UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:97-CV-00126-H

BRADLEY TODD PLAINTIFF

V.

UNITED PARCEL SERVICE DEFENDANT

MEMORANDUM OPINION

Plaintiff, Mr. Bradley Todd, asserts claims under the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq*. ("ADA") and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"). The Court now considers motions for summary judgment submitted by both Mr. Todd, ("Plaintiff") and United Parcel Service ("Defendant" or "UPS"). The Court will dismiss all Plaintiff's claims save one--his ADA claim under the third prong of 42 U.S.C. § 12102(2). As the Memorandum Opinion explains, the Court concludes that a collective bargaining provision which precludes an employee a second leave for alcohol abuse treatment could be evidence that the employer regards the employee as disabled.

I.

Plaintiff began working for UPS in 1982, and is a member of the Teamsters Local 89. The union represents certain employees at UPS. Those employees, including Plaintiff, are subject to a Collective Bargaining Agreement ("CBA") with UPS. Article 16, Section 5 of the CBA (the "Medical Leave Provision") states:

> An employee shall be permitted to take a leave of absence for the purpose of undergoing treatment in an approved program for alcoholism or substance abuse. Employees may use the United Parcel Service Employee Assistance Program (EAP), a Union sponsored rehabilitation program, as

> well as any other referral service in choosing an approved program for treatment.
>
> The leave of absence must be requested prior to the commission of any act subject to disciplinary action except as provided in Article 35, Section 3. Such leave of absence shall be granted on a *one time basis* and shall be for a maximum of ninety (90) days; additional time may be granted if it is mutually agreed between the Company and the Union, or requested by the treatment care professional or the Medical Review Officer (MRO). While on such leave, the employee shall not receive any of the benefits provided by this agreement, Supplements, Riders and/or Addenda except the continued accrual of seniority.

National Master United Parcel Agreement and The Central Conference of Teamsters Supplemental Agreement, For the Period: August 1, 1993 through July 31, 1997 (emphasis added).

Plaintiff took a leave of absence under this provision in 1992 for treatment of alcohol abuse. At that time, he understood that such leave was available on a one-time basis. Following the treatment in 1992, he returned to work at UPS without incident. In August 1994, his physician referred him to another substance abuse treatment program because of Plaintiff's failing health. He voluntarily entered an inpatient program at Our Lady of Peace Hospital in Louisville, Kentucky and informed his UPS manager explicitly that the hospitalization was for substance abuse and depression. Plaintiff gave notice to his superiors at UPS on the day he admitted himself to the hospital. No evidence tends to show that Plaintiff was unable to do his work prior to the last hospitalization.

Plaintiff entered the rehabilitation program on August 2, 1994. UPS terminated him on August 10, 1994. Robert Crouch, the UPS Division Manager, stated that he terminated Plaintiff for violation of the Medical Leave Provision. UPS's letter of termination also cites that reason for the firing. No evidence shows an inability to work after completion of the hospitalization.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Fed. R.Civ.Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The issue is whether the evidence submitted presents a sufficient disagreement about the material facts so that submission to a jury is necessary, or whether the evidence is so one-sided that a party must prevail as a matter of law. *Id.* at 251-52.

III.

Plaintiff alleges that his dismissal from employment at UPS violates both the FMLA and the ADA. The Court turns first to his FMLA claims.

Under the FMLA, an eligible employee may take up to twelve work weeks of leave during any twelve-month period for serious health conditions. 29 U.S.C. § 2912. To be eligible for the leave under the statute, an employee must have been employed for at least twelve months, and must have worked 1,250 hours within the twelve months immediately preceding the requested leave. 29 U.S.C. § 2611(2)(A).

