BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 32784
	)	
STANLEY McNICOL	)	**BOARD DECISION**
	)	(Precedential)
From nonpunitive termination from	)	
the position of Staff Psychiatrist	)	**NO. 94-14**
at the California Medical Facility,	)	
Department of Corrections at Vacaville	)	April 5-6, 1994

Appearances: Ann Perrin Farina, Attorney, Eisen and Johnston, represented appellant, Stanley McNicol; John W. Spittler, Attorney represented respondent, Department of Corrections.

Before Carpenter, President; Ward, Bos and Villalobos, Members.

DECISION AND ORDER

This case is before the State Personnel Board (SPB or Board) for consideration after having been heard and decided by an SPB Administrative Law Judge (ALJ).

We have reviewed the ALJ's Proposed Decision. The Board has decided to adopt the attached Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code section 19582.5.

The attached Proposed Decision of the Administrative Law Judge in said matter is hereby adopted by the State Personnel Board as its Precedential Decision.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

*Vice President Alice Stoner did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order, and I further certify that the attached is a true copy of the Administrative Law Judge's Proposed Decision adopted as a Precedential Decision by the State Personnel Board at its meeting on April 5-6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	
STANLEY McNICOL	Case No. 32784
From nonpunitive termination from the position of Staff Psychiatrist at the California Medical Facility, Department of Corrections at Vacaville	

PROPOSED DECISION

This matter came on regularly for hearing before Philip E. Callis, Administrative Law Judge, State Personnel Board, on June 11, 1993, and July 20, 1993, at Vacaville, California.

The appellant, Stanley McNicol, was present and was represented by Ann Perrin Farina, Attorney, Eisen & Johnston.

The respondent was represented by John W. Spittler, Attorney at Law.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above nonpunitive termination effective January 15, 1993, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act. The matter was originally calendared for May 21, 1993, but was continued for good cause at the respondent's request. The

matter was recalendared and heard on June 11, 1993, and July 20, 1993, when the matter was considered submitted. On December 16, 1993, the Administrative Law Judge requested supplemental briefing on the Board's precedential decision in Michael K. Yokum (1993) SPB Dec. No. 93-25, which was issued after the case was submitted. The final brief was filed on January 24, 1994, and the matter was again considered submitted for decision.

II

The appellant has been employed as a Staff Psychiatrist at the California Medical Facility since July 5, 1991. He has no adverse actions of record.

III

As cause for this nonpunitive termination, it is alleged that the appellant failed to meet a requirement for continuing employment as a Staff Psychiatrist at the California Medical Facility in that the Osteopathic Medical Board of California issued an order which prohibited the appellant from providing any direct or indirect patient treatment or from prescribing any controlled substances.

IV

The appellant was employed as a Staff Psychiatrist at the California Medical Facility. In this position, the appellant provided psychiatric treatment to inmates of the Department of Corrections. This included group therapy, individual consultations, and the prescription of medications including controlled substances.

V

On September 23, 1992, the California Board of Osteopathic Examiners filed an amended accusation against the appellant which alleged, inter alia, that the appellant's ability to practice psychiatry safely was impaired due to mental illness affecting competency based on the following:

A. On July 5, 17 and 29, 1989, the appellant was psychologically evaluated by Irwin Dreiblatt, Ph.D., for mental illness affecting his competency to practice psychiatry in Washington. At that time, it was alleged by the State of Washington that the appellant was guilty of unprofessional conduct and incompetency in the following respects:

1. Overtreatment of patients.

2. Encouraging an overdependent and unhealthy relationship with patients.

3. Overprescribing of known, highly addictive drugs.

4. Inadequate expertise in human system and pharmacology.

5. Inconsistent counseling.

6. Inappropriate use of sexual fantasy in psychotherapy and sexual contact with patients.

As a result of his examination, Dr. Dreiblatt found:

> "In my professional judgment, Dr. McNicol is not fit to practice with reasonable skill and safety due to his serious emotional problems. He appears unable to use professional knowledge effectively, exercises extremely poor judgment, and interacts with patients in very destructive and damaging ways. Much of this behavior must be viewed as sexually abusive. His practices do not begin to meet professional standards and ethics. Dr. McNicol has no insight into the degree of disturbance he experiences nor

