

Guard Allegedly Fired For Appearance Has ADA Claim

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A security guard with cerebral palsy who alleged he was fired over his appearance, not performance, is entitled to a jury trial, a federal judge has ruled.

The case is *Nash v. Charlotte Mecklenburg Hospital Authority* (North Carolina Lawyers Weekly No. 7-04-0899, 23 pages).

The court denied summary judgment even though the plaintiff was terminated by the same supervisor who hired him. That normally creates a presumption against a charge of discrimination under the Americans with Disabilities Act.

The plaintiff, who worked for the Mecklenburg Hospital Authority, suffers from a partial paralysis which limits his strength and mobility. He walks with a noticeable limp, cradling his right arm close to his side. One side of his body is smaller than the other.

Fellow officers took to calling him "Flipper" and imitated his limp.

After nearly four years on the job, he was terminated, ostensibly for slow response times and a long list of reprimands.

But U.S. District Judge Robert Potter held that a jury could find that the plaintiff's ungainly appearance was the true reason for the firing.

The presumption against discrimination was rebutted by substantial evidence that the flurry of reprimands was just a pretext to get rid of him.

"The ADA not only protects people who have an actual disability, but also those who have a scar or physical appearance that is used as a reason for treating them differently," said the plaintiff's attorney, Julie Fosbinder of Charlotte.

"There was significant evidence here that the plaintiff's appearance created an image problem for the security department and the hospital," she said. "They attempted to say he couldn't do the essential functions of his job

"But the court said that generalized assertions about his performance were not enough to overcome specific evidence from his coworkers that he could do the job," Fosbinder said.

The plaintiff was employed by the defendant from January 1991 through Feb. 9, 1995. He worked at the Huntersville Oaks facility for the first two years until job cuts eliminated his position.

In January 1993, his old boss called the director of security at Carolinas Medical Center and asked him to hire the plaintiff. After interviewing him, the director agreed.

According to the defendant, the plaintiff didn't satisfy his job requirements at CMC. He couldn't adequately restrain dangerous patients nor meet the 2.5 minute response time required of security officers, according to the defendant.

Over the course of two years, the plaintiff was reprimanded for not reporting a missing patient, not reporting a job injury, failing to write up an incident report, and excessive absenteeism.

A last reprimand occurred on Feb. 6, 1995 when the plaintiff allegedly failed to follow proper procedures when transporting a patient by car.

After he was fired, the plaintiff filed a charge with the EEOC. The agency dismissed the charge and informed the plaintiff of his right to bring a private lawsuit.

He did so, alleging that he had been discharged because of the perceptions about his disability. The defendant moved for summary judgment.

Ruling

Judge Potter denied the motion, holding the plaintiff had made out a prima facie ADA claim.

"Nash has produced evidence that he was disabled and perceived as a person with a disability ... and that he was treated differently because of his disability," the court said, citing these assertions:

- One of the plaintiff's supervisors said that he created an "image problem" for the department because comments were made that "you've got a cripple on the force."
- The same supervisor stated that he tried to keep the plaintiff out of the public eye by giving him assignments away from the administration building. He repeatedly discussed the issue with CMC's director of security.
- The director told a supervisor to "keep throwing it at him" and that "we need to figure out a way to get rid of Nash." At the same time, he told other officers they should "never tell Nash that we are trying to weed him out."

The court said it was reasonable for a jury to conclude this statement did not mean "weed him out consistent with the ADA," the court said.

- All of the plaintiff's performance reviews were satisfactory. None cited any need to improve his response times.
- The director was aware of his limited arm movements when he was hired.
- Evidence showed the 2.5 minute response time was not an absolute rule and that other officers had comparable numbers.
- Other officers at CMC testified that they responded to calls with the plaintiff and that his performance was as good as an average officer.

"According to CMHA, the opinion of Nash's supervisors is more valuable because they were able to review his performance as a whole," wrote Judge Potter. "But as Nash notes, outside a few specific references ... which never found their way into his performance appraisal - the testimony of these officers is nothing more than a generalized assertion that Nash did not do well in these areas.

"The court agrees ... that these generalized assertions - devoid of specificity and therefore virtually impossible to contradict - are not sufficient" to defeat the plaintiff's evidence, said Judge Potter.

- **Presumption.** The court rejected the defendant's argument that dismissal was required as a matter of law because the CMC security director hired the plaintiff with full knowledge of his handicap.

"[T]he law acknowledges a strong inference of nondiscrimination when the same person who hires someone with knowledge of their disability later discharges that individual," said Judge Potter, citing *Tyndall v. National Educ. Centers*, 31 F.3rd 209 (4th Cir. 1994).

The presumption did not apply here with its normal force because the director testified that he didn't know the full extent of the plaintiff's impairment until after he was hired, the court said.

"More fundamentally, the court finds that Nash has produced the sort of substantial and significantly probative evidence that rebuts any such presumption," Judge Potter wrote.

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