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ADA: ADA Claim Fails where Officer Cannot Demonstrate How Alleged Impairment Interfered with Major Life Activities and Prevented Promotion

Mancini v. City of Providence, No. 18-1011 (1st Cir. Nov. 21, 2018).

Although it determined that a police officer's knee injury could constitute an "impairment" for ADA purposes and overturned a lower court's grant of summary judgment to the city in the officer's suit after being denied a promotion, the First Circuit nevertheless found for the city because the officer had not demonstrated how the alleged impairment interfered with the "major life activities" of standing, bending, and walking.

In 2010 Mark Mancini (Mancini) suffered a knee injury when working as a sergeant for the Providence, Rhode Island (City) police department. The injury required surgery and Mancini was placed on various forms on light duty for some months, soon after which he took the lieutenant's promotion exam. The test has four parts, three of which require little subjective evaluation, and one of which is entirely within the subjective control of the police chief. Mancini received zero

points on that fourth part, leaving him just out of the top candidates who received a lieutenant promotion - in fact, he would have needed just one point from the chief to obtain a lieutenant's job. He filed an ADA claim, alleging the City discriminated against him on the basis of his disability when the police chief awarded him no available points and prevented him from obtaining a total score that would have resulted in his promotion. The district court found he did not establish that he was disabled within the meaning of the ADA and granted summary judgment to the City.

The City's argument on appeal was that Mancini did not demonstrate an "impairment" (and therefore did not demonstrate a disability) within the meaning of the ADA because he did not proffer any medical evidence showing an impairment. While the district court found this to be the case, the First Circuit recognized that the need for medical evidence to support a disability claim is determined on a case-by-case basis since some impairments are obvious to a lay jury (a missing limb for example) while others might require the plaintiff to describe his/her injuries and to include medical expertise (a cognitive or emotional impairment for example). The Circuit thus ruled Mancini's knee injury *could* qualify as an impairment - overruling the lower court's decision simply to dismiss the case at the summary judgment stage for this reason.

The Circuit did not stop here though, it went on to ultimately affirm the lower court on a different rationale; specifically the issue became whether there was a genuine issue of material fact about Mancini's *impairment substantially limiting one or more major life activities* (which he identified as the activities of standing, bending, and walking). The district court found two problems: Mancini's failure to demonstrate a link between his knee injury diagnosis and his alleged physical limits of walking, bending and standing and his failure to provide evidence showing that those alleged limitations were substantial. The Circuit Court found the second more "troubling" noting that while the ADA has a "low bar," it is "not no bar." It found Mancini fell short because his complaint had "conclusory allegations" and was "unilluminating" since "there was not so much as a hint as to how or in what ways the alleged limitation manifested itself." Mancini tried to hang his hat on the ADA prong allowing cases to proceed when an employer *regards an employee* as disabled - his third and final hope - but he had failed to raise that argument below and the Circuit refused to hear it on appeal. Thus, the Circuit affirmed the lower court ultimately, albeit not on identical grounds.

LINK

Employment: Applicant's Failure to Disclose Religion-Based Inability to Work on Fridays Precludes EEOC's "Opposition Clause" Action

Equal Opportunity Employment Commission v. North Memorial Health Care, No. 17-2926 (8th Cir. Nov. 13, 2018).

Where a Seventh Day Adventist nurse did not disclose her inability to work Friday nights when applying for a hospital job which specifically required weekend work, was subsequently offered the position but declined it, and was unable to secure a mutually-acceptable accommodative position with the hospital, she could not avail herself of Title VII's "opposition clause" in a retaliation claim.

Emily Sure-Ondara (Sure-Ondara), a Seventh Day Adventist and a registered nurse, applied for a job with North Memorial Heath Care (North Memorial), a hospital provider based in Minnesota. Throughout a lengthy interview and hiring process Sure-Ondara never mentioned that her religious faith prevented her from working from sundown on Fridays to sundown on Saturdays, despite North Memorial's repeated advisements that its contract with the nurses' union *required* all nurses to work nights every other weekend. North Memorial offered, and Sure-Ondara accepted, a conditional offer of employment and, at that time, she stated her religious restrictions

and requested an accommodation. North Memorial advised her that it was unable to provide an accommodation in the nursing role she was offered and asked if she would be interested in another position in which it could accommodate her religious restrictions. She applied for other positions without success and, ultimately, the EEOC filed suit on Sure-Ondara's behalf, alleging that North Memorial engaged in unlawful retaliation in violation of Title VII. The district court granted summary judgment to North Memorial and the EEOC appealed.