> into the destructiveness of his behavior. Despite Board intervention, he continues to use many of the same bizarre practices. Given the degree of mental disorder of some of his patients, his practices undoubtedly further traumatize them. One would expect that Dr. McNicol's style of interaction with patients would exacerbate their mental illness, making them overly dependent on him, and create an atmosphere of undue influence. These patients are very vulnerable individuals who cannot be expected to make judgments about the care they are receiving from this physician. It is very unlikely that any short term treatment or available practice remedies could enable this physician to practice safely and effectively. It is recommended that the Board consider prohibiting Dr. McNicol from any medical practice at this point.
>
> "Overall, the testing reflects a very troubled man. Although his responses are mostly suggestive of a serious mixed personality disorder, there are some indications which could suggest a psychotic-like disturbance.
>
> "The chronicity and tenacity of this man's mental health problems and his past resistance to treatment raise question as to whether he could, in the future, be able to work in psychiatry or any area of clinical medicine."

B. On January 2, 7, and 9, 1992, the appellant was psychologically evaluated by Robert M. Dorn, M.D., for California licensing authorities. Dr. Dorn found:

> "Dr. McNicol demonstrates features of a Narcissistic Personality Disorder (DSM III-R: 301.81), especially interpersonally exploitive, taking advantage of others to achieve his own ends, lack of empathy, and behaving in a fashion of special talents and achievements, allowing him to operate professionally under his own set of rules. He also demonstrates unusually powerful dependency needs, as became frighteningly evident after loss of his family. From then on his total life (behavior and thinking) became intertwined and inseparable from patient care, and his office group, manifesting many aspects of the Dependent Personality Disorder (301.60), and also difficulties seen in the Passive Aggressive Personality Disorder (procrastination, obstructionism, problems with authority, etc.: 301.84). Projective testing substantiates most of the above, and adds evidence

of a degree of brittleness, confusion, tension, poor judgment, and problems with controls, including cognitive slippage.

"I would feel the need to diagnosis his character disorder as: Personality Disorder Not Otherwise Specified (301.90). Judgment can be poor, especially if under stress. He continues to show lack of awareness of emotions underlying his everyday thinking and behavior. This contributes significantly to the recurrent inability to differentiate boundaries between himself and others, whether it be in social situations and/or in doctor-patient situations. He cannot be allowed to do psychotherapy with individuals or groups at this time. There is a significant potential for this problem to recur."

VI

On December 24, 1992, the appellant entered into a stipulation with the California Board of Osteopathic Examiners in which he admitted that he had violated Business and Professions Code sections 822[1/] and 2305,[2/] in that:

"1. On or about November 30, 1990, the Washington State Board of Osteopathic [Medicine and Surgery] inactivated [appellant's] Washington Osteopathic Certificate to practice medicine due to a mental condition that impaired his ability to provide competent psychiatric care via stipulation.

"2. On or about October 6, 1992, it was determined that [appellant] was in violation of Business and Professions Code § 822 in that his ability to practice osteopathic medicine in California is impaired due to a mental illness affecting competency. Said determination is based on [the findings of Dr. Dorn]."

[1/] Section 822 provides that a licensing agency may revoke, suspend, or restrict the professional license of a person whose ability to practice safely is impaired because the person is "mentally ill, or physically ill affecting competency."

[2/] Section 2305 provides that "[t]he revocation, suspension or other discipline by another state of a license or certificate to practice medicine issued by the state . . . shall constitute grounds for disciplinary action for unprofessional conduct against such licensee in this state."

VII

As part of the stipulation, the Osteopathic Medical Board of California issued a disciplinary order on January 4, 1993, revoking the appellant's medical license. The revocation was stayed, and the appellant was placed on supervised probation for a period of ten years during which time he was prohibited from prescribing any controlled substances or treating any female patients. The appellant was further required to undergo psychiatric treatment under strict Board supervision. Pending a favorable psychiatric evaluation from a Board approved psychiatrist and further approval of the Board, the appellant was "prohibited from direct or indirect patient treatment, including engaging in solo practice, private practice and any clinical practice involving continuous treatment of patients." The effect of this disciplinary order was to prohibit the appellant from rendering any direct or indirect clinical services to inmates as a Staff Psychiatrist at the California Medical Facility or from prescribing required medications.

