North Carolina Lawyers Weekly **http://nclawyersweekly.com**

ADA claim survives summary judgment in Western District

by Guy Loranger, Staff Writer

Published: December 15th, 2008

A federal magistrate judge has ruled that a quadriplegic computer analyst can go to trial on his claim that a Charlotte bank used cost-cutting measures as an excuse to fire him because of his disability.

The denial of the bank's summary judgment motion in the U.S. District Court for the Western District of North Carolina marks a rare victory for plaintiffs with Americans with Disabilities Act claims, said the plaintiff's attorney, Joshua R. Van Kampen.

The Charlotte attorney said his research had turned up no other reported Western District case in which an ADA plaintiff had survived summary judgment.

The ADA, which took effect in 1990, is aimed at giving people with disabilities the same protections from discrimination as those found in the Civil Rights Act of 1964.

But federal courts have stringently construed the ADA, such as narrowly defining what qualifies as a "disability," Van Kampen said. (See related article above).

Because the plaintiff in this case had no trouble proving a disability, he did not face an obstacle many ADA plaintiffs have been unable to overcome, according to the attorney.

In his ruling, U.S. Magistrate Judge Dennis L. Howell said the plaintiff had presented sufficient direct evidence that he was fired because of his disability, including a manager's reference to the plaintiff's "health issues" at his 2005 termination meeting.

The magistrate also held that a jury could reasonably find through circumstantial evidence that the bank had discriminated against the plaintiff.

For instance, the plaintiff produced evidence of a stark contrast between the plaintiff's job performance and that of other employees who were not laid off.

"Any ruling on summary judgment is high stakes because it has the potential to extinguish the suit," said Van Kampen, who is representing the plaintiff along with Julie Fosbinder. "Given the difficulties other ADA plaintiffs have had in passing this hurdle, we feel very fortunate.

"We view the decision as a critical first down, but we certainly are not across the goal line by any means."

The case is *Eckhardt v. Bank of America, N.A.* (North Carolina Lawyers Weekly No. 08-04-1341, 41 pages). It should go to trial by early next year, Van Kampen said.

Aaron J. Longo, an attorney for the bank, said his client denies the plaintiff's allegations. Citing the pending litigation, Longo said he could not comment further.

'Recent health issues'

The plaintiff, who suffered a spinal cord injury in a 1979 auto accident, started working at the bank in 1996. He joined its operation credit exposure team two years later.

According to the opinion, the plaintiff was instrumental in the team's creation and operation of a risk-monitoring program for the bank's commercial customers. By 2001, he was promoted to team leader.

The plaintiff was considered an OCE expert, highly rated as an employee and never once the subject of a disciplinary action, the opinion said.

In his complaint, the plaintiff alleged that he was removed from his team leader position to a consultant application programmer job in 2004. The bank claimed that the plaintiff still held a management role in his new position.

In June 2005, the bank's senior technology manager and a project manager met the plaintiff to inform him that his job had been eliminated as part of the bank's cost-reduction plans. His job could be outsourced for a third of the cost, one manager said.

When he asked why his particular position had been eliminated, the plaintiff said the senior technology manager told him that a software release had taken "a physical toll on you." She also told the plaintiff that he had experienced "recent health issues," and that his termination would allow him to "find something less demanding."

Later, in response to the plaintiff's Equal Employment Opportunity Commission charge, the bank stated that the plaintiff and a co-worker had been terminated because the bank wanted to consolidate three team lead positions into one.

While the co-worker was quickly rehired after his termination, the plaintiff was not.

The plaintiff sued the bank for violations of the ADA, the N.C. Equal Employment Practices Act and negligent infliction of emotional distress in state court in October 2006, seeking compensatory and punitive damages.
The case was later removed to federal court.
After more than a year of discovery and depositions, the bank filed the motion for summary judgment in October 2008.

Direct evidence

If credited by a jury, the senior technology manager's statements about the plaintiff's "health issues" would be direct evidence of disability discrimination, Judge Howell wrote in denying the bank's motion on the ADA and NCEEPA claims, which were considered together.
The statements also were "in sync" with another manager's comments that had been made when the manager had tried to secure disability leave for the plaintiff prior to his firing, the opinion said.
Judge Howell wrote that there was "no tangible difference" between those statements and those made in two other cases in which the Fourth Circuit Court of Appeals had found discrimination: *Adams v. Greenbrier, et al.*, 172 F.3d 43 (1999), and *Cline v. Wal-Mart Stores*, 144 F.3d 294 (1998).

Indirect evidence

The court also held that the plaintiff had presented sufficient circumstantial evidence to send his case to trial.
Under the burden-shifting scheme established by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the plaintiff needed to first make a prima facie case of discrimination.
He had met that burden by showing he had a disability, had been selected from a large group of candidates, had performed at a level substantially equivalent to the lowest level of that in the group retained by the bank and that his selection had left the bank with a residual work force that contained non-protected persons who performed at a lower level.
In fact, the plaintiff had produced evidence that he was "the most qualified and valuable" employee on his team, the opinion said.
The burden then shifted to the bank, which said it had fired the plaintiff for a "legitimate, non-discriminatory" reason: Consolidating the three team lead positions into one.
According to the opinion, the plaintiff had evidence to present to the jury that the bank's reason was instead a pretext for discrimination, including:
* Direct evidence of discriminatory statements made by the managers at the termination meeting;
* A shift in articulated reasons for the plaintiff's firing between statements made at the termination meeting and those provided in the bank's response to the EEOC charge;
* Failure to fire lesser-valued team members with disciplinary issues;
* The impact on the team's performance and relations with its business partners, some of whom had said the plaintiff was the "most knowledgeable" member of the OCE team; and
* The rehiring of a fellow employee without a disability, which came within weeks after both he and the plaintiff had been fired.

NIED

Having ruled that the plaintiff could go forward with his ADA claim, the court said that the plaintiff's negligent infliction of emotional distress claim would necessarily fail.
The reason: The ADA claim was based on an intentional act of discrimination, not an act of negligence.
Questions or comments may be directed to guy.loranger@nc.lawyersweekly.com.

Complete URL: **http://nclawyersweekly.com/2008/12/15/ada-claim-survives-summary-judgment-in-western-district/**