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NEW Proposed Regulations for the ADA Amendments Act

October 21, 2009

Telephone Seminar/Audio Webcast

Equal Employment Opportunity Commission, Plaintiff-Appellant, v. Humiston-Keeling, Inc., et al., Defendants-Appellees.

Case No. 99-3281

United States Court of Appeals for the 7th Circuit

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-3281

Equal Employment Opportunity Commission,

Plaintiff-Appellant,

v.

Humiston-Keeling, Inc., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 5654--George W. Lindberg, Judge.

Argued February 24, 2000--Decided September 15, 2000

Before Cudahy, Posner, and Evans, Circuit Judges.

Posner, Circuit Judge. The district court granted summary judgment for the defendant in this suit by the EEOC under the Americans with Disabilities Act, 42 U.S.C. sec.sec. 12101 et seq. The Commission's brief states the issue on appeal clearly though, as we shall see, incompletely: "whether the summary judgment evidence, viewed most favorably to the EEOC, would permit a jury to find that Humiston-Keeling violated the ADA by reassigning Nancy Cook Houser to a warehouse job that did not offer a meaningful equal employment opportunity, and refusing to reassign her to an equivalent vacant clerical position that she was qualified to perform consistent with her physical limitations."

Houser worked as a picker in a warehouse, where her duty was to carry pharmaceutical products from a shelf to a conveyor belt. The job required frequent lifting of as much as five pounds. An accident at work led to very bad lateral epicondylitis (better known as "tennis elbow") in her right arm, as a result of which she could not use that arm to lift the items that her job required her to be able to lift. We may assume without having to decide that this impairment was a sufficiently significant restriction of a major life activity to count as a disability within the meaning of the statute (although we have our doubts, see, e.g., *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 675 (7th Cir. 1998); *Hughes v. Bedsole*, 48 F.3d 1376, 1388-89

(4th Cir. 1995); *Snow v. Ridgeview Medical Center*, 128 F.3d 1201, 1207 (8th Cir. 1997), and especially *Howard v. Navistar Int'l Transportation Corp.*, 904 F. Supp. 922, 927-28 (E.D. Wis. 1995), *aff'd*, 107 F.3d 13 (7th Cir. 1997)), thus placing on her employer, the defendant, the duty to find if possible a "reasonable accommodation" of Houser's disability that would enable her to remain in the company's employ. 42 U.S.C. sec. 12112(b)(5)(A). Such an accommodation can take various forms, such as making the workplace accessible to a person who is wheelchair-bound, or, of particular pertinence here, "reassignment [of the disabled person] to a vacant position." sec. 12111(9)(B).

Houser's employer recognized its obligation to attempt a reasonable accommodation of her disability and endeavored to discharge its obligation in several ways successively. First, it rigged an apron for Houser in such a way that (it hoped) she could carry items from the shelf to the conveyor belt with just her left arm. She gave up on this after a few hours and there is a dispute over whether she gave it a fair shot but we'll assume she did. The EEOC doesn't think the "one-arm picker" accommodation was "meaningful." That is too strong. It was a failed experiment, undertaken in good faith so far as appears and not obviously doomed to fail from the start, as in *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 602 (7th Cir. 1998). Experimentation should not be discouraged by deeming, with the wisdom of hindsight, an experiment that fails unreasonable per se, which seems to be the Commission's view.

But it is a separate question whether, the experiment having failed, the employer was excused from further efforts to accommodate Houser's disability. We may assume that the employer was not excused. But the further efforts did not have to take the form of a further effort to enable Houser to do picking with only one arm. Indeed, the EEOC asserts that such an effort would have been futile: "nor does the evidence indicate," we read in its brief, that any such modification [that is, any modification that would enable her to keep up with the assembly line] exists." Any further attempt at accommodation would have to take the form of a reassignment. And indeed, immediately upon the failure of the "one-arm picker" attempt at accommodation, Houser's employer offered her, and she accepted, a substitute accommodation that the EEOC acknowledges was reasonable--a light job as a greeter to visitors to a company construction site. That job disappeared, however, when the construction was completed, precipitating the most important issue presented by the appeal. The company had several vacant clerical positions for which Houser was qualified in the sense of having at least the minimum qualifications for the position. She applied for these positions but in each case was turned down in favor of another applicant, and as a result was eventually let go by the company.

The EEOC does not deny that in every case the applicant chosen for the job was better than Houser in the sense of likely to be more productive. Nor does it deny that the company had a bona fide policy, consistently implemented, of giving a vacant job to the best applicant rather than to the first qualified one. Nor does it suggest that Houser's disability played any role in the decisions favoring her competitors. None of the jobs involved a degree of lifting that her disability would have interfered with her performing, and it is not suggested that the defendant harbors any animus toward disabled workers. Rather the Commission interprets the "reassignment" form of reasonable accommodation to require that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show "undue hardship," a safe