



# WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

## THE EAGLE'S VIEW

May 2004 Volume 4, Issue 5

### DISCHARGE OF ALCOHOLIC SHOWS NARROW INTERPRETATION OF ADA

#### About our Firm

Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina; and Wimberly, Lawson, Suarez & Russell, Tampa, Florida.

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A recent case demonstrates again the narrow interpretation the courts have made of the Americans With Disabilities Act (ADA), as regards an alcoholic employee. Sullivan v. Neiman Marcus Group, Inc., 15 AD Cases 321 (CA 1, 2004). The case involved an alcoholic former store assistant manager who was discharged after he entered a rehabilitation program.

Based upon various reports, the employer concluded that the plaintiff had been drinking during work hours. After the employer decided to terminate the plaintiff, the plaintiff called to inform the employer that he had a problem with alcohol and was entering an alcohol rehabilitation program. The plaintiff testified that the employer informed him that he could have the time off from work to attend the rehabilitation program, and that he should contact the employer when the program ended. After being discharged from the rehabilitation program, the plaintiff contacted the employer who told him that they needed to talk concerning the termination of his employment. The plaintiff was sent a letter informing him that his employment had been terminated for violation of company policies concerning the use of alcohol on the job.

During litigation, the employer claimed that the plaintiff had been fired because he had consumed alcohol during the work day in violation of company rules and not because he was an alcoholic. The company also claimed that the

decision to terminate the plaintiff had been made before he notified the company that he was entering the rehabilitation program. Among other things, the plaintiff admitted he had put certain alcohol bottles in his desk but insisted he did not drink the alcohol. He further claimed that he was not terminated for misconduct but that the decision to terminate him was made after he informed the company that he had to undergo treatment for alcoholism. In the plaintiff's view, the company made the decision because of its concerns about his alcoholism rather than misconduct on the job.

The lower federal court granted summary judgment in favor of

the ADA. The court noted that the ADA explicitly allows an employer to "hold an employee who ... is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the ... alcoholism of such employee." The court notes that this statutory provision means that an employee who tries to use deficiencies in his job performance as evidence that alcoholism substantially impairs his ability to work is likely to establish the unhelpful proposition, for ADA coverage, that he cannot meet the legitimate requirements of the job.

The court then analyzes the evidence, noting that perhaps because of the danger that the plaintiff's evidence might establish that he was unqualified for the job, the plaintiff presented virtually no evidence demonstrating that his alcoholism had an adverse effect on his ability to work. Thus, since there was simply no showing that his alcoholism had substantially interfered with his ability to work, the only theory argued by plaintiff as to his disability, plaintiff could not prevail on this theory on appeal.

The court next addressed whether the employer had regarded the plaintiff as being substantially impaired, within the meaning of the ADA, as the ADA protects an employee from discrimination based on their employer's mistaken impression that they are disabled. The court notes that theoretically an employee subject to this mistaken belief could qualify as disabled under the "regarded as" prong of



the employer, concluding that there was no evidence from which a reasonable fact finder could infer that the plaintiff was fired for a disability (i.e., alcoholism), rather than his employer's rational belief, even if mistaken, that he engaged in on-the-job possession of alcohol and intoxication in violation of company policy. On appeal, the appeals court focused on the issue of whether the plaintiff was disabled within the meaning of

#### Inside.....

Know Your Attorney  
Joseph J. Doherty.....Page 2

New Federal Notice Requirements for Unionized Government Contractors.....Page 2

Supreme Court Says Employer Can Favor Older Workers.....Page 3

Perspective of Fairness Critical in Minds of Jurors.....Page 3

Special Note Changes to Subscription.....Page 4

the ADA, without confronting the "catch-22" dilemma posed by proof of actual impairment, which runs the risk of establishing that the employee is unqualified for the job. That is, the plaintiff could argue, as he essentially did, that his alcoholism did not effect his ability to do the job but that rather the company unfairly believed that, as an alcoholic, he could not do the job.

The court then stated that according to precedent, the plaintiff must demonstrate not only that the employer thought that he was impaired in his ability to do the job that he held, but also that the employer regarded him as substantially impaired in "either a class of jobs or a broad range of jobs in various classes as compared with the average person

having comparable training, skills, and abilities." The plaintiff claimed that his employer either "believed that a person who had previously suffered from alcoholism could not satisfactorily perform his or her job, or ... it simply was not willing to employ someone who had the stigma of having either suffered from the disease of alcoholism or who had the stigma of having been treated in an alcohol rehabilitation/detoxification facility for alcoholism." The only proof he could offer of his claim, however, was that of the actions the employer took against him, and thus he had not demonstrated that his employer considered him to be limited in his ability to work in a broad range of jobs required by the rigorous standards of the

ADA. Accordingly, the court concluded that plaintiff also failed in establishing that the company regarded him as "disabled" within the meaning of the ADA.

