Employer foots the bill under the ADA

BY LAWRENCE R. LEVIN

In a case of first impression, the United States Court of Appeals turned thumbs down on suing a supervisor for violating the Americans with Disabilities Act (the ADA). This may sound like good news for supervisors and their corporate employers. This case, however, merely places greater emphasis on holding employers liable for penal damages and supervisors liable under companion theories like intentional infliction of emotional distress.

"A flood of unpunished and undeterrable discrimination."

The case

The case involved the head of a security guard firm firing the manager of a 300 employee division. The manager was responsible for the overall management, direction and profitability of the division. In 1987, the manager was diagnosed with lung cancer. In the spring of 1992, the cancer having spread, he was told he had less than 12 months to live.

Because the inoperable cancer made it impossible for the manager to come to his office every day, his supervisor summarily fired him when he missed approximately 25 days in 3 months. The jury determined that regular, predictable, full-time attendance was not an essential function of the manager's job and that with modern electronics and telecommunications, he could effectively do his job from home on days when he could not come to work. Appalled at his supervisor's actions, the jury awarded the manager $72,000 in actual damages. It also socked the employer with $250,000 in punitive damages, plus an additional $250,000 against the manager's supervisor.

The Court of Appeals affirmed the jury's determination, except for the penal award against the supervisor. Holding that the supervisor could not be sued under the ADA, the Court sends mixed signals.

The Equal Employment Opportunity Commission (the EEOC) argued that by forbidding discrimination by an "employer...and any agent", the ADA authorized suing supervisors as the employer's "agent". Pointing to Congress' protection of small businesses with fewer than 15 employees against the costs of suits, the Court concluded "it is inconceivable that Congress intended to allow" such suits against "individual employees."

Prior to the 1991 amendments to the Civil Rights Act, when compensatory and punitive damages were authorized under federal antidiscrimination laws, only remedies that the employer could provide, such as back wages and reinstatement, were available. The Court rejected the idea that Congress, by adding compensatory and punitive damages, intended to "abruptly change" and permit suits against supervisors under federal antidiscrimination laws including the ADA. Noting that the amount of damages that could be awarded against small companies was capped at $50,000, the Court concluded that the absence of a cap for individual employees was proof Congress did not intend for individual employees, such as supervisors, to be sued.

The EEOC stressed that penalizing supervisors was "essential to dissuade supervisors and other employees from violating the law." Once it was clear that supervisors could discriminate and retaliate against employees with AIDS or cancer without fear of being held liable under the ADA, the EEOC envisioned "a flood of unpunished and undeterrable discrimination" occurring.

The verdict

The Court of Appeals acknowledged increasing the number of potentially liable defendants would increase deterrence by encouraging plaintiffs to sue in marginal cases. This would cause supervisors to be more careful lest they be targets. But Congress struck a balance between deterrence and social costs, the Court concluded, and the judiciary should not upset that balance.

In brushing aside the EEOC's "parade of horribles" if supervisors could not be sued, the Court made a series of points that should quickly end any celebrating employers might consider. The reason Congress included the "agent" language was to "ensure that courts would impose...liability upon employers" for the actions of supervisors, the Court emphasized.

The Court was also careful to point out that its decision would not protect individual business owners just because they also act as supervisors. Such persons would be liable as an "employer" under the ADA for their actions or those of others even though not liable in their "purely individual capacity." The Court concluded that "where an individual owns all or a significant share of the employing entity, he will be disciplined directly by the financial loss he must absorb, whether or not there is individual liability."

Making sure its message was not lost, the Court of Appeals instructed the trial court to determine whether the $250,000 in penal damages that could no longer be collected from the supervisor should be added to those damages already assessed against the employer! Before supervisors celebrate, they should remember that, in recent years, juries have awarded millions in penal damages against supervisors they find have caused "intentional infliction of emotional distress."

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