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ADA [Americans with Disabilities Act]/AIDS Discrimination

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Disability Compliance Bulletin

April 27, 1995

SECTION: Vol. 6, No. 7

LENGTH: 1151 words

BODY:

WASHINGTON -- Police departments in Bell Gardens, California, and Saginaw Township, Michigan, have agreed to provide effective communication with members of the public who are deaf or hard-of-hearing, according to the Department of Justice. Two separate settlement agreements resolved complaints alleging that the police failed to provide a sign-language interpreter as requested by an individual who was arrested. In Pickens County, South Carolina, county court personnel have adopted a policy to provide auxiliary aids to persons with hearing impairments. A woman there had alleged that the court denied a request to have her daughter assist her by repeating questions for her.

A federal judge has ruled that a lab technician who claimed he was fired because of his HIV status failed to furnish sufficient evidence to support his charges.

U.S. District Judge Ruben Castillo said the technician, identified as "R.G.H.," did little more than assert his contention that Abbott Laboratories demoted and discharged him in violation of the Americans with Disabilities Act (ADA).

"Although the Court sympathizes with R.G.H.'s most difficult circumstances, there is insufficient evidence to raise a genuine issue of material fact as to his claims of disability discrimination," Castillo wrote in granting summary judgment to Abbott.

The judge said R.G.H. was unable to prove that his supervisors knew he had HIV and had failed to refute major criticisms they made in his job performance evaluations. In addition, R.G.H. was late in filing court documents and unable to apply the ADA to some of his charges because they predated the law.

For the first few years of his career at Abbott, R.G.H. was well-regarded. He received several "commendable" evaluations and at least three promotions. But in May 1985, while working on HIV research, he contracted the virus in an accident. In keeping with company policy, he reported the exposure to a supervisor.

R.G.H. said Abbott began to discriminate against him when it passed him over for a management position in 1989. Though his master's degree qualified him for the position, the job instead went to an employee with a Ph.D.

In October 1989, R.G.H. asked that his current supervisor, Dr. W. Gerard Robey, transfer him to another department, but Robey refused, saying his work was needed in his present position. Also for the first time, R.G.H.'s performance rating slipped from "commendable" to "satisfactory." He was instructed to work more independently, keep more detailed accounting of experiments and improve his productivity.

Two months later, a hoped-for promotion instead went to a less-qualified employee. Over the next two years, R.G.H. was again refused a transfer, placed on a six-month improvement plan which Robey said he failed to meet, demoted, assigned to another division and refused another position. In May 1993, he took an extended medical leave of absence. One month later, he filed a complaint with the Equal Employment Opportunity Commission (EEOC).

R.G.H. charged that Abbott supervisors engaged in a pattern of discrimination against him based on his HIV status. He contended that the report of his workplace infection was part of his personnel file, which he said would have been available to supervisors who reviewed his requests for promotions. Moreover, he said, he told one supervisor about his HIV infection in hope of gaining a transfer to another less stressful job, but the supervisor turned him down because of unfavorable performance evaluations.

The EEOC issued him a letter to sue, and he filed suit in July 1993, charging violation of the ADA and state-law claims of infliction for intentional emotional distress.

In June 1994, after returning from his medical leave of absence, R.G.H. was fired.

In granting Abbott's motion for summary judgment, the judge said R.G.H. could not recover damages arising from actions before 1992, when the ADA took effect. Citing the U.S. Supreme Court in its 1994 decision in Landgraf v. USI Film Prods., the judge said the ADA cannot be applied retroactively.

That left R.G.H. with only three claims to assert: that he was denied a promotion in December 1992, that he was denied a pay raise in August 1992 and that Abbott lowered his performance evaluation in April 1993.

In the case of the promotion, the two managers involved in the decision, Belinda Hightower and Cynthia Rask, both stated in affidavits that they were unaware R.G.H. had HIV.

The judge said there was "no shred of evidence" supporting R.G.H.'s assertions that Hightower and Rask knew about his HIV status. "R.G.H. submits no evidence that Hightower or Rask ever had access to R.G.H.'s personnel file or were otherwise informed of his exposure incident; nor does R.G.H. submit evidence that Hightower or Rask ever saw the notice advising R.G.H.'s supervisors that he should not be exposed to infectious agents. Similarly, R.G.H. offers no evidence that Hightower or Rask ever heard the rumor regarding R.G.H.'s HIV status. ... In the absence of any probative evidence supporting the inference that either Hightower or Rask knew of R.G.H.'s medical condition, a factfinder could not reasonably conclude that their decision not to hire R.G.H. was motivated by discriminatory intent."

