the patients back and forth, but he said no. (He later said it would have been a hardship on the facility to hire someone else to help with transporting residents who use wheelchairs.) She asked if she could transfer to working full-time in the laundry, a job she could do without any accommodations. He rejected that proposal. With no alternative, she quit. Until she was replaced, the remaining hairdresser received assistance from other staff members in wheeling residents to and from the beauty parlor.

Kauffman sued, alleging discrimination

in employment on the basis of her disability, in violation of the Americans with Disabilities Act (ADA). The trial court found that wheeling patients was an essential part of her job, and granted summary judgment to Petersen. But the appellate court disagreed.

The Court of Appeals found that Kauffman spent less than two hours of her 35-hour work week wheeling patients back and forth. Petersen did not show that it would have been unreasonable to find someone else to do that task, and until it replaced Kauffman, they did find someone else to do exactly that. The Court of Appeals remanded the case to the trial judge to evaluate whether it would have been unreasonable to have done this on a longer term basis.

The Court of Appeals seemed concerned that the supervisor allegedly said that Petersen could not employ someone with a medical restriction. The ADA requires employers to provide reasonable accommodations to employees with disabilities, yet Petersen did not apparently even consider doing so in this case. Nor did Petersen engage in the required interactive process with Kauffman, to see if it could come up with an accommodation that met her needs, and the facility's needs.

The case is Kaufmann v. Petersen Health Care VII, LLC, 769 F. 3d 958 (7th Cir. 2014). If you have any questions about the ADA, please contact the BHRC.

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Gary Police Officer's Sex Discrimination Case Can Continue

LaRia Crews is a police officer in Gary. In 2012, her job title was Indiana data communications system coordinator for the administrative services division of the police department. Her job duties included programming and distributing police radios.

When Pete Sormaz, a police sergeant, asked Crews to give him a radio that was programmed with secure channels, she refused. She said that under departmental policy, she could not give him this kind of radio without a written order from the police chief. He yelled at her and demanded that she give him the requested radio by the end of the day. Then he

went to the chief and demanded that Crews be transferred. The chief transferred Crews to a patrol position, filling her old job with a less qualified male officer.

Crews filed an administrative complaint alleging sex discrimination. A few months later, an investigator position opened up, and she applied, but was rejected. She was initially told that she didn't qualify for the job because she was on light duty, but that was not true. Then she was told they weren't going to fill the position at all. However, they later gave the job to a male officer with less seniority than she. So she took her case to court.

The City argued that by merely being transferred, Crews had not suffered an adverse employment action, and therefore had no case. But the court noted that she alleged her new working conditions on patrol were not as desirable as her working conditions as a coordinator. At least at an early stage in the proceeding, that was enough to let the case proceed. She also won the right to argue that Gary retaliated against her by not offering her the investigator job.

Although some of her claims were dismissed, Crews won the right to have a jury hear many of them.

Discriminatory Fashion

The U.S. Supreme Court will decide two cases this session dealing with appearances and religion.

In one, the question is whether a Muslim prisoner in Arkansas has the right to wear a one-inch beard. The prison rules say no beards, but the inmate asked for an exception, noting that the Muslim faith requires him not to cut his beard. He was willing to compromise by having only a short beard. The prison rejected his compromise, and the inmate sued, citing a federal law that prohibits prisons from imposing substantial and unjustified burdens on prisoners' religious rights.

The Court heard arguments in October, and learned that 40

prison systems allow beards of any length. Arkansas argued that beards pose security risks: inmates could hide something in their beards, or shave them to alter their appearance. The justices did not seem convinced. Justice Alito asked why the prison could not just give inmates a comb and tell them to comb their beards. If there was a "tiny revolver" hidden in the beard, "It will fall out." And an inmate could alter his appearance by shaving his head or changing his hairstyle as well.

The other case involves a Muslim woman, Samantha Elaut, who wanted to work at Abercrombie while wearing her hijab, or head covering. She asked a friend who worked at the store if she could work there while wearing a hijab.

He asked a manager who said that a co-worker wore a yarmulke on the job, so he thought her hijab would be fine, as long as it was not black. Elaut did well during the interview, but a higher-up supervisor said that a headscarf would be inconsistent with the store's rules on employees' appearances, in part because the store doesn't sell scarves. She didn't get the job and sued, alleging discrimination in employment on the basis of religion. She won at the trial level, lost a split decision at the Court of Appeals, and now will have a chance to argue her case before the Supreme Court.

If you have any questions about religious discrimination, please contact the BHRC.



Requiring Woman to Use Sign Language Interpreter Does Not Violate Due Process

R.K. is a deaf woman with many health issues who faced losing her parental rights. When her daughter was a few months old, the two of them were living in a homeless shelter. Staff at the shelter were concerned about R.K.'s ability to mother her baby and called Child Services. The baby was determined to be a child in need of services (CHIN) and removed from R.K.'s care.

The Court said that for R.K. to be reunified with her baby, she would have to find housing, find a job, complete a parenting assessment, complete counseling and attend all scheduled parenting time. She did not complete these required tasks. Eventually, a hearing was held to consider termination of her parental rights.

