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### **Employee whose Injured Arm does not Prevent Him from Performing Basic Daily Tasks is not Disabled under ADA, Court Rules**

Daniel Didier was employed by Schwan's Home Service as a Sales Manager. Didier, who had previously injured his right wrist and arm on the job, aggravated the injury, requiring surgery. After the surgery, he returned to work but was restricted to light duty. Several months later, Didier was released to full duty, and Schwan's offered him the position of route sales manager, the duties of which included operating route trucks and loading and unloading the trucks. Didier declined the position, asserting that he was unable to maneuver the heavy truck doors because of his injured arm. Schwan's informed Didier that it could no longer provide him any light duty assignments, and terminated his employment. Didier sued Schwan's under the Americans with Disabilities Act, claiming that the company terminated him on the basis of a disability, and refused to provide him with a reasonable accommodation, namely, another employee that could go along on routes to open and close the truck doors. The lower court dismissed the case and Didier appealed.

In [Didier v. Schwan Food Company](#) (10/16/06) the U.S. Court of Appeals for the Eighth

Circuit agreed with the lower court that Didier could not establish a claim under the ADA. The appeals court ruled that Didier could not prove that he was substantially limited in any major life activity, as required by the ADA. Didier claimed that he was substantially limited in the life activity of caring for himself. However, he admitted that he had learned to adapt to his restrictions and to perform tasks such as shaving, grooming, tying his shoes, writing, dialing the phone, washing dishes, and preparing meals using his left hand as necessary. The appeals court determined that these admissions defeated Didier's claim that he was substantially limited in caring for himself. Even if Didier could establish that he was disabled, his requested accommodation-having another employee ride along on routes to open and close the doors-was not related to his claimed limitation on the major life activity of caring for himself. For this reason also, the appeals court concluded that Didier could not prevail on his ADA claim. [\[back\]](#)

## **New York Court Upholds Legislation Requiring Insurance Coverage for Contraceptives**

Ten faith-based social service organizations, including organizations operating hospitals, nursing homes, shelters and schools, brought a lawsuit challenging the constitutionality of New York's Women's Health and Wellness Act. The WHWA mandates that, except for exempt religious employers, the employer health insurance contracts that provide coverage for prescription drugs must include coverage for the cost of contraceptive drugs or devices. To qualify as a religious employer, an entity must meet certain criteria, including that the purpose of the entity is the inculcation of religious values and that the entity employs primarily persons of its religious tenets. The organizations claimed that the WHWA compelled them to violate their religious tenets by financing contraceptives, conduct they condemned. They sought a declaration that the WHWA was invalid under the Free Exercise and Establishment Clauses of the U.S. Constitution and the Free Exercise Clause of the New York Constitution. The lower court found the legislation constitutional and the organizations appealed.

In [Catholic Charities of the Diocese of Albany v. Serio](#) (10/19/06) the New York Court of Appeals, the state's highest court, concluded that the WHWA is constitutional as applied to the organizations and dismissed their lawsuit. The court ruled that the Free Exercise Clause of the U.S. Constitution was not violated because the WHWA is a neutral law of general applicability. The fact that some religious organizations are exempt, and some are not, did not convert the WHWA into a non-neutral statute. Similarly, the court ruled that the New York Constitution was not offended. In assessing whether the New York Constitution was violated, the court weighed the incidental burden on the organizations' free exercise of religion against the interests of the legislation. The court concluded that the state's interest in providing women with better healthcare outweighed the organizations' interest. The court pointed out that WHWA did not literally compel the organizations to purchase contraceptives for their employees; it only requires that policies that provide prescriptive health coverage include coverage for contraceptives. Moreover, the organizations employed many individuals of different faiths and were obligated to accept neutral regulations imposed to protect their employees' interests. Finally, the court determined that the WHWA does not violate the Establishment Clause. The WHWA exemption did not distinguish between different religious denominations, but only between organizations based on the nature of their activities. [\[back\]](#)

## **Post Office Employee who Conducted Mary Kay Business at Work Fails to Establish Race Discrimination Claim under Title VII**

Denise Roland, an African-American, worked for the U.S. Postal Service as the postmaster of a post office in Georgia. Roland's supervisor received complaints that Roland was using work time to further a side business selling Mary Kay products to customers and co-workers. The USPS investigated the complaints and found that Roland's activities included displaying Mary Kay fliers in the post office, soliciting employees and customers to buy products and host parties, handing out business cards, and conducting Mary Kay transactions in the post office. The USPS determined that Roland used her status as a supervisor inappropriately by involving subordinates in her Mary Kay business and demoted Roland to a clerk position. Roland sued the Postmaster General and a supervisor, alleging that she was demoted and discriminated against based on her race, in violation of Title VII. She argued that a white male employee used his mail truck to deliver his wife's Avon products, yet was not disciplined as severely. The district court dismissed Roland's case before trial and she appealed.