R.G.H.'s supervisor told him he was being denied his pay raise because of five areas in which she found his performance to be unacceptable. R.G.H. was unable to rebut all of those points, both at the time of the evaluation and subsequently. As a result, the judge agreed with Abbott that denial of a pay raise for unacceptable performance does not constitute discrimination.

R.G.H. also based his discrimination claim on the fact that a series of supervisors reviewed his April 1993 performance evaluation to make it appear more negative. However, the judge said R.G.H. was unable to identify which supervisors were involved and whether they knew he had HIV. "More fundamentally, the Court does not believe that the mere fact that R.G.H.'s performance evaluation were subject to negative revision constitutes an 'adverse employment action' that is actionable under the ADA particularly in the absence of any claim that the revised evaluations contained false information," the judge wrote.

The judge also dismissed an amended motion R.G.H. filed to support a second EEOC letter to sue arising from his firing in June 1994. The motion, the judge said, was filed too late to be considered. In addition, the judge said Abbott should not be subjected to a second claim of discrimination when, had R.G.H. acted promptly, the two claims could have been addressed simultaneously rather than piecemeal. The letter to sue was dated Sept. 29, 1994, but R.G.H. said he did not receive the certified mail until approximately Oct. 17, 1994.

(R.G.H. v. Abbott Laboratories, DC Ill. N.D., No. 93 C 4361. Decided Feb. 16.)

LANGUAGE: ENGLISH

LOAD-DATE: January 25, 1996

ILLINOIS EMPLOYMENT LAW LETTER

June, 1995

SECTION: Volume 5, Issue 11

LENGTH: 760 words

HEADLINE: AIDS Victim's ADA Claims Survive but State Law Claims Fail

BYLINE: Matkov, Salzman, Madoff & Gunn

BODY:

Ron Sather went to work for Neiman Marcus as an assistant sales manager in 1991. At that time, he met with the human resources manager to learn about Neiman Marcus' benefit plans. He was given enrollment forms for the plans.

Sather said he selected coverage of $ 80,000 under the group universal life insurance program and enrolled in the longterm disability plan. However, Neiman Marcus records (the company kept all of the enrollment forms) did not show that Sather enrolled in the life insurance plans, and Sather's long-term disability enrollment form was crossed out. This fact is important because Sather was diagnosed with AIDS after he became a Neiman Marcus employee.

Sather continued to work for Neiman Marcus but without the life and disability coverages. He sued Neiman Marcus for damages for its failure to enroll him, relying largely on various aspects of Illinois law, breach of contract, for instance, and violation of Illinois wage payment and attorneys fees' statutes, fraud, and negligent misrepresentation. He sued, though, in federal court, and Judge Reuben Castillo of the District Court for the Northern District of Illinois held that state law claims were unavailing. The Employee Retirement Income Security Act (ERISA) preempts (supersedes) any state claims relating to employee benefit plans that are subject to ERISA. Sather's claims, the judge found, depend on the existence of ERISA plans and the benefits they provide. Considerations of state law have no role in this controversy.

On the other hand, another federal law, the Americans with Disabilities Act (ADA), seemed to Judge Castillo to be quite on point. Sather was an individual with a disability, since AIDS has been recognized as a disability subject to the Act. Sather was able, even with AIDS, to perform the essential functions of his job. He claimed that he had been discriminated against by being excluded from benefits coverage because of his disability. Of course, he would have to prove this aspect of the case, but at least he was in the right ballpark when he seized on the ADA claim. Like many individuals, employers and employees alike, Sather experienced some difficulty finding his way though the legal thicket that confronts AIDS sufferers and employers of employees with AIDS under various state and federal laws.

One of the peculiarities that employers face in dealing with employees with AIDS is the veil of secrecy that normally surrounds the AIDS patient. Indeed, Illinois law prohibits the disclosure of the identity of any person who has tested positive for the human immunodeficiency virus (HIV). The Illinois AIDS Confidentiality Act states that "no person may disclose . . . the identify of any person upon whom [an HIV] test is performed, or the results of such a test in a manner which permits identification of the subject of the test," with some exceptions for health care providers, law enforcement officers, and firefighters. Quite obviously, the public interest of maintaining the privacy of AIDS sufferers is considered by the Illinois state legislature as paramount to any interest that an employer might perceive in informing co-workers that an employee has tested positive for the HIV virus. Thus, an employer has a dual responsibility under federal and state law to accommodate the employment needs of employee-victims of AIDS and to maintain confidentiality of an AIDS victim's identity. There are situations where the safety of others may be the predominant consideration. An employer also has a duty to maintain a safe workplace. A hospital was recently sustained by a federal appellate court in Richmond, Virginia, in its decision to remove a surgeon from surgical duties after he tested positive for the HIV virus. Although the possibility of transmission of the HIV virus from surgeon to patient is remote, there was enough patient risk in this circumstance to make accommodation of the surgeon's disability impossible.

