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THE TIDE IS TURNING ON ADA CLAIMS:

BANK EMPLOYEE'S DISCRIMINATION CLAIMS GO TO JURY

Since the passage of the Americans with Disabilities Act in 1990, courts have generally taken a restrictive view of the ADA. In a federal appeals court decision concerning a fired loan officer in Beatrice, Nebraska, a lower court decision in favor of the bank was reversed, perhaps a harbinger of further pro-plaintiff findings in the wake of the amendments to the ADA which went into effect on January 1. (*Willnerd v. First Nat'l of Nebraska Inc.*, 8th Cir., No. 07-3316, 3/13/09).

Willnerd worked as a loan officer for First National for over 20 years. He started suffering from a degenerative voice condition in 1999 which eventually reduced his voice to a whisper. In September 2003, the bank fired Willnerd on the grounds that he had not met his sales quota. The lower court granted summary judgment to the bank, and the issue on appeal was whether Willnerd raised genuine questions as to whether the bank's declared reason for the firing was really a pretext for discrimination because of his voice condition. Willnerd produced evidence that the sales quota imposed on him was unattainable, and other similarly situated employees were not subject to such a quota and were not terminated. There was also evidence that bank executives expressed concern about Willnerd's voice condition. Willnerd applied for and was denied 22 jobs with First National after his termination.

This case provides a useful warning to banks about their heightened duty under the "new" ADA to engage in a dialog with disabled employees to determine how best they can perform the essential functions of their positions. The ADA Amendments Act greatly enlarges the category protected by the ADA. Previously, a disabled individual had to have an impairment that "substantially" limited him from performing "tasks of central importance." This definition has now been so watered down, that virtually every impairment will qualify an individual as disabled. Even those whose condition is completely corrected by remedial measures are covered.

The immediate impact of the ADA amendments is to make it much easier for plaintiffs to sue and at least get a jury trial. The secondary impact is on employers. The stakes are now much higher when a request for accommodation is ignored, or a discharge or disciplinary decision is based even in part on the employee's disability.

Practice Pointers:

- Review and update job descriptions to accurately describe the essential functions of the job and all work requirements
- Schedule manager training on the ADA, and the obligation to accommodate an employee with a disability.
- Review/create process for dialog with the employee's healthcare provider, as well as the disabled employee, to determine whether a reasonable accommodation can be made.
- Review discharge and disciplinary decisions to ensure that they are based exclusively on objective business factors, not the employee's disability.