Testa v. Barley
Supreme Court of Smalbania
December 12, 2010

Opinion by Justice Felix Kielbasa

Today we revisit the Smalbanians with Disabilities Act, which we first considered in 2007 in *Carey v. Mountain Man Hiking Tours, Inc.* In *Carey*, we attempted to develop a standard for balancing reasonable accommodation against undue hardship but the facts of the case before us today suggest that we need to do more to develop a specific standard to address the Act and guide lower courts, attorneys, employers, and employees.

In 2004, the Testa auto marketing group hired Condi Barley as a sales representative. Testa is a parent company that owns four auto dealerships within a two-mile radius. Unlike most dealerships, Testa has its sales representatives learn about specific types of vehicles rather than about particular manufacturers' lines of products. Thus, when customers come to any of Testa's dealerships, they are matched up with a sales person who knows a lot about the type of vehicle they intend to purchase. Testa's sales personnel are paid a base salary along with commissions on each vehicle they sell.

Barley was hired as an expert on trucks and later on sports utility vehicles (SUVs). After her first year on the job, she was consistently one of the most effective sales persons in the company, ranking within the top five representatives in 2005, 2006, 2008, and the first two quarters of 2009. In August of 2009, however, she got into an auto accident, flipping her own SUV and seriously injuring her spine. As a result of this accident, she is paralyzed below the waist for life and is confined to a wheelchair.

In the late winter of 2009, Barley returned to her job selling trucks and SUVs for Testa but immediately faced difficulties. The practice at Testa was to have sales staff wait at a central location, the sales lounge, until a customer drove on to one of the lots and talked to a greeter. The greeter then called the sales lounge to request the appropriate sales person. Staffing was largely dependent upon the typical traffic, but usually at least two sales people for each type of vehicle worked at a time. The general practice was for the sales staff to take turns going out to talk to customers, but Barley soon found that the other truck/SUV sales person or persons would go out to greet the customers out of turn when she was on duty. When she consulted her supervisor about this problem, he replied that this was simply because it took Barley longer to get to the lot because she had to be driven over in a van. Evidence at the trial, however, showed that more nefarious motives were at work – one upper-level manager testified at trial that the management had decided to limit the number of customers Barley saw. He testified that "No guy wants to buy a truck or SUV from some cripple in a wheelchair, and while that's tough, it's just plain business."

As a result of her lack of contact with customers, Barley's performance as a sales representative began to suffer. After she had ranked in the bottom half of Testa's sales representatives for two months in a row, Testa's management called her in for a performance review. In the review, Testa suggested that she move from her sales position to an administrative position in which she would be responsible for handling credit applications and data entry for Testa. Testa specified that the administrative position would have the same salary as Barley's base salary as a sales representative, but no provisions were to be made to compensate Barley for her lost commissions.

Barley refused the offer and continued to work in sales for an additional month. During that month, she was sent to greet customers only when all other sales personnel were occupied. At the end of the month, Testa discharged Barley, claiming as its basis her lack of success as a sales representative. Barley brought suit under the EDA and won a jury award of reinstatement with back pay and interest in August of 2010. Testa appealed, claiming that the trial judge had inappropriately instructed the jury regarding the scope of the EDA and the definitions of reasonable accommodation and undue hardship.

In *Carey*, this court set forth definitions of reasonable accommodation and undue hardship that sought to give guidelines to the lower courts. While we endorse those guidelines here, we simply wish to make them more specific in order to clarify their proper functioning in these cases. We begin with reasonable accommodation.

Carey teaches that a reasonable accommodation is one that allows the disabled employee to perform the essential functions of his or her job. The employee for whom accommodation is provided should be able to perform those "part[s] of the job that touch[] on the core reason for which the employee was hired or maintained on the payroll" (*Carey* 2 (2007)). Further, the employee should be able to do the same or substantially the same work for which she or he was hired (Id.). An additional question remains to cloud this inquiry, however: how one is to determine what parts of the job constitute essential functions. In some cases, the employer's definition of the job begins and ends the inquiry while in others, a more contextual inquiry considers the work that the employee has actually been doing. Other courts have also questioned the extent to which the employee has suffered illegitimate discrimination that has prevented him or her from performing workplace duties effectively.

In order to answer this question more effectively, we use a three-part inquiry. (1) The employer's explanation of a job's principal responsibilities is certainly a valid starting point, as the statute suggests (15 Sma. Code 2001 § 102 (4)). (2) But in cases in which an employee becomes disabled after having worked for the employer long enough to have an established set of workplace responsibilities, the inquiry should also take into account the employee's experiences of his or her essential functions in the workplace. (3) Finally, in order to comport with the legislative intent driving the statute, the court must take into account the extent to which stereotyping or other inappropriate discriminatory animus on the behalf of the employer or the employer's clients has contributed to a significant diminution in the employee's ability to perform essential functions. Surely we would not allow a corporation to refuse to hire African American salespeople because of the discriminatory impulses of its clients. Our treatment of the disabled should be no different.

At the trial, Testa insisted repeatedly that Barley could not perform her sales job effectively. In employing the three-part test, we see first that there is little disagreement regarding the employer's definition of Barley's job. She was hired to sell trucks and SUVs. Likewise, her actual experience on the job comported with the employer's definition – after she was hired, she continued to perform the essential function of selling trucks and SUVs. The third prong of the test, however, poses serious problems for Testa. Principally because of Testa's own stereotyping of individuals with disabilities and perhaps secondarily because of the public's discriminatory views, Barley saw her effectiveness as a salesperson decrease significantly. Bowing to prejudice does not allow for reasonable accommodation.

