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THE AMERICANS WITH DISABILITIES ACT: POLICY IMPLICATIONS**Overview**

A broad remedial statute, the Americans with Disabilities Act [ADA] (1990) makes it unlawful to discriminate in employment against any individual covered by the Act. While Title I applies to private employers with fifteen or more employees, Title II of the ADA applies to public sector employers. In addition the ADA “makes it unlawful to retaliate against (*e.g.*, coerce, intimidate, threaten, or interfere with) an individual for asserting his or her rights and protections under the Act.” The ADA is enforced by both the EEOC and the United States Department of Justice. (Vacca and Bosher, 2012)

Act Coverage and Accommodations. To be covered by the ADA an individual must have, or has had, or is perceived as having a physical or mental impairment that “substantially limits” one or more major life activities. Major life activities are defined as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning, and working. The ADA mandates that employers make *reasonable accommodations* (*i.e.*, accommodations that do not place undue hardship [require significant difficulty or expense], or cause a “fundamental alteration in the nature of the job,” or create a “substantial risk of injury,” or “present a direct threat” to the individual or to others) to enable an individual covered by the Act to perform the essential functions of the job. (ADA, 12112[a]) In essence the ADA mandates that an otherwise qualified individual who, with or without reasonable accommodations, meets “basic job requirements” and can perform “essential job functions,” will not be discriminated against. (Vacca and Bosher, 2012)

ADA Litigation. Where litigation involving the ADA has occurred the case facts and judicial analysis more often than not focus on the “subjective criteria” relied on in making the employment decision. Recently I came across a case decided by the United States Court of Appeals for the Sixth Circuit involving a local public school and allegations of employment discrimination and disparate treatment due to “actual or perceived discrimination” covered by the ADA and state law.

Rosebrough v. Buckeye Valley High School (6th Cir. 2012)

Facts. Plaintiff (hereafter referred to as T.R.) was born without a left hand. In September 2007, she applied for a cook's position at a local public high school. T.R. was interviewed for the job by a department supervisor (hereafter referred to as R.C.). During the interview R.C. told T.R. that the school was in desperate need of a bus driver and he asked if she would be interested in that position. R.C. mentioned to T.R. that that he would need to check with the State to see if there were any restrictions that would prevent her from driving a school bus. T.R. responded that she wanted to speak with her family regarding the job. The next day T.R. called R.C. and said that she was interested in the bus driver position. R.C. responded that he was still waiting for a response from the State. In the meantime R.C. released a memorandum to employees citing the school's need for bus drivers.

Some time later T.R. called R.C. and asked "what was the hold up?" R.C. said that he again would contact the State. On October 3 or 4, R.C. called T.R. to inform her that a waiver was required from the Ohio Department of Education (D.O.E.) before an individual who was missing a limb is allowed to operate a school bus. He told T.R. to come to his office to pick up a waiver request form. On January 23, 2008, T.R. received approval of the waiver from the Ohio Department of Education. The D.O.E. had rejected T.R.'s two previous waiver requests because the first waiver's "medical evaluation" had been performed by a physical therapist instead of the required "orthopedic surgeon or physiatrist" and the second was not completely filled out. T.R. later testified that she relied on R.C.'s instructions and filled out what R.C. "told her to fill out."

One or two days before T.R. received the waiver, a Buckeye Valley bus driver trainer (S.P.) contacted T.R. to schedule her training. The training did begin later but with another trainer (D.C.). On February 15, T.R. met with department supervisor R.C. to "discuss some issues she was having in her training." T.R. complained that trainer S.P. made discriminatory comments about her disability on two separate occasions. On February 5, S.P. said that T.R. "was going to need a lot more [training] hours...because of her [arm]" than another trainee who "knew the bus because he worked on cars and he was a race car driver." On February 9, in front of trainer D.C. and another trainee, S.P. told T.R. she "won't be able to drive bus 4 or 11...because of [her] hand" since the doors on those buses are difficult to open. S.P. later denied making statements referencing T.R.'s disability. Supervisor R.C. told T.R. he would speak with trainer S.P.

