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Trials & TRIBULATIONS

Untreated alcoholism is not a disability in New York City

A few months ago, the New York State Court of Appeals answered the certified question, from the Federal Court of Appeals for the Second Circuit, of whether “sections of the New York City Administrative Code preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism?” The court found that the New York City Human Rights Law (NYCHRL) precludes a disability discrimination claim based solely on the “perception of untreated alcoholism.” *Makinen v. City of New York*, 30 NY3d 81 (2017).

Facts

City police officers brought an action against the City of New York, the police commissioner, and a police sergeant, claiming that they had been discriminated against on a perceived disability violation of the Americans With Disabilities Act (ADA), New York State Human Rights Law (NYSHRL) and NYCHRL.

The action arose from separate referrals of plaintiffs, each of whom were an officer with the New York City Police Department (NYPD), and the determination by the Counseling Services Unit (CSU) of the police force that each plaintiff suffered from some form of alcoholism. Interestingly, the plaintiffs did not commence a CPLR Article 78 proceeding to challenge the CSU's determinations, but now both parties agree that the plaintiffs “were not actually alcoholics.” *Id.* at 83.

To that end, the plaintiffs subsequently commenced this action alleging, among other things, that they were “discriminated against by subjecting them to adverse employment actions based on the illegitimately perceived



By **JAMES S. WOLFORD**
Daily Record
Columnist

disability of alcohol dependence and/or abuse,” in violation of the ADA, NYSHRL and NYCHRL. *Id.* at 84. In short, the plaintiffs challenged “the legitimacy of defendants’ perception of them as disabled.”

After a trial in the District Court, a jury returned a verdict in favor of the plaintiffs on their NYCHRL claims, and defendants moved for a

new trial contending that the NYCHRL does not extend to untreated alcoholism. The new trial request was denied and an appeal was taken to the Second Circuit.

On appeal, defendants contended that “the NYCHRL does not protect an employee who is perceived to be an untreated alcoholic.” To date, no state court had addressed whether the relevant parts of that law “permit a plaintiff to bring a disability discrimination claim based solely on a perception that the plaintiff suffered from untreated alcoholism,” the Second Circuit certified the question to the Court of Appeals. *Id.*

Decision

The case primarily turns on the issue of whether defendants violated the Administrative Code contained in NYCHRL and specifically the section entitled “Unlawful Discriminatory Practices,” which provides: in the context of “employment it shall be an unlawful discriminatory practice ... for an employer or an employee or agent thereof, because of

the actual or perceived ... disability ... status of any person ... to discriminate against such person in compensation or in terms, conditions or privileges of employment.” *Id.* at 85.

In terms of disability, NYCHRL adds that “in the case of alcoholism, drug addiction or other substance abuse, the term disability shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” *Id.*

The Court of Appeals answered the certified question in the affirmative because the Administrative Code does not consider a mistaken perception of alcoholism to be a disability covered by the NYCHRL. Moreover, there is no ambiguity about the plain language of the NYCHRL, which is only open to one reasonable interpretation: the disability of alcoholism “shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse.” *Id.* at 86.

The Court of Appeals held that the NYCHRL does not regulate employer actions motivated by concern with respect to the abuse of alcohol. Rather, the NYCHRL covers circumstances in which employers unfairly typecast alcoholics who have sought treatment and who are not presently abusing alcohol, so as to ensure that such persons are afforded a fair opportunity of recovery. Said differently, the NYCHRL provides that, with respect to alcoholism, a person is considered to be disabled (so as to trigger the

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protections of that law) only when he or she “is recovering or has recovered” and “currently is free of such abuse.” Id.

Essentially, the Court of Appeals found that although NYCHRL was required to be interpreted broadly to accomplish its remedial purposes, and state and federal human rights laws were required to be treated as a baseline below which the NYCHRL should not fall, the NYCHRL, by its plain language, clearly did not provide for a cognizable disability discrimination claim on the basis of untreated alcoholism. Rather, the NYCHRL plainly stated that with respect to protection against employment discrimination based

on actual or perceived disability, the term “disability” in the case of alcoholism, drug addiction, or other substance abuse, applied only to an employee who was recovering or has recovered from that addiction and currently was free of such abuse. Id. at 88-89.

Conclusion

Interestingly, the Court of Appeals acknowledged that the NYCHRL treats only recovering or recovered alcoholics as having a disability under the statute, while the NYSHRL and the ADA cover alcoholics presently abusing alcohol, as well as recovering and recovered alcoholics. While the plain mandate of the Restoration Act is for it to be read broadly, this is a rare case where

through its express language, the City Council has mandated narrower coverage than the NYSHRL or the ADA.

The Court of Appeals took the position that although the Restoration Act’s requirement that the statute be construed broadly cannot apply when the NYCHRL expressly requires otherwise, the court was not willing to rewrite the NYCHRL, nor give it a broad reading to effectuate its remedial anti-discrimination purpose.

James S. Wolford is a partner with The Wolford Law Firm LLP and practices in the areas of commercial, personal injury, employment and criminal litigation.