Sather's ultimate success or failure may depend on the knowledge that Neiman Marcus had of his condition at the time he was hired. The U.S. Court of Appeals for the Seventh Circuit, located in Chicago, ruled recently that an employer that was unaware of an employee's disability cannot be held liable under the ADA for discrimination on the basis of disability. In any case, if anything is certain about AIDS cases, it is that they are invariably tragic and invariably involve serious public policy concerns.

Sather v. Neiman Marcus Group Inc., 19 Emp. Ben. Cases (BNA) 1153 (N.D. Ill. 1994).

LANGUAGE: English

LOAD-DATE: November 10, 1995

Chicago Tribune

June 23, 1994 Thursday, NORTHWEST SPORTS FINAL EDITION

SECTION: NEWS; Pg. 1; ZONE: NW

LENGTH: 873 words

HEADLINE: AN AIDS PATIENT WINS BACK HIS JOB;
SETTLEMENT WILL ALSO PAY HIM $160,000

BYLINE: By Matt O'Connor, Tribune Staff Writer.

BODY:

An employee who sued a Schaumburg mortgage firm, alleging he was fired because he has AIDS, will be paid $160,000 in damages and back pay and be reinstated to work under a settlement approved Wednesday by a federal judge.

Dovenmuehle Mortgage Inc. also agreed to provide health insurance coverage for Shawn L. Smith, of Chicago, for the rest of his life, even if Smith quits the company.

Smith, 36, was one of the first AIDS patients in the country to file a lawsuit against an employer in federal court under the Americans with Disabilities Act, a 1992 federal law prohibiting discrimination against the disabled.

Smith, who started at the mortgage company in 1985 as a clerk and rose to assistant vice president, alleged in the suit that he was fired three months after he confided to his immediate supervisor in 1992 that he has AIDS.

A jury trial was scheduled to begin next Monday, but lawyers for both sides negotiated a settlement late last week during a meeting in U.S. District Judge Ruben Castillo's chambers.

Dovenmuehle indicated it decided to settle the lawsuit as a "pragmatic business decision." But Paul Vickrey, Smith's lawyer, said, "We see this as a complete vindication of Shawn."

Smith, who was fired in October 1992, will receive $60,000 in back pay and an additional $100,000 in damages-the limit under the Americans with Disabilities Act for an employer the size of Dovenmuehle, Vickrey said.

If the case had gone to trial, Smith could have received further damages if the jury found Dovenmuehle had inflicted emotional distress on him as a result of the firing, as the lawsuit alleged.

As part of the settlement, Dovenmuehle also agreed to immediately put Smith back on the payroll with the same $40,280-a-year salary and benefits and find or create a "reasonably comparable" post for him by early October.

In addition, the company agreed to provide health insurance benefits "for the remainder of Smith's natural life, regardless of whether Smith continues in the employ of Dovenmuehle," the settlement said.

That means Smith's insurance coverage will continue if he becomes too physically ill to work or he finds the working conditions at Dovenmuehle too hostile on his return, noted Michael Closen, a professor at John Marshall Law School.

But Smith, who is healthy and intends to return to work, is optimistic things will work out. "I'm looking forward to going back to work," he said outside the courtroom. "I was an outstanding employee. I don't think there will be any problems."

Smith said he hopes his settlement will spur other people with AIDS to take legal action if employers wrongly discharge them.

The Americans with Disabilities Act, which took effect two months before Smith's firing, greatly expanded the numbers of people with disabilities who are protected from discrimination on the job.

Before 1992, victims of job discrimination had to sue under often ineffective state laws or local ordinances or a federal law that only protected employes of federal agencies or companies that get federal funds.

The new law affects any employer of 15 or more, and federal regulations make it clear the law covers people with AIDS, lawyers said.

In Smith's settlement, Dovenmuehle neither admits nor denies wrongdoing in his firing. But in a prepared statement Wednesday, the company contended Smith's disease had nothing to do with his dismissal and denied coworkers knew of his illness at the time.

In court filings, Dovenmuehle maintained Smith was fired for failing to complete a work project on time, forcing the company to spend $240,000 to meet a hurried-up deadline.

Dovenmuehle, in its statement, said its decision to settle the lawsuit "was nothing more than a pragmatic business decision" given "the high costs and inherent risks of protracted litigation."

The settlement allows "Dovenmuehle to focus on its business while allowing Mr. Smith the opportunity to make productive contributions and maintain the benefits essential to his long-term health care," the company statement said.

