Employment: Worker "Jointly Employed" by State and County Cannot Obtain ADA Relief From County Where All Supervision Was by State

Whitaker v. Milwaukee County, No. 13-3735 (7th Cir. Nov. 25, 2014)

A worker who was "jointly employed" by Milwaukee County and the State of Wisconsin cannot avoid the State's immunity from liability under the ADA by suing the County, where the State exercised all supervisory control over the employee, according to the Seventh Circuit.

Joyce Whitaker worked for Milwaukee County from 2001 to 2010. After she was injured on the job in 2005 she was reassigned at least three times to different positions to accommodate her disability. In 2009, Wisconsin enacted a statute directing the state Department of Health Services (DHS) to establish a unit to administer all public assistance in the state. At the time the law took effect Whitaker worked in public benefit administration. As a result of the state law, Whitaker remained a County employee, but worked for the state DHS. Whitaker was terminated in 2010 when this somewhat complicated employment arrangement was in place.

In November 2010 Whitaker filed a charge with the EEOC naming both Milwaukee County and Wisconsin as employers, and stating she believed she was discharged unlawfully under the ADA based on her disability. She then filed suit in District Court, again naming both parties. The court held she could only proceed against the County, since the state was immune from suit based on sovereign immunity. It then held that Whitaker's two failure to accommodate claims were not "reasonably related" to the EEOC charge (since it was for disability discrimination), and thus dismissed them. Next, it held the remaining termination claim alleging the County and DHS were "joint employers" had to fail since in the pleadings she only alleged an agency relationship between the parties, not that they were joint employers. Whitaker appealed.

HELD: The Seventh Circuit affirmed the District Court, holding that the County was not Whitaker's principal employer and thus could not be held liable for her termination under the ADA.

DISCUSSION: The Circuit Court noted that the lower court had dismissed Whitaker's "joint employer" theory based on two Seventh Circuit cases. In those decisions the plaintiff had revised the theory of the case by relying on factual circumstances that had changed drastically between the initial pleadings and the amended complaints. No such situation was presented in Whitaker's case; rather she alleged from the beginning a relationship between the State and County and only added a "new characterization" of that relationship in the amended complaint. The Circuit held this re-characterization did not unfairly prejudice the defendants such that it merited a dismissal.

The Circuit Court then addressed the merits of the case head on: could the County be held liable for the actions of the State of Wisconsin where the State allegedly violated the ADA? Under the ADA it was clear that both the County and the State are "covered employers," but Whitaker had to establish that she was actually "employed by" the employer she sought to hold liable – the County. When more than one employer is involved in an ADA case, as here "an entity *other than the actual employer* may be considered a "joint employer" only if it exerted significant control over the employee." The factors used to make such a determination are: "(1) supervision of employee's day-to-day activities; (2) authority to hire or fire employees; (3)

promulgation of work rules and conditions of employment; (4) issuance of work assignments; and (5) issuance of operating instructions."

Following the passage of the 2009 act requiring the State Department of Health to administer public benefits within counties, Whitaker had retained her County benefits, her County union membership, her employee ID badge, and was compensated from the County -- but all her supervisors were employees of the State Department of Health. They managed the day-to-day aspects of her job, and had "the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, and adjust grievances with respect to . . . and state supervisory employees may supervise, county employees performing services . . . for the unit." As a result of these facts, the court held "nothing in the record suggests that the County participated in the alleged discriminatory conduct or failed to take corrective measures within its control . . . [T]he use of the joint-employer device here is an attempt to obtain relief for alleged State-employee misconduct despite the State's immunity under the ADA."

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