Here, it is undisputed that Plaintiff worked only 1086.28 hours during the twelve months immediately preceding his leave beginning August 2, 1994. He argues that Labor Department regulations for implementing the Family and Medical Leave act save him from strict application of the eligibility requirements. He relies on the last sentence of 29 C.F.R. § 825.110(d), which states,

> Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

Unfortunately for Plaintiff, the regulation does not apply in this case. Plaintiff's second hospitalization and subsequent termination took place in August of 1994. The permanent regulations adopted by the Department of Labor were not effective until April 6, 1995. *See* The Family and Medical Leave Act of 1993; Final Rule, 60 Fed. Reg. 2180 (1995); The Family and Medical Leave Act of 1993; Deferral of Effective Date of Regulations, 60 Fed. Reg. 6658 (1995). Administrative regulations, whether interpretive or legislative, are presumed to be prospective in application, not retroactive. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As the Sixth Circuit Court of Appeals pointed out in *Bauer v. Varity Dayton-Walther Corp.,* 118 F.3d 1109, 1111, n.1 (6th Cir. 1997), addressing the same set of regulations: "Because the FMLA's grant of authority to the Secretary of Labor to promulgate regulations, 29 U.S.C. § 2654, does not affirmatively grant her the authority to make those regulations retroactive, and because the final regulations themselves do not provide any indication that they are to be applied retroactively, . . . the final regulations do not govern this case." *Bauer*, 118 F.3d at 1111, n.1, *citing Robbins v. Bureau of Nat'l Affairs, Inc.*, 896 F. Supp. 18, 21-22 (D.D.C. 1995). Plaintiff could not have been deemed "eligible" for FMLA protection under regulations which were not effective at the time of the events in question; nor could one reasonably expect UPS to have complied with them.

Because there is no other dispute as to Plaintiff's lack of eligibility under the FMLA, the Court will dismiss Plaintiff's FMLA claim.

IV.

The Court now turns to Plaintiff's ADA claim. A plaintiff must meet several elements to establish a prima facie case for discrimination under the ADA. Specifically, one must prove: (1) he was "disabled" within the meaning of the ADA; (2) that he was qualified for the position, with or without accommodation; and (3) he suffered discrimination solely by reason of his disability with regard to his position. *See Brohm v. JH Properties,* Inc., 149 F.3d 517, 520 (6th Cir. 1998), *citing Monette v. Electronic Data Systems Corp.* 90 F.3d 1173, 1178 (6th Cir. 1996); *see also Kocsis v. Multi-Care Management, Inc.*, 97 F.3d. 876, 882 (6th Cir. 1996). Once a plaintiff meets this burden, the defendant must "articulate a legitimate, nondiscriminatory reason for firing him." *Brohm*, 149 F.3d at 520-21. If the defendant provides one, the burden shifts back to the plaintiff to prove the reason was pretext, offered to hide a discriminatory purpose. *Id.* at 521.

These prima facie elements find their source in the language of the ADA. Under the ADA, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees, . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). In this case, the question which ultimately governs whether Plaintiff can go forward is the first prima facie element--disability. Under the statutory terms, a plaintiff has three ways of showing he was disabled under that statute. He can show that (1) he has a physical or mental impairment that substantially limits one or more major life activities; (2) he has a record of such impairment; or (3) he is regarded as having such an impairment. 42 U.S.C. § 12102(2). Plaintiff alleges that he meets all three of these statutory definitions of impairment. In this section, the Court will explain why Plaintiff cannot meet the first two definitions.

A.

To prove the first prong, Plaintiff relies on his admission of being an alcoholic as proof of disability. Even if the Court assumes he was an alcoholic, Plaintiff must still prove that his alcoholism is a disability. Alcoholism is not a disability *per se*. In fact, "[a] disability determination . . . should not be based on abstract lists or categories of impairments, as there are varying degrees of impairments as well as varied individuals who suffer from the impairments." *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996), *citing Forrisi v. Bowen,* 794 F.2d 931, 933 (4th Cir. 1986). The regulations implementing the ADA elaborate on this further:

> The ADA and [29 C.F.R. 1630], . . . do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. 1630.2(j).

