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Working not substantially limited by alcoholism

By Lawrence Peikes

The 1st U.S. Circuit Court of Appeals grappled with the difficulty of relying on the "major life activity" of working to support a finding that an employee's alcoholism is a "disability" under the Americans with Disabilities Act (ADA) and ruled that it was not.

In March 1999, Neiman Marcus hired John Sullivan, an alcoholic with a long and varied employment history in the retail sector, as a sales associate in its Boston store. In less than three months, Sullivan was promoted to assistant manager. On Aug. 12 of that year, Sullivan went to lunch with a group of co-workers. After his co-workers returned to the store, Sullivan stayed at the bar. Later that afternoon, he called Susan Parker, Neiman Marcus's human resources manager, informing her that his father had medical problems and requesting to leave work early. Parker granted that request.

That same afternoon, Ramon Lora, an employee Sullivan supervised, approached Parker seeking to resign his position. Lora claimed that Sullivan often drank at work and was drunk during the day, and that when Sullivan was drunk, he abused Lora. Lora gave the same information to Paul Karbowski, Neiman Marcus's loss prevention manager, who, upon searching Sullivan's desk, found an empty vodka bottle. Given this information, Parker determined that Sullivan had been drinking on the job and, according to her, decided that day to terminate Sullivan.

Sullivan did not return to work as scheduled but eventually called Parker on Aug. 16, informing her that he was an alcoholic and was entering a treatment program. Sullivan said Parker told him that he could have time off to attend the program and that he should speak with her when the program ended. On Aug. 24, after being discharged from the program, Sullivan called Parker, and they arranged for a meeting. Sullivan did not attend that meeting, and on Sept. 10, Neiman Marcus sent him a letter terminating his employment effective Aug. 25.

Suing Neiman Marcus under the ADA, Sullivan claimed that he suffered from a disability resulting from his alcoholism. He further asserted that the retailer had failed to reasonably accommodate his disability and, alternatively, that it had discriminated against him based on his disability.

In response, Neiman Marcus alleged that it had terminated Sullivan because of his consumption of alcohol during the workday in violation of company rules. The district court granted summary judgment for Neiman Marcus, and Sullivan appealed.

Assuming that working could be a major life activity supporting an ADA claim, the 1st Circuit recognized that an alcoholic's ADA claim based on such a foundation often would present the claimant with a "catch-22." That is, to be subject to the ADA's protections an employee must demonstrate that he or she is a "qualified individual" with a disability. However, by demonstrating that an impairment substantially limits his ability to work, an employee instead may succeed in showing that he is unqualified, thereby losing the ADA's protection. An employee asserting alcoholism as his disability will find it particularly difficult to surmount this difficulty, because the ADA explicitly allows an employer to hold an employee with alcoholism to the same standards as an unimpaired employee.

Even if Sullivan could overcome these hurdles, he still would have to demonstrate that he was unable to perform either a class of jobs or a broad range of jobs. The court held that Sullivan, likely concerned that evidence demonstrating that he was impaired in the major life activity of working instead would show that he was unqualified for his position, had failed to produce any evidence that his alcoholism had a negative effect on his ability to work. Rather, Sullivan presented evidence that his alcoholism *did not* interfere with his ability to work, making a finding that he had a disability under the ADA virtually impossible.

Sullivan's claim also failed under the "regarded as disabled" prong of the ADA, again because of the complications that arise when relying upon the major life activity of working. Under such a theory, an employee must demonstrate that the employer not only believed him to be unable to do a particular job, but also regarded him as unable to perform a class of jobs or a broad range of jobs. The only evidence that Sullivan presented in support of his contention that Neiman Marcus regarded him as disabled was that the retailer had deemed him unfit for

his own job. Recognizing this, the court held that although Neiman Marcus may have determined that Sullivan's alcoholism substantially limited his ability to do his job, there was no evidence that it regarded him disabled under the ADA.

Sullivan v. The Neiman Marcus Group, Inc., 1st Cir., No. 03-1606, Feb. 27, 2004.

Professional Pointer: Although alcoholism has been deemed an impairment under the ADA, employers should not worry that enforcing their policies against drinking on the job will subject them to liability under the ADA. The ADA explicitly allows employers to hold alcoholic employees to the same standards as other employees, preventing an employee from using evidence of his substandard job performance to demonstrate a disability without also likely establishing that the employee is unqualified for the job.

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