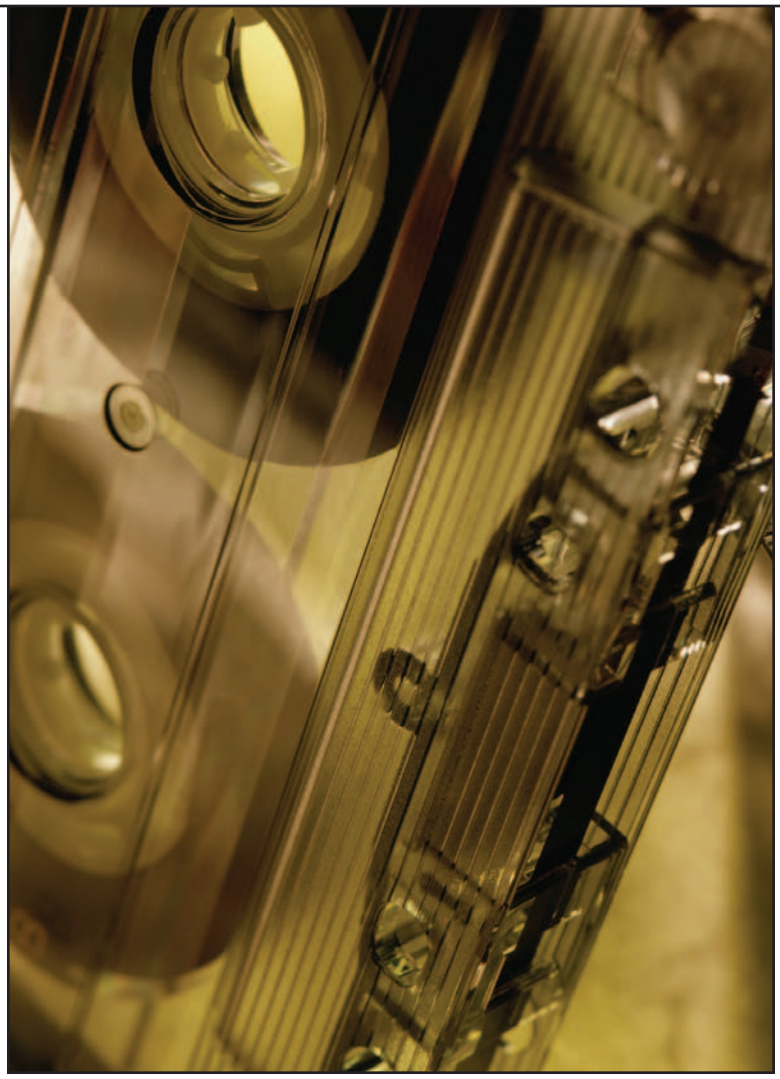
Employment Law Briefing



2
Spy games
Did employer's use of recorded conversation violate the Wiretap Act?

3
Closing argument draws fire in discrimination case

4
How much is enough?
Employer's response put to the test in hostile work environment case

6
Employee sues over need for ASL interpreter

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Spy games

Did employer's use of recorded conversation violate the Wiretap Act?

Employee discussions aren't always kind to their employers. So you can imagine the dismay of an employee and former employee of a hospital when they learned that a recording of one of their conversations had wound up in the hands of their employer. The resulting lawsuit, *McCann v. Iroquois Memorial Hospital*, went before the U.S. Court of Appeals for the Seventh Circuit.

Conversation recorded

In early February 2006, the director of physicians' services (DPS) lost her position at Iroquois Memorial Hospital as part of the restructuring under a new CEO. Around the same time, the CEO was also reorganizing the radiology department, which would potentially eliminate the position of one of the radiologists therein.

On Feb. 24, 2006, the former DPS went to visit that radiologist in his office. Although she no longer worked for the hospital, she still worked for the Independent Physicians Association, of which the radiologist was president, and she needed him to sign some checks for the association.

When the former DPS arrived, the radiologist was dictating a report into his dictation machine. According to the radiologist, he turned off the machine and the two exchanged greetings. The former DPS and radiologist testified that, while they were talking, a department staff member who oversaw the transcription of radiology reports entered the office. She picked up some forms next to the dictation machine and left. The department staffer later denied that she'd activated the machine but, somehow, it went on during the conversation between the former DPS and radiologist. And, during that conversation, the two were critical of the trustees — especially the CEO.

Soon thereafter, the radiologist's dictated reports, along with the recorded private conversation, were sent to a transcriptionist. The transcriptionist notified the department staffer that a conversation critical of the administration had been recorded. The staffer then notified the CEO, and copies of the transcript were distributed to the trustees.

