

WORKER AND FOREMAN HAVE A SCUFFLE, BUT ONLY THE WORKER LOSES HIS JOB



A man working as a sandblaster was fired following an altercation with a foreman. He filed a lawsuit, claiming, in part, a violation of the Americans with Disabilities Act (ADA), as he had a lower than average IQ. But for the courts, it wasn't about his disability – it was about what actually took place between the two men. The man had worked at Capital Contractors, Inc. in Nebraska for over 30 years, twice quitting voluntarily but both times returning to work. He is mentally slow and had taken special education classes in school. Co-workers and management knew of his condition, but also recognized that he was able to complete all of his required tasks. In his testimony, the company VP/general manager placed the man in the “lower half” of employees with regard to cognitive function but stated that he was not the lowest. The company was aware that employees may engage in name-calling and horseplay, but it had a strict no-fighting policy – fighting would result in termination. The former employee and the foreman regularly called each other names, derogatory comments about the man's mental limitations and the foreman's physical girth. They also gave each other charley horses and pinched each other. The man later claimed that he asked the foreman to stop such behavior, but it nevertheless continued. The altercation in question occurred after the foreman curtly told the man to get to work, and the man responded with an equally vulgar comment. According to another worker, the foreman grabbed the man's coat and “kinda picked [him] up,” shaking him. The man took a swing and knocked off the foreman's respirator mask (they were in a paint room). The employee was sent home. After the incident was reported, the VP made the decision to fire the man. The foreman was disciplined, fired later during his



probationary period – for “unwelcome physical contact” – and rehired six months later.

The former worker filed a lawsuit, alleging violations of the ADA, the Nebraska Fair Employment Practices Act (NFPEA) and the Age Discrimination in Employment Act (ADEA). The district court granted summary judgment in favor of the company. The man appealed only the ADA and NFPEA claims, stating that he was treated differently due to his disability and subjected to a hostile work environment. Even if the appellate judges accepted the argument claiming disability discrimination, the plaintiff could not establish pretext for his firing. He couldn't show different treatment from a “similarly situated” employee because he was comparing his position with a foreman's dissimilar responsibilities. Furthermore, the altercation involved “different levels” of aggression – the plaintiff was the only person who swung a punch. In other words, different positions and behavior resulted in different consequences for both men. The appeals court likewise dismissed the hostile work environment allegation. The former employee was able to perform his job duties despite the reportedly unwelcome conduct, and he engaged in similar behavior. He also couldn't prove that higher-ups were even aware of the foreman's behavior for two simple reasons – it never happened in front of management, and the plaintiff never complained to anyone. Accordingly, the district court's decision was affirmed.