



RIGHTS STUFF

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Sometimes It Is Legal to Discriminate On The Basis Of Sex

We hope that everyone reading this newsletter knows that typically, it's illegal to discriminate on the basis of sex. But there is one exception: when sex is a bona fide occupational qualification, or BFOQ. This narrow exception is rarely invoked, but it did apply in a recent case involving prison security employees.

The State of Washington faced problems in its women's prisons: sexual abuse and misconduct by prison guards, breaches of inmate privacy and security gaps. Prison authorities, after considerable study, found that one major reason for these problems was the lack of female correctional officers to oversee female offenders and administer sensitive tasks, such as observing showers and dressing and performing pat-downs and strip searches. The state identified 110 positions to patrol housing units, prison grounds and work sites that could be staffed only by women. The Teamsters sued, saying this decision constituted sex discrimination against its male union members, and lost.

The Court reviewed the state's decision making process, which included legal research, consultation with other states, consultation with the state's civil rights commission and a review of job duties and history, and found the state had made a compelling case that requiring only women to fill these positions was a BFOQ. It was not making a decision based on stereotypes; it had a factual basis for making the decision it did.

The Teamsters argued that the state had made its decision during a time of crisis and panic that "was little more than a desperate attempt to settle the state court class action" concerning abuse in the prison. The Court said, "If sordid details of sexual abuse and constitutional violations do not inspire a 'crisis' and feelings of 'panic,' then what does?" The Court noted that the state had "targeted only guard assignments that require direct, day-to-day interaction with inmates and entail sensitive job responsibilities such as conducting pat and strip searches and observing inmates while they shower and use the restroom."

One of the Teamsters' experts argued that "female inmates cannot be shielded from the world in which we live. If they are to reintegrate into society, they have to be taught how to deal with abusive staff, male or female. They have to be taught what constitutes a healthy interaction and what does not. They cannot learn those skills if they are sheltered from contact with males in a position of authority. Sexual abuse is present in all areas of our society . . . just as females have to be taught how to deal with those abuses in the larger society, female inmates must be taught as part of the rehabilitation process how to deal with abusive staff: males and females, custody staff and civilian staff." The Court responded to this argument by saying "We reject any

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EEOC and United Airlines Settle Lawsuit

United Airlines had a policy that said if an employee could no longer do her job because of a disability, she could apply for vacant job positions with the company that she was qualified to do. But she would have to compete with other applicants for that job; she would not receive any preferential treatment.

The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the employment provisions of the Americans with Disabilities Act (ADA), said that United Airlines' policy was illegal. The EEOC argued that instead, the airlines should transfer the employee with a disability to the vacant position as a reasonable accommodation under the ADA.

The EEOC filed a lawsuit in San Francisco in 2009. United Airlines got the case moved to Illinois, where the trial court originally dismissed it. But the Seventh Circuit Court of Appeals reversed that decision, ruling that "the ADA does indeed mandate that an employer assign employees with disabilities to vacant positions for which they are qualified, provided that such accommodation would be ordinarily reasonable and would not present an undue hardship to the employer." United appealed to the Supreme Court, but in 2013, the Supreme Court refused to review the case.

Two years of settlement discussions followed, and in June of 2015, the parties agreed to settle. United Airlines will pay \$1,000,000 to former employees with disabilities and will make

changes to its personnel policies. In announcing the settlement, William Tamayo, an EEOC attorney, said, "If a disability prevents an employee from returning to work in his or her current position, an employer must consider reassignment. As the Seventh Circuit's decision highlights, requiring the employee to compete for positions falls shorts of the ADA's requirements. Employers should take note: When all other accommodations fail, consider whether your employee can fill a vacant position for which he or she is qualified."

It's important to note that if the employer doesn't have any vacant positions for which the employee with a disability is qualified, the employer does not have to create a job or fire another employee to create an opening.

What Does Overnight Mean?

Jeffrey Bonkowski worked for Oberg as a wirecut operator and machinist. He has several health-related issues, including a bicuspid aortic heart valve and diabetes. On November 14, 2011, he met with his supervisors to discuss an allegation that he had been sleeping on the job. During the meeting, he began to experience shortness of breath, chest pain and dizziness. His supervisors allowed him to go

home, saying they would continue the meeting the next day.

He didn't feel well at home, either. He couldn't catch his breath or slow down his racing heartbeat. At about 11 p.m., his wife drove him to the hospital. He said they arrived before midnight; the records showed he was admitted shortly after midnight. Medical staff gave him a variety of tests

and released him to go home early in the evening of November 15. The next day, Oberg terminated Bonkowski's employment because he had "walked off the job" the day before, on November 14. He sued, alleging that his rights under the Family and Medical Leave Act (FMLA) had been violated. He lost.

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What Does Overnight Mean? (continued from page 2)

The FMLA allows covered employees to take time off, paid or unpaid, to deal with their own serious medical issues. One definition of a serious medical issue is an issue that causes the employee to have to be in the hospital overnight. So the question for the courts was, does getting admitted into the hospital shortly after midnight and being released that evening qualify as an "overnight" visit?