According to a recent Sixth Circuit decision, the Court must consider three factors in order to determine whether Plaintiff's alcoholism constitutes a disability: "(1) whether the disease constitutes a physical impairment; (2) whether the life activity purportedly curtailed as a result of the physical impairment constitutes a major life activity under the ADA; and (3) whether the physical impairment substantially limits this major life activity." *Cehrs v. Northeast Ohio Alzheimer's Research Center,* 1998 WL 548837 (No. 97-3388, Sep. 1, 1998), *5, *citing Bragdon v. Abbott*, ____ U.S. ____, ___, 118 S.Ct. 2196, 2202 (1998). A physical impairment is

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. 1630.2(h)(1), (2). "*Major life activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i). To determine whether a claimant is substantially limited in a major life activity, the Court must consider: "(1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2).

Being an alcoholic may require one to make certain life changes in order to avoid the dire consequences of the condition. The Court cannot conceive that any such changes involve the impairment of a major life activity. Plaintiff suggested none. More to the point, no evidence in the record shows any such life changes. The facts show that until he entered the hospital, Plaintiff could meet the essential functions of his job and that no other major life activities were impaired. Disability is defined by the facts on a case-by-case basis. The facts viewed in a light most favorable to the Defendant do not come close to permitting a reasonable jury to find a disability due to the impairment of a major life activity.

B.

To prove the second prong of the "disabled" definition requires Plaintiff to show that he had a prior impairment that substantially limited a major life activity. Regulations implementing

the ADA provide that this prong of the definition means the claimant "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the major life activities." 29 C.F.R. § 1630.2(k) (1996). *See Sherrod v. American Airlines, Inc*., 132 F.3d 1112, 1120 (5th Cir. 1998), *citing Burch v. Coca-Cola Co.*, 119 F.3d 305, 321 (5th Cir. 1997). UPS has a record of Mr. Todd's prior hospitalization. However, the records are confidential. Obviously someone had to review the records or be aware of his prior treatment to know the 1994 incident was a second treatment. If, under such facts UPS is assumed to have knowledge of his alcoholism, one cannot merely assume that the alcoholism is "such an impairment," or that it substantially limited a major life activity. Nothing in the record supports classifying his alcoholism in this manner. Moreover, Plaintiff's 1992 hospitalization alone does not prove disability or record of impairment. *See Taylor v. United States Postal Service*, 946 F.2d 1214, 1217 (6th Cir. 1991)("proposition that *any* hospital stay is sufficient to evidence a 'record of impairment'" is "nonsensical"); *Burch*, 119 F.3d at 316-17 ("ADA requires an individualized inquiry beyond the mere existence of a hospital stay"). Thus, Plaintiff cannot meet this prong of the definition.

V.

Under the third prong, Plaintiff may establish disability by showing that Defendant "regarded [him] as having such impairment." This is always a somewhat confusing concept for both judges and juries. This case presents an unusual and not altogether clear circumstance for application of the idea. Nevertheless, courts must not be deterred from applying the statutes even under difficult circumstances.

The Code of Federal Regulations attempts to describe the "regarded as having such

impairment" language as follows:

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
3. Has none of the impairments defined in paragraphs (h)(1) or 2) of [29 C.F.R. § 1630.2][1] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l). Plaintiff offers his termination and being precluded from seeking a second leave as evidence UPS regarded Plaintiff as disabled. To find an employer regarded a claimant as disabled, the employer must regard the employee as "significantly restricted in the ability to perform a class or broad range of jobs." *Sherrod*, 132 F.3d at 1121, *citing Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996). Here, UPS did not assess Todd's ability to perform his job or any other. Rather they applied a CBA provision.

