

Disability Discrimination: Pushing the Limits

By Ellen C. Meyer

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A recent study published by the American Bar Association reports that nearly 95% of lawsuits filed under the federal Americans with Disabilities Act (ADA) and nearly 80% of administrative claims of disability discrimination are ultimately decided in favor of the defendant. However, at the same time, employers and their HR departments are confronted with more and more bizarre tales of liability under the disability laws.

Three recent cases – from the United States Supreme Court, the Massachusetts Supreme Judicial Court, and the federal Court of Appeals covering Massachusetts – provide some useful guidance to employers dealing with some of the increasingly common and perplexing claims of disability.

Drug and Alcohol Addiction as a Disability?

It is now generally accepted that an employer commits disability discrimination if it terminates or refuses to hire an individual simply because he or she has a “record of” drug or alcohol addiction, at least insofar as the individual is in recovery from the addiction. On the flip side, it is equally well settled that it is not discrimination to take adverse action against an employee who violates a workplace policy regarding the use of drugs or alcohol, irrespective of whether the employee suffers from an addiction.

Given these settled propositions, does an employer have some legal obligation to consider for *re-hire* a recovering addict who was previously and validly terminated for using drugs and alcohol in violation of a workplace conduct rule? When one federal court was presented with this question, it said – surprisingly – yes. However, on appeal, the Supreme Court of the United States – while not definitively answering the question – provided some useful reassurance to employers faced with this dilemma. See *Raytheon v. Hernandez* (U.S. Sup Ct. Dec. 2, 2003).

In the *Raytheon* case, the employer terminated an employee after his “appearance and behavior at work suggested that he might be under the influence of drugs and alcohol” and after his follow-up drug test was positive for cocaine use. Two years later, the employee applied for rehire and was rejected out of hand, purportedly due to a blanket no-rehire policy applicable to any employee terminated for violation of *any* workplace conduct

rule. The employee brought a claim under the ADA, contending that the employer’s refusal to consider him for re-employment was actually based on his “record of” drug addiction and therefore constituted unlawful disability discrimination. After lengthy and costly litigation, a federal appeals court sided with the employee. The employer then appealed to the Supreme Court.

Rather than answering the question presented, the Supreme Court sent the case back to the lower court for further factual inquiry into the employer’s *true* reason for refusing to rehire the employee. However, in so doing, it provided the following clear message: if, in turning away this former employee, the company in fact applied a “neutral” no-rehire policy applicable to any person terminated for violation of any workplace misconduct rule, it could “in no way” be said to have committed disability discrimination. Going further, the Court stated that such a “blanket” no-rehire policy “is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee.” In short, the Supreme Court made clear its view that, if the employer *truly* treated this employee the same as any other employee terminated for violation of any workplace conduct rule, the employer did not violate the law in refusing to rehire him, irregardless of the fact that his disability was a factor in his misconduct.

With these statements from the Supreme Court, employers are reassured that they have no particular obligation under the disability laws with respect to individuals terminated for drug and alcohol use in violation of a company policy – so long as they treat such employees the same as others terminated for misconduct.

Stress and Emotional Instability?

One of the most perplexing disability analyses faced by employers arises when an employee is “regarded as” unable to handle work stress or as otherwise emotionally unstable. Employers increasingly worry that they will run afoul of the disability laws if they make changes to an employee’s title or duties based on such a perception, despite the impact of the employee’s problems on his performance or on the work environment. A recent case decided by the Massachusetts’ Supreme Judicial Court makes clear, however, that employers retain wide discretion in these situations. See *City of New Bedford v. MCAD* (Mass. SJC Dec. 2, 2003).

In the *New Bedford* case, a city police officer was removed from two advanced tactical units in the Police Department, including the SWAT team, purportedly because his superiors “perceived that he ‘suffered from stress’ and might be mentally unstable.” After he was reassigned to foot patrol duty, the officer filed a claim of disability discrimination under state law before the Massachusetts Commission Against Discrimination (MCAD). He argued that he was unlawfully demoted based on a perception that he was “disabled” by stress – and he succeeded on his claim before the MCAD. The City appealed the MCAD decision through the state courts, and it ultimately won its appeal before the state’s Supreme Judicial Court (SJC), which dismissed the officer’s disability discrimination claim.

In ruling for the City, the SJC stressed that in order to prove that he had a protected “disability,” the officer had to prove that his superiors regarded him (i) as disabled generally (*i.e.*, from a “class of jobs,” not just one or two specific jobs); and (ii) as substantially limited “as compared to the ability of the average person in the general population.” Because the officer was not terminated but instead transferred to another demanding job (*i.e.*, foot patrol), the Court said it was clear that the superior officers did not perceive the officer as disabled under the law. In reaching this conclusion, the court also issued a strong reminder that “not every claim of workplace unfairness is a claim of discrimination, and the MCAD has no jurisdiction to order relief for workplace disputes that arise for reasons other than discrimination.”

With this ruling from Massachusetts’ highest court, employers are reassured that their discretion to alter the workplace assignments of seemingly unstable employees is not lost to the disability laws. However, because this case does not speak to those scenarios where an employee is terminated outright, employers should exercise particular care when it has no option for reassignment in these circumstances.

Attention Deficit Disorder?

Employers often assume that an employee with a confirmed medical diagnosis of a physical or mental impairment has, *de facto*, a protected disability. In fact, the law requires much more than a mere diagnosis. Indeed, in two cases recently decided by the federal First Circuit Court of Appeals (which covers Massachusetts), the court found that employees who presented their employers with documentation of diagnosis with attention deficit disorder (ADD) did not have a protected disability. See *Wright v. CompUSA* (1st Cir. Dec. 19, 2003) and *Whitlock v. Mac-Gray, Inc.* (1st Cir. Oct. 6, 2003).

In the *Wright* case, the employee told his employer that he was diagnosed with ADD. A year later, he presented a doctor’s note stating that his symptoms were exacerbated by his supervisor’s purportedly harsh “managerial style.” He asked for several accommodations – for example, that he be able to set his own

timetables for his tasks and that he be allowed to avoid early morning meetings. Later, he was fired after a confrontation with his supervisor, and he sued for disability discrimination.

Similarly, in *Whitlock*, the employee told his employer that he had been diagnosed with ADD. As an accommodation, he asked that he be allowed to build partitions around his workplace, to play a radio in order to drown out distractions, to work part-time, and to be exempt from demands for overtime – and the employer allowed these accommodations at most times. Nonetheless, the employee brought a claim of disability discrimination based on his few demands that were not met.

In each of these cases, the court rejected the employee’s claim that his ADD constituted a protected “disability.” In the first case, it found that the employee proved only that stress occasionally exacerbated his symptoms, not that he had a “continuing inability to handle stressful situations.” In the second case, the court likewise concluded that the employee was capable of performing his job and that there was no evidence that the employer thought otherwise.

These ADD cases serve as a reminder that diagnosis is not synonymous with disability. They also offer reassurance that the fact that an employer has allowed a requested accommodation will not be treated by the courts as an admission that it regarded the employee as disabled. Above all, it demonstrates that where an employer continues to hold an employee to his job duties, and particularly while granting a requested accommodation, the prospect of disability discrimination liability will remain remote.



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