We now turn to the question of undue hardship. In *Carey*, the court explained that balancing the cost of the accommodation against the employer's resources was the appropriate means of determining whether a proposed accommodation constituted an undue hardship. While

this is a good start to the process, we must also take into account the difference between direct costs that result from providing an accommodation and indirect costs arising from the illegitimate discriminatory sources discussed above. Direct costs may be taken into account in performing the balancing test, but indirect costs resulting from discriminatory animus against or stereotyping by clients are not valid considerations in determining whether an undue hardship would result from accommodation.

Testa's main response to Barley's suit was that accommodating her constituted an undue hardship on Testa. The principal reason for this claim was that she was a less effective sales person of trucks and SUVs because she did not fit the image of an SUV/truck user. Leaving aside for the moment Testa's illegitimate interference with Barley's client contacts, let us consider the claim by accepting Testa's allegation that Barley would not have been able to sell as many SUVs and trucks as she could before her accident. If this claim was in fact true and was causing significant economic loss to Testa, were the losses attributable to Testa's attempts to accommodate Barley or did they have another cause? Testa's own management provided the answer to this question at the trial by asserting that Barley's lower sales were a result of her failure as a woman in a wheelchair to fit the proper image of an SUV/truck user. Image alone cannot provide justification for Testa's actions. Testa is selling motor vehicles, not images, to the public. Any economic losses that are attributable to the public's stereotypes about individuals in wheelchairs cannot be taken into account in the balance between the cost of accommodation and Testa's resources.

Once this loss is set aside, the true nature of the hardship posed by accommodating Barley becomes clear. Testa had to give her extra time to get from the sales lounge to the lot and this might occasionally result in an extra five-minute wait by a prospective buyer. This might pose an inconvenience to some individuals, but the typical customer probably expects to spend more time shopping for a truck or SUV than he or she does shopping for eggs and milk. The only meaningful economic loss that Testa can claim is the impatient customer who leaves one of Testa's lots rather than waiting for Barley to arrive. Such a loss does not pose an undue hardship on Testa.

Since Barley could be reasonably accommodated in a way that would enable her to perform her essential job functions and since this accommodation in no way posed an undue hardship on Testa, we rule in Barley's favor and uphold the finding of the trial court.

I am authorized to say that Ms. Justice Roberta Dork joins my opinion.

Dissent by Justice Learned Arm.

Testa, which has been one of the most successful auto dealerships in the state, attributes its success to the fact that its sales staff specializes in particular types of vehicles rather than in particular manufacturers. Thus, it hires its sales staff with the intention that these individuals will act as effective marketers for the types of vehicles they are selling. While I certainly sympathize with Ms. Barley in light of her unfortunate accident, I cannot see that Testa acted unreasonably in concluding that she was no longer able to perform her duties effectively as a seller of trucks and SUVs. While companies are obligated to make reasonable accommodations for disabled employees, they are not required to maintain such employees in jobs that they can no longer perform. Such a requirement would constitute an undue hardship to the employer.

The majority, while purporting only to explain our ruling in the *Carey* case, actually goes significantly beyond that case here, establishing a whole new set of hurdles for employers and most likely provoking another round of appellate litigation on the EDA. With regard to reasonable accommodation, the majority promulgates a confusing three-prong test that adds an additional factor not mentioned in the text of the law itself. We can certainly all agree that the background intention of the law is to promote the elimination of damaging stereotypes about the disabled, but this is a society-wide project that cannot be accomplished through law alone. How are fact finders to separate discriminatory animus or stereotypes of employers from legitimate concerns about their employees' ability to do the work that they were hired to do? In the case at the bar, the majority correctly points out that Testa's business is to sell motor vehicles (*Testa v. Barley* 3 (2007)). The majority fails to take into account that Testa's business is limited to the sale of motor vehicles and does not include social engineering for the entire state.

The same problem pervades the majority's discussion of undue hardship. How can a trier of fact separate between economic losses attributable to pervasive society-wide discrimination and losses attributable to an employer's attempts to accommodate a disabled employee? Even if such a calculus is possible, why should the employer bear the primary economic burden for changing society's views on ability and disability? Again, the case at hand provides a clearly problematic example. The majority has not done enough to separate the "legitimate" and "illegitimate" costs to Testa. If a prospective customer tires of waiting for Barley and walks off the lot to purchase a vehicle elsewhere, this qualifies as a legitimate economic loss. But what of the customer who wants to talk with a sales representative who has actually driven some of the vehicles he or she is considering buying? Is this illegitimate stereotyping that Testa should not be able to consider? What of the customer who does not have a clear idea of what kind of vehicle she or he wants and needs to visit several different lots to make a decision? If this customer has limited time and tires of waiting for Barley to get from lot to lot, should Testa pay the price in the form of a lost sale?

Sales are of course primarily about the product, but they are also about images and marketing. Testa pointed out at the trial that part of Barley's success as a sales person was linked to these factors. Before her accident, she was featured in a number of radio and television advertisements as a powerful female figure who knew her product because she used it for her vigorous outdoor lifestyle. Because of her accident, she was no longer able to project this image of power and competence with respect to trucks and SUVs, and Testa should have been permitted to take this into account.

I respectfully dissent from the majority's reworking of the standards for the EDA and from its disposition of the present case.