VIII

The official State Personnel Board specification for the Staff Psychiatrist classification describes the typical tasks for positions in institutional settings as follows:

> "In an institutional capacity, examines and diagnoses psychiatric patients; determines type of psychiatric and general medical treatment needed; administers psychiatric treatment with assistance, as necessary, from nurses and technicians; performs general medical and surgical work; performs ward duties, such as giving medications and tube feeding; makes ward rounds and reviews progress of patients;

> prescribes changes in treatment when indicated; consults, as necessary, with supervisory psychiatrist on unusual, complex, or serious cases, or presents such cases to a clinical conference for advice or decision; may instruct and supervise interns, residents, other physicians, nurses, technicians, and personnel assigned for special training; participates in staff conferences and clinics; keeps and supervises the keeping of medical records; provides relatives with information concerning patients in person or by correspondence; performs research in psychiatry; serves periodically as officer-of-the-day."[3/]

The minimum qualifications for the class include:

> "Possession of the legal requirements for the practice of medicine in California as determined by the California Board of Medical Quality Assurance or the Board of Osteopathic Examiners."[4/]

IX

The duty statement for the appellant's position at the California Medical Facility (revised 2/89) provides that "the Staff Psychiatrist is responsible for an outpatient general population ward, including direct patient care." The "typical duties" are described as follows:

> "Interviewing and evaluating patients to determine need for hospitalization or other therapy, referring those who need hospitalization to the psychiatric hospital. Ordering medication and laboratory work, psychological and medical testing when indicated, referring for ancillary services and providing therapy to patients. Making routine sick call and attend to emergencies as appropriate. This may also include group counseling and group therapy.
>
> "Medical supervision of nursing staff (non-administrative) and assisting in ongoing inservice

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[3/] The specification describes a different set of duties for positions "[i]n a headquarters or field office capacity." These duties were inapplicable to the appellant's position.

[4/] Since publication of the job specification, the licensing boards were renamed the Medical Board of California and the Osteopathic Medical Board of California respectively.

training of nursing staff and psychiatric inservice training for custodial officers. Be available for psychiatric consultation. "Maintaining and charting physician's progress notes and treatment plans as appropriate, writing psychiatric reports for various entities requiring them, such as Board of Prison Terms, Paroles, etc. Serving as liaison to families and interested agencies. Serving as Medical Officer of the Day as assigned. Assist in developing and planning programs. Supervising the administration of involuntary medication. Participating in Unit Classification Committee meetings. Differentiating between neurological and psychiatric disabilities."

X

According to the appellant's duty statement, his time was to be apportioned as follows:

50%	Perform direct medical/psychiatric/neurological treatment of patients
20%	Maintain medical records and charts
10%	Write psychiatric/medical evaluations and reports
10%	Provide supervisorial and administrative services
5%	Attend required education/training programs
5%	Staff consultation.

XI

Because of the restrictions placed on his license, the appellant no longer possessed the legal requirements to provide individual or group counseling to inmates or to prescribe required medications. On January 15, 1993, respondent terminated appellant on a nonpunitive basis for failing to meet a requirement for continuing employment.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Respondent established by a preponderance of the evidence that the appellant's medical license was restricted in such a way that he no could no longer perform the essential functions of his position as a Staff Psychiatrist at the California Medical Facility. The evidence established that the principal function of the appellant's position was to provide individual and group counseling to inmates and to prescribe necessary medications including controlled substances. Since the appellant could not perform any of these duties under the license restrictions imposed on him, he was subject to nonpunitive termination under Government Code section 19585 for failure to maintain a requirement for continuing employment.[5/]

The appellant concedes that the limitations placed on his medical license brought him within the provisions of Government Code section 19585. He argues, however, that

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[5/] Government Code section 19585(b) provides that "[a]n appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment that is prescribed by the board on or after January 1, 1986, in the specification for the classification to which the employee is appointed." Section 19585(d) provides that "[r]equirements for continuing employment shall be limited to the acquisition and retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment . . ." Termination under this section is considered "nondisciplinary." (Gov. Code § 19585(h).) A terminated employee has permissive reinstatement rights to the former position "[w]hen the requirements for continuing employment are regained." (Gov. Code § 19585(g).)

because the license restrictions arose from his "personality disorder," the Americans with Disabilities Act of 1990, 42 U.S.C § 12101 et seq., required respondent to provide him with reasonable accommodation before terminating his employment. The accommodations proposed by the appellant include: (1) restructuring the appellant's job to eliminate patient care duties; (2) transferring him to a vacant position in the Department where patient care duties are not required; (3) finding him a job in another state agency; or (4) leaving him on the Department payroll until he can find such a job himself.

THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990, 42 U.S.C § 12101 et seq. (hereafter ADA), was adopted to combat discrimination against individuals with physical or mental impairments

> "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." (42 U.S.C. § 12101(a)(7).)

Among other things, the ADA prohibits an employer from discharging a qualified individual with a disability "because of" the employee's disability (42 U.S.C. § 12112(a)). A "qualified individual with a disability" is one who can perform the "essential functions" of the position, either with or without reasonable accommodation (42 U.S.C. § 12111(8)). "Reasonable accommodation" may include job-restructuring, part-time or modified work schedules, reassignment to a vacant

position, and other similar accommodations. (42 U.S.C. § 12111(9).) Failure of an employer to provide reasonable accommodation to the known physical or mental limitations of an "otherwise qualified" disabled employee is a violation of the ADA, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business. (42 U.S.C. § 12112(b)(5)(A).)

The State Personnel Board has recognized that the protections of the ADA may be available to an employee in a nonpunitive termination case where the employee loses a necessary license because of the employee's disability (Michael K. Yokum (1993) SPB Dec. No. 93-25).[6/] In order to establish a valid defense to a non-punitive termination under the ADA, the employee must prove the following facts:

1. The employee is a "qualified individual with a disability" under the ADA.

2. The license restrictions at issue were imposed "because of" the disability.

[6/] In deciding Yokum, the Board relied upon Pandazides v. Virginia Bd. of Educ. (E.D.Va. 1990) 752 F.Supp. 696, in which the District Court held that a disabled employee who could not meet an employer's "minimum qualifications" was not "otherwise qualified" for the position under the Rehabilitation Act of 1973. On appeal, the Fourth Circuit reversed and remanded, holding that a determination whether an employee is "otherwise qualified" must involve two factual determinations: first, whether the employee can perform the "essential functions" of the position; and second, whether the employer's "minimum qualifications" actually measure those functions (Pandazides v. Virginia Bd. of Educ. (4th Cir. 1991) 946 F.2d 345, 349). In accordance with the Fourth Circuit's holding, the focus of the inquiry in this case will be whether the appellant could perform the "essential functions" of his position under the license restrictions rather than whether he met the "minimum qualifications" for the classification.

3. Despite the license restrictions, the employee can perform the "essential functions" of the position, either with or without reasonable accommodation.

The employer may defeat the ADA claim by rebutting one of the elements of the employee's case or by proving that any proposed accommodation of the employee's disability would impose an "undue hardship" on the employer's business.

DISCUSSION

I. WAS THE APPELLANT DISABLED?

To be covered by the ADA, the appellant initially had to prove that he was a "qualified individual with a disability." (42 U.S.C. § 12112(a).) "Disability" under the ADA is defined in three ways:

1. A physical or mental impairment that substantially limits one or more of the individual's major life activities;

2. A record of such impairment; or

3. Being regarded as having such an impairment. (42 U.S.C. § 12102(2).)

The appellant failed to prove that he met any of these definitions.

a. Evidence of mental impairment.

In order to meet the principal definition of "disability," the appellant had to prove that he had "a physical or mental impairment" (42 U.S.C. § 12102(2)(A)). "Mental impairment" means "[a]ny 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)). Personality traits such as poor judgment, quick temper, or irresponsible behavior are not themselves considered to be impairments; environmental, cultural, or economic disadvantages are also not impairments. (EEOC Technical Assistance Manual II-2.) Certain "behavior disorders" are explicitly excluded from the definition of disability, including current illegal use of drugs; compulsive gambling, kleptomania, or pyromania; and transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, "or other sexual behavior disorders." (42 U.S.C. § 12211(b).)

The record in this case was insufficient to determine whether the appellant suffered from any legitimate "mental impairment" subject to the protections of the ADA. The appellant offered no medical evidence in support of his claim and successfully objected to the one medical report offered by the respondent. Instead, the appellant relied solely upon records from his license proceedings to establish the existence of his mental impairment. These artfully drafted legal documents raise as many questions about the appellant's claimed impairment as they purport to resolve.

