Benefit Short Circuit

Does applying for disability benefits disqualify discrimination claims under the ADA?

October 1, 1995 By Catherine Hanssens

In *Ennis v. National Association of Business and Educational Radio, Inc.* ("Putting the Dis in Disability," POZ No. 9), a judge questioned whether an individual with asymptomatic HIV infection was sufficiently disabled for protection from employment discrimination under the Americans with Disabilities Act (ADA). This past June, a federal trial court in Pennsylvania asked and answered the opposite question: Is a PWA who applies for disability benefits claiming "total and permanent disability" too disabled to sue for job discrimination as a "qualified person with a disability?" The court answered yes in this case, *McNemar v. The Disney Stores*.

McNemar, an assistant manager of a Disney retail store in a New Jersey mall, was diagnosed with AIDS in October 1993 and was briefly hospitalized. When he returned to work the following month, the district manager confronted McNemar with questions about whether he had AIDS. McNemar denied his condition, although he had confided it to the store manager at the time of his diagnosis.

About a week later, McNemar took $2 from a cash register and gave it to an employee to buy him a pack of cigarettes because his wallet was in an employee locker as store policy required. Another well-known policy warned employees that thefts of any size would be cause for firing, and offered $100 to employees reporting theft; the employee who ran for the cigarettes promptly reported McNemar's action. Disney supervisors confronted, then fired, McNemar. Following his discharge, but prior to suing Disney for disability discrimination, McNemar certified in an application for disability benefits that he was "totally and permanently disabled."

Dismissing the case prior to trial, the federal judge ruled that McNemar's sworn statement in his application for disability benefits prevented him from claiming in court that he is a "qualified person with a disability, "i.e., a person with a disability able to do the essential tasks of the job at issue, as required under the ADA.

The curious thing about this decisions the court's concern that a plaintiff might be double-dipping—collecting disability benefits while pursuing damages or reinstatement to a job one claims the ability to perform. Rather than considering an application for disability benefits as some evidence of the plaintiff's ability to work, the court treats it as the last word on the issue.

The *McNemar* court avoided any individual assessment of the plaintiff's actual ability to work. The

judge also failed to recognize that the Social Security Administration (SSA) has long acknowledged that disabled persons may be able to perform some work. In fact, the SSA has established work incentive plans to encourage persons receiving disability benefits to return to work.

The *McNemar* decision can present a genuine dilemma for people with disability discrimination claims. Suing one's employer is neither quick nor cheap, and a fired employee with AIDS may be able to work but unable to find another job during the years a lawsuit is pending. A person fired by an employer for cause, as happened to McNemar, may be denied unemployment and health benefits and consequently have no alternative but to file a disability claim, if eligible. McNemar says that you can apply for disability benefits o you can due your employer, but you can't do both.

While a couple of cases support the *McNemar* reasoning, a handful of cases do not. Last year, an Illinois federal court rejected the argument that a former employee with AIDS who received disability benefits after his employer fired him was prevented from recovering under the ADA This case relied on an appeal court decision that the SSA's award of disability benefits can't be read as a final judgment that the plaintiff in a disability discrimination case is unable to work. The appeals court recognized that an applicant may meet the criteria for a listed disability and receive benefit without consideration of an overall ability to work. The issue in a discrimination case is whether there is sufficient evidence for a jury to determine whether a plaintiff could perform the essential functions of the job with or without reasonable accommodation. At least four other federal trial courts have come to similar conclusions.

The pending appeal of the McNemar case may help settle the dispute. The conclusion the appeals court reaches will make a real difference to the significant number of PWAs who continue to unfairly lose their jobs.

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