INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: Work Session II: The ADA Today

Title: ADA and Employment

by

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The Americans with Disabilities Act

Recent Decisions of Interest to Government Employers

-Coverage issues

McWilliams v. Jefferson County, 464 F.3d 1113 (10th Cir. 2007) – Plaintiff, a computer support specialist, claimed to suffer from intermittent episodes of depression, a difficulty sleeping, difficulty in dealing with people, and difficulty coping with some work related situations. She was ultimately terminated, which she claimed violated the ADA. The Court held that Plaintiff's condition did not prevent her from performing her job nor from performing any other life activities completely, and hence she was not covered by the ADA.

Jacques v. DiMarzio, 386 F.3d 192 (2d Cir. 2004) – After reviewing the various circuit courts' decisions in this area, the Court held that "a plaintiff is 'substantially limited' in 'interacting with others' when the mental or physical impairment severely limits the fundamental ability to communicate with others. This standard is satisfied when the impairment severely limits the plaintiff's ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people-at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful." The Court distinguished the inability to get along with others from the inability to interact with others.

Vinson v. New York City Department of Corrections, 2006 WL 140553 (E.D. NY, Jan. 17, 2006) – Court found that corrections worker with a condition exacerbated by smoke was not protected by the ADA, since she could work in any non-smoking environment and her smoke sensitivity (despite keeping her from going to certain bars and social establishments) did not substantially limit a major life activity.

Thursby v. City of Scranton, 2006 WL 1455736 (M.D. Pa., May 25, 2006) – Court denied summary judgment to City on claim that police officer's smoke allergy is protected by the ADA and City's failure to prohibit smoking in all Plaintiff's work areas was unreasonable. The Court held that whether Plaintiff's smoke allergy substantially limited her ability to work and breathe was a jury question, as was the reasonableness of the City's response.

-Inability to work

Allen v. Hamm, 2006 WL 436054 (D. Md. Feb.22, 2006) – Baltimore changed its light duty policy to require that after 12 months of light duty, officers be able to perform the functions of making a forcible arrest, driving a motor vehicle under emergency conditions and qualifying with a firearm, or apply for retirement. The Court found that officers unable to perform these three functions were not qualified to perform the essential function of a police officer and not entitled to ADA protection.

Rossback v. Miami, 374 F.3d 1161 (11th Cir. 2004) – Plaintiff police officers filed suit alleging that a departmental policy denying the right to engage in off-duty work to officers on light or limited duty violated the ADA. The Court ruled in favor of the City, finding that the officers were not protected by the ADA because they could not establish an impairment that interfered with major life activities. The Court specifically held that the inability to perform the duties of a police officer did not constitute inability to work, and therefore did not alone constitute interference with a major life activity.

Epps v. City of Pine Lawn, 333 F.3d 588 (8th Cir. 2003) – Inability to perform the particular job as a Pine Lawn police officer (due to degenerative disc disease) does not constitute inability to "perform either a class of jobs or a broad range of jobs" and therefore does not meet the definition of disability under the ADA.

Jackson v. Chicago, 414 F.3d 806 (7th Cir. 2005) – Plaintiff, a police officer developed fibromyalgia and was unable to ambulate normally or to carry a firearm. The Court held that the ability to safely handle a weapon to be an essential function of the police officer position. Because Ms. Jackson had refused to engage in the interactive process of providing information necessary to a job search within the City, but outside the police department, insisting on reinstatement, the City had fulfilled its ADA obligation, and summary judgment was granted in its favor.

Giordano v. City of New York, 274 F.3d 740 (2d Cir. 2001) – NYPD officer who was terminated because his medical condition required him to take anticoagulant medication sued under the ADA alleging discrimination by the department. The court granted the employer summary judgment finding that the fact that an employer views the employee as incapable of performing as a police officer does not mean that the employer regards him as disabled (incapable of performing a broad range of jobs).

- Accommodation

Szedlock v. Tenet, 139 F.Supp.2d 725 (E.D.Va. 2001) – CIA found to have violated the rehabilitation act by failing to provide adequate interpreters for meetings attended as part of the job of a deaf systems engineer.

Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007) – Plaintiff worked as a warehouse technician at Iams. All warehouse technicians worked on rotating shifts. Based on a condition of diabetes, Plaintiff's doctor requested that Iams provide Plaintiff with a permanent day shift assignment. The employer declined, citing their team concept and producing evidence that allowing exceptions to shift rotations would create inequities among other technicians in the workforce. Based on this, the court concluded that rotating shifts were an essential function of the warehouse technician position and upheld the district court's grant of summary judgment to the defendant.

Huber v. Walmart, 486 F.3d 480 (8th Cir. 2007) – Plaintiff was injured while working for Walmart and requested reassignment to a vacant equivalent position. The employer instead hired a more qualified candidate for the equivalent position and reassigned Plaintiff to a lesser paid position which she was qualified to perform. Plaintiff filed suit, alleging that she was entitled to reassignment to the vacant equivalent position. The court ruled, consistent with the 7th Circuit, but contrary to the 10th Circuit, that Plaintiff was not entitled to the reassignment if she was not the most qualified applicant.