Termination alone is not evidence of being regarded as disabled. *Harrington v. Rice Lake Weighing Systems, Inc.*, 122 F.3d 456, 561 (7th Cir. 1997). Thus, Plaintiff makes the interesting argument that the CBA provision itself is evidence of Defendant's regarding those with alcohol problems as disabled. The CBA provision exhibits an institutional perception, Plaintiff says, that alcoholics are substantially limited in major life activities and, as such, are disabled. A CBA provision that precludes seeking a second leave for treatment discriminates because other medical conditions (e.g., heart conditions, recurring back problems) are afforded multiple leaves. Those

[1] 1630.2(h)(1) and (2):

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

conditions may or may not be "disabilities" under the statute, just like alcoholism may or may not be disabilities under the ADA. Where a contract provision precludes reasonable accommodation, it would appear to violate the ADA by limiting an employee's rights under the ADA. *See* 42 U.S.C. § 12112(b)(2). *See Eisfelder v. Michigan Dep't of Natural Resources*, 847 F. Supp. 78, 84 (W.D. Mich. 1993) (court refused to bar action under ADA based on collective bargaining agreement denying leave, because collective bargaining agreement term limiting medical leave itself could be found to violate ADA).

The question becomes whether the CBA provision amounts to Defendant treating Plaintiff as if he were disabled by precluding a second leave of absence and in fact precluding him from even raising a claim of disability due to his alcoholism. The answer is certainly not self-evident. However, upon reviewing the statutory and regulatory language in light of the Sixth Circuit's recent discussion of related issues in *Cehrs v. Northeast Ohio Alzheimer's Research Center*, the Court is convinced that the CBA language presents a reasonable basis for a jury to infer that Defendant perceived Plaintiff and others like him, as impaired. While this is a far cry from proving his case, the argument does gain Plaintiff the opportunity to try.

The Court reaches this conclusion by first considering a seldom-tested provision of the ADA, 42 U.S.C. § 12112(b)(2), which includes in the definition of "discriminate:"

> participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter[2] (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).

[2]This "subchapter" refers to Title I of the ADA, that covering employment issues.

In the regulations implementing this portion of the ADA, collective bargaining agreements are listed among the various examples of the "contractual or other arrangement or relationship" meant to be encompassed in this provision. 29 C.F.R. § 1630.6. The Interpretive Guidelines further explain the provision:

> An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly. . . . This provision only applies to situations where an employer or other covered entity has entered into a contractual relationship that has the effect of discriminating against its own employees or applicants with disabilities. Accordingly, it would be a violation for an employer to participate in a contractual relationship that results in discrimination against the employer's employees with disabilities in hiring, training, promotion, or in any other aspect of the employment relationship. <u>This provision applies whether or not the employer or other covered entity intended for the contractual relationship to have the discriminatory effect</u>.

29 C.F.R. § 1630.6 Appendix to Part 1630--Interpretive Guidance on Title I of the Americans with Disabilities Act. (Emphasis added).

One element of a the prima facie case is proof that the claimant was a "qualified for the position, with or without reasonable accommodation." In *Cehrs*, the Sixth Circuit addressed the presumption that had theretofore been accepted by many courts that "uninterrupted attendance is an essential job requirement." *Cehrs*, at *7. The courts that adopted that position made attendance a criteria one had to meet to be an "otherwise qualified" employee. The Sixth Circuit pointed out that "[u]nder such a presumption, the employer never bears the burden of proving that the accommodation proposed by an employee is unreasonable and imposes an undue burden upon it." *Cehrs*, at *7. Thus, a party who required additional medical leave could never be considered "otherwise qualified" for the job, with or without accommodation because the party's need for leave precluded his or her qualifying for the job. As the Court noted, "the presumption eviscerates the individualized attention that the Supreme Court has deemed 'essential' in each

disability claim." *Id. citing School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). The Court further explained, "Prohibiting employees with disabilities from taking a leave of absence as a reasonable accommodation, while allowing other employees to take advantage of the employer's leave policies, would result in employees with disabilities being treated differently and worse than other employees." *Id.*

Of course, *Cehrs* did not directly address the third prong of the "disability" definition in the ADA. Nevertheless, it is pertinent. As applied to this case, it means that precluding a particular individual from seeking leave circumvents the individualized analysis called for under the ADA and creates a situation where the CBA provision itself provides evidence that the employer does intend to treat individuals with a particular condition--whether it is technically a disability under the act or not--as if they are disabled.