The Eighth Circuit noted there were two potential ways to bring Sure-Ondara's discrimination claim: the first Sure-Ondara raised on her own and was a claim of disparate treatment discrimination. The second, which the EEOC filed in the district court on her behalf was an "opposition clause" case. The latter of these derives from Title VII's prohibition against an employer discriminating against an *applicant for employment* "because [she] has opposed any practice made an unlawful employment practice by this subchapter," or because she has made a charge of discrimination or participated in any proceeding under Title VII. Having received this claim, the Circuit was provoked into digging into *exactly* what form of employment discrimination Sure-Ondara opposed - a question the EEOC could not answer satisfactorily.

The EEOC argued Sure-Ondara *necessarily* was complaining that requiring her to work Friday night shifts conflicted with her religious beliefs, but the majority saw it differently. Whereas the EEOC (and the dissent that took its side) pressed that *based solely* on the fact that her request for an accommodation was statutorily-protected activity, she *automatically* had a valid opposition-clause case, the majority found Sure-Ondara did *not* complain that North Memorial *refused* to accommodate her religious beliefs, but that she *requested* an accommodation and North Memorial's *non-discriminatory* practice of considering each request on a case-by-case basis was followed and no mutually acceptable accommodation was reached. As a result, for the majority, the EEOC failed to make out a *prima facie* case. The majority explained that the issue here was Sure-Ondara was an applicant for a job and that her initial request did not communicate or reflect opposition or resistance to an employment practice, and thus her failure to secure a position she sought simply did not support an opposition claim. The Circuit affirmed the lower court.

LINK

Employment: Termination of Principal Who Falsified Evidence of Student's Misconduct was not Based on Race

Burton v. Gwinnett County School District, no. 18-10904 (11th Cir. Nov. 28, 2018).

Statements by school district officers about the role of race in a termination action were not enough to support a finding of "mixed motive" where a Superintendent fired a white principal after she falsified evidence that a student damaged school property.

Lauri Burton (Burton), the principal of an elementary school in Georgia's Gwinnett County School District (District) was issued a disciplinary letter in 2015 after she solicited and received prescription dog medication from a subordinate, repeatedly failed to arrive to work on time, and created an inhospitable work environment. The letter notified her that failing to improve her performance could result in termination. About three months later, Burton removed a disruptive African-American student to a conference room along with two assistant principals, also African American. The student repeatedly slammed a chair against the wall, creating a small indentation. Burton later falsely claimed that the student had made a hole in the wall; at a school meeting the student's family asked to see the damage, whereupon Burton lied and said the room was occupied. She then directed an assistant principal to use a hammer to create a hole in the wall, a

photograph of which was emailed to the student's family.

The misconduct was reported to the Superintendent, who directed that, based on Burton's previous disciplinary warning, the District should seek termination unless Burton voluntarily resigned or retired. The District's Associate Superintendent met with Burton, who admitted that the incident took place. Burton alleges that the Associate Superintendent told her: "This could look like you framed children. This is a little black boy. This is two black AP's."

The Georgia Professional Standards Commission was also notified about the incident. Its Executive Director of Human Resources and Staffing made a statement referencing "this whole 'Black Lives Matter,'" and "you've got Administrators and the child was African-American, you know? Of course, Sheldon, he is African-American and the other Assistant Principal, she is African-American. But with a white Principal issuing some directives, you know, to do this and framing this child, you know, you can see how that would come across."

Burton filed a complaint with the EEOC and then sued the District in federal court claiming that the school district's treatment of her constituted employment discrimination under Title VII of the Civil Rights Act of 1964. The court followed the magistrate judge's recommendation that it grant the District's motion for summary judgment.

On appeal, Burton contended that summary judgment was inappropriate because even if her disciplinary record provided some support for her termination, a jury could reasonably conclude that race was also a motivating factor. A plaintiff can succeed on a mixed-motive claim by showing that illegal bias "was a motivating factor for an adverse employment action, even though other factors also motivated the action." Under a mixed-motive theory a plaintiff must provide "evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action;" such evidence may be direct or circumstantial.