**Editor's Note** - *This case is interesting for three reasons. First, it shows the narrow interpretation the courts have given to the ADA. Second, it emphasizes that a plaintiff who tries to use deficiencies in his job performance as evidence that he has an impairment that limits his ability to work is likely to establish the unhelpful proposition, for ADA coverage, that he cannot meet the legitimate requirements for the job. Finally, in light of the fact that alcoholism is probably the major drug problem in our society, the case shows the difficulty of an alcoholic employee prevailing in an ADA case.*

**KNOW YOUR ATTORNEY**



**JOSEPH J. DOHERTY**

Joe has been a practicing attorney since 1990, joined the firm of Wimberly Lawson Seale Wright & Daves in January 1993 and became a Member of the firm in January 2002. He received his Bachelor of Science degree from East Tennessee State University in 1981, and his Doctor of Jurisprudence degree from the Nashville School of Law in 1990. From May 1990 through April 1991, Joe was a law clerk to Tennessee Supreme Court Justice Charles H. O'Brien.

Joe is a member of the Hamblen County, Tennessee and American Bar Associations. Joe's community activities include Board of Trustees, All Saints Episcopal School, former Hamblen County Red Cross Board of Directors and Hamblen County Democratic Party Chairman.

**NEW FEDERAL NOTICE REQUIREMENTS FOR UNIONIZED GOVERNMENT CONTRACTORS**

A Final Rule was published on March 29 of the Labor Department's regulation detailing federal contractors' requirements to post notices to inform employees about the use of union dues. The U.S. Supreme Court in 1988 in Communications Workers v. Beck, 487 U.S. 735, ruled that union-represented workers who pay agency fees in lieu of union dues can not be required to pay the portion of dues that cover union expenditures not related to collective bargaining, contract administra-

tion, or the adjustment of grievances. Shortly after taking office, President Bush issued Executive Order 13201 requiring that government contractors and subcontractors, with some exceptions, post notices informing their employees on their rights related

to union membership and the use of union dues under Beck. Non-union contractors are exempt from the notice posting requirements.

The Executive Order requires the posting of the following notice:  
 "Under Federal Law, employees cannot be required to join a union or maintain membership in a union in order to maintain their jobs. Under certain conditions, the law

who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, or grievance adjustments."



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permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees

The notice states that workers may be entitled to a refund if they believe their dues or fees have been used for other purposes, such as political activities. It also directs those seeking more information about their rights to contact the NLRB and it contains the address of the Board's internet site.

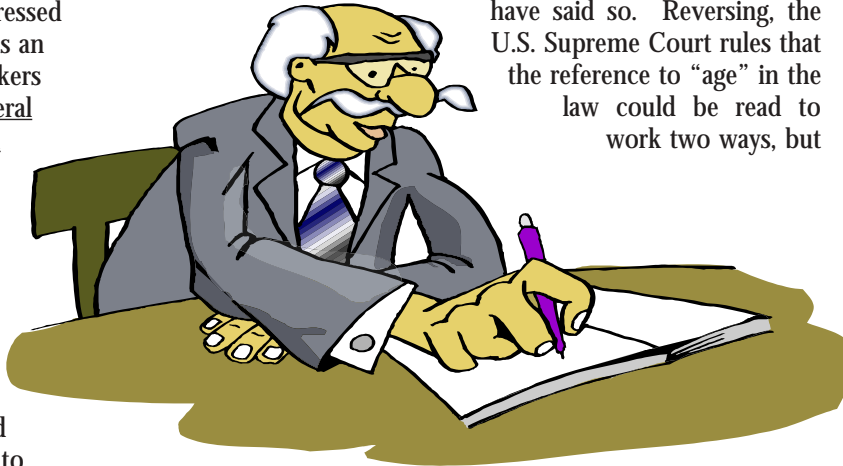
## SUPREME COURT SAYS EMPLOYER CAN FAVOR OLDER WORKERS

Sine 1967 it has been established that an employer cannot discriminate on the basis of age. The Supreme Court has now addressed whether the law forbids an employer to favor workers over a certain age. General Dynamics Land Systems, Inc. v. Cline, 93 FEP Cases 257 (February 24, 2004). The facts of the case indicate that the employer had eliminated certain health benefits to subsequently retired employees except as to the then-current workers at least 50 years old. A lower

federal court had ruled that the prohibition covering discrimination against "any

on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so. Reversing, the U.S. Supreme Court rules that the reference to "age" in the law could be read to work two ways, but

understanding of discrimination as directed against workers who are older than the ones getting treated better. The Court concludes that the EEOC is clearly wrong in its contrary interpretation. In a dissenting opinion, Justice Thomas said that the ruling is inconsistent with earlier rulings that have expanded the definition of discrimination beyond "the principal evil that Congress targeted," referring to the fact that Title VII's prohibition on discrimination because of race and sex protects whites and males and even protects men from such harassment by other men.



