

7TH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN A [MOSTLY] EMPLOYER-FRIENDLY ADA CASE: EMPLOYEE WAS TERMINATED FOR INSUBORDINATION

A Seventh Circuit panel including Judge Posner **affirmed summary judgment** for AMS Mechanical System, Inc., the employer in an ADA case, despite some facts adverse to AMS. The panel accepted the employee's version of the facts insofar as they were supported by his testimony: the employee, a welder named Gogos, left work early for a doctor's visit on three occasions during the first month of his employment. The general foreman complained to the project's superintendent of the frequency with which Gogos was excusing himself from work. Then near the end of the first month, Gogos experienced a loss of vision, redness in his right eye and high blood pressure. He requested the day off to seek medical attention, explaining his symptoms. The general foreman told him that if he was going to take the day off, he must bring a doctor's note with him to work the next day.

Gogos, apparently feeling that his symptoms spoke for themselves, first rebuffed the request for a doctor's note and then became belligerent and profane when the general foreman continued to insist. Ultimately, after Gogos shouted, "I'm not (expletive) giving you anything," the general foreman fired him. As the latter turned away, Gogos grabbed his shoulder, and the general foreman told him, "Do not put your hands on me" and reiterated that he was fired. However, the general foreman checked a box on the discharge paperwork indicating that Gogos was being let go for "excessive absenteeism" and "tardiness" yet (inconsistently) that the termination was due to "voluntary resignation." The general foreman explained that he "didn't want to ruin Gogos's chances of getting another job." He gave Gogos this paperwork, but AMS subsequently sent Gogos different paperwork indicating that he had been laid off, which was done at Gogos's request so that Gogos could receive unemployment compensation.

On these facts, the 7th Circuit affirmed summary judgment, finding that a reasonable jury "would have to conclude that Henson fired Gogos because he grabbed Henson and profanely disobeyed a lawful request for a treatment note."

7TH CIRCUIT'S REASONING

On a previous appeal in the same case, the 7th Circuit had held that Gogos's high blood pressure and loss of vision qualified as a disability for ADA purposes. However, on remand, the district court granted summary judgment on the basis that the employer did not know that he had a disability. The 7th Circuit rejected this basis, finding that a jury could reasonably conclude that AMS did know about the disability. Yet the 7th Circuit still affirmed the grant of summary judgment but on the basis that the cause of Gogos's termination was unambiguous. He was fired not because of his disability or ADA-protected activity but for his profane insubordination after his employer requested medical documentation—a request that is expressly permitted by the ADA.

PRACTICAL TAKEAWAYS

This decision evinces the willingness of courts to interpret "disability" broadly, especially after the 2008 amendments to the ADA. It also reaffirms that a plaintiff need not provide any formal request to render an employer responsible under the ADA. Here, Gogos's statement that he had a red eye, high blood pressure and loss of vision was considered sufficient to impose such responsibility. Employers should be on the lookout for any communication that could constitute notice of a disability, even if not framed clearly as such notice.

It is settled law that employers may request medical documentation of a disability, though employers may not request more information than they need. Such requests should generally be limited to information relevant to determining whether a disability exists, the diagnosis, whether or not the employee can perform essential job functions with or without reasonable accommodation and what accommodations (if any) would be appropriate and feasible. An employee's noncompliance with an employer's reasonable request for medical documentation will generally be devastating to the employee's ADA case, even when such noncompliance is not, as here, accompanied by insubordination.

What is probably more significant for employers and certainly more surprising is the panel's willingness to base summary judgment on the causation element of the ADA claim. In the realm of employment actions, "causation" is often synonymous with "motivation," and human motives are very murky. For this reason, courts are often eager to leave issues of causation in ADA cases to juries. But, in this case, the 7th Circuit held that the reason for which Gogos was terminated was unambiguous—and did so despite the inconsistent paperwork connected with Gogos's discharge and the fact that the general foreman who fired Gogos had previously complained to the superintendent about how

Gogos was missing work excessively to see his doctor. Especially surprising is that the panel considered summary judgment appropriate even though the first set of paperwork cited "excessive absenteeism" and "tardiness" as the cause of termination rather than insubordination.

This should not be read to indicate that inconsistent or misleading paperwork is not a problem. Clear documentation is the key to effectively dealing with most situations that implicate the ADA. Managers and others likely to face such situations should be trained and retrained on how to perform such documentation. But, this case will be an important positive precedent when the documentation itself fails to convey the correct story.

For advice regarding best documentation practices or for more information, please contact Brian Sabey at (720) 282-2025 or briansabey@hallrender.com or your regular Hall Render attorney.