No one at Dovenmuehle's main office across the street from the Woodfield Mall was available for further comment, according to company lawyers.

Smith, who grew up in a Rockford housing development, was an exemplary employee, working 10- to 12-hour days and most Saturdays, garnering six promotions in six years and rising to assistant vice president of customer service, the lawsuit said.

In spring 1992, Smith, who had been HIV positive since 1990 and by then had full-blown AIDS, lost a lot of weight, prompting his immediate supervisor, Mary Przybyla, to continually ask him what was wrong, the suit said.

According to the suit, Smith didn't tell Przybyla he had AIDS until late July 1992 when she asked him why he was leaving work an hour early to see a doctor and told him, "You can confide in me."

When Smith told her of his AIDS, Przybyla threw a pencil in the air, rolled her eyes at the ceiling and didn't say anything, Smith said.

In succeeding weeks, Przybyla became distant and hostile, no longer sat down in Smith's office, berated him in front of subordinates and began dealing more with his assistant, the suit alleged.

LANGUAGE: ENGLISH

LOAD-DATE: June 23, 1994

LEVEL 1 - 874 OF 1807 STORIES

Chicago Daily Law Bulletin

June 22, 1994, Wednesday

SECTION: Pg. 1

LENGTH: 607 words

HEADLINE: Fired exec, suburban firm settle AIDS-related discrimination case

BYLINE: JOHN FLYNN ROONEY; Law Bulletin staff writer

BODY:

A Chicago man with AIDS will get his job back and $ 160,000 in damages as part of a settlement reached Wednesday in reportedly the first AIDS-related lawsuit brought in federal court under the Americans With Disabilities Act.

The settlement agreement between Shawn L. Smith and Dovenmuehle Mortgage Inc. in Schaumburg was approved Wednesday by U.S. District Court Judge Ruben Castillo. Smith will return to his job as a high-ranking executive with the company by Oct. 3 under the agreement.

Smith said Wednesday that he was excited about the settlement and looked forward to returning to work with Dovenmuehle.

I was an outstanding employee, and I continue to be one," Smith, 36, said after a brief court hearing. I don't expect there to be any problems."

I hope this case will help other people do the same," said Smith, who learned he had the AIDS virus in 1990.

Smith's attorney, Paul K. Vickrey, praised his client's courage.

We see this as a complete vindication of Shawn," said Vickrey, a Hopkins & Sutter partner. I'm proud of the way he fought for his rights."

Vickrey said he believed Smith's was the first AIDS-related case filed under the ADA and the first settlement of such a case.

Wednesday's agreement also calls for Smith to immediately resume receiving his $ 40,280 annual salary and for the reinstatement of benefits Dovenmuehle provided, including medical, disability, dental and life insurance coverage. Dovenmuehle, which has about 150 employees, agreed to continue to provide Smith's medical insurance coverage even if he left the company.

Dovenmuehle issued a statement Wednesday afternoon stating that the company stands by its position that Mr. Smith was terminated from his employment in 1992 not because of his disability, which Dovenmuehle was not even aware of at the time of his termination, but because of performance related issues."

The statement added that Dovenmuehle's decision to settle was nothing more than a pragmatic business decision it made in light of Mr. Smith's condition and the high costs and inherent risks of protracted litigation." The case was scheduled to go to trial Monday.

Chicago Daily Law Bulletin, June 22, 1994

Accordingly, Dovenmuehle determined to resolve the litigation through a settlement that allows Dovenmuehle to focus on its business while allowing Mr. Smith the opportunity to make productive contributions and maintain the benefits essential to his long-term health care, rather than proceed with the litigation, which Dovenmuehle believes it would have won," the statement concluded.

Dovenmuehle hired Smith in February 1985, and he was promoted six times over the next six years, according to Smith's complaint. He was assistant vice president of customer service when he was fired in October 1992.

The lawsuit, filed in January, charged that Smith was fired after he told a colleague in July 1992 that he had AIDS. The complaint alleged that Smith was fired because he had AIDS and that Dovenmuehle wanted to avoid to paying his medical and disability benefits.

Under the ADA, which took effect in 1992, lawsuits can be brought in federal courts on behalf of people terminated or discriminated against because of disabilities, including people who are HIV-positive, Vickrey said. The ADA caps damages to $ 100,000 for companies with between 100 and 200 employees, and allows for back pay, which in Smith's case amounted to about $ 60,000, the attorney added.

Dovenmuehle is represented by James R. Daly and Thomas P. McNulty with Jones, Day, Reavis & Pogue's Chicago office. The case is Shawn L. Smith v. Dovenmuehle Mortgage Inc., No. 94 C 139.

LANGUAGE: ENGLISH

LOAD-DATE: June 23, 1994