

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2614

RICHARD O'BRIEN,
Appellant

v.

CITY OF HACKENSACK,

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 98-cv-5728)
District Judge: Honorable Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a) April 10, 2003

Before: BARRY and ROSENN, Circuit Judges, POLLAK, District Judge*

(Filed: April 17, 2003)

OPINION OF THE COURT

ROSENN, Circuit Judge:

I.

This appeal concerns whether the City of Hackensack ("City") violated the

*Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Americans with Disabilities Act and the Rehabilitation Act, by discriminating against Richard O'Brien because of his drug and alcohol addiction. O'Brien alleged in his complaint that the City had terminated him on the basis of a drug and alcohol addiction. He sought relief under the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C. §§ 12101, et seq. and the Rehabilitation Act, 29 U.S.C. §§ 791, et seq.¹ The City filed a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, which the District Court granted in its entirety. Accordingly, the court dismissed all of O'Brien's claims.² O'Brien timely appealed. We affirm.

O'Brien was a firefighter for the City of Hackensack from 1989 to 1995. Prior to 1994, he had received only positive evaluations from the Fire Department and had not been involved in any serious disciplinary proceedings. In mid-1994, O'Brien admitted to the head of the Fire Department, Chief Richard Johnson, that he had a substance abuse problem, and that he was seeking treatment for the problem. Johnson condoned O'Brien's efforts to seek treatment, and no disciplinary action was taken against him at

¹The Rehabilitation Act provides that "the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990." 29 U.S.C. § 794(d); see Donahue v. Consolidated Rail Corp., 224 F.3d 226, 229 n.2 (3d Cir. 2000). Therefore the analysis in this opinion focuses solely on discrimination under ADA standards, inasmuch as this analysis determines the disposition of both legal claims.

²O'Brien also sued under the Privacy Act, 5 U.S.C. §§ 551-552, which the District Court dismissed on summary judgment. However, O'Brien has not appealed the dismissal of this claim.

that time. O'Brien successfully completed a substance abuse rehabilitation program, and was, by late 1994, no longer abusing drugs and alcohol.

However, in November 1994, a prescription medication, ordered by O'Brien's doctor, had the unexpected consequence of precipitating anew O'Brien's drug abuse problem, which caused O'Brien to miss numerous days of work. During December 1994, O'Brien sought hospitalization for treatment. However, his insurance provider would not cover this service. In early 1995, O'Brien confessed a relapse to Johnson, who ordered that O'Brien be examined by the Hackensack City Physician and City Psychologist. Johnson subsequently heard allegations that O'Brien had appeared at fire stations apparently under the influence of drugs or alcohol. As a result, Johnson ordered O'Brien to stay away from the workplace. Later, at a meeting to discuss O'Brien's future in the Fire Department, Johnson asked O'Brien to undergo a drug screening. O'Brien tested positive for drug use.

After the drug test results were known, Johnson preliminarily terminated O'Brien, subject to a disciplinary hearing, on the grounds that O'Brien had not provided medical documentation to vouch for numerous absences, that he had appeared at work apparently under the influence of drugs, and that he had refused to undergo the prescribed examinations by City physicians.

O'Brien contested most of the charges against him at a March 1995 disciplinary hearing before the City Manager. In his decision, the City Manager found that, although

O'Brien had missed some days of work without leave and did come to work apparently under the influence of drugs or alcohol, these incidents were the result of his drug addiction. Similarly, his failure to appear for Fire Department-ordered medical evaluations was due to his enrollment in an inpatient drug treatment program. Thus, the City Manager held that his transgressions were substantially attributable to his addiction, for which O'Brien actively was seeking treatment. Noting that addiction status was a protected handicap under New Jersey law, the City Manager converted the discharge to a 60-day suspension without pay. This afforded O'Brien an opportunity to fully rehabilitate. The City Manager conditioned O'Brien's return to work on his participation in a City-approved drug treatment program, including an inpatient care regimen, and his submission to periodic drug tests upon his return to work.

O'Brien appealed the City Manager's decision. O'Brien submitted documentation to the City suggesting that he was drug free and was no longer in need of the intensive drug treatment recommended by the City Manager. He asserted that, in February 1995, he had participated in a drug therapy program, including inpatient care, and he presented drug testing results that showed he had been drug free since. O'Brien doubted whether more time off work would be necessary or helpful to his continued recovery, and he expressed particular concern about his ability to finance the drug treatment ordered by the City Manager. The City Manager and the City's attorney engaged in internal discussions regarding whether it was appropriate to require inpatient treatment and whether the the

City might reimburse some of O'Brien's treatment expenses. As a result, a revised plan was tentatively set forth which included some city financial support for O'Brien's rehabilitation. There is no evidence that the revised plan ever received final approval from the City or was tendered to O'Brien at this time.