In the Washington license proceedings, the appellant was accused of multiple acts of professional misconduct towards his patients including overtreatment of patients, encouraging an overdependent and unhealthy relationship with patients, overprescribing of known, highly addictive drugs,

inappropriate use of sexual fantasy in psychotherapy, and sexual contact with patients. In a subsequent agreement with Washington authorities, the appellant's Washington license was inactivated "due to a mental condition that impaired his ability to provide competent psychiatric care via stipulation" (emphasis added). The details of this stipulation were never presented in this proceeding.

The appellant subsequently entered into a similar agreement with California licensing authorities. He admitted by stipulation that his license revocation in Washington constituted "unprofessional conduct" under Business and Professions Code section 2305. He further admitted by stipulation that he was in violation of Business and Professions Code section 822 because his ability to practice medicine in California was impaired due to "a mental illness affecting competency." This "illness" was identified variously as a Narcissistic Personality Disorder, Dependent Personality Disorder, Passive Aggressive Personality Disorder, and Personality Disorder Not Otherwise Specified. These admissions were made solely for the purposes of the licensing proceedings and would be "null and void" under certain specified conditions.[7/]

[7/] The appellant himself apparently doubted the existence of any mental illness. In his application to the California Medical Facility dated June 29, 1991, he stated: "Allegation of Narcissistic Personality Disorder with obsessive features - possibly not any mental disorder." (Emphasis added. Appellant's Exhibit B.)

Thus, the evidence of the appellant's "mental impairment" consisted principally of self-serving "admissions" he made in stipulated agreements with licensing authorities. These stipulations included selected quotations from medical reports which were never offered in evidence. No medical practitioner was ever presented for examination at the hearing to confirm the existence or extent of the appellant's purported "personality disorders."

The appellant bore the burden of proof to establish that he had a disability protected by the ADA. He failed to meet this burden. At most he has shown that through adroit lawyering, he was able to convince the licensing authorities that serious charges of professional misconduct against him would be treated as a "medical problem" in order to dispose of the matter without trial. There may have been good reasons why the licensing authorities entered into these arrangements with the appellant. However, these negotiated agreements were not binding on the Department of Corrections or the State Personnel Board and provide an insufficient basis for concluding that the appellant suffered from a legitimate "mental impairment" as claimed.

b. Evidence of "substantial" limitation.

Even if the appellant had been successful in proving that he suffered from a mental impairment, the evidence was insufficient to show that the disability was sufficiently serious to warrant coverage under the ADA. A covered disability is one which "substantially limits one or more of

the major life activities of the individual." (42 U.S.C. § 12102(2)(A).) Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." (29 C.F.R. § 1630.2(i).)

The appellant did not claim that his mental impairment limited any life activity other than working. With regard to the life activity of working,

> "[t]he term 'substantially limits' means significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." (29 C.F.R. § 1630.2(j)(3).)

EEOC's Interpretative Guidance states:

> "[A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." (Emphasis added. 29 C.F.R. § 1630.2(j)(3) Interpretative Guidance.)

The only demonstrable impact of the appellant's claimed impairment was that certain restrictions were placed on his medical license. These restrictions did not preclude the appellant from all work as a physician or psychiatrist. At the hearing, the appellant produced a number of job specifications

for psychiatric and medical consultant positions within the State Civil Service which do not require

patient care or the prescription of controlled substances. The appellant is on the employment list for at least one such position. Similar positions exist in other public agencies as evidenced by the appellant's prior employment as a reviewer with the Social Security Administration. Since the license restrictions disqualified the appellant only from some positions as a physician or psychiatrist, his claimed disability did not "substantially limit" the major life activity of "working." Accordingly, his claimed mental impairment, even if otherwise proven, was not substantial enough to qualify for protection under the ADA.

c. Record of impairment.

