



STERNS & WEINROTH, P.C.

EMPLOYMENT LAW
Update

Spring 2000

Disabilities, Handicaps and Absences

Karen Sutton and Kimberly Hinton are twin sisters who applied for airline pilot positions at United Airlines. Both are licensed pilots with experience flying for regional commercial carriers. The twins are nearsighted, but their corrected vision is 20/20 in both eyes. Last summer, in a much-publicized ruling, the United States Supreme Court decided they were not “disabled.” United had rejected both sisters on account of their myopia, and the Supreme Court, *Sutton v. United Airlines, Inc.*, rejected their claim that United had wrongfully discriminated against them in violation of the federal Americans with Disabilities Act.

Vaughn Murphy had been working for United Parcel Service as an auto mechanic, but was fired when a UPS nurse discovered he had high blood pressure. UPS requires its mechanics to road test vehicles and, according to company policy, Murphy’s hypertension made him a risky driver. The Supreme Court dismissed his ADA claims, in *Murphy v. United Parcel Service, Inc.*, finding that Murphy’s hypertension was not a disability.

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The Finer Points of the Law of Employee Handbooks

Peter Cirillo had worked as a manager in the Bell System since 1970, first for AT&T, then for Bellcore. Bellcore’s Corporate Personnel Practice Manual contained detailed procedures for employee evaluations and made the immediate supervisor responsible for preparing fair and equitable evaluations. Cirillo read it before preparing evaluations of the employees he supervised. Cirillo himself began to receive poor evaluations around 1990. His own supervisors told him that, if he did not give certain employees unsatisfactory ratings, his own evaluation would suffer. It did suffer. In short succession, Bellcore downgraded Cirillo’s position and then fired him. In his suit, Cirillo claimed that the Manual created an employment contract. Under the contract, Cirillo argued, if he evaluated his employees fairly, he had a right to expect that he himself would be evaluated fairly. An appellate court agreed with Cirillo’s version of the contract in *Cirillo v. Bell Communications Research, Inc.*, decided February 28, 2000. The case turned

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Published by Sterns

& Weinroth, P.C.

Employment Law

Practice Group.

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The ADA defines “disability” as a condition which “substantially limits” a major life activity. Because walking, seeing and hearing are obviously major life activities, the blind, deaf and wheelchair-bound are covered. The Supreme Court’s decisions mean that under the ADA, conditions such as hypertension and myopia, correctable by the ordinary means of prescription drugs and eyeglasses, are not “disabling.” The irony is that an employer may refuse to hire a mildly impaired person, or one who compensates for the impairment through ordinary means, but might be required to accommodate a person more seriously impaired.

But the Supreme Court did not deal with state anti-discrimination statutes. New Jersey’s Law Against Discrimination does not use the term “disability.” The LAD prohibits unlawful discrimination against “handicapped” persons and defines “handicapped” broadly to include such things as a “visual impediment” and “physiological and neurological conditions” which prevent normal bodily or mental functions. New Jersey courts have found employees “handicapped” when they suffered from alcoholism, asthma, spinal and back ailments, heart attacks and even obesity.

The LAD is also different from federal anti-discrimination law because it considers handicapped even those persons with no substantial impairment of a life activity. Myopia corrected by eyeglasses and hypertension controlled by medication are handicapping conditions. Karen Sutton, Kimberly Hinton and Vaughn Murphy might have had

good claims for handicap discrimination under the LAD.

Given the enormous range of handicapping conditions and the large proportion of New Jerseyans who suffer from them, how is an employer to deal with its handicapped workers? The answer is that under LAD, discrimination against the handicapped is lawful where the “nature and extent of the handicap reasonably precludes

performance of the particular employment,” unless the employer can make some reasonable accommodation to enable satisfactory job performance. In other words, UPS could fire Vaughn Murphy only if, in his medicated condition, he could not operate UPS’ vehicles safely.

Recently, A New Jersey appellate court, in *Svarnas v. AT&T Communications*, found that AT&T did not violate the LAD when it fired Helen Svarnas, an employee of 22 years, for excessive absenteeism. The causes of most of Ms. Svarnas’ absences were asthma and a serious automobile accident, both handicapping conditions.

Because regular, predictable attendance is a necessary element of most jobs, an employee who does not come to work is unqualified, handicapped or not. There is probably no reasonable accommodation an employer can make for an employee who is chronically absent. Job restructuring, reassignment and schedule modification are typical accommodations. But none of these would accommodate an employee who is not there.

While AT&T could not have denied Ms. Svarnas a position on the assumption that her asthma would cause irregular attendance, it acted properly once it established that the asthmatic condition was the cause of the absences. Even an otherwise satisfactory worker like Ms. Svarnas is not protected. Thus, whenever regular attendance is a necessity, the discharge of an employee, whether handicapped or not, is permissible based upon an unsatisfactory attendance record.

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had been working
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on the version of the Manual the jury would see. In a 1987 edition, Bellcore attempted to advise its employees that it was not bound by the terms of the Manual, but its disclaimer was ineffective because it did not clearly inform the employees of its intention. The Court also excluded a 1989 version of the Manual. It was not proven that the Company had ever distributed it. While Bellcore's 1991 edition of the Manual contained an effective disclaimer, it was published after the evaluations of Cirillo, which led to his discharge. It, too, was excluded. With only the 1987 version before it, the jury awarded Cirillo \$260,000 in back pay. The appellate court upheld the verdict. The lesson: if you amend your manual, make sure your employees see it. And make sure you can prove they saw it.

The result was different in another appellate decision decided on the same day. In *Palushock v. JFK Hartwyck Nursing, Convalescent & Rehabilitation Centers*, the Court found that an employee handbook left no doubt that there was no binding contract. Joan Palushock was a nursing home supervisor who failed to both wake sleeping employees and report their conduct. When she was fired, she claimed that certain terms of the handbook protected her. But this employer's handbook was a primer on how to ensure that a company does not create a binding contract when it merely intends to inform employees of certain policies:

- **Wording.** In clear language, the handbook informed employees that they could be terminated at any time, with or without cause.

- **Repetition.** The handbook reminded employees a number of times, including in the Introduction and a section entitled At-Will Employment that they could not count on job security.
- **Receipt.** The company reminded employees, yet again, on the "Receipt of Employee Handbook," which employees were asked to sign, that no cause was needed to terminate them.

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SHORT TAKES

To determine whether a parent company is the "employer," and thus may be sued in an employment discrimination case, the court will look to whether the parent and subsidiary have interrelated operations, common management, centralized control of labor relations, and common ownership or financial controls. If they are an "integrated enterprise," the parent may be sued even though the employee worked for the subsidiary. *Johnson v. Cook Composites & Polymers, Inc.*, U.S. District Court for the District of New Jersey, March 3, 2000.

Disability benefit plans that provide better coverage for physical injuries than for mental illness do not violate the Americans with Disabilities Act. Even though these plans have discriminatory classifications, the court said it would not force sweeping changes in benefits without a clear direction from the Congress. *Equal Opportunity Commission v. Staten Island Savings Bank*, U.S. Court of Appeals for the Second Circuit, March 20, 2000.

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