In June 1995, O'Brien was arrested and pled guilty to the crime of stealing a tire. O'Brien was preliminarily terminated for this occurrence; however, the guilty plea was subsequently vacated and the disciplinary action against O'Brien was suspended pending further action on the criminal prosecution.

Later, in August 1995, O'Brien faced another disciplinary order of termination. This order charged him with disobeying the City Manager's orders by failing to attend all of the required rehabilitation programs. Around this time, O'Brien filed charges with the EEOC and the New Jersey Division of Civil Rights, alleging discrimination based upon his drug-addiction status. In October 1995, the parties settled the outstanding termination action against O'Brien on terms that would have O'Brien withdraw his pending EEOC and New Jersey complaints, and the court would order him reinstated, provided he remained alcohol- and drug-free and that he maintain enrollment in an outpatient treatment program for six months after his return to work. O'Brien would also agree to a suspension without pay, in addition to the earlier suspension levied for his 1995 charges, as punishment for the tire theft charges against him. The City agreed to help O'Brien secure and fund an outpatient therapy program. However, the City later shifted the

burden back to O'Brien to find outpatient treatment on his own.

O'Brien returned to work in October 1995, and there is no evidence that he continued to use drugs over the next two months. In December 1995, O'Brien was arrested on charges of possession of marijuana. The City again preliminarily terminated O'Brien on the grounds of conduct unbecoming a public employee, and failure to obey the order to undergo six months outpatient care, as specified in the earlier settlement of disciplinary charges against him. The drug arrest charges were later dismissed, and O'Brien submitted a drug test, from very shortly after his arrest, showing no signs of current drug use. Also, despite the City's promise to help find a program for him, O'Brien had contacted an outpatient program solely through his own efforts, and was awaiting notice from the program as to when he was to begin treatment. The City Manager heard his appeal of the preliminary discharge, and, noting the gravity of a drug offense shortly after O'Brien's return to work after suspension for drug abuse, issued a decision in May 1997 upholding the discharge, based on both the arrest and on his failure to undergo outpatient therapy. O'Brien subsequently filed the instant suit.

II.

Our review of a summary judgment motion is plenary. Only if there is no evidence from which a rational person could conclude that the plaintiff's position is correct should summary judgment be granted. Olson v. General Electric Astrospace, 101

F.3d 947, 951 (3d Cir. 1996).³

To set forth a prima facie case under the ADA, a plaintiff must show “(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.” Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998). Here, O’Brien has failed to establish the third prong of the test. No one could reasonably conclude, on this record, that O’Brien was terminated for his addiction, rather than for the misconduct of drug use and possession. The record reveals that the City clearly terminated O’Brien in response to his arrest for possession of drugs, which is a permissible reason under the ADA. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 981 (3d Cir. 1998).

Whether there exists a meaningful distinction between discrimination based on addiction status and discrimination based on work misconduct related to drug use is a debatable point. With respect to most other disabilities, a termination may be unlawful “if the employee’s violation [of work rules] stems from his or her disability,” where an employer can otherwise accommodate the disability. Id. However, “Congress has decided to treat drug and alcohol addiction differently from other disabilities by ensuring

³The District Court exercised original jurisdiction pursuant to 28 U.S.C. § 1331. This court’s appellate jurisdiction is proper under 28 U.S.C. § 1291.

that employers do not have to go through the accommodation process in these cases.” Id. Therefore, in order to make out a prima facie case for discrimination in such cases, the plaintiff must show animus directed strictly toward the plaintiff’s addiction status. An employer need not show any tolerance for work-related problems that are a consequence of drug or alcohol use. Thus, termination based on drug possession and failure to accommodate drug-related misconduct are not violations of the ADA. Absent evidence that the employer was motivated by the employee’s status, as opposed to mere drug use or possession, there can be no ADA discrimination claim. O’Brien has not demonstrated that the actions of the City were motivated by his status, rather than by his drug possession. Only when he was arrested for drug possession was he terminated. After showing some tolerance for O’Brien’s addiction in the past, the City promptly terminated him after the arrest. It acted in accordance with N.J.A.C. 4A:2-2.3(a)6, which permits the discipline of public employees for “[c]onduct unbecoming a public employee.” Arrest on drug possession is plainly unbecoming conduct.

O’Brien takes issue with the District Court’s factual finding that he was currently using drugs at the time of his arrest; discharge for “current use” of drugs is unprotected under the ADA. The City was not motivated by O’Brien’s actual use of drugs at the time of discharge, but by his possession of drugs and his arrest on a drug-related charge. These are valid bases on which to terminate an employee under the ADA, regardless of how one construes “current use.” The third prong of the prima facie case of disability discrimination has not been met, and

O'Brien's case fails as a matter of law. The judgment of the District Court will be affirmed. Each side to bear its own costs.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Max Rosenn
Circuit Judge