Since the FMLA regulations don't define what "overnight" means, the courts have to define it themselves. The District Court defined it to mean "a stay from sunset on one day to sunrise the next day." That Court relied on *The Old Farmer's Almanac* to determine that on November 14, the sun set at 5:02 p.m. and rose the next day at 7:07 a.m. Since Bonkowski had not been admitted to the hospital when the sun set on November 14, he had not been in the hospital overnight, and thus was not covered by the FMLA.

The Court of Appeals found

fault with this sunset/sunrise definition, noting accurately that what visit qualified as overnight would vary depending upon the season and your location. The Court noted that in Fairbanks, Alaska, the sun set at 2:40 p.m. on December 20, 2011, and then rose at 10:58 a.m. the next day, more than 20 hours later. But at the same location on June 22, 2011, the sun set at 12:48 a.m. and then rose the same day at 2:57 a.m. So being admitted into a Fairbanks hospital at 12:15 a.m. on June 22 and being released at 3:30 a.m. the same day would qualify as an "overnight" visit. The Court of Appeals thus found that the District court's interpretation of the term "overnight" produced "odd or absurd results."

But the Court also rejected Bonkowski's argument that the question of whether or not he spent the night at the hospital should have been a question for the jury. The Court said that was its job to decide, not the jury's. And its decision was that an "overnight stay" means "a stay in a hospital, hospice, or

residential medical care facility for a substantial period of time from one calendar day to the next as measured by the individual's admission and time of discharge" (not the time the person arrived at the hospital).

The dissenting opinion found that the majority's definition of the term "as inequitable and unworkable as the one it seeks to replace." That judge noted that if Bonkowski had been admitted to the hospital at 11 p.m. and discharged the next day at 7 a.m., he would have been covered by the FMLA under the majority's definition, even though his stay at the hospital would have been considerably shorter. He argued that the term should be defined by a totality of the circumstances, including how many hours the employee was at the hospital, whether he spent at least part of the night hours there, etc.

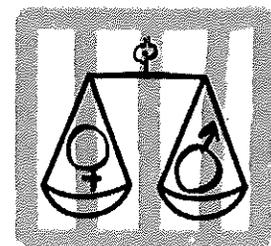
The case is *Bonkowski v. Oberg Industries, Inc.*, 2015 WL 2444503 (3rd Cir. 2015).

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suggestion that female prisoners would benefit from being subjected to abusive prison guards as 'part of the rehabilitation process' so that they may better 'reintegrate into society.'" As the Court said, "To state something so obvious, we never imagined it

would need to be written."

The case is *Teamsters Local Union #117 v. Washington Department of Corrections*, 2015 WL 3634711 (9th Cir. 2015).



Surgeon Loses Federal Funding Because He Refused to Treat HIV+ Patient

San Agustin is a California physician who practices neurological surgery in Monterey Park, California. He participates in the joint state/federal Medicaid program, and because he is a recipient of this funding, he may not discriminate against any qualified patient with a disability.

A man who is HIV+ and who also has back and hip pain was referred to Agustin by his primary care physician. Agustin met with the man, diagnosed him and recommended surgery. Agustin agreed to perform the surgery and to arrange the necessary treatment authorizations. But then Agustin's secretary told him the man was HIV+. Agustin stopped the authorization process

and called the man in for another appointment. When the man confirmed his HIV status, Agustin refused to perform the surgery and told him to go to the county hospital for treatment. He discharged the man from his practice.

The man filed a complaint with the federal Office of Civil Rights, which attempted to negotiate a settlement with Agustin. All Agustin had to do under the proposed terms of the settlement was to agree to not discriminate in the future, to undergo some AIDS training and to display a notice of nondiscrimination in his office. He said he agreed with the proposed agreement "in

principle," but never signed it. Thus, the administrative law judge for the Civil Remedies Division of the Department of Health and Human Services canceled Agustin's federal financial assistance until he satisfies the officials that he will comply with the law in the future.



Examples of Discrimination in Housing

The BHRC doesn't receive many complaints of discrimination in housing, but we do receive reports about this type of discrimination in other jurisdictions. Some recent examples, all from Texas:

- A landlord allegedly terminated a woman's lease after he found out the tenant was HIV positive and had bipolar disorder. He told the tenant. "You would not have even been here if you had told me of your bipolar problems and your positive HIV diagnosis."
- A landlord allegedly required a tenant who is transgender to apply for disability benefits as a condition of renewing the lease. The landlord believed the tenant's gender non-conformity with gender norms to be a disability and added a clause to the lease, "Michael will immediately pursue disability payments . . . not negotiable." When the tenant refused to sign the new lease, the landlord gave him a notice to vacate and threatened to report him to the IRS.
- A landlord allegedly refused to allow a tenant to have a service animal, even though she had the proper medical documentation establishing her need for the service animal. A tester called the landlord and was told they would not rent to anyone with service animals.
- A landlord allegedly refused to help a blind prospective tenant complete his rental application. A tester called the landlord, said she was blind and asked if someone could help her complete the application. The landlord said she would have to get a friend or caseworker to help her.