



RIGHTS STUFF

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Obesity And The ADA

Allan Greenberg worked for BellSouth as a telephone lineman. He is obese and suffers from a variety of medical conditions, including "diabetes, hypertension, hypothyroidism and a variety of disorders that affect his endocrinology." According to Greenberg, these physiological disorders cause him to be overweight and prohibit him from losing weight.

Telephone linemen can't weigh more than 275 pounds because the manufacturers' safe load limit for the ladders, gaffs, buckets and safety belts they use is 300 pounds, and their tools weigh 25 pounds. Because Greenberg weighed more than 275 pounds, his supervisors hand-picked his job assignments for years, making sure he did not have to climb.

However, in 2004, BellSouth decided that it was going to uniformly apply the load limit policy and told Greenberg he had to lose weight. They gave him 25 weeks to lose 50 pounds. He was unable to do so, so they gave him 60 days to find another job within the company. When he didn't, he was fired. He sued, alleging that BellSouth had discriminated against him on the basis of his disability. However, neither the Trial Court nor the Court of Appeals agreed.

Greenberg said that his hypothyroidism caused him to have dry mouth and made him "bigger and slower." He said it affected his mental state, caused him to sweat, caused his extremities to grow large and caused him to get light-headed when he stood up after being seated. Greenberg said when he tried to lose weight in the 1990s, it "really messed [him] up." He said when he was dieting, he couldn't sleep well and he couldn't walk much. He said he had stinging in his extremities. He said dieting made his mind "dull."

Greenberg said that no one at work made derogatory comments about his weight. But, he felt isolated at work because of his limitations. He sometimes had to take a break to get something to eat because he could not miss a meal. He said he thought he could have climbed if he had been given a stronger ladder, but no one responded to his request for such a ladder.

Greenberg said that he was able to take care of himself and able to walk, but was apprehensive about walking any distance. He said that when he was told he had 60 days to find another job at BellSouth, he also was told that there was an opening for a job answering phones in Florida. He decided he was not qualified for that job, because he "neither answered phones nor typed." Greenberg expressed no interest in any jobs at BellSouth other than his previous job.

Greenberg's doctor said he knew of no medical condition that would prevent him from dieting and exercising. The doctor said Greenberg had no limitation on his daily activities.

Another doctor, testifying on behalf of BellSouth, said that Greenberg might well suffer from undiagnosed sleep apnea and possibly moderate depression. This doctor said the medications Greenberg took could contribute to his obesity.

The District Court granted BellSouth's motion for summary judgment, finding that Greenberg did not have a disability as the law defines that term. The District Court said that Greenberg had not shown that he was substantially limited in any major life

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The Family Medical Leave Act And Retaliation

Karen Bryson worked at a Supercuts store in Kentucky for 15 years. She began as a hairstylist but was quickly promoted to shift manager and then store manager. Even as store manager, she still spent 90 percent of her time cutting hair, but she also was responsible for hiring, firing, supervising employees and completing paperwork.

In the fall of 2002, Bryson hurt her knee at home. She sought treatment and physical therapy, but her condition didn't improve. About a year later, she had a cortisone injection, but that didn't help, and her doctor then advised surgery. On December 6, she told her supervisor, Kim Sawyer, that she was having surgery on December 16. Sawyer said that was not a good time, but Bryson's doctor said she could not delay the operation. Bryson told Sawyer what the doctor had said, and Sawyer said her absence would hurt the store and that she was "behaving selfishly." Bryson took this as an implicit threat that she would be terminated if she had the surgery. Between December 6 and the operation, Bryson said. Sawyer called her every day and yelled at her, told her that her attorney said she could deny the leave request, made her work on a day she was scheduled to be off and made her work the day before her operation from opening to closing without any breaks. Bryson's co-workers corroborated Bryson's testimony. They said Sawyer blamed

Bryson for having scheduled the surgery near Christmas, said she was not really injured and called her a "crippled ass." They said that they heard Sawyer say she would make sure that Bryson never returned to work if she took a medical leave.

Nevertheless, Bryson requested time off under the FMLA, which Supercuts approved. She chose to use paid vacation time for her time off, leaving her up to 12 weeks of unpaid leave if she needed it. Her return-to-work date was set for January 1. After her operation, her doctor said she would not be able to return to work as scheduled. Supercuts approved her request for an extended leave, saying in a letter, "You are expected to return to work no later than March 10. This will exhaust your 12 workweek entitlement to Family and Medical Leave." On March 8, Bryson's doctor said that she could return to work, but could do only seated work. Supercuts received this letter on March 15, but five days earlier, on March 10, Supercuts had terminated her because, they said, her doctor had not cleared her to return to work.

Bryson told Supercuts that she thought she could return to work as long as she didn't have to stand all of the time. She suggested she could do more duties involving training, opening new stores, etc., instead of standing and cutting hair

most of the day. When she didn't get a response to her suggestions, she sued, alleging that Supercuts had violated the Family and Medical Leave Act (FMLA) and the ADA by failing to accommodate her and by firing her. Supercuts won summary judgment at the Trial Court level, and Bryson appealed.

