Jury Slams Railroad Co. for Failure to Accommodate Hearing-Impaired Train Conductor to Tune of $44M

The cost of not accommodating a disabled employee can have some major consequences.

By **Jeffrey Campolongo** | July 16, 2021

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One of the first questions asked in the context of a reasonable accommodation request is how much it is going to cost. It can be excruciatingly difficult to identify a precise cost associated with accommodating an employee. In some instances, the accommodation could be relatively simple and inexpensive. In other cases, it could be much more nuanced and come with a heftier price tag.

A jury in Wisconsin recently provided its own estimate of the cost in failing to accommodate an employee by rendering a verdict in favor of an employee to the tune of $44 million. And what was the cost for the accommodation sought by the employee at the time, you may ask? $3,600. Suffice to say, the cost of not accommodating a disabled employee can have some major consequences.

Mark Mlsna began working as a "thru-freight train conductor" for Union Pacific Railroad Co. in or around 2006. When he was hired, the company was aware that he had a hearing impairment and that he wore hearing aids. Mlsna was able to work without any issues until 2015. His issues arose as a result of new regulations to the Federal Railroad Administration (FRA) in 2012 that went into effect in 2015. The purpose of the new regulations was to ensure that train conductors possessed hearing acuity, and to confirm that railroads appropriately protected and conserved their employees' hearing.

In February 2015 Union Pacific had Mlsna's hearing tested a number of different ways: with hearing aids and without, using an amplified hearing protection device called the "Pro Ears-Gold" with the sound turned off, and using that device with the sound turned on. Mlsna did not pass any of these hearing tests. After receiving the test results, Union Pacific did not recertify Mlsna to work as a conductor. Mlsna's dilemma was that when he wore his hearing aids he was in violation of Union Pacific's hearing conservation policy, yet when he complied with that policy by wearing the Pro Ears-Gold, he could not pass the hearing acuity test.

To no one's surprise Mlsna requested an accommodation by asking to use a custom-made hearing protection called the E.A.R. Primo. Union Pacific rejected his proposal because that device did not have a factory-issued or laboratory-tested noise reduction rating. Though Union Pacific never identified an alternative to the device it had suggested, the company refused to recertify Mlsna as a conductor and his employment was terminated. The cost for the requested accommodation was estimated to be $3,600.

The case mended its way through the federal courts with several bumps along the way. For example, the district court dismissed the case on summary judgment. The court held that Mlsna did not establish that he was a "qualified individual" within the meaning of the Americans with Disabilities Act because he "failed to marshal enough evidence for a reasonable jury to conclude that he could fulfill the essential functions of the train conductor position with a reasonable accommodation," in *Mlsna v. Union Pacific Railroad,* No. 18-cv-37 (W.D. Wis.).

The lower court acknowledged that there was "no dispute" Mlsna had "the requisite background, experience, and knowledge to serve as a train conductor," however, Mlsna was also required to satisfy the FRA hearing acuity requirements. The court held that wearing hearing protection is an essential function of the conductor position. The court stated that the question, therefore, was "whether a reasonable accommodation would have permitted plaintiff to meet the FRA hearing acuity standards while wearing hearing protective devices." The court also held that "Union Pacific cannot be held responsible for the breakdown of the interactive process, having met its burden by evaluating plaintiff's proposed

accommodation and offering to review others." In other words, Union Pacific's rejection of the E.A.R. Primo was reasonable while noting that Mlsna did not propose any "others" during the interactive process.

The decision by the Western District of Wisconsin was overturned by a unanimous panel of the U.S. Court of Appeals for the Seventh Circuit. See *Mlsna v. Union Pacific Railroad,* 975 F. 3d 629 (7th Cir. 2020). On appeal, neither party disputed that Mlsna had the requisite background experience and knowledge to work as a train conductor, or that his hearing impairment is a qualifying disability under the ADA. The parties also did not dispute that his disability was the reason he was not recertified.

According to the decision, what was in dispute was whether Mlsna could perform the essential functions of the position of train conductor with or without reasonable accommodation. At the outset, the appellate court reiterated what many employment lawyers already know, i.e., that determining whether a function is "essential" is a question of fact, not law. In this case, the panel deemed the evidentiary record sufficient to yield fact questions as to whether wearing hearing protection is an essential function of Mlsna working as a conductor.

As stated in the opinion, "This case presents a two-edged problem. The regulations require that conductors have hearing acuity, as well as that their hearing be protected and conserved. But from this record it does not appear that Union Pacific can test hearing acuity under noisy working conditions." Moreover, the court was not satisfied that all potential reasonable accommodations were considered which could have permitted Mlsna to wear hearing protection while also meeting the requirements of the hearing acuity regulation. In fact, the panel went on to point out that there is no shortage of devices without published noise reduction ratings that could be considered as possible accommodations for Mlsna's disability, irrespective of whether it was the one he had suggested or others.

There was also one additional, damning piece of evidence that propelled the court to remand the case to the lower court for further proceedings. Namely, the fact that the record revealed that Union Pacific told Mlsna that it engaged in an "extensive search" for adaptive devices, but discovery showed that no such search ever occurred. Per the opinion, after Union Pacific rejected Mlsna's proposal of the E.A.R. Primo, nobody at the railroad took any additional steps to explore reasonable accommodations.

As a result of these genuine issues of fact as to whether Union Pacific reasonably accommodated Mlsna's hearing disability, the court reversed summary judgment. In doing so, the court provided specific direction to the lower court on remand when considering the overall accommodation process. The defendant employer must consider more than just what the plaintiff employee proposes. A proposed accommodation is not limited to what the plaintiff introduced into the process, noting that an employer must do more than sit on its hands when an employee requests accommodation. Here, Union Pacific was obliged to do more than just conclude that Mlsna's proposal must fail because it is contrary to the railroad's policy.

Following remand, and eventually a trial on the merits of Mlsna's claims, a Wisconsin jury rendered a verdict in Mlsna's favor on his ADA claims and hit Union Pacific with almost $40 million in punitive damages. Of course, we will never know exactly what motivated the jury's determination, however, the record seems to point strongly toward Union Pacific's misrepresentation about exploring all possible accommodations. Based on the testimony adduced during discovery, this appears to have been a complete fabrication. That lie may very well have been what sets the company back $44 million. An expensive price to pay compared to the $3,600 it could have spent to accommodate Mlsna from the beginning.

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