

MEMORANDUM OF LAW

DATE: February 3, 1995

TO: Lawrence B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: San Diego Municipal Code Section 24.0501(b) and the
Americans With Disabilities Act, 42 U.S.C. Sections
12101-12117

Question Presented

Citing the Americans with Disabilities Act ("ADA"), 42 U.S.C. Sections 12101-12117, several applicants for industrial disability retirement have questioned the legality of the exclusions for preexisting conditions and nervous and mental disorders found in San Diego Municipal Code ("SDMC") section 24.0501(b). Since their cases are now pending before different Board Adjudicators, you have asked whether these exclusions violate the ADA.

Short Answer

No. The exclusions found in SDMC section 24.0501(b) do not violate either the letter or the spirit of the ADA. Simply stated, an applicant seeking an industrial disability retirement under the SDMC is not a qualified individual with a disability within the meaning of the ADA. Our review and analysis follow.

Background

The industrial disability retirement described in SDMC section 24.0501 is one of several benefits available to members of the San Diego City Employees' Retirement System ("SDCERS") by virtue of their employment with The City of San Diego or the Unified Port District. Established by the City Council and administered by the Board of Administration for SDCERS ("Board"), the industrial disability retirement benefit allows a member to retire from active service and draw a pension based on a percentage of final salary regardless of the member's age or service.

To be entitled to this benefit, the member must prove that he or she is permanently incapacitated from the performance of duty rendering his or her retirement from active service necessary. The member must also prove that the permanent incapacity arose out of, or was caused by, the workplace. In addition, a member enrolled into SDCERS on or after September 3, 1982, must also prove that the permanent incapacity did not arise out of a preexisting condition or a nervous or mental disorder.

The ADA is a sweeping federal anti-discrimination statute designed to remove barriers which prevent "qualified individuals with disabilities" from enjoying the same employment opportunities that are available to persons without disabilities. Equal Employment Opportunity Commission, 56 Fed. Reg. 35739 (1991). Signed into law on July 26, 1990, it provides comprehensive civil rights protections to qualified individuals with disabilities in the areas of employment, public accommodations, state and local government services and telecommunications. Equal Employment Opportunity Commission, 56 Fed. Reg. 35694 (1991).

With respect to the employment provisions found in Title I, the ADA prohibits "covered entities" from discriminating against a "qualified individual with a disability," because of the disability, in regard to job application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, or privileges of employment. 42 U.S.C. Section 12112 (Supp. 1994). Authorized and empowered to administer the retirement benefits established by the City Council, the Board is a covered entity within the meaning of the ADA.

In addition, pension benefits, including disability retirements, are considered an element of a public employees' compensation. *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978). As such, the Board is prohibited from discriminating against an applicant for a disability retirement who meets the threshold requirements of a qualified individual with a disability.

In the cases under review, applicants challenge the facial validity and application of the exclusions, for preexisting conditions and nervous and mental disorders, found in SDMC section 24.0501(b) as violative of the ADA. They argue the exclusions are discriminatory on their face because they single out for special treatment preexisting conditions and nervous and mental disorders. With respect to application, they allege a prima facie violation of the ADA because the exclusions only apply to those members who enrolled into SDCERS on or after September 3, 1982.

We disagree. Any applicant for an industrial disability retirement, regardless of enrollment date in SDCERS, is not and cannot be a "qualified individual with a disability" within the meaning of the ADA. Absent satisfaction of this threshold requirement, there can be no violation of the ADA.

Discussion

At the outset, we note that we have found no reported case, statute or regulation which squarely address the ADA in the context of exclusions for industrial disability retirements administered by retirement boards for public retirement systems. Although the Equal Employment Opportunity Commission ("EEOC"), the agency entrusted with enforcement of the employment provisions in Title I of the ADA, has indicated that it will address the application of the ADA to employer

provided pension plans, it has yet to do so.

The absence of specific guidance from the EEOC in the pension arena, however, is of no concern. The plain language of the SDMC, the ADA, the Final Regulations promulgated by the EEOC, the Interpretive Guidance on Title I of the ADA and recent case law, compels the conclusion that the exclusions for disability retirement found in SDMC section 24.0501(b) do not violate either the letter or the spirit of the ADA.