Burton argued that statements by District supervisors provided circumstantial evidence that the Superintendent's decision was motivated in part by race. The Circuit found no such connection. "[T]hese statements on their own are insufficient to convince a reasonable jury that Burton was fired because of her race. They show that two of [the Superintendent's] subordinates were concerned that Burton's misconduct might inflame racial tension at the school, but provide no evidence that [he] was motivated by or even aware of these concerns." While a statement made by a non-decisionmaker "may be sufficient if it provides strong circumstantial evidence that an employment decision was made based on an individual's race," the statements in question did not provide such evidence.

Burton argued that two Eleventh Circuit cases supported her position. In one, school board members declined to renew a superintendent's contract because she wanted to hire a woman assistant. Board members repeatedly expressed their desire to have a male in the role, and one member admitted that she did not vote for renewal specifically on those grounds. In the second case, a non-decisionmaker's statement that a county government would "continue to promote based on color" provided adequate circumstantial evidence of bias because it "rais[ed] the inference that the [decisionmakers] improperly based their decisions on race." Here, Burton provided no statements to indicate that the District's Superintendent acted based on race.

LINK

Excessive Force: Directing K-9 to Bite Non-resistant Subject was not Objectively Reasonable

Landon v. City of North Port, No. 18-10108 (11th Cir. Nov. 13, 2018).

Reversing the district court, the Eleventh Circuit has found that summary judgment in favor of the municipality was not warranted where officers directed a K-9 to bite a man who was profusely bleeding due to self-inflicted slashing, was prostrate on the ground and was not resisting arrest.

The family of Mark Landon (Landon) called police after he slashed his wrists ran out of the house - reportedly with a knife - into the woods. Officers from the City of North Port (City) located Landon in his underwear, suicidal and bleeding profusely from self-inflicted knife wounds. The officers, instead of approaching Landon themselves and in order to ensure their own safety, ordered a K-9 dog to bite Landon. The bites later became infected and required prolonged medical care. Landon filed a §1983 suit against the City alleging the police used excessive force. The district court ruled for the City and Landon appealed - leading to a reversal by the Eleventh Circuit.

Landon's case against the City hinged on his ability to prove first that there was a constitutional violation, and second, that the violation was a product of the municipality's "official policy" or "unofficial custom or practice." While the district court never reached the second prong, the Circuit Court found the first satisfied at the pleading stage because it found an issue of material fact (unlike its lower counterpart). Specifically, the Circuit found the lower court opinion did not properly credit Landon's account at the summary judgment stage, giving too much credence to the officers' factual rendition that they believed Landon had a knife and was actively resisting commands. While the belief of knife possession may well be credible, the fact that he wore nothing other than underwear, was bleeding profusely, and was not suspected of criminal violations, all led the Court to finding the officers' conclusion that he could have *used* a knife as not objectively reasonable under *Graham* when viewed from a light most favorable to Landon (i.e. plaintiff).

Although we "must resist the temptation to judge an officer's actions with the 20/20 vision of hindsight," we are not required to close our eyes to evidence that circumstances at the time may have rendered an officer's actions objectively unreasonable. Instead, we must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (citations omitted).

This was compounded by the fact that the officers all said Landon *did not move* toward them. Lastly, the Court noted the officers' stories were *inconsistent* with regard to whether Landon even replied to their verbal commands (one officer said he made some incomprehensible noises) or whether he was silent (the other officer said he just did not reply). Viewing the facts in a light most favorable to Landon, the court found issues of material fact. Since the Circuit precedent held an officer's force is excessive when s/he orders a dog to attack and bite a person who poses no threat of bodily harm to the officer and does not attempt to flee or resist arrest, reversal was ordered.

LINK

Jurisdiction: Court May Exercise "Ancillary Enforcement Jurisdiction" to Effectuate its Decrees

Burgos-Yantin v. Municipality of Juana Diaz, No. 14-1359 (1st Cir. Nov.

19, 2018).

The First Circuit has upheld the exercise of "ancillary enforcement jurisdiction" by the federal district court in Puerto Rican in enforcing a payment obligation determined by the Puerto Rico Secretary of Justice.