In [Roland v. United States Postal Service](#) (10/11/06) the U.S. Court of Appeals for the Eleventh Circuit agreed with the lower court and ruled that Roland could not proceed to trial on her discrimination case. Roland could not establish a race discrimination case because she could not identify a similarly-situated white employee who was treated more favorably. The employee who used his mail truck to deliver Avon was not similarly situated because there were no allegations that he was in a supervisory position and had exploited his authority. That employee's activity occurred outside of the post office and did not involve subordinates; therefore, even if he received lesser discipline, that fact did not establish that Roland was discriminated against. The appeals court concluded that Roland could not establish that her demotion was discriminatory and, therefore, upheld the lower court's decision. [\[back\]](#)

## **Court Dismisses Age and Religion Discrimination Claim of Wal-Mart Cashier who Under-Charged Fellow Employee**

Shirley Austin worked as a cashier for Wal-Mart. Upon her hiring, at age 44, she informed Wal-Mart she was unavailable to work on weekends because she was a minister at her church. Several years later, an off-duty cashier reported that Austin had checked her out without charging her for all of her items and had hugged her and stated "God is so good." Despite that Austin presented a different version of the facts, Wal-Mart terminated Austin's employment for under-ringing items. Austin sued Wal-Mart under the Texas anti-discrimination laws, claiming that the company discriminated against her based on her age and religion. Wal-Mart requested that the court dismiss the discrimination claims.

In [Austin v. Wal-Mart Stores Texas, L.P.](#) (10/5/06) the U.S. District Court for Texas agreed with Wal-Mart and dismissed her age and religion discrimination claims. The court found that Wal-Mart presented a legitimate reason for terminating Austin-her failure to charge another employee for purchases. Austin's claims, that this reason was pretextual, failed. Although Austin alleged that a Wal-Mart employee made age-related remarks, she did not present any evidence that the manager who made the termination decision knew of the comments. The court also concluded that Austin's claim that she was accused of signaling to her fellow employee by saying "God is so good" did not show that Wal-Mart had a

discriminatory motive, but established only that Austin was suspected of using this phrase in furtherance of a scheme. While Austin claimed that her requests not to work on the weekends due to her church activities were not honored, the court noted that these claims did not prove pretext. Austin admitted that she was not terminated for failing to work on the weekend, but for under-ringing items. The fact that Wal-Mart terminated seven other employees for under-ringing in the past also undermined her claim of pretext. [\[back\]](#)

## **Employee Must Allow Employer Sufficient Time to Correct Problems prior to Resigning in Order to Establish Constructive Discharge**

Reverend Gary Thompson was a bus driver for Bi-State Development Agency. While driving an empty bus, Thompson collided with a truck. He alleged that he had been suffering from job-related headaches and stress and this contributed to the accident. Before the accident, Thompson had filed two racial discrimination and retaliation claims against Bi-State, both of which had been resolved. Bi-State classified the accident as preventable. Thompson was placed on sick leave and evaluated by physicians and psychiatrists, who after several months released him to return to work. Upon Thompson's return, Bi-State followed its employee guidelines with respect to preventable accidents and issued Thompson a five-day suspension and ordered him to attend retraining. Thompson opted to take retirement instead of accepting the discipline and never returned to work. He filed a lawsuit against Bi-State, claiming that the company had retaliated against him for his two prior lawsuits and violated the Americans with Disabilities Act by disciplining him and forcing him to take retirement. The lower court dismissed Thompson's claims, and he appealed.

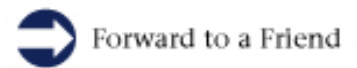
In [Thompson v. Bi-State Development Agency](#) (9/22/06) the U.S. Court of Appeals for the Eighth Circuit also rejected Thompson's claims. First, the court ruled that Thompson could not establish that he was constructively discharged or forced to take retirement. Noting that a constructive discharge occurs only when a reasonable person would find working conditions intolerable, the court found that there was no evidence that Bi-State created an intolerable environment for Thompson. Bi-State followed its standard procedures in issuing Thompson discipline and retraining. Moreover, Thompson opted to take retirement before he ever actually returned to work. According to the court, even assuming Bi-State had done something wrong in assessing discipline, Thompson too quickly jumped to the conclusion that Bi-State was harassing him and never gave Bi-State the opportunity to resolve any problem. This precluded Thompson from bringing a constructive discharge claim. Thompson's retaliation claim also failed because there was no evidence that Bi-State's actions were related to the two prior lawsuits filed by Thompson. In fact, the court found it difficult to believe that Bi-State would reinstate Thompson after his leave of absence, just so that it could retaliate against him. [\[back\]](#)

## **U.S. DOL Opinion Letter Concludes that FLSA Executive Exemption Applies to Store Manager not Physically Present to Supervise Employees**

In an opinion letter dated September 21, 2006, the U.S. Department of Labor applied the executive exemption to the overtime requirements of the Fair Labor Standards Act to managers not present in a store who monitor the store's employees. The organization employed a store manager who was responsible for and had supervisory authority over several employees, including interviewing, selecting, and training employees, adjusting rates of pay and hours of

work, directing work, appraising employees' productivity and efficiency, handling complaints, and disciplining employees. Due to staffing levels, the store manager did not supervise all of the employees in person. When not present in the store, the store manager remained responsible for ensuring that company policies were carried out and might visit or call the store to check on employees.

In the [opinion letter](#), the DOL discussed the requirements of the executive exemption, including that the employee "must customarily and regularly direct the work of two or more other employees." The DOL expressed the opinion that, based on the information provided, the store manager directed the work of two or more subordinate employees, even when not in the store, because the manager continued to be responsible for ensuring that company policies and his or her instructions were carried out. For example, the manager followed up on assigned tasks on a daily basis, monitored employee productivity, and ensured that goals were met by reviewing the previous shifts' sales reports. The DOL concluded that the manager's continuous physical presence in the store with the employees was not necessary to qualify him or her for the exemption. [\[back\]](#)



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