-Discipline

Raytheon Co. v. Hernandez, 124 S.Ct. 513 (2003) – The US Supreme Court held that a "no-rehire" policy for employees terminated for violating a company's drug and alcohol policy does not constitute disparate treatment discrimination under the ADA (Plaintiff had not pled disparate impact, so this theory of liability was not addressed). The Plaintiff in this case had been employed at the company for 25 years. He was terminated after testing positive for cocaine on a reasonable suspicion test. He underwent a rehabilitation program and reapplied 2.5 years later. He was denied reemployment, allegedly based on an unwritten no-rehire policy. The case was remanded to allow Plaintiff to develop a pretext challenge.

Hernandez v. Raytheon, 342 F.3d 564 (9th Cir. 2004) (on remand) – Court of Appeals found a genuine issue of material fact exists as to whether Plaintiff was not rehired based on the policy or based on his status as an alcoholic (the latter being protected by the ADA). Remanded to the District Court for jury trial.

Longen v. Waterous Company, 347 F.3d 685 (8th Cir. 2003) – After numerous problems with substance abuse, Plaintiff entered into a Last Chance Agreement, allowing him to get treatment, but subjecting him to termination if he used "mood altering chemicals." Four years later, Plaintiff was arrested for DWI, plead guilty

and was terminated. The Court upheld the validity of last chance agreements, even when they involve conditions that might be protected by the ADA, and found the termination not to be based on a disability, but rather on the violation of the agreement.

Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001) – Aviation department employee terminated for drug possession alleged ADA violation based on his drug addiction. Court held that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability.

Smith v. Davis, 248 F.3d 249 (3d Cir. 2001) – Alcoholic probation officer sued over his termination, alleging it violated the ADA. Although the employer alleged that the officer was fired for absenteeism, the record was far from clear, as the supervisor's documentation showed only that he was fired for violation of the employer's drug and alcohol policy. Court reversed grant of summary judgment to the county.

-Medical questions

Leonel v. American Airlines, 400 F.3d 702 (9th Cir. 2005) – Flight attendant candidates were given conditional offers of employment, subject to completion of background checks and medical exams. The medical exam revealed previously undisclosed HIV conditions and the candidates were denied jobs. The 9th Circuit held that the conditional offer was not "real" because it was subject to both medical *and non-medical* post offer conditions.

Thomas v. Corwin, 483 F.3d 516 (8th Cir. 2007) – Court upheld District Court's grant of summary judgment to Employer in a case where the Plaintiff was terminated for failing to provide a release of her medical records in order to complete a fitness for duty exam. Plaintiff based her complaint, among other things, on a violation of the ADA. The Court held that, under the circumstances where the employee had missed work because of anxiety attacks due to "work-related stress," the employer was justified, consistent with the ADA, in ordering the employee to undergo a fitness for duty evaluation.

EEOC Advisory Letter (3/28/07) – The EEOC opined in an advisory letter that an employer was permitted, under the ADA, to order a fitness for duty exam for candidates seeking promotion to positions with an increased level of physical requirements, so long as the test did not consist of a "medical" evaluation (heart rate; blood pressure), but only measured performance of a task or tasks. In a competitive selection process, the incumbent employee must be treated like an applicant and only asked medical questions post-conditional offer. If the promotion is non-competitive (career path progression), a medical examination may only be required if the employer has reason to believe that a particular

employee has a medical condition that may impair their ability to perform the essential functions of the new position.

-Retaliation

Burlington Northern and Santa Fe Railway v. White, 126 S. Ct. 2405 (2006) – A forklift operator, transferred to other duties following a discrimination complaint and another incident of discipline (subsequently overturned) for insubordination, filed suit alleging retaliation. The Supreme Court held that the standard of harm is different for Title VII discrimination violations (which require an adverse tangible job action) and retaliation claims, which require only action, whether or not employment related, which is *materially adverse*. Materially adverse actions are those that would dissuade a reasonable employee from making a charge of discrimination. The Court made several key findings:

- "The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." Id. at 2406.

- "The anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Rochon v. Gonzales*, 438 F.3d 1211, 1219." Id. at 2407.

- "The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable." Id. at 2407.

Excerpt from 42 U.S.C § 12203, a section of The Americans with Disabilities Act (ADA)

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

EEOC v. SunDance Rehabilitation Corp., 466 F.3d 490 (6th Cir. 2006) – Plaintiff, terminated in a RIF, was offered 80 hours of severance pay in return for signing an agreement which included, among other items, an agreement that should she file an EEOC complaint, the employer could recover the severance pay. Plaintiff decided not to sign and didn't receive the severance pay. The EEOC sued, claiming the language in the agreement was a preemptive strike against future protected activity and therefore a violation of the ADA's anti-retaliation clause. The Circuit Court disagreed, finding that the severance agreement did not constitute retaliation (although commenting that enforcement of such an agreement post execution might well constitute retaliation).

Kramer v. Banc of America Securities, 355 F.3d 961 (7th Cir.), cert. denied, 542 U.S. 932 (2004) – Circuit Court upheld trial court decision that Plaintiff is not entitled to compensatory and punitive damages in an ADA retaliation claim and therefore not entitled to a jury trial, ultimately ruling in favor of the employer following a bench trial. The 7th Circuit noted that this was a case of first impression, no federal circuit court having previously ruled directly on the issue (with the handful of lower court rulings split on the issue).