The ADA also defines "disability" as having "a record of such impairment." (42 U.S.C. § 12102(2)(B).) The purpose of this definition is to ensure that qualified individuals are not discriminated against merely because they have a history of a disability. (29 C.F.R. § 1630.2(k) Interpretative Guidance.) If an employer relies on such a record to make an adverse employment decision, the employee is considered to be disabled for purposes of the ADA.[8/]

In the instant case, the respondent did rely upon the records of the Medical Board of California to terminate the

[8/] Examples under this definition include: (1) an employer who excludes a qualified job applicant based on an old hospital record which misdiagnoses the applicant as being psychopathic; (2) an employer who excludes a learning disabled applicant based on a record from a prior employer labeling the employee as "mentally retarded"; and (3) an employer who excludes a job applicant based on a record of successful drug rehabilitation. (EEOC Technical Assistance Manual II-2.)

appellant's employment. However, there was no evidence that the respondent relied upon any psychiatric information contained in those records to make this decision. Had the respondent relied upon such psychiatric information to process a termination for medical reasons, the appellant may have satisfied this definition. The evidence showed, however, that the appellant was discharged solely for his failure to maintain an unrestricted medical license. There was no evidence that respondent would have acted any differently had the license been restricted for non-medical reasons.

Moreover, in order to qualify for coverage under this definition, the record relied upon by the employer must refer to an impairment that substantially limits one or more major life activity. (29 C.F.R. § 1630.2(k) Interpretative Guidance.) As noted previously, the Medical Board records did not meet this requirement (see discussion ante, pp. 15-17).

d. Regarded as having an impairment.

The final definition of "disability" under the ADA is that the individual is "regarded as having such an impairment." (42 U.S.C. § 12102(2)(C).) This definition is intended to protect individuals who do not actually have a covered disability, but are treated by employers as though they do out of "myth, fear, or stereotype." (29 C.F.R. § 1630.2(l) Interpretative Guidance.)[9/] There was no

[9/] Examples include individuals excluded from jobs because of (1) controlled high blood pressure; (2) facial scars or disfigurements; or (3) unsubstantiated rumors of HIV infection. (29 C.F.R. § 1630.2(l) Interpretative Guidance.)

evidence that the appellant was terminated because the respondent regarded him as disabled. The evidence showed that the respondent discharged the appellant solely because of the license restrictions. Thus the appellant failed to meet this definition as well.

II. WAS THE LICENSE RESTRICTED "BECAUSE OF" A DISABILITY?

Assuming that the appellant could establish that he had a disability covered by the ADA, he next had to prove that it was his disability that was the cause of his discharge. The ADA prohibits an employer from discharging a qualified individual with a disability only when the discharge is "because of" the employee's disability (42 U.S.C. § 12112(a)).

In a nonpunitive termination case, the question of causation can be complicated. The employer does not literally discharge the employee "because of" the disability. Instead, the employer bases the termination on the fact that the employee no longer has a license necessary for the job. However, neutral job qualification standards, such as possession of a license, are subject to ADA scrutiny if the requirement screens out, or tends to screen out, disabled employees "because of" their disabilities. (42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10 and 1630.15 (b) and (c) Interpretative Guidance.) Thus, if a license is revoked "because of" the employee's disability, the protections of the ADA should be available because the ultimate cause of the discharge was the disability. On the other hand, if the license is revoked for misconduct or nonpayment of fees, ADA

protections are not available since the employee, even if disabled, was not discharged "because of" the disability.

The issue of causation is relatively straightforward in cases where the license is revoked because of the existence of the disability. For example, EEOC's Interpretative Guidance discusses the case of a blind applicant who applies for a job which requires a driver's license so that the employee can be asked to run an occasional errand by car.

> "This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that the criterion is job-related and consistent with business necessity. See House Labor Report at 55. [¶] However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with reasonable accommodation." (29 C.F.R. § 1630.15 (b) and (c) Interpretative Guidance.)

Similarly, the House Judiciary Committee noted that a person who could not obtain a driver's license because of epilepsy should not be disqualified from a position requiring a driver's license if it was shown that driving was not an "essential function" of the position and that a reasonable accommodation could be made by shifting those duties to another employee. (U.S. Congress, House Committee on the Judiciary, The Americans with Disabilities Act of 1990, 101st Cong., 2d sess., 15 May 1990, H. Rept. 101-485, p. 33.)

The analysis is more problematical, however, when the license is revoked because of misconduct, and the employee claims that the misconduct was caused by the disability. Such

claims involve difficult questions of causation and proof especially when the disability is a "personality disorder" such as that claimed by the appellant. Many personality disorders are just psychiatric descriptions of antisocