

When the EEOC Gets It Wrong

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To eager government lawyers, it must have sounded irresistible: a nonprofit that helps people with disabilities accused of discriminating against a former employee with a disability. It's like the Sierra Club being sued for polluting or the Humane Society for animal cruelty.

Hypocrites! Let's get 'em!

Except that's not how it turned out. The case came to a formal end last week, when the federal government forked over nearly \$20,000 to Placer Advocacy Resources & Choices, or ARC, to cover its legal costs, though the nonprofit was stuck paying its own attorney fees.

The little-noticed case is a fascinating study of what happens when the U.S. Equal Employment Opportunity Commission gets it wrong.

The agency sued the local ARC chapter in U.S. District Court for the Eastern District of California in 2013, alleging that it failed to reasonably accommodate former employee Homeyra Kazerounian, who is deaf, and then retaliated against her.

It's not the first time the EEOC sued someone for failing to accommodate a deaf worker or job applicant--but most other targets settled for modest amounts, plus injunctive relief. For example, Bank of America paid \$30,000, Toys'R'Us settled for \$35,000, and a UPS unit settled for \$95,000. The world collectively shrugged.

But ARC--that's a different animal. It's the largest national community-based organization advocating for and serving people with intellectual and developmental disabilities and their families, with more than 140,000 members and nearly 700 state and local chapters nationwide.

The group even chastised the EEOC for its "absence of strong guidance ... on the federal government's role as a model employer" for people with disabilities in comments on a proposed rulemaking. How could the local chapter of such an organization just capitulate when charged with disability discrimination?

Perhaps more crucially, ARC also had insurance--and its carrier, Philadelphia Insurance Co., was willing to let them fight, according to ARC's lawyers, **Robert Rediger and Candice Rediger of Rediger, McHugh & Owensby.**

The EEOC said the nonprofit violated the Americans With Disabilities Act by refusing continue to provide Kazerounian with an American Sign Language interpreter at staff meetings. As a result, she "could not follow what was being discussed during or participate fully in meetings, and was deprived of the benefits and privileges of employment that were available to co-workers who could hear," wrote EEOC lawyers William Tamayo, Marcia Mitchell and David Offen-Brown.

But ARC said the real problem was that with or without an interpreter, she couldn't perform her essential job functions as an instructional aide--which meant she wasn't a "qualified individual" under the ADA in the first place.

She left clients unattended, didn't follow the daily schedule, couldn't work independently and was written up for insubordination, ARC said. She allegedly didn't complete necessary paperwork and failed to document when she gave a client medication. More than a dozen of her clients complained they couldn't communicate effectively with her.

On the plus side, several of her co-workers said she did a good job. And her first supervisor gave her excellent reviews as well as a raise. But after she got a reprimand, she consulted a lawyer, then filed internal and administrative complaints alleging disability discrimination.

Around the same time, the Placer ARC chapter warned it was on the verge of shutting down due to lack of funding. And paying for an interpreter--a two-hour minimum charge, at \$55 an hour-- would have cost \$550 a week. That amounted to an undue hardship, ARC argued, especially since the nonprofit had another staff member who was proficient in sign language to translate. Kazerounian eventually quit in 2010, but says she was forced to resign because her supervisors wouldn't provide a reasonable accommodation.

U.S. District Judge Kimberly Mueller tossed the retaliation claim on summary judgment last year, but ruled that there was a genuine dispute whether Kazerounian was capable of performing the essential functions of her job.

After a two-and-a-half week trial, a jury in December unanimously found in ARC's favor. How did the EEOC miscalculate? The subsequent motions for attorney fees and costs shed some light.

To be sure, some elements of the EEOC's case were solid. Everyone agreed Kazerounian had a disability. And the jury found she was in fact qualified to do her job (even if her supervisors were unhappy with her performance), making her eligible for ADA protection.

The jury just didn't think she was discriminated against.

The EEOC seems to have stumbled where it has in prior cases: in the beginning, when it investigates the charges and attempts conciliation. Here, ARC said it gave the agency all the evidence it later presented to the jury up front to show that there was no discrimination based on denial of reasonable accommodation.

The EEOC "refused ARC's requests that it identify the scope of its investigation and explain why the evidence ARC produced did not show that it acted in compliance with the ADA," **Robert Rediger** wrote.

Instead, it seems the agency was convinced up front its client had been wronged and was determined to fight.

In the wake of its loss, the EEOC did fend off ARC's bid for attorney fees, pointing to the U.S. Supreme Court's *Mach Mining* decision last year. The high court "held that judicial review of conciliation does not permit courts to evaluate whether during conciliation the EEOC has negotiated 'in good faith,' whether it 'la[id] out the factual and legal basis for all its positions,' whether there was enough 'back and forth with the employer,' whether the EEOC provided the employer 'sufficient time ... to review and respond' to proposals, and so forth," the EEOC wrote.

Still, it's incumbent on the EEOC to do everything it can up front to be sure it's got a good case. Because when the EEOC loses, we all lose.