individual ... because of such individual's age," was so clear

that Congress' almost unanimously referred to its

## PERSPECTIVE OF FAIRNESS CRITICAL IN MINDS OF JURORS

Jury consultant Jill Huntley, Ph.D., recently gathered nationwide data from mock trial participants involving thousands of jurors. She states that in light of the fact that a desire for fairness is a central theme in all types of relationships, it should be no surprise that fairness is very much in jurors' minds as well. Plaintiffs often build their cases around the context of fairness attempting to capitalize on jurors' desire to impose fairness upon situations. For example, laying off a long-time employee when that employee's skills are no longer needed may be legal, but it seems wrong. When given such a choice, only half of jurors nationwide say that they can put aside such feelings and focus on the letter of the law. Legal arguments such as that the company has a legal right to terminate him under those circumstances, may not carry the day.

Jurors want to give employees the benefit of the doubt in disputes with their employers. Jurors often see employees as victims of mistreatment or as taken advantage of by their employers. Despite standards required by the law to find discrimination, jurors often are willing to read between the lines and see discrimination, and remedy a situation of unfairness, despite legal instructions.

As an example of a possible instance of the above situation, this author remembers a jury verdict in favor of a minority plaintiff at an all-minority branch of an employer, a number of years ago. When jurors were questioned afterward as to why they returned a verdict for the plaintiff, in a situation where the branch was virtually all minority, they said that the direction "must have come from headquarters," which they perceived as non-minority. There was no evidence

of this direction from headquarters in the record, but the jurors were apparently simply reaching for a theory to support their desire to remedy a perceived instance of unfairness.

In today's climate, Dr. Huntley states that most jurors assume that companies have policies and procedures in place to address issues such as discrimination and sexual harassment. However, jurors expect companies not only to have such policies and procedures, but to make sure that such policies and procedures are clearly explained to employees and that the policies and procedures are followed without exception. To jurors, inconsistency or failure to apply policies and procedures is inherently unfair.

This author recalls another jury trial several years ago in which the plaintiff was laid off and the employee handbook became part of the evidence introduced at trial.

No mention was made of the contents of the handbook until closing argument, when the plaintiff's attorney pointed out and tabbed a portion of the handbook showing certain layoff procedures that were not followed in the plaintiff's situation. This argument possibly tipped the jurors in the favor of the plaintiff.

In most employment lawsuits, individual plaintiffs are "taking on" a corporate defendant, and the power differential alone invoke some feelings of unfairness. Further, the average juror is more likely to identify with an employee than a major corporation. Given the unfairness that jurors are willing to believe about work places, such jurors are ready to use their legal platform to send messages as a demand for change, which often results in punitive damages designed to send a message. Fortunately, the same findings show that a majority of jurors are open to the



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**THE EAGLE'S VIEW**

*May 2004 - Volume 4, Issue 5*

**PAGE 4**

employer's defense position if the defense addresses the issue of fairness.

In addition to having clear policies and procedures in place, as well as training, jurors are interested in understanding what type of investigation was conducted and what the findings were. Thus, taking notes, documenting the complaint, and

following up with the alleged wrong-doer and his or her co-worker(s) is important. If the company uncovers misconduct, jurors will need to understand what response was taken in light of those findings.

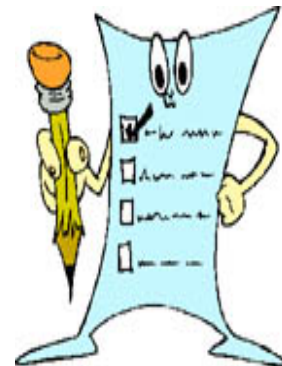
A long term goal for the employer is to show that it is a fair company dedicated to treating all of its employees with respect.

**SMOKY MOUNTAIN FALL CONFERENCE**

**October 28 and 29, 2004  
Knoxville, TN**

**MUSIC CITY FALL CONFERENCE**

**November 18 and 19, 2004  
Nashville, TN**



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**Please note our insert for important information on upcoming fall conferences**