At the hearing, R.K. said she preferred to speak instead of using an interpreter. Her attorney noted that R.K. could be difficult to understand. After R.K. was sworn in and stated her name, the judge said they would need to use the interpreter, as he could not understand her. R.K. gave the rest of her testimony through the interpreter. The judge terminated her parental rights, and she appealed.

She argued that she was denied her due process rights when she was required to use sign language and an interpreter instead of speaking at her hearing. The Court of Appeals disagreed. Since R.K. did not object to the procedure during the trial, she had waived her ability to challenge the ruling.

And even if she had objected, the Court said, her due process rights were not denied. The Court noted that "Interpreters serve not only defendants, but our trial courts as well." The trial judge had the discretion to make that decision. The Court acknowledged that R.K. preferred to communicate orally rather than through sign language, "but we can conceive of no other method the trial court could have used that would have ensured that it heard and understood Mother's testimony. And Mother fails to establish that testifying this way prejudiced her." The case is In the Matter of the Termination of the Parent-Child Relationship of S.E. (Minor Child) and R.K. (Mother) v. Indiana Department of Child Services, 15 N.E. 3d (IN Ct. App. 2014).

Customer Preference No Defense to Discrimination Complaint

Alberto Tarud-Saieh lost his right arm in a car accident. He worked as a security guard for Florida Commercial Security Services. Florida Commercial assigned him to work for a community association. When Tarud-Saieh reported to work, the president of the association called Florida Commercial and said, "The company is a joke. You sent me a one-armed security guard." Florida Commercial removed Tarud-Saieh from this position and failed to reassign him, effectively terminating him.

Tarud-Saieh filed a complaint with the U.S. Equal Employment

Opportunity Commission (EEOC), alleging discrimination in employment on the basis of disability in violation of the Americans with Disabilities Act (ADA). The EEOC found in his favor and when it was unable to reach a settlement, took the case to court. A jury recently found in Tarud-Saieh's favor.

The EEOC argued at trial that it is well-settled law that reliance on discriminatory customer preferences and stereotypes is not permitted under fair employment laws. A jury agreed with the EEOC, awarding Tarud-Saieh

\$35,922. The EEOC will also be seeking an injunction prohibiting further discrimination by Florida Commercial.

Kristen Foslid is an attorney with the EEOC. After the trial, she said, "I worked with Mr. Tarud-Saieh for over a year and a half and personally saw how the discrimination affected him. He was vindicated when the jury agreed with him that he could perform the job he is licensed to do. He hopes that other employers will get the message that they cannot rely on stereotypes and assumptions, and must treat people based on their actual abilities."



Doctor/Partner Not An Employee for Purposes of ADA

Linda Bluestein is a doctor who began working for Central Wisconsin Anesthesiology in 1996. Her initial agreement referred to her as an employee. But about three years later, she became a full partner of Central Wisconsin as well as a shareholder and member of the board of directors. As a shareholder, she had a vote on all matters that came before the board. She began sharing in profits and served as the board's secretary-treasurer for three years.

In 2009, Dr. Bluestein was hurt in a kayak accident. She received approval to take intermittent leave for several months, but she was not able to return to work at full strength. So in 2010, she sent her partners a letter, saying she needed to take "an open-ended medical leave of absence."

The board voted to deny her request. Instead, they voted that she would be allowed to resign, and if she didn't resign by mid-September, she would be terminated. She didn't resign and was terminated. She sued, alleging violations of the Americans with Disabilities Act, the Rehabilitation Act and Title VII of the Civil Rights Act. She lost.

Only employees are protected from discrimination by the laws cited in Bluestein's lawsuit. She was not an employee. Rather, she was a full physician-shareholder and board member, allowed to vote on all issues coming before the board. She even voted on her own termination.

She said that since she had to follow the rules set by the board, she was an employee. But as a

board member, she helped write those rules. No one supervised her work as an anesthesiologist. She was not always in the majority on board votes, but that did not make her an employee. And if she was not an employee, she was not protected by fair labor laws.

Even if she had been found to be an employee, the laws do not require employers to approve open-ended leaves of absence.

The case is Bluestein v. Central Wisconsin Anesthesiology, 769 F.3d 944 (7th Cir. 2014). If you have questions about the ADA, please contact the BHRC.

EEOC Sues Home Care Agency for Allegedly Violating GINA

GINA stands for the Genetic Information Nondiscrimination Act, a federal law passed in 2008 that prohibits employers from requesting genetic information, including family medical history, from employees or applicants, and from using that information in the hiring process. The law is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

The EEOC has filed a law suit against BNV Home Care Agency, Inc., a New York City company, for allegedly violating GINA.

According to the lawsuit, BNV required applicants and employees to complete an "Employee Health Assessment" form. The form asked the applicant or employee to indicate any illnesses experienced by family members, including health conditions such as diabetes, kidney disease, heart disease, high blood pressure, arthritis, mental illness, epilepsy and cancer. Applicants were required to complete the form after being offered a job but before being hired, and employees had to complete the form each year.

In announcing the law suit, the EEOC representatives said, "GINA is clear: employers cannot ask applicants or employees for their family medical history. The EEOC will pursue these cases to the fullest extent of the law to ensure that such genetic inquiries are never made of applicants or employees. GINA has been in effect since 2009. Employers by now should have reviewed their procedures and practices to make sure that they or their agents do not violate the law by asking for family medical history."