At a follow-up meeting in his office R.C. said that the trainers told him that T.R. was "speeding, braking too fast, and not listening to instructions." T.R. later testified that R.C. said "it was the trainer's responsibility to make sure that I knew what I was doing and that it was his job to fire me if I wasn't going to do the proper job." She also testified that R.C. said that she "had become high maintenance," slammed his fist down on the desk, and said "[t]he parents at Buckeye Valley will not be happy with you as a driver." In her view he meant that the parents would not want her because she had a hand missing.

On February 19, T.R. and her husband met with the Superintendent. He said that he would meet with R.C. to discuss the issue. When T.R. did not hear from the Superintendent for several days she called him. He apologized for not getting back with her and said "they would be more than happy to have [her] as a driver at Buckeye Valley."

After T.R. resumed training, trainer D.C. suggested that T.R. contact the State to schedule her commercial driver's license certification test which required T.R. to attend with a trainer and a school bus. T.R. scheduled her test on March 20. On the morning of March 19, D.C. called T.R. and said that she could not attend because supervisor R.C. had refused to split D.C.'s bus route and that a substitute driver could not be found. T.R. cancelled the test with the State and did not ask for it to be rescheduled. In her view she "believe[d] there would

never be a substitute driver” available to allow a trainer to take her to get her test “after everything they had done to me.”

T.R. called the Superintendent and requested her paperwork so that she could finish her training and obtain her commercial driver’s license elsewhere. Over the next several months T.R. contacted several other testing centers and school districts but learned that she could only be trained by the school district that ultimately hired her. She never contacted Buckeye Valley to return and finish her training.

District Court Action: On March 11, 2009, T.R. filed suit in a federal district court asserting violations of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) and Ohio statutory law (Ohio Rev. Code Ann. 4112.02, et. seq.) for discrimination due to a disability, a perceived disability, and disparate treatment. She also alleged infliction of emotional distress. In 2010, Buckeye Valley moved for summary judgment asserting that T.R. could not establish a *prima facie* case on any of her claims. Also Buckeye Valley claimed that it was entitled to political subdivision immunity on her tort claim and was not liable for punitive damages as a matter of law. Finding that T.R. was not qualified to be a bus driver because she did not have a commercial driver’s license, the court granted summary judgment to Buckeye Valley on all claims. Rosebrough v. Buckeye Valley High School (S.D. Ohio 2010) T.R. next took her case to the United States Court of Appeals for the Sixth Circuit

Sixth Circuit Analysis: The appellate court first reviewed the standard for *de novo* review of the lower court’s grant of a summary judgment. In such matters because the moving party has the burden of proving the absence of a genuine issue of material fact and its entitlement to summary judgment as a matter of law, all facts, including inferences, are viewed in the light most favorable to the nonmoving party. Thus, because Buckeye Valley moved for summary judgment, said the Sixth Circuit, “this court must accept the facts alleged by Rosebrough as true and draw all inferences in her favor.”

The appellate court made it clear that because both the ADA and Ohio disability discrimination law entail the same legal analysis the issues and claims in this case are subject solely to analysis under the ADA. Turning to defendant’s argument that the plaintiff could not establish a *prima facie* case of discrimination the Court reiterated the following five basic elements that plaintiff must show in establishing a *prima facie* case: (1) she is disabled; (2) she was otherwise qualified for the position, with or without reasonable accommodations; (3) she suffered an adverse action; (4) the employer knew or had reason to know of her disability; and (5) she was replaced or the job remained open. In granting summary judgment to defendants on all claims the district court assumed, without deciding whether she was disabled under the ADA, that plaintiff failed to show the second element—*i.e.*, because she lacked a commercial driver’s license she was not “otherwise qualified.” On appeal the Sixth Circuit parties focused their briefs on the question of whether plaintiff was a qualified individual under the ADA.

The Sixth Circuit clarified that all discrimination claims brought by plaintiff in this case require her to show that “she was otherwise qualified for the position, with or without reasonable accommodation.” To this point the appellate court cited the ADA where it states: “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if the employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C. 12111(8) In this case the district court had held that a commercial driver’s license (CDL) is required to

perform the essential job functions as a school bus driver. As such, in the district court's view because plaintiff did not possess a CDL she was not "otherwise qualified." Thus, the district court dismissed all her claims.

