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Experts, Videos Were Key To Win In Disability-Bias Case

VERDICT Spotlight

A recent victory in federal court for a deaf airline mechanic who sued United Airlines for discrimination was the result of decon-

structing the airline mechanic's job using deaf mechanics, experts, work logs and video evidence, according to the plaintiff's attorneys.

The lawyers also made a key strategic decision by choosing a bench trial because the case involved complex evidence about technical work on airplanes.

Small-firm lawyers Harold L. Lichten and Shannon E. Liss-Riordan of Boston represented the plaintiff, along with Jane K. Alper of the Disability Law Center, in a case that pitted them against one of the largest firms in the country, the San Francisco office of O'Melveny & Meyers.

The case involved United's withdrawal of an offer of employment to plaintiff John Sprague, purportedly because of safety concerns about his hearing problems.

After a three-week trial, U.S. District Court Judge George A. O'Toole Jr. found that the refusal to hire was unlawful and, on Aug. 7, he awarded the plaintiff lost wages, lost seniority benefits, discretionary prejudgment interest, post-judgment interest, attorneys' fees and costs, along with the maximum amount of \$300,000 in compensatory and punitive damages.

The judge also ordered United to reinstate its offer of employment and make "front pay" until the date of the plaintiff's hire.

Bucking Traditional Wisdom

O'Toole, said Alpert, "really understood the case. We got every remedy we could possibly get, and it couldn't have been better."

She added that "traditional wisdom would dictate a jury trial, but there have been some really disappointing jury verdicts in disabilities cases lately."

Liss-Riordan said the key to victory was the careful analysis of the essential job functions and the plaintiff's qualifications.

"We felt we learned how to take an airplane apart and put it together again, and we got a



Shannon E. Liss-Riordan of Boston (left) and Jane K. Alper of the Disability Law Center represented John Sprague (above), a deaf airline mechanic who sued United Airlines for discrimination.

lot of help from deaf mechanics," she said.

And Lichten suggested it was important to present evidence that two other deaf mechanics and the plaintiff had performed the same job for other airlines.

"You can be arguing over hypotheticals about whether disabled people can do the job, but it is better to have actual examples that they can [do so]," he said.

The lawyers all agreed that the judge awarded punitive damages largely because evidence from videos and other sources showed that the defendant had no basis for any of its purported safety concerns.

Bench Trial Decision

The plaintiff's lawyers told *Lawyers Weekly* that they had a long debate about the potential benefits and disadvantages of a jury trial before deciding to submit the case to the judge.

Lichten said his thinking was influenced by talking to lay people, who appeared skeptical about the idea of a deaf person working as an airline mechanic.

He also expressed concerns about teaching

the jury the details of an airline mechanic's job, noting that this was one of the toughest cases he had ever tried due to the complexity and details of the job involved. The case involved testimony on the use of complex equipment, such as boroscopes, which are used to analyze the internal parts of an engine.

Alper said that concerns about jury perceptions of safety issues and concerns about the technical, detailed nature of the evidence were key motivators for a bench trial, but noted that the group considered other factors as well.

"Judges have been telling lawyers for years that they might rule more favorably on some employment cases than their juries did," she noted.

Alper said O'Toole understood the detailed evidence, which showed that the plaintiff could perform "the essential functions of the job," even if he could not do every single item listed by the defendant as part of the job.

She suggested that the judge's careful review of a long trail of evidence also led to his finding on punitive damages.

Liss-Riordan warned, however, that the

bench trial decision was a “two-edged sword,” noting that lawyers had to prepare detailed versions of their proposed findings, and that the decision did not issue until two years after the trial.

Qualifications For The Job

The lawyers said they had to prove what the job really entailed and show that the plaintiff could perform the job without unreasonable risk to himself or others.

The defense asserted that the job required communication with other mechanics on a number of tasks and required clear speech skills that the plaintiff did not have — an assertion that the plaintiff’s team decided to test.

First, the plaintiff’s attorneys found two other deaf mechanics working for other airlines. According to Liss-Riordan, she and Lichten have used workers with the same disabilities to testify in at least three other successful trials.

She said lawyers must be prepared to use “e-mail, news groups, news wires, word of mouth and any form of networking necessary to find a good witness.”

The plaintiff, who was hired by a smaller airline after the defendant rescinded the job offer, along with the other two deaf mechanics, showed how communication among mechanics took place on the job in other workplaces.

Liss-Riordan said that the defendant argued that “we have to do the job the United way.”