More than a decade ago, Miguel Ángel-Burgos was shot by police officers employed by the Municipality of Juana Diaz, Puerto Rico (City). His family filed suit against the City and the officers involved, ultimately dismissing the City from the suit but succeeding in holding the officers liable under a negligence theory; in 2010 the family was awarded a total of $30,000 in damages. The family asserted, under a Puerto Rican statute, that the City was "responsible for the payment of the Judgment" against its officers. Under the statute the family had to obtain a resolution from the Puerto Rican Secretary of Justice in order to recover from the City, which the family obtained and then included with its Motion for Execution of Judgment. The City objected to the Motion, arguing the district court lacked the power to enforce the judgment, but the court held it had "ancillary enforcement jurisdiction" and invited the family to move for a writ of execution against the City. The family thus moved for the "garnishment, attach[ment], or restraining of the Municipality of Juana Diaz's assets and properties," ultimately setting up an appeal to the First Circuit by the City.

A district court may exercise ancillary jurisdiction for two reasons: (1) to permit a single court to dispose of claims that are, in varying respects, factually interdependent; and (2) "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Enforcement jurisdiction provides a federal court the "inherent power to enforce its judgments" but is not available to a party seeking "to impose an obligation to pay an existing federal judgment on a person *not already liable* for that judgment." The City argued this case fell within the ambit of the prohibition: that it had been dismissed as a party from the original case and now the district court was effectively shifting liability from the officers to a different party (i.e. the City) "not already liable for the judgment."

The Court disagreed and distinguished the leading case on the matter, the Supreme Court's *Peacock v. Thomas*, 516 U.S. 349, 354 (1996). In *Peacock*, the plaintiff obtained a judgment on an ERISA cause of action against his former employer and, after failing to collect from the employer, filed a *new* action in federal court seeking to impose liability on the company's *executive and shareholder* -- based on a *new* theory of liability. The First Circuit found the facts materially different, however, since the family in the case at hand was *not* seeking to hold the City liable under any theory - new or otherwise - but instead was simply seeking payment by the City required by operation of law for an *original* judgment to indemnify its own officers. The Court thus ordered its lower counterpart to issue an order requiring the City to pay the monies due to the family based on the resolution by the Puerto Rican Secretary of Justice.

LINK

Legislative Privilege: Councilmembers Sitting as Redistricting Commissioners Have Privilege in Gerrymandering Case and Cannot be Deposed

Lee v. City of los Angeles, No. 15-55478 (9th Cir. Nov. 19, 2018).

Upholding the lower court, the Ninth Circuit holds that Los Angeles councilmembers can claim legislative privilege and avoid being deposed in a case alleging racially-motivated gerrymandering.

Buried in a redistricting case pitting residents of a voting district (Peter Lee and his neighbors) against the City of Los Angeles, the Ninth Circuit tackled a legislative privilege claim. The plaintiffs in the case sought to depose officials involved in the redistricting process - including two city councilmembers sitting as commissioners on the redistricting commission - to prove the redistricting was racially-motivated and violated the US and California Constitutions, but the district court barred them from doing so. The Ninth Circuit affirmed the lower court's ruling prohibiting the deposition of the redistricting commissioners. As an aside, the Ninth Circuit also affirmed the lower court's rejection of the constitutional challenges.

First, the plaintiffs argued that the legislative privilege did not apply to the particular state and local officials to which the lower court had applied it - the city councilmembers sitting as commissioners on the redistricting committee. The Circuit disagreed, highlighting the rationale that the privilege is needed so that elected legislators can "discharge their public duties without concern of adverse consequences outside the ballot box," and that this was true of elected officials at the state, federal and local levels.

The plaintiffs' second argument was an alternative: even if the privilege applied to local and state officials, it was qualified at that level and should be overcome in the case at hand. Recognizing that the Supreme Court has not set a standard, the Circuit keyed in on the Supreme Court's use of the phrase "substantial intrusion" as its descriptor for how the judicial branch should conduct an inquiry into the legislative branch's motivations. While the Court found the *allegations* at issue in this case of the utmost seriousness - racial gerrymandering - it found the *factual record* lacking and too weak to justify the "substantial intrusion" depositions of local officials represented. It refused to sanction the judicial branch allowing it in this case and affirmed the lower court.

LINK

Sovereign Immunity: Electric Authority Created and Controlled by City is Entitled to Sovereign Immunity

Fluid Dynamics Holdings, LLC v. City of Jacksonville, No. 18-11082 (11th Cir. Nov. 5, 2018).

An agency of the City of Jacksonville-in this case and electric authority-was entitled to sovereign immunity where the City controlled the agency's board and budget and could amend provisions of the agency's charter.

The City of Jacksonville, Florida (City) and the Jacksonville Electric Authority (JEA) - an agency thereof - developed concerns that "precision flow systems" installed by Fluid Dynamics Holdings, LLC (Fluid Dynamics) would cause fire safety issues. The two ordered Fluid Dynamics to remove some of these systems that had been installed in apartments and announced the concerns in an article published in the First Coast News. Fluid Dynamics filed suit under Florida law for tortious interference and defamation, arguing the actions interfered with its agreement to install the systems in private apartment complexes. The district court agreed with both the City and JEA's primary argument that they were each entitled to sovereign immunity. Fluid Dynamics appealed as to JEA.

Fluid Dynamics' argument hinged on precedent: the district court relied on a 1981 Florida decision holding JEA *had* sovereign immunity; Fluid Dynamics pointed to a recent 2015 Florida Supreme Court case that examined the degree of control exercised by a state agency over a private, nonprofit corporation to determine whether the nonprofit enjoyed sovereign immunity and argued the case called into question the legitimacy of the 1981 case upon which the lower court

had relied. Fluid Dynamics argued that applying this new "control test" stripped JEA of its previously granted sovereign immunity.

The Eleventh Circuit disagreed. It held JEA was entitled to sovereign immunity *as a governmental unit* and that the Florida Supreme Court's 2015 decision with regard to whether a *private nonprofit* is entitled to such immunity as a function of the amount of control a state agency exerts over it did not undermine that status. In the alternative, the Court also found applying the new "control test" from the 2015 decision showed that JEA was entitled to sovereign immunity under that theory as well because, like the private nonprofit, the governmental unit (i.e. the City) controlled JEA's board members, budget, revenues, and could amend the article of the charter that delineates JEA's power. The Circuit affirmed the district court's ruling and denied as moot Fluid Dynamics' motion to certify the question to the Florida Supreme Court.

LINK

THIS JUST IN:

More Developments in Cincinnati Billboard Case:

In our last eNews, we profiled a case brought by Lamar Advantage and Norton Outdoor Advertising to invalidate, on First Amendment grounds, higher billboard taxes imposed by the City of Cincinnati. On October 17, the Ohio Court of Common Pleas granted a preliminary injunction against the increased taxes.

On November 9, Judge Hartman permanently enjoined the higher billboard tax. *Norton Outdoor Advertising Inc. v. City of Cincinnati*, No. A-18-04105 (Oh. Ct. Comm. Pleas, Nov. 9, 2018).

Cincinnati had argued that billboards are economic activity, not protected expression or speech. Judge Hartman cited evidence presented to the court showing that the billboards communicate commercial and non-commercial speech, including political messages and assistance to law enforcement. In his seven-page entry making the injunction permanent on November 9, Judge Hartman criticized the legal analysis used to uphold a targeted billboard tax in Baltimore. "The entire foundation for the analysis of the Baltimore City Circuit Court, i.e. that because the billboard tax is directed at the 'means of expression rather than the expression itself' there is not a First Amendment interest implicated, is clearly repudiated by well-established case law," said Judge Hartman. In that case, Clear Channel Outdoor is challenging Baltimore's billboard tax, which was enacted in 2013.

Cincinnati has indicated its intention to appeal Judge Hartman's permanent injunction.

Virginia County Uses Drone to Track Missing Persons

Loudon County, Virginia, located to the west of Washington DC, is successfully deploying a drone to assist in searches for missing persons. The county, which does not have its own helicopter and previously relied on neighboring jurisdictions for aerial assistance, purchased a Lockheed-Martin drone for $96,000 and is now able to use tracking technology to locate at-risk dementia patients. It recently located a missing hunter within minutes using only the drone's camera capabilities.

See the full story by Dave Nyczepir in *Route Fifty* HERE.

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