



### **ELEVENTH CIRCUIT UPDATE: DECEMBER 2005**

*This bulletin provides an update of recent employment law decisions for employers in Alabama, Georgia and Florida which are all served by the United States Court of Appeals for the Eleventh Circuit. Please contact us if you have any questions about these decisions or about their effects on your organization.*

#### **Employers Have a Duty to Consider Accommodations for Employees Considered or Perceived to Have Disabilities.**

It is well settled that employees with a covered disability under the Americans with Disabilities Act are owed a duty by employers to provide a reasonable accommodation, if necessary, so the individual can perform the essential job functions. The Eleventh Circuit of Appeals recently expanded the duty to accommodate beyond actual disabilities to misperceptions about disabilities.

DeAngelo was diagnosed with vertigo shortly before she began working at ConAgra Seafood Processing Plant. She did not disclose her condition to ConAgra when she was hired. Several months into her employment, she informed her supervisor she was experiencing sickness and dizziness while working on a conveyor belt.

DeAngelo was later promoted to a product transporter position which involved using a pallet jack to move products from one area of the plant to another. She was assigned by a new supervisor to monitor a conveyor belt known as the "box former belt," a job that she had never performed.

She had another episode of vertigo and reported to her new supervisor that this task was making her sick and dizzy. The new supervisor asked for documentation of her condition. DeAngelo provided a copy of her vertigo medication prescription to her supervisor and then delivered a note from her doctor to the plant manager. The doctor's note stated that she had a vertigo condition that "affects her when her eyes have to look at moving objects such as belts. She should avoid the situation since it could cause her to fall and sustain injury."

The managers discussed whether any jobs were available in the plant that would not require DeAngelo to look at and work around moving equipment but concluded that

there were none. The next day, ConAgra fired DeAngelo because it did not have a job within her restrictions. DeAngelo sued the company under the ADA, alleging that it had discriminated against her based on her disability.

A trial court ruled in the employer's favor but the Eleventh Circuit Court of Appeals viewed the case differently. The Court of Appeals agreed with the employer that DeAngelo's condition did not substantially limit one or more of her life activities and therefore was not a disability. However, the Eleventh Circuit ruled that the ADA also requires employers to provide reasonable accommodations to employees whom the employer regards as having such an impairment, even if the employer's judgment is mistaken. The Court found that ConAgra regarded DeAngelo as being unable to perform any job that involved working around moving equipment when in fact she could perform any task that did not involve staring continuously at moving conveyor belts.

Although ConAgra was mistaken about the extent of DeAngelo's limitation and her vertigo did not substantially limit her ability to work, she was still entitled to a reasonable accommodation. DeAngelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11<sup>th</sup> Cir. 2005).

**Ninety-Day Right to Sue Under Title VII and ADEA Runs From Reasonable Time After Employees had Actual Knowledge That the EEOC had Terminated its Investigation.**

By statute, the 90-day right to sue under Title VII and the ADEA runs from the date a charging party receives the right-to-sue letter from the EEOC. The Eleventh Circuit recently narrowed this 90-day window, stating that it can begin to run upon a charging party's actual knowledge that the EEOC investigation has been terminated which can occur before receipt of the right-to-sue letter.

Kerr and Green filed age discrimination charges with the EEOC. Several months later, the EEOC told Kerr during a telephone conversation that the investigation of her claim was finished and gave her a tentative conclusion that there was not enough evidence to issue a finding in Kerr's favor. The EEOC also explained that a right-to-sue letter would be issued upon Kerr's request. The EEOC had a similar conversation with Green the same month.

Later that month, Green and Kerr orally requested a right-to-sue letter. The EEOC had a practice of following up all oral requests by sending a letter to charging parties asking for written confirmation. Green and Kerr were each instructed to fill out an enclosed right-to-sue letter request form and return it to the EEOC by a certain date in January. Both Kerr and Green did so and, according to evidence presented by the EEOC, right-to-sue letters were mailed to each shortly thereafter.

The EEOC presented evidence that the right-to-sue letters were signed by a supervisor on December 31 and the standard practice was to mail right-to-sue letters out the same day or within the following two days, at the latest. The Court of Appeals found that the 90-day period, based on this evidence, would end in mid-April. Therefore, because both plaintiffs filed their lawsuits on May 15, 2003, their claims were untimely by nearly a month and therefore barred. Kerr v. McDonald's Corp., 427 F.3d 947, (11<sup>th</sup> Cir. 2005).

This case illustrates the need for employers and outside counsel to retain copies of any correspondence from the EEOC, as well as the envelopes in which the documents are transmitted. The dates these documents are mailed and the dates received can be very persuasive to a court if a timing issue is raised later after a lawsuit is filed.

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