The Appeals Court said that "an employer does not violate the FMLA when it fires an employee who is indisputably unable to return to work at the conclusion of the 12-week period of statutory leave." In this case however, Bryson said that Supercuts had retaliated against her for needing to take time off. There was evidence that Supercuts might have decided to fire her before finding out that she could not return to work. The letter from the doctor was received by Supercuts on March 15, five days after the employer had already terminated Bryson. It was unclear from the record what role, if any, Sawyer had played in the decision to terminate Bryson. The Court remanded the case to the Trial Court for additional proceedings.

The case is *Bryson v. Regis Corp.*, 498 F.3d 561 (6th Cir. 2007). ♦

FMLA complaints are handled by the Federal
Wage & Hour Division of Department of Labor
800-959-FMLA (3652)



Employment Non-Discrimination Act of 2007

The Bloomington Human Rights Ordinance prohibits discrimination in employment on the basis of sexual orientation or gender identity. Two bills introduced in the United States House of Representatives, both called the "Employment Non-Discrimination Act of 2007," may help the federal government catch up with Bloomington's policies. Both bills, HR 2015 and HR 3685, would prohibit discrimination in employment on the basis of sexual orientation, much as federal law currently prohibits discrimination in employment on the basis of sex, race, religion, color or national origin. Both bills say they don't apply to members of the Armed Forces. But there are significant differences as well.

One of the bills, HR 2015, would also prohibit discrimination in employment on the basis of gender identity. HR 2015 provides an exemption from the law for religious organizations, but says the exemp-

tion applies only to "the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance," etc. A janitor or accountant who worked for a church likely would be protected by this version of ENDA: a religion teacher or minister would not. HR 3685 just says that the bill "shall not apply to a religious organization."

HR 2015 addresses the privacy issue that often comes up in gender identity legislation, saying that employers may deny access to shared shower or dressing facilities based on actual or perceived gender identity, "provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later." This bill also says that the employer

retains the right to impose reasonable dress and grooming standards, but that the standards should be for the gender to which the employee "has transitioned or is transitioning."

Congressman Barney Frank, one of the lead sponsors of HR 2015, realized in September 2007, that with the gender identity language, the bill was unlikely to pass. He then introduced the new version of ENDA, HR 3685, deleting the gender identity language and expanding the religious exemption, to increase the chances of getting the bill through. Many but not all GLBT (Gay Lesbian Bisexual Transgender) groups have pledged to withhold their support of the newer version of the bill because it lacks protections against gender identity discrimination. In early November, the House passed the more limited bill. ♦

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activity, noting that obesity is rarely considered to be a disabling impairment. The Court of Appeals agreed.

The Court of Appeals said that "Greenberg has not shown that he has an impairment that substantially limits him in one or more major life activities" because he could take

care of himself and do household chores. He presented no evidence that he is unable to "work in a broad class of jobs." Greenberg's attorney tried to argue that there was conflicting evidence about why he could not lose weight, and thus the case should have gone to trial. The Court of Appeals said that this question "is immaterial to the statutory definition of disability."

The case is [Greenberg v. BellSouth Telecommunications, Inc.](#) 498 F.3d 1258 (11th Cir. 2007).

If you have questions about your rights and responsibilities under the ADA, please contact the BHRC. ♦

If you would like to be added to or taken off of the Rights Stuff mailing list, please let us know by calling us at 349-3429 or sending us an e-mail at human.rights@bloomington.in.gov.



Mayor Kruzan Announces 2007 Awards For Excellence In Civic Engagement

Mayor Mark Kruzan announced that residents are encouraged to submit nominations for the Mayor's Awards for Excellence in Civic Engagement. The purpose of the awards is to acknowledge Bloomington residents, who through their commitment to service in our community, have significantly improved civic life in Bloomington.

"We designated November as 'Be Civic Bloomington' month as part of our Be Bloomington community character campaign," Kruzan said. "We have extremely civic-minded, generous residents who regularly give back to their community. We look forward to receiving many strong entries for these special awards."

Civic engagement can take many forms, including individual volunteerism; organizational involvement; electoral participation, membership on local boards, committees and commissions; work with a neighborhood association; organization of peaceful protests; informal community work or affiliation with a political organization. It also may include efforts to directly address an issue and working with others in the community to solve a problem.

Individual nominees must be residents of Bloomington; Group Nominees must perform work or services within the Bloomington city limits. Nomination forms are available at www.bloomington.in.gov or by calling Calender-Anderson at

349-3560. Four hard copies or an electronic copy of the nomination materials must be submitted by 5 p.m. Friday, November 30 to City of Bloomington Community and Family Resources Department, 401 N. Morton St., Suite 260, Bloomington, IN 47404 or andersb@bloomington.in.gov.

A reception will be held in December to honor the nominees and award recipients.

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