

## WHAT DID YOU SAY?\*

### General Information

Nolan Johnson, age 54, was hired by the Federal Delivery Service as a Level 3 technician in 1994. He was trained to maintain the 8 Delivery Bar Code Sorting (“DBCS”) Machines at the mail processing plant in Fort Worth, Texas. Nolan maintained a good work record, and, as his seniority increased, he was able to move from the night shift to daytime hours.

In August 2001, as part of a downsizing, the Fort Worth processing plant was shut down and Nolan’s position was eliminated. He was able to find a Level 5 Technician position paying \$18/hour plus benefits on the night shift at the Dallas–Ft. Worth Air Mail Facility maintaining the two new Flat Sorting Machines (“FSM”) the facility just received. FSM machines are similar to DCBS machines but are used for larger pieces of mail such as catalogs and magazines. The FSMs have greatly speeded up mail processing.

Donna Patrick, aged 30, was hired by the Federal Delivery Service as a Level 5 technician at the Dallas–Ft. Worth Air Mail Facility in 1995. In July, 2001, Donna’s supervisor, Harry Dewitt, retired and she became an acting supervisor. She was scheduled to receive two weeks of supervisory training in June 2002.

In early September 2001, while making rounds on the workroom floor, Donna saw several mail handlers with full containers of “flats” waiting impatiently while Nolan performed what appeared to be routine maintenance on one of the FSMs. She told Nolan to come back to that later, at the end of his shift, after all of the flat mail slated for next day delivery had been processed. Nolan appeared to ignore her, and Donna repeated her instruction. Nolan cupped his ear to indicate he had not heard Donna and then resumed working. In a loud voice, Donna said “Do it later!”

Donna returned to her office. A very frustrated mail handler came in, told her Nolan was still working on the FSM, and demanded that she do something about it. Donna asked the mail handler to send Nolan to her office “immediately.”

When Nolan appeared, Donna said she was issuing him a letter of warning for insubordination: she’d given him a direct order to stop what he was doing and he flagrantly disobeyed her. Nolan said he could see she was trying to tell him something, but his hearing had really gotten bad since he had been in the Army and that she needed to come much closer when she talked to him. Donna said the organ that was causing him problems did not appear to be his ears, and she had no intention of getting any closer to him.

After this incident, the relationship between Donna and Nolan was very tense. The next time Donna approached Nolan on the workroom floor, he again cupped his hand around his ear, and he said he couldn’t hear her. He told her he’d prefer to receive instructions from her in writing.

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Donna refused because she does not have the time and thought Nolan was just trying to irritate her.

After Donna gave a routine Stand Up Talk to her staff on safety a week later, Nolan, who had been standing in the back, asked a question about stacking excess trays that Donna had just addressed. Donna barked: "I just answered that. What are you, deaf?" Nolan replied: "What are you, pre-menstrual?" Several technicians snickered. As soon as she got back into her office, Donna suspended Nolan for two weeks for insubordination and making a sexist remark.

The final straw came a few months later, in November of 2001, when Nolan again apparently ignored Donna when she was trying to tell him to fix a jam in the second FSM. On the spot, Donna told Nolan "You're fired." Nolan responded, "You're a wacko—I'm not the only one who is disabled."

Nolan immediately filed an Equal Employment Opportunity ("EEO") complaint alleging that, by terminating him, Donna had discriminated against Nolan on the basis of disability. The EEOC issued a right-to-sue letter, and Nolan filed suit against the Federal Delivery Service. After the Answer was filed, and some initial discovery took place, the parties (and their counsel) agreed to try mediation.

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### Supplemental General Information

The federal Americans with Disabilities Act is codified at 42 U.S.C. §§ 12101 et seq., and in pertinent part provides:

#### § 12102. Definitions.

- (2) Disability. The term “disability” means, with respect to an individual—
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual...

#### § 12111. Definitions.

- (8) Qualified individual with a disability. The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer’s judgment as to what functions of a job are essential...
- (9) Reasonable accommodation. The term “reasonable accommodation” may include
- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices...training materials or policies...and other similar accommodations for individuals with disabilities.
- (10) Undue hardship.
- (A) In general. The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
- (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered included—
- (i) the nature and cost of the accommodation needed under this Act;

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- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources; or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of the covered entity with respect to the number of its employees; the number, type, and location of its facilities, and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

**§ 12112. Discrimination.**

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term “discriminate” includes—

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Note: The Federal Delivery Service is a “covered entity,” and is an “employer” for purposes of this act.

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### Confidential Information for Donna Patrick

After Donna fired Nolan, and heard rumblings that he was going to file suit, she turned to an experienced supervisor, Daisy Thomas, for advice. Daisy said whenever an employee claims to have a disability and asks for some type of “accommodation,” a supervisor is required to act on the request. If the situation is easily resolved, the supervisor is supposed to handle it herself. Company policy is to refer more difficult cases to the Disability Coordinator in the main office in Dallas.

In addition, the company’s progressive discipline policy requires supervisors to consult with employees before issuing a suspension unless the conduct is “so egregious that no discussion is warranted.” And, of course, there must be “good cause” for the termination of an employee.

Donna did not know anything about these policies because she had not had any supervisory training at the time. It’s not her fault; when she was appointed an acting supervisor she practically begged for training. But when money gets tight, the training budget is the first thing to get cut. But Donna now realizes that she was probably a bit hasty in both suspending Nolan and in terminating him. She is getting pressure from the higher-ups to get this lawsuit resolved as soon as possible.

However, Donna does feel strongly that Nolan just made up the hearing problem as an excuse for ignoring her. If he had a disability, why hadn’t he given her any paperwork or specifically asked for some sort of accommodation? Also, what she was asking him to do that first time should have been obvious. To take one of only two Flat Sorting Machines out of service for routine maintenance at peak processing time was just plain stupid. Nolan didn’t need to hear what she said; he just needed to think.

Donna has seen how difficult it is for any acting supervisor to command respect. And as a small, relatively young woman in a mostly male environment, she feels it is doubly difficult for her. She viewed Nolan’s blatant disregard of her order in front of a group of other employees as a test of wills she had to win. If she had blinked, he would have “owned” her, and it would have only be a question of time before other challengers came along.

His subsequent insubordinate and sexist comment, plus another incident of ignoring her confirmed her suspicions about Nolan.

Donna is ambitious: she wants to move up in the organization. She thinks that it is crucial for her subordinates to respect her authority. However, it is also clear that she may have permanently hurt her dreams of promotion if this cannot be quickly resolved. She would rather not work with Nolan again, but is willing to do so if that’s the only way to make this nightmare go away.

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