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TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

Temporarily Bypassing an Employee for a Position Because Of Opioid Addiction Is Not Discrimination

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August 4, 2016

SECRET WARDLE NOTES

Ford Motor Company was able to avoid liability in the instant action due to their preservation of Ferrari's employment and rigorous medical examinations. By allowing Ferrari to continue working in a "light-work" capacity until he has weaned off of opioids, Ford essentially stripped Ferrari of his ability to claim opioid-dependent disability. As the Sixth Circuit held, the inability to perform a single, particular job does not strictly inhibit one's ability to work. This is particularly true when the individual is only temporarily bypassed for a position. Additionally, Ford's rigorous medical examinations laid the foundation for the dismissal of Ferrari's pretext argument. By not only conducting employment physicals, but also conducting an independent medical examination, Ford was able to enhance the credibility of their own physicians while simultaneously furthering a medical record on which their employment evaluators could reasonably rely.

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In affirming a grant of summary judgment in favor of the defendant, the Sixth Circuit Court of Appeals held an employer's decision to bypass an employee for a position due to the employee's use of opioids was not enough to prove a disability discrimination claim pursuant to the Americans with Disabilities Act. *Ferrari v. Ford Motor Company*, Case No. 15-1479 (6th Cir. June 23, 2016).

Ford Motor Company hired Ferrari who initially worked in assembly. Ferrari suffered a neck injury while at work, placing him on medical leave. After Ferrari returned from medical leave, Ford accommodated his restrictions for the next nine years, allowing Ferrari to maintain his employment in "light-work" positions.

Subsequently, Ferrari took several medical leaves for neck and psychiatric problems. On December 3, 2012, Dr. Brewer, a Ford Motor Company physician, conducted a physical to determine whether Ferrari could return from medical leave. Dr. Brewer cleared Ferrari to return to work but based upon prior medical evaluations intimating an addiction to narcotic medications, Dr. Brewer maintained Ferrari's physical restrictions pending further testing and review.

Despite his work limitations, Ferrari was offered an employment opportunity in two skilled trade apprenticeships if he could first pass a pre-apprenticeship physical. In anticipation of said physical, Ferrari obtained clearances from two doctors and a functional capacity evaluator, all of which concluded that Mr. Ferrari was no longer physically inhibited by his previous injuries. It is to be noted however, that all Ferrari's medical examiners failed to comment on his opioid addiction and one physician stated that Ferrari was currently taking opioids at the time of the consultation. Pursuant to these reports and in the absence of further testing in regards to Ferrari's continued opioid use, Dr. Brewer again maintained Ferrari's physical limitations.

In addition to the physical restrictions, Dr. Brewer scheduled an independent medical evaluation with Dr. Friedman who found that Ferrari's claim that he had been off opioids for three months was not substantiated by his medical records. He concluded that if Ferrari was on opioids, he could not resume unrestricted employment due the drugs affecting his physical performance. As a result, Dr. Brewer refused to remove restrictions for climbing ladders and overhead work.

Citing Dr. Brewer's report and claiming the restrictions prevented activities essential to his employment, Ford temporarily bypassed Ferrari for the apprenticeship. Ferrari then sued, asserting claims under the ADA and the Michigan Persons with Disabilities Civil Rights Act. The district court granted summary judgment to Ford.

To recover on a claim for discrimination under the ADA a plaintiff must show: 1) he is a person with a disability; 2) he is otherwise qualified; and 3) he suffered an adverse employment action because of his or her disability. Establishing a claim can be done either by direct evidence or indirect evidence. With respect to direct evidence, the Sixth Circuit stated that the plaintiff bears the burden of establishing that he or she is a person with a disability and otherwise qualified for the position despite his or her disability: 1) without accommodation from the employer; 2) with an alleged essential job requirement eliminated; or 3) with the proposed reasonable accommodation. Once the plaintiff has established these elements, the employer bears the burden of proving that a challenged job criterion is essential or that a proposed accommodation will impose an undue hardship upon the employer.

Ferrari claimed direct evidence of discrimination, stating Ford "regarded him" as disabled based upon his use of opioids. In order to succeed on this claim Ferrari had to show that Ford believed his opioid use limited his ability to perform a "major life activity". Thereupon, Ferrari alleged Ford regarded him as limited in his ability to perform the major life function of "working." However, noting that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working, the court pointed out that while Ford concluded his opioid use restricted him from working jobs that required ladder climbing or working at heights, it cleared him to work in any job that did not require those activities, and in fact placed him in both clerical and assembly positions. Thus, the evidence did not show that Ford regarded his opioid use as a substantial impairment of the major life activity of "working."

Additionally, Ferrari attempted to bolster his disability argument by using circumstantial evidence to prove a *prima facie* case of discrimination. In denying that claim, the district court held that Ferrari failed to raise a fact issue as to pretext.

A pretext can be shown in the following three ways: 1) the offered reasons had no basis in fact; 2) the offered reasons did not actually motivate the employer's action; or 3) the offered reasons were insufficient to motivate the employer's action. The Sixth Circuit has adopted an honest belief rule with regards to pretext. So long as the employer honestly believes the reason it gave for the employment action an employee is not able to establish pretext even if the employer's reason is ultimately found to be mistaken. Proving that the nondiscriminatory basis for the employment action is honestly held means that the employer must establish reasonable reliance on the particular facts that were before it at the time the decision was made. Once the employer shows that it made a reasonably informed and considered decision before taking the adverse action, the employee has the opportunity to produce proof to the contrary to establish it is a pretext.

Dr. Brewer's stated reason for imposing restrictions on Ferrari was his opioid use. Ford temporarily bypassed him for the apprenticeships because of those restrictions. The Court observed and found that those restrictions, and the medical condition underlying them, were a legitimate, nondiscriminatory explanation for Ford's adverse employment decision. It held that Ferrari failed to create a fact dispute as to whether the apprenticeship decision-makers honestly believed his restrictions reflected a reasonable medical judgment. While Ferrari argued that he had ceased using opioids when Dr. Brewer imposed the restrictions, his medical records indicated that he was addicted to opioids and he was still actively using them. Further, the IME report concluded that the medical record did not substantiate his claim to have weaned off opioids and that opioid use could affect his performance. Accordingly, Ferrari failed to present sufficient evidence of pretext to survive summary judgment.

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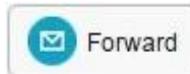
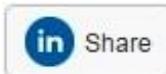


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