Further discussion in *Cehrs* supports this analysis. Specifically, the Defendant-Employer in *Cehrs* proffered it's policy of terminating employees who do not comply with the company's procedures for obtaining extended leave as its non-discriminatory reason for the termination. In effect, the employer was proffering the claimants failure to report to work, not her disability as the reason for termination. This closely parallels UPS's reasons for firing Plaintiff in this case. They state that his absence without a legitimate leave to "cover" the absence, not his alcoholism, was the reason for termination. There was no need, given the CBA provision, to consider whether Plaintiff was truly disabled, and there certainly would be no conscious objective to discriminate if the Defendant merely mechanically applies its CBA provision. This, however, appears to fly in the face of the specific provisions Plaintiff invokes, preventing the use of contractual arrangements to discriminate, even when the defendant's lack an intent to

discriminate in drawing up the contract.

Given the language of 42 U.S.C. 12112(b)(2) and its implementing regulations, and given the Sixth Circuit's analysis in *Cehrs* regarding the possibility that medical leave may in appropriate circumstances be a reasonable accommodation, this Court finds that a CBA provision precluding a second leave of absence for the treatment of substance abuse or alcoholism could be evidence that UPS regarded Plaintiff as disabled. Thus, Plaintiff meets the first prima facie element of his case--that is, that he is disabled within the meaning of the ADA.

VI.

The second prima facie element Plaintiff must show is that he is a "qualified individual with a disability." This means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position" in issue. 42 U.S.C. § 12111(8). It is undisputed in the record that up until the time of his hospitalization, plaintiff was adequately performing his job at UPS. Thus, it would appear Plaintiff has met the second element of his prima facie case. The inquiry regarding this element cannot end here, however, because Defendant argues the ADA exempts current drug users from ADA protection.

Specifically, Defendant cites 42 U.S.C. § 12114(a), which states, ". . . the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." Plaintiff's use of drugs up until the time of his hospitalization in 1994 is undisputed. At best, however, the record is unclear whether Defendant considered Plaintiff's drug use as a basis for termination. Viewed in the light most favorable to the Plaintiff, Defendant's awareness of

Plaintiff's drug use appears to have arisen during discovery for this case, not during the time Defendant contemplated dismissing Plaintiff. Viewed in the light most favorable to the Defendant, there is at least some dispute as to the reasons for Plaintiff's dismissal, since Plaintiff reported to his supervisor that he was entering the hospital for "substance abuse." Because a reasonable jury could find for either side on the issue of whether Plaintiff is a "qualified individual with a disability," Defendant is not entitled to summary judgment.

VII.

As a result of the foregoing, Plaintiff may go forward with his ADA claim only as to the third prong of the disability definition, along with the other prima facie elements of an ADA claim. The Court cannot necessarily predict how the case will be argued at trial. It is bound to be somewhat confusing. However, the ADA in these unusual circumstances is not easily simplified. Presumably, Defendant will contend that it terminated Plaintiff in accordance with the CBA provision, which existed for reasons other than a belief that Plaintiff or others similarly situated might be disabled. Plaintiff must argue this is not the real reason and it is only a pretext. Plaintiff must convince the jury that Defendant terminated Plaintiff because it believed him to be disabled.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:97-CV-00126-H

BRADLEY TODD PLAINTIFF

V.

UNITED PARCEL SERVICE DEFENDANT

ORDER

Defendant has moved for summary judgment on Plaintiff's FMLA and ADA claims. The Court has entered a Memorandum Opinion discussing its views. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment as to Plaintiff's FMLA claim is SUSTAINED and that claim is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment as to Plaintiff's ADA claim is SUSTAINED as to Plaintiff's claim that he is disabled under 42 U.S.C. §§ 12102(2)(A) & (B), but is DENIED as to Plaintiff's claim that he was terminated because Defendant regarded him as disabled. 42 U.S.C. § 12102(2)(C). The case will go to trial as to this last issue and on the claim that Defendant discriminated against Plaintiff in violation of 42 U.S.C. § 12112.

This _____ day of October, 1998.

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JOHN G. HEYBURN, II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record