Shortly thereafter, the radiologist's privileges at the hospital were terminated and the former DPS was banned from entering the hospital other than for health care for herself or a loved one. The former DPS and radiologist filed a lawsuit alleging violations of the Wiretap Act based on:

- The department staffer intentionally intercepting their conversation,
- The department staffer disclosing it to the CEO,
- The CEO disclosing the conversation to the trustees, and
- The CEO and trustees' reliance on the conversation to justify their resulting actions.

The district court granted the defendant's motion for summary judgment, and the plaintiffs appealed.

Testimony heard

The first issue on appeal was whether the department staffer intentionally recorded the conversation. The Wiretap Act prohibits intentionally intercepting an oral conversation as well as intentionally disclosing or using the contents of such a conversation while having reason to know that it was unlawfully intercepted.

The Seventh Circuit began by citing testimony by the DPS and radiologist that they hadn't turned on the dictation machine that recorded their private conversation. Rather, according to them, during their conversation, the department staffer walked in and picked up papers adjacent to the machine, giving her easy access to it.

The court explained that this testimony, along with the fact that the machine had been turned on mid-conversation and that the department staffer disliked the radiologist's work at the hospital (and, therefore, had reason to discredit him), provided circumstantial evidence that the staffer had deliberately turned on the recording equipment to capture the unflattering exchange. Although the staffer denied turning on the dictation machine, the court concluded that the conflicting evidence was enough to establish a triable issue of material fact as to whether she'd intentionally intercepted the conversation.

There was circumstantial evidence that the staffer had deliberately turned on the recording equipment to capture the unflattering exchange.

Thus, the appeals court reversed the summary judgment finding on the first issue. And, because the department staffer didn't deny distributing the transcript to the CEO, the appeals court also reversed the summary judgment finding on the second cause of action.

What the employer knew

Turning to the third and fourth causes of action — the CEO's disclosure of the transcript to the trustees and their reliance on it in sanctioning the DPS and radiologist — the Seventh Circuit explained that, for the plaintiff to prevail, she had to establish that the employer knew that the conversation was intercepted.

The court noted that the CEO had testified that the department staffer had told him that the recording had been made because the radiologist had forgotten to turn off his dictation machine. So, if that's all the CEO (and trustees) knew, he had no reason to think that the recording violated the statute, which doesn't cover inadvertent interceptions. Therefore, the Seventh Circuit upheld summary judgment on the third and fourth causes of action.

The act exists

All employers should be aware of the Wiretap Act, which prohibits employers from monitoring or intercepting phone calls or other verbal communications of employees without their knowledge or consent. The act does, however, include a number of exceptions, so consult your attorney about its finer points. ♦

Closing argument draws fire in discrimination case

During any televised legal drama, the closing arguments are usually the most stirring moment in the case. In *Alvarado-Santos v. Department of Health of the Commonwealth of Puerto Rico*, the U.S. Court of Appeals for the First Circuit had to consider whether the plaintiff's counsel went a little too far in going for the win.

Clash of cultures

In April 2002, the plaintiff, a female native of Puerto Rico, entered into a professional services contract with the Correctional Health Services Program to work as an Admissions Director (AD) at the Rio Piedras Correctional Complex in Puerto Rico. In the fall of 2003, the admissions center where she worked was closed and its services moved to the Bayamón Correctional Complex, also in Puerto Rico. The AD was put in charge of one of the two admissions centers there, with the other placed in the hands of a male AD, also of Puerto Rican descent.

The plaintiff's immediate supervisor was a native of the Dominican Republic. Sometime after Oct. 1, 2003, an office clerk overheard him say that the "Dominican doctors were better" than "the other physicians who were there, who were Puerto Rican."

In May 2004, the Executive Director for the Correctional Health Services Program, a native of the Dominican Republic, advised the plaintiff that the admissions centers would be consolidated under the other AD's oversight and her (the plaintiff's) contract wouldn't be renewed.

The plaintiff filed a district court lawsuit alleging gender and national origin discrimination. During closing arguments, her attorney appealed to the jury's Puerto Rican composition, urging them to "send a message" to Dominicans and remarking that Dominicans working in Puerto Rico were there only to take the Puerto Ricans' money. The jury awarded the plaintiff $1.25 million, and the defendant appealed.

National origin claim

The First Circuit first examined the national origin claim. It noted that the other AD, who was eventually chosen to direct both admissions centers, was Puerto Rican (like the plaintiff), not Dominican.

The court also found that the plaintiff offered no evidence that the supervisor's isolated remark about Dominican doctors was close in time to the decision not to renew her employment contract or otherwise related to her or the employment decision. Therefore, the appeals court concluded that no reasonable jury could conclude that the plaintiff had met her burden to show that the decision to not renew her contract was motivated by national origin discrimination.

Other claims

Turning to the gender claim, the First Circuit found abundant evidence that the plaintiff and the other AD weren't similarly situated and that the differential treatments cited by the plaintiff were based on rational differences between them.

The court explained that the Executive Director and supervisor testified that they had chosen the male AD over the plaintiff based on their review of monthly reports that indicated that his facility had a better compliance record than the plaintiff's from October 2003 to May 2004. In addition, he had five more years of experience in that occupation than the plaintiff.

Thus, the appeals court concluded that no reasonable jury could conclude that the plaintiff had met her burden to show that the nonrenewal of her contract was motivated by gender discrimination.

Finally, the First Circuit addressed the comments made by the plaintiff's attorney. The court stated that the jury may have been influenced by the closing argument. But such arguments are "clearly prohibited conduct" and have no place in a court of law.

Therefore, the appeals court reversed the decision and ordered the entry of judgment in favor of the defendant.

The danger of juries

This case demonstrates the risks of allowing a case to go to a jury, which can focus on extraneous reasons in reaching its verdict. Even when a jury's decision is ultimately reversed on appeal, as in this case, the costs in time and money of going to court are considerable. ♦

How much is enough?

Employer's response put to the test in hostile work environment case

When an employee complains of sexual harassment, any employer clearly needs to do something. But, from there, the question often becomes: How much of a response is enough to safeguard the company from legal liability? The case of *Cross v. Prairie Meadows Racetrack and Casino, Inc.*, which went before the U.S. Court of Appeals for the Eighth Circuit, offers some insights.

Driven to legal action

The female plaintiff was employed as a valet at Prairie Meadows Racetrack and Casino from August 2005 until September 2007. When first hired, she received a copy of Prairie Meadows' policy manual, which explained that employees could complain about any workplace issue to a supervisor or directly to the HR department. The policy further stated that any member of management who

receives a sexual harassment complaint must forward it to HR.

In the summer of 2006, the plaintiff informed her supervisor that another valet, who was male, had grabbed and pulled her ponytail. The supervisor spoke to the other valet as well as a witness who confirmed the conduct but characterized it as playful teasing. The supervisor then advised all of the valets to avoid horseplay but didn't report the incident to HR.

On another occasion, the same male valet brushed the back of his hand across the plaintiff's breast, purportedly to wipe something off her shirt. The plaintiff again complained to her supervisor, who spoke to the alleged perpetrator and accepted his explanation. The incident also went unreported.

Additional incidents

On another occasion, the plaintiff informed the supervisor that the same male valet had pulled a car in front of her and asked whether she liked him. She responded that she liked him only as a friend. He said he wanted to be more than friends, banged his hands on the steering wheel and blocked her path with the car. The supervisor told the plaintiff, "That's just Sam," and didn't investigate or report the matter.

Finally, in 2007, another valet told the plaintiff that the same male valet was saying that he and the plaintiff had had a sexual encounter. The plaintiff reported this incident to a different supervisor, who informed HR. Although the male valet denied the comments, Prairie Meadows suspended him.

The next day, however, the plaintiff quit her job and, shortly thereafter, filed a sexual harassment lawsuit. The district court granted Prairie Meadows' motion for summary judgment, and the plaintiff appealed.

A high threshold

The Eighth Circuit found that these four incidents over the plaintiff's two-year employment period didn't sufficiently meet the high threshold for a hostile work environment. The court pointed out that the harassment didn't unreasonably interfere with the job performance of the plaintiff, who testified that, despite the male valet's conduct, she was able to perform her job well.

A violation of an internal reporting procedure doesn't automatically establish inappropriate remedial action under federal law.

The appeals court also found that, even if the incidents rose to the level of a hostile work environment, the plaintiff couldn't show that Prairie Meadows had failed to respond adequately to her complaints. For example, though the hair-pulling incident was undisputed, the supervisor received conflicting reports about what had happened. And the supervisor took appropriate remedial action in instructing the valets to avoid horseplay.

Insufficient evidence

The Eighth Circuit went on to address the supervisor's failure to adhere to Prairie Meadows' internal policy of reporting all sexual harassment complaints to HR. Although a violation of an internal reporting procedure may be relevant in some cases, it doesn't automatically establish inappropriate remedial action under federal law.

Regarding the physical contact to the plaintiff's breast and the male valet's angry response to her romantic rejection of him, the court found these to be isolated incidents. It noted that the supervisor should have taken these occurrences more seriously, but the evidence was insufficient to establish a hostile work environment.

