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## News Story

### ADVERTISEMENT

## Broker Wins \$1.25 Million Arbitration Award On ADA, FMLA Claims

By Ertel Berry

A Charlotte broker has won a \$1.25 million arbitration award on claims that he was improperly demoted — then had to quit — after returning from a brief hospital stay for treatment of a bipolar disorder.

The plaintiff claimed his employer's actions violated the federal Americans with Disabilities Act and the Family and Medical Leave Act, as well as state laws on constructive discharge and emotional distress.

As is typical in arbitration awards, an eight-page document dated June 26 doesn't elaborate the three-member panel's reasoning.

However, the legal basis of the award is clear in light of an assessment for \$310,000 in attorney's fees and costs "pursuant to the ADA and the FMLA."

The award also includes \$340,000 for "liquidated damages." That figure, which equals the amount of compensatory damages, is consistent with the FMLA.

"Those references help discern what this money is being paid for," said Charlotte attorney Joshua Van Kampen. Van Kampen, and Charlotte attorneys Julie Fosbinder and C. Murphy Archibald, represented the plaintiff in *Allen v. A.G. Edwards & Sons, Inc.* (NASD No. 04-06092).

The plaintiff had been the Charlotte branch manager for A.G. Edwards for 12 years. He was diagnosed in 2001 with bipolar disorder and briefly hospitalized.

Until that point, the plaintiff said he had been highly successful and had built the office from two employees to approximately 50 in three area locations.

When he returned to work, the company refused to reinstate him to his old job — even though he offered to disclose his medical records and take an independent exam. He furnished a note from his psychiatrist that said he could still handle the management position.

The plaintiff offered to take any other steps company officials felt were needed to assess his ability to manage, according to Fosbinder.

"A.G. Edwards and Sons had options under the FMLA and ADA (such as requesting an independent medical examination) if it was concerned about Mr. Allen's ability to perform his job," she said in an e-mail to Lawyers Weekly. "They did not exercise those options and instead substituted their judgment concerning Mr. Allen's condition over that of Mr. Allen's psychiatrist."

Van Kampen agreed.

"A regional manager said he didn't think a competent psychiatrist would write a note like that," said Van Kampen. "He said that someone with bipolar disorder couldn't manage a branch office because of the highs and lows. Our client was in bad shape, but once he got the proper medication, he was able to do his job again."

The plaintiff claimed that he was demoted to a financial consultant job which required him to report to the former assistant branch manager. The former assistant was designated as the new "co-manager in charge."

The plaintiff was also given a management-type title, according to Van Kampen — "co-manager not in charge."

"They tried to argue that there was no FMLA violation because they had returned him to a management position," Van Kampen said.

The plaintiff's claims against Edwards under federal and state law were originally filed in state court. After removal to the U.S. Western District, a trial judge granted the defendant's motion to compel arbitration.

"We fought arbitration for a while," said Van Kampen. "But then Julie and I talked about it and after researching NASD decisions we thought we might actually have a better chance of winning in arbitration."

Although that prediction turned out to be right, the arbitration was by no means easy, requiring 16 days of hearings. The arbitrators assessed the plaintiff with \$22,200 in "forum fees," while Edwards must pay \$31,200 in arbitration fees.

"This was an exhaustive, marathon trial that was very hard fought on both sides," Van Kampen said.

Most ADA cases filed in court are dismissed because the judge finds the plaintiff isn't actually or "perceived as" disabled under the statute, according to Van Kampen.

The panel in *Edwards*, which was chaired by Leland attorney Zeb Barnhardt Jr., didn't go that route.

The lesson for plaintiffs' attorneys, according to Van Kampen: "Because federal courts have been so hostile to these claims, in my opinion ADA plaintiffs are probably better off in arbitration than in court," he said.

## Discovery Sanctions

The arbitration panel also awarded the plaintiff \$7,500 as a discovery sanction against A.G. Edwards.

According to Van Kampen, that sanction referred to the company's redaction of notes made by a regional manager. The deletions were only supposed to remove references to other employees and extraneous matters, according to Van Kampen.

But the arbitration panel's in camera inspection "found a whole lot of notes about our client that hadn't been produced," he said. "There was nothing in there that gave us an automatic win. But I think it did give the panel some pause about their defense."

## Answer Raised Performance Issues

In its arbitration answer, A.G. Edwards denied the legal basis of the plaintiff's claims and challenged his version of the events surrounding his hospitalization.

According to that answer, the plaintiff was not formally "demoted" but he had been removed from management responsibilities after engaging in "erratic conduct."

Among the actions alleged by Edwards:

- In March 2001, the plaintiff began calling the regional manager, at home and at work. "His conversations made little sense, and he railed on and on about his very negative opinions of Edwards," the answer states.
- The plaintiff made "major and costly" decisions to transfer financial consultants to different branches in the area without the permission or knowledge of the regional manager.
- Without telling his colleagues, the plaintiff subsequently checked into the behavioral unit of a local psychiatric hospital. In his absence, the former assistant manager was made "co-manager-in-charge."
- When he returned, the plaintiff sent a "rambling" e-mail to the new co-manager, in which the plaintiff said that "for awhile," he had been "something of a Timothy McVeigh, except for the violent part," according to the answer. In that e-mail, the plaintiff apologized to his co-workers and admitted that his clients had been neglected, the answer states.
- "In July 2001, without explanation, [he] advised [the co-manager-in-charge] that his presence in the office would be 'spotty' for some period of time. He appeared to be satisfied with the duties of a financial consultant, stating again that management responsibilities (and a return to those duties) were not a consideration."

"While [the plaintiff] maintains in his lawsuit that he was ready, willing, and able to resume his management role upon his release from the hospital in June 2001, his own actions at the time belie this assertion," the Edwards answer states.

The company also said the plaintiff's resignation was voluntary and that it enforced strict rules against disability discrimination.

## Both Sides Heard

Many of the allegations in the Edwards answer were disputed, according to Van Kampen. The arbitration panel heard both sides' version of the case and ultimately ruled for the plaintiff, he said.

"The plaintiff didn't know what he had before he was hospitalized and diagnosed," he said.

"Edwards identified some conduct before he was treated and then said that basically undid his years of exemplary success."

Van Kampen said the plaintiff had sent an e-mail to colleagues after he returned in which he was "very open about the fact that he had been hospitalized.

"They argued that was inappropriate," said Van Kampen. "We argued it was no big deal."

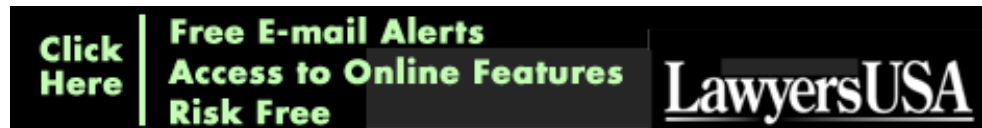
Local counsel for A.G. Edwards did not return a phone call before press time.

For Fosbinder's case report, see sidebar.

— *Questions or comments may be directed to* [Ertel.Berry@nc.lawyersweekly.com](mailto:Ertel.Berry@nc.lawyersweekly.com).

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