It was legally significant that the judge rejected the defendant’s contention, according to Liss-Riordan, because the employer’s assertion of essential job functions and methods is ordinarily given great weight.

“United claimed mechanics needed headsets for speaking to do their tasks in teams all of the time, but we showed that even at United hand signals are used all the time,” she said.

The plaintiff’s team spent days and nights at Logan Airport taking zoom-lens videos from the passenger waiting areas of what mechanics were actually doing on the planes and how they were doing it.

The plaintiff’s counsel showed some of these video clips during opening statement and, with the help of their expert mechanics, explained the tasks the defendant’s mechanics were performing in each clip.

The mechanics often worked independently and used hand signals frequently for communication, according to Liss-Riordan.

Alper noted that the plaintiff’s team also used Rule 34 of the Federal Rules of Civil Procedure to obtain an order granting supervised access to the tarmac for viewing the mechanics in action away from the gates.

They studied United operations at Logan and noticed that almost all of the mechanics wore hearing protectors to block out noise and utilized signs for communication.

According to Alper, the defendant’s disability suddenly looked like an advantage because he had effectively been operating with hearing protectors all his life.

She recalled that the team’s acoustical and audiological experts explained how deaf people also develop their other senses to compensate for loss of hearing and provide other cues to approaching danger or changes in their surroundings.

This meant the plaintiff was much less likely



Plaintiff’s attorneys proved airline mechanic John Sprague (above) could perform his job without unreasonable risk to himself or others.

to be a danger to himself or to others, and the lawyers presented evidence that he actually enhanced safety at the small airline, AirTran, that employed him.

The plaintiff’s supervisor at AirTran, Howard Fuller, testified as an expert mechanic and explained that the plaintiff was not only an excellent mechanic, but he taught co-workers how to use more hand signals for better communication on the noisy tarmac.

Alper also noted the importance of subpoenas for the airline’s maintenance logs.

“These showed absolutely everything the mechanics did, how much of the time they spent on each task, and it deflated claims that working on sound systems was a major part of the job,” she recalled.

She acknowledged that the plaintiff had trouble speaking, but asserted that only a tiny fraction of tasks required speech. Alper added that technologies for paging and sound text conversions could be used as substitutes for speech when necessary.

Alper also suggested that the plaintiff could work the midnight shift with less emphasis on communication, an assignment that new mechanics often get in their first few years.

Based on audiological and acoustical testimony, the judge found the plaintiff could hear sufficiently well with hearing aids to perform all of the essential tasks of the job, and the judge added that the evidence showed that line mechanics rarely diagnose mechanical problems by sound.

In the end, according to Alper, the plaintiff’s side quantified what deaf mechanics could not do and it amounted to less than 1 percent of all tasks, a factor that could easily be accommodated by task shifting and scheduling.

Credibility

The plaintiff’s team agreed that the methodical refutation of the defendant’s assertions concerning safety and hearing played a critical role in the judge’s award of the maximum amount of compensatory and punitive damages under the Americans with Disabilities Act.

Liss-Riordan recalled that the defendant made a list of job functions that the plaintiff

could not perform, such as taxiing and receiving aircraft, diagnosing engine problems and repairing sound systems.

“But we showed that he could do each task using the testimony of our experts on audiology, acoustics and mechanics,” said Liss-Riordan. “They kept coming up with new tasks he could not perform, and we kept proving he could do them until they were left with fixing the passenger entertainment system.”

The plaintiff’s team disputed that Sprague could not work on the entertainment systems, but argued that this was not an essential job function anyway.

They tracked voluminous maintenance records and did a data analysis of those records to show that maintaining the system took a fraction of a percent of the average mechanic’s time.

“The defense also contended that the entertainment system was used for emergencies and was part of the ‘minimum equipment list’ needed for the plane to fly, but we found that repairing those systems was never recorded on that list,” said Liss-Riordan.

But Alper suggested that the video evidence was the most effective tool for impeachment.

“The video showed that things United claimed were always done didn’t always happen. They said mechanics always carry radios plugged to the nose of the plane, but that wasn’t happening,” she said.

Alper contended that the tape was the most effective tool not only for showing the true nature of the job, but impeaching the credibility of the defense.

Liss-Riordan said the key to impeachment was “getting the reasons documented for the defendant’s decisions at every step of the decision-making process up through the date of trial.”

She suggested that disability lawyers should be prepared for shifting explanations and institutional assertions that may not stand up to careful research and examination. **MLW**

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