The plaintiff's complaint that the male valet had started a rumor about a sexual relationship between the two of them also didn't support her claim. After all, the court noted, that complaint was forwarded to HR and the male valet was suspended. Thus, the Eighth Circuit affirmed the summary judgment.

Adequate response

This case demonstrates how employers can avoid liability by adequately responding to harassment complaints. Nonetheless, supervisors should follow all procedures set forth in employment policy manuals. ♦

No action = employer liability

The case of *EEOC v. Prospect Airport Services*, heard by the U.S. Court of Appeals for the Ninth Circuit, provides a telling counterpoint to *Cross v. Prairie Meadows Racetrack and Casino* (see main article).

In April 2002, a female employee of Prospect Airport Services initiated a series of rejected sexual overtures toward a male co-worker. He complained to four company officials about the harassment, but nothing was done to stop it. Prospect's general manager deemed the harassment "a joke" and said that the plaintiff should appreciate the attention.

The plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC), which filed a lawsuit on his behalf. The district court granted Prospect's motion for summary judgment, and the EEOC appealed.

The Ninth Circuit first explained that it can't be presumed that a woman's sexual advances toward a man are welcomed. In fact, it found that the plaintiff unquestionably established a genuine issue of fact regarding whether he welcomed such conduct.

The appeals court also found that, though Prospect was aware of the female employee's conduct, it failed to take even the slightest disciplinary action. Thus, the court concluded that a reasonable jury could find the employer liable.

Employee sues over need for ASL interpreter

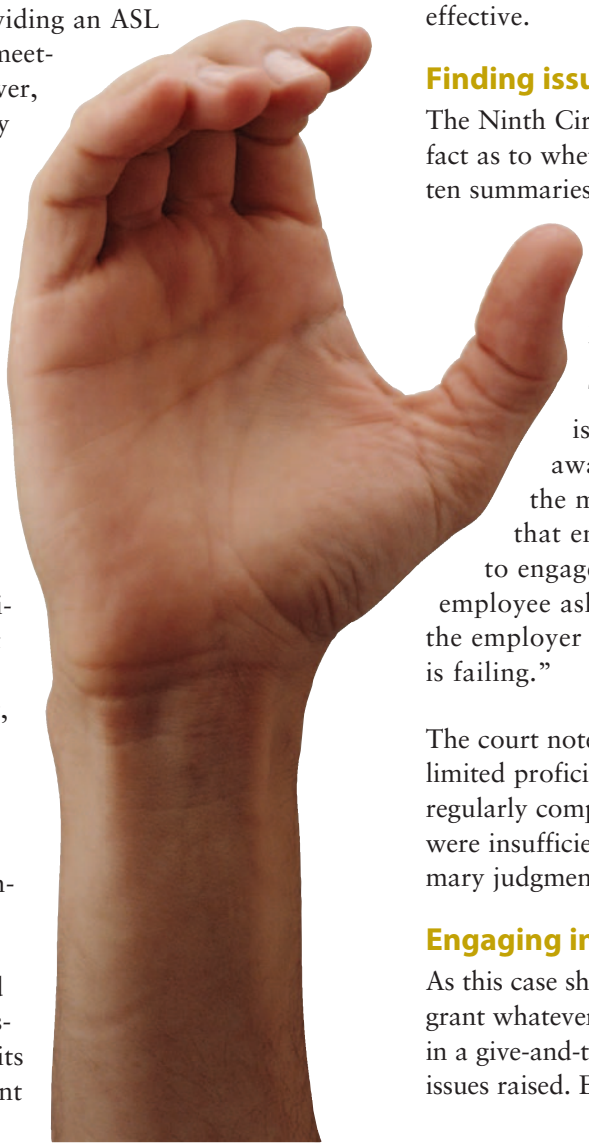
Imagine being in a business meeting and having little to no idea of what everyone around you was saying. That was the plight of the plaintiff in *EEOC v. UPS Supply Chain Solutions*, who sued his employer for failing to provide an American Sign Language (ASL) interpreter in the workplace. The case was heard by the U.S. Court of Appeals for the Ninth Circuit.

Struggling to understand

The plaintiff had been deaf since birth, communicated primarily with ASL, and read and wrote English at a fourth or fifth grade level. In 2001, he was hired by UPS Supply Chain Solutions (UPS) as a junior clerk in its accounting department.

In 2004, UPS began requiring the clerk to attend both weekly and monthly meetings. Initially, after each meeting, the company e-mailed the plaintiff notes of what was discussed. But he disliked getting the information after everyone else, because it prohibited him from asking questions or making suggestions during the meetings. As early as August 2002 and several more times in 2003, as well as in 2004, the plaintiff requested that an ASL interpreter be present at any meetings he was asked to attend. These requests were denied.