Both in the district court but more carefully on appeal the plaintiff asserted that she was hired as an employee without wages, provisionally subject to being issued a CDL—using the phrase "bus driver trainee" for the first time on appeal. While plaintiff had unsuccessfully argued to the district court that she was discriminated against during her training period, the Sixth Circuit Court considered her argument as properly before it on appeal. In the Court's words, the plain language of the ADA covers discrimination on the basis of disability during job training. 42 U.S.C. 12112(a) The statutory inclusion of "job training" protects individuals while they receive training required to perform the essential functions of their ultimate job position. Moreover, said the Court, the ADA covers individuals in training without regard to whether they are called employees, conditionally-hired employees, trainees, or a title specific to one employer.

In the appellate court's view, because T.R. was in the job training period necessary to obtain her CDL and learn how to perform as a bus driver, Buckeye Valley did not state the essential job functions of the training position, T.R. was qualified to be a trainee, and she was given the training, "there can be no logical basis for requiring her *to have* a CDL to be 'otherwise qualified' for the position of training *to obtain* a CDL." Therefore, said the Sixth Circuit Court, having a CDL "was not necessary" for her to perform the "essential functions" of her training position. Thus, "the district court erred in holding otherwise."

Sixth Circuit Court Decision: The federal district court is reversed. However, regarding the remaining elements of T.R.'s prima facie discrimination claims, the Sixth Circuit *remanded* the case to allow the district court to determine in the first instance whether she has shown genuine issues of material fact. The Court also *remanded* her claim of "intentional infliction of emotional distress," so that the district court is "provided with the opportunity to consider this claim, and Buckeye Valley's asserted defenses, in the first instance."

Subsequent History: Summary judgment granted at, 2013 U.S. Dist. LEXIS 23041 (S.D. Ohio, 2013)

Policy Implications

There is little doubt that over the past two decades the Americans with Disabilities Act (ADA) has had a profound impact on personnel policies and day-to-day employment operations and practices in our nation's public school systems. Recent history shows that the ADA's broad sweep and remedial character have changed and continue to change employee recruitment, selection, hiring, training, assignment, evaluation, promotion, leave, lay-off, and dismissal policies and procedures in every American school district. The phrases "otherwise qualified individual," "basic job requirements," "essential job functions," "undue burden," and "reasonable accommodations" have become terms of common parlance in human resources administration.

While Rosebrough v. Buckeye Valley High School (6th Cir. 2012) is but one court decision with limited application, the appellate court's rational nonetheless offers a good example of the judicial analysis most often applied to alleged ADA discrimination issues—especially where the "otherwise qualified" element of a plaintiff's prima facie case is the main focus of inquiry. What follow are some policy implications for local school board policies gleaned from the Sixth Circuit's rational.

Local school system personnel policies must make it clear that:

- No current employee or job applicant who is otherwise qualified shall be excluded from, denied the benefits of, or be subjected to discrimination under any program or activity.
- All personnel decisions shall be made based on essential job-related criteria as specified in official job descriptions and in job vacancy listings and advertising.
- Reasonable accommodations shall be made where current employees and job trainees are covered by the Americans with Disabilities Act, meet basic job requirements and can perform the essential job functions of a specific school system employment position, and where accommodations made do not place an undue burden on the school system and/or fundamentally alter the nature of the position or program, and/or create a substantial threat of injury or harm to the individual, students, or other employees.
- Audits are regularly conducted to determine and ensure that all personnel policies and procedures are in compliance with the mandates of the Americans with Disabilities Act and all other federal and state anti-discrimination statutes and regulations.

Final Note: While not directly involved in the Rosebrough case, two inferences can be drawn from the case facts and the appellate court's reasoning. First, job descriptions must be carefully written to highlight basic requirements and essential job functions. Second, the need to provide professional development activities for all school administrators and other personnel involved in the personnel process. Too often problems occur when those involved in the day-to-day operations of the school system do not know the mandates of the ADA and other anti-discrimination statutes.

Resources Cited

Americans with Disabilities Act, 42 U.S.C. 12101, et. seq. (1990)

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Note: The views expressed in this commentary are those of the author.