

CLIENT ALERT

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Employer That Chose Co-Worker Safety Over Accommodation Faces ADA Trial

In *Turner v. Hershey Chocolate USA*, the Third Circuit recently held that a disabled production line inspector whose employer had denied her request to be excused from a new rotation work schedule could proceed to trial on her Americans with Disabilities Act (“ADA”) failure to accommodate claim. In reversing summary judgment for the employer, the Third Circuit rejected the employer’s arguments that the rotation schedule was an “essential function” of the job or would reduce injuries.

The Facts

In 1985, plaintiff Janet Turner began employment with The Hershey Company in Reading, Pennsylvania, working in different production capacities and as a custodian. During her employment, she was diagnosed with back and related medical problems and underwent several operations.

In 1999, Hershey accommodated her medical condition by assigning her to a light duty position as a “shaker table inspector” on a York Peppermint Pattie production line. This position required Turner to sit or stand next to a production line, repeatedly reaching, stretching, and twisting to maneuver and remove candy patties. Her physician cleared her for work as an inspector provided she did not bend, stoop, or lift over twenty pounds.

Two shaker table inspectors worked on each of three lines: 7, 8, and 9. Turner was assigned to line 7, which was considered more strenuous than 8 or 9. Two days after beginning her light duty assignment, Turner complained that she was in pain and could not work. Her supervisor transferred her to line 8.

In 2001, Hershey discovered that shaker table inspectors were experiencing repetitive stress injuries. At the suggestion of the plant nurse,

Hershey decided to rotate inspectors among all three production lines daily, permitting them to change position hourly, to alternate between standing and sitting, and to use both their right and left arms, thereby decreasing the likelihood of repetitive stress injury.

Turner refused to work on line 7 and requested an exemption from the rotation. Hershey concluded that the rotation system was necessary to prevent injuries to the shaker table inspectors and, therefore, determined that Turner could not continue in her position.

Turner sued Hershey under the ADA in federal court in the Eastern District of Pennsylvania, alleging that she could have performed her job if Hershey had provided her with the reasonable accommodation of exempting her from working on line 7.

The ADA

The ADA bars employers from “discriminat[ing] against a qualified individual with a disability because of the disability.” A “qualified individual with a disability” is an “individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that individual holds or desires.” An employer violates the ADA when it does “not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer].”

The District Court

The district court granted summary judgment for Hershey, holding that Turner was not a “qualified individual” under the ADA, because she was not able to rotate between production lines, which was an essential

function of her job. The court further held that any exemption from the rotation system would increase the risk of injuries to Turner and the other shaker table inspectors and was, therefore, not a reasonable accommodation.

The Third Circuit

On appeal, the Third Circuit first addressed whether, under the ADA, Turner was a “qualified individual,” meaning someone who could perform the “essential functions” of her job “with or without reasonable accommodation.” In order to decide the issue, the court considered whether the rotation system was an “essential function” of the shaker table inspector position. The court determined that rotating was not an essential function of the position, because: (1) the position did not exist for the purpose of rotating inspectors; (2) the rotation system would have no effect on the number of employees needed to inspect the production lines; and (3) rotating is not a specialized skill and Turner was not hired for her ability to perform it.

The Third Circuit then considered the following evidence of whether a function is essential: (1) the employer’s judgment as to whether a function is essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the performance of the function; (5) the collective bargaining agreement; and (6) the experience of current and previous employees in the position. Only the first and fourth factors suggested that the rotation system was an essential function of the job. Moreover, regarding the fourth factor, Hershey did not present any medical evidence supporting its contention that lack of rotation would increase repetitive stress injuries. In light of the factual dispute, the court concluded that a jury should decide the issue.

Hershey argued in the alternative that, even if the rotation system was not an essential function, Turner could not maintain her ADA claim because her requested accommodation was not reasonable.

In evaluating this argument, the court first determined that rotating Turner between lines 8 and 9 while rotating the other inspectors between all three lines was possible. Next, while acknowledging that “an employer is not required to provide a reasonable accommodation if it would pose a ‘direct threat’ to the safety of the employee or others,” the court concluded that there was insufficient evidence to support Hershey’s contention that the requested accommodation could have negative health and safety implications. The court noted that Hershey could try to prove this defense at trial, but denied its motion for summary judgment.

Conclusion

The Third Circuit reversed summary judgment because: (1) rotating lines was not an essential function of Turner’s job; and (2) there was insufficient evidence that the rotation would decrease workplace injuries. In order to avoid a similar outcome in litigation, an employer should, before denying a request for an accommodation, carefully analyze what functions truly are essential and make sure that there is sufficient evidence to support its decision.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

Title VII’s 15-Employee Threshold Is Not Jurisdictional

In *Arbaugh v. Y & H Corp.*, the U.S. Supreme Court held that Title VII’s 15-employee threshold is an element of a plaintiff’s claim, not a jurisdictional requirement that determines whether a federal court can hear a case. In *Arbaugh*, Jennifer Arbaugh, a waitress, sued her employer for sexual harassment under Title VII. After the district court jury returned a verdict for Arbaugh, the employer filed a motion to dismiss on the ground that it employed fewer than 15 employees and, therefore, was not an “employer” under Title VII. The district court granted the motion, holding that the number of employees determines a court’s subject matter jurisdiction in a Title VII action. The Fifth Circuit affirmed.

The Supreme Court reversed. The Court held that the 15-employee threshold is an element of a Title VII claim, not a jurisdictional requirement. The Court followed a “readily administrable bright line” rule that, unless Congress specifically indicates otherwise, statutory limitations should be treated as non-jurisdictional. Given that the threshold is merely an element of a Title VII claim, the employer in *Arbaugh* could not assert the defense after the trial.

Relying upon *Arbaugh*, the Fifth Circuit held, in *Minard v. ITC Deltacom Communications*, that the Family and Medical Leave Act’s 50-employee threshold is an element of a claim under that statute, not a jurisdictional requirement.

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