In October 2004, UPS assigned a co-worker to sit next to the clerk and take notes during the meetings. The plaintiff complained that this also didn't work, because the co-worker couldn't write everything down and, often, wrote things in an incomprehensible shorthand. The clerk continued to request that an ASL interpreter be provided. In July 2006, UPS started providing an ASL interpreter at the monthly meetings. The interpreter, however, wasn't present at the weekly meetings, where the co-worker continued to take notes.



The plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) and that agency filed a lawsuit on his behalf alleging failure to provide a reasonable accommodation for a disability as required under the Americans with Disabilities Act (ADA). The district court granted a motion by UPS for summary judgment, and the EEOC appealed.

Defining "reasonable"

EEOC regulations define the term "reasonable accommodation" to include "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." Ineffective modifications, therefore, aren't accommodations.

UPS conceded that understanding and participating in mandatory departmental meetings are "benefits and privileges of employment" — even when those meetings have no bearing on an employee's job performance. The employer also conceded that its obligation to make reasonable accommodations includes an obligation to provide modifications that enable an employee "to enjoy equal benefits and privileges of employment" as other employees, including the benefits and privileges of understanding and participating in such meetings.

But, UPS argued, the modifications of providing the plaintiff with contemporaneous notes and written summaries for the weekly departmental meetings were effective.

Finding issues of fact

The Ninth Circuit found that there was a genuine issue of fact as to whether the contemporaneous notes and written summaries contained enough information to enable a person reading those documents to enjoy the same benefits and privileges of someone who attended and was able to fully participate in the weekly meetings.

The court also found that there was an issue of fact regarding whether UPS was aware — or should have been aware — that the modifications were ineffective. It explained that employers have a continuing obligation to engage in an interactive process "when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing."

The court noted that UPS was aware of the plaintiff's limited proficiency in written English and that he had regularly complained that the written summaries and notes were insufficient. Thus, the Ninth Circuit vacated the summary judgment finding.

Engaging in a process

As this case shows, while an employer isn't required to grant whatever accommodation is requested, it must engage in a give-and-take process with employees to address any issues raised. Employers cannot act unilaterally. ♦

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6th Circuit Places Burden on A Disabled Employee to Propose A Reasonable Accommodation

Despite the breadth of the 2009 amendments to Americans with Disabilities Act, not all disabled employees receive the benefit of the Act's protection. Instead, the Act only protects those employees who are "qualified," that is, those who are able to perform all of the essential functions of the job with or without reasonable accommodation. If necessary to determine an appropriate reasonable accommodation, the ADA's regulations require an employer to "initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." The purpose of this process is to identify the "precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

Whose burden is it, however, to propose a reasonable accommodation to account for an employee's disability? According to the recent decision of the 6th Circuit in *Jakubowski v. The Christ Hosp., Inc.*, the burden falls squarely on the employee.

Dr. Martin Jakubowski suffers from Asperger's syndrome, a severe and sustained impairment in social, occupational, or other important areas of functioning, with a marked impairment in the ability to regulate social interaction and communication. Following his diagnosis, the hospital terminated his employment. Before the termination, the hospital met with Dr. Jakubowski to discuss various accommodations for his poor communications skills, all of which he rejected. Because he did not propose another accommodation, the 6th Circuit held that the hospital met its burden to engage in the interactive process, and Dr. Jakubowski was precluded from proceeding on his discrimination claim:

> Jakubowski contends that Christ Hospital did not act in good faith because it did not offer him a remediation program similar to the one offered to the previous, unnamed resident who exhibited similar deficiencies. Importantly, Jakubowski did not request a remediation program at the accommodation meeting with Christ Hospital….
>
> Christ Hospital … met with Jakubowski to discuss his proposed accommodations, and told him that the hospital lacked sufficient resources to comply. [It] also offered to help him find a pathology residency because it would involve less patient contact…. Because Christ Hospital met with Jakubowski, considered his proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new pathology residency, and never hindered the process along the way, we agree that there is no dispute that Christ Hospital participated in the interactive accommodation process in good faith.

The ADA does not require an employer to offer a disabled employee the most reasonable accommodation, or the employee's preferred accommodation. Instead, it only requires the employer to offer *a* reasonable accommodation, one which enables the employee to perform all of the essential functions of the job. If an employer meets this burden, the employee cannot complain that the employer rejected a proposed accommodation that did not address all essential functions, or failed to implement an accommodation that the employee did not propose.

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