With respect to either the letter or the spirit of the ADA, an insurmountable hurdle faces applicants who challenge the exclusions for industrial disability retirement found in SDMC section 24.0501. This hurdle is the threshold definition of a "qualified individual with a disability." The ADA's coverage only extends to individuals who meet this threshold definition. Under the ADA, "a qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. Section 12111(8) (Supp. 1994).

This definition, however, excludes applicants for the industrial disability retirement available under the SDMC. According to the SDMC, the industrial disability retirement benefit is available only when a member proves that he or she cannot perform the essential functions of his or her position. The ADA, however, requires that the individual be able to perform the essential functions of the job with or without accommodation. There is an obvious distinction.

The distinction is critical. To be protected by the ADA, a member seeking a disability retirement must not only be an individual with a disability, he or she must also be qualified. This means that he or she must be able to perform the essential functions of the job, with or without accommodation. Absent satisfaction of this threshold requirement, a member seeking an industrial disability retirement is not covered by the ADA.

Similar reasoning was recently acknowledged in a case involving an unsuccessful ADA challenge to disability based distinctions concerning sick leave reimbursements. *Felde v. City of San Jose*, 839 F. Supp. 708, 710-711 (N.D.Cal. 1994). Although the Felde decision does not address the issue of qualification or the exclusions for industrial disability retirement, its reasoning is persuasive.

Felde involved a challenge to the legality of the method used by the City of San Jose to determine the reimbursement for unused sick leave upon retirement. Under the City's procedures, employees retiring on a disability basis received a proportionally smaller payout for unused sick leave than those employees retiring on a regular service basis. Felde was aware of these procedures.

Although Felde could have retired on a regular service basis, he retired on a disability basis and brought suit against the City of San

Jose. Arguing that San Jose's differentiation between disability and non-disability retirement benefits violated the ADA on its face, Felde sought payment for his uncompensated accumulated sick leave. Felde, 839 F. Supp. at 709.

The Ninth Circuit Court of Appeals disagreed. Citing *Alexander v. Choate*, 469 U.S. 287, 306 (1985), a case decided under the Rehabilitation Act of 1973 (29 U.S.C. Section 794)F

With respect to the relationship between the Rehabilitation Act and the ADA, the ADA specifically provides that both the ADA and the Rehabilitation Act are to be considered in tandem. The ADA also requires enforcement agencies to promulgate procedures to ensure that complaints filed under both the ADA and the Rehabilitation Act are handled so as to avoid duplication of effort and the application of conflicting standards. 42 U.S.C. ' 12117 (b). In essence, the ADA is meant to be an expansion of the protections afforded by the Rehabilitation Act.

the court noted

that "to constitute discrimination, the grantee of a benefit must deny an otherwise qualified handicapped individual equal and meaningful access to a benefit offered by that grantee." *Felde v. City of San Jose*, 839 F. Supp. at 710 (emphasis added).

In addition, the court noted:

The ADA protects disabled individuals from being discriminated against because they are disabled. It, therefore, requires an employer to treat qualified disabled and nondisabled workers equally in terms of the conditions and privileges of employment. The ADA does not, however, require employers to somehow compensate a disabled worker for his or her disability.

Felde, 839 F. Supp. at 711 (emphasis added).

In the cases at hand, applicants are not qualified disabled workers within the meaning of the ADA. Absent satisfaction of this threshold requirement, there can be no violation of either the letter or the spirit of the ADA.

Conclusion

The provisions of the industrial disability retirement benefit and the protections afforded by the ADA exist for different purposes. The industrial disability retirement seeks to compensate an individual who can no longer do his or her job as the result of a permanent incapacity caused by the workplace.

The ADA seeks to ensure access to equal employment opportunities based on merit. Equal Employment Opportunity Commission, 56 Fed. Reg. 35739 (1991). Although the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to

perform the essential functions of the job.

Herein lies the critical distinction. An applicant for a disability retirement under SDMC section 24.0501 must prove that he or she cannot perform the essential functions of the job. In essence, he or she is asking to be removed from the workplace.

The ADA, however, seeks to retain the disabled worker in the workplace. By definition, an applicant for an industrial disability retirement is excluded from coverage. Absent satisfaction of this threshold requirement, there can be no violation of the ADA.

If you have any further questions, please let me know.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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