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Discharge of Attorney Was Not Due to Discrimination

11/12/2012

By W. Kevin Smith

An attorney who suffered diminished capacity after an aneurism was not discharged in violation of the Age Discrimination in Employment Act (ADEA) or the Americans with Disabilities Act (ADA), the 7th U.S. Circuit Court of Appeals ruled.

Howard Fleishman, a trial attorney for Continental Casualty Co., suffered an aneurism in 2003, which caused him to miss work on an intermittent basis until 2005. During the course of these sporadic absences, Fleishman's supervisor approached him and asked whether he had considered retirement. The supervisor assured Fleishman that he would receive severance compensation if he chose to retire. Fleishman declined this offer.

In June 2005, Fleishman returned to work in a full-time capacity, assigned to the company's Major Case Unit (MCU). This unit handled "high exposure" cases. Throughout 2005, both Fleishman's immediate supervisor and the manager of all staff counsel offices for Continental received complaints regarding the work performed by Fleishman. Confirmation of the complaints led to Fleishman receiving a mediocre performance evaluation that rendered him ineligible for a raise. When Fleishman complained, his supervisor claimed that management was "out to get [the supervisor], too."

The complaints regarding Fleishman continued in 2006. After reviewing his files, Fleishman's supervisor placed him on a performance improvement plan. Fleishman did not improve his performance, and the director of the MCU requested that Fleishman be taken off the unit. Fleishman's supervisor recommended to the staff attorney manager that Fleishman be discharged. The discharge was effective in early 2007, and Fleishman brought discrimination claims under the ADEA and ADA shortly thereafter.

The trial court granted summary judgment in favor of Continental, finding that there were no issues of material fact to show that the company discriminated against Fleishman in discharging him. The 7th U.S. Circuit Court of Appeals affirmed the decision of the trial court.

Reviewing the evidence, the court first examined Fleishman's ADEA claim. Fleishman relied on his supervisor's statement that management was "out to get [the supervisor], too." The court noted that this statement was not only ambiguous, but had nothing to do with age on its face. In addition, the court observed that the comment was made a full 10 months before Fleishman's discharge, and so was not evidence of age discrimination.

Fleishman pointed to his supervisor's questions regarding retirement and offer of severance. Again, this offer occurred in 2005, and so was not contemporaneous with the employment separation. Rather, the court determined, the comments likely reflected the supervisor's concerns regarding the quality of Fleishman's work, and his ability to adequately handle the workload.

Also, Fleishman made broad assertions that older attorneys left the company at a greater rate than younger attorneys. The court noted that it was common sense that older workers would leave the workforce more frequently than younger employees and that arguments based on pure numbers must have additional facts to be useful in ADEA claims. Without more, there was no evidence of age discrimination.

The court turned next to Fleishman's claims of disability discrimination. As an initial matter, Fleishman failed to claim that his aneurism substantially limited him in a major life activity. Notwithstanding his later assertions that he was substantially limited in the major life activity of working, despite his deposition testimony to the contrary, the court found that Fleishman was not disabled at the time of his discharge.

Finally, Fleishman suggested that Continental regarded him as disabled. The court determined that Fleishman was not regarded as having a disability. Between 2003 and 2005, Fleishman maintained the same position he held before his aneurism. In 2005, Continental placed him in the MCU, a unit with more responsibility than he held before. As a result of these facts, the court found that Fleishman could not show that his employer regarded him as disabled, and, therefore, summary judgment was appropriate.

Fleishman v. Continental Casualty Co., 7th Cir., No. 11-3754 (Oct. 18, 2012).

Professional Pointer: This case illustrates the necessity for documentation of performance issues. Here, the employee's performance decreased after his aneurism. Each instance of poor performance was documented and acted upon by Continental, where appropriate. Because Continental relied only on Fleishman's documented performance issues to make its discharge decision, Fleishman could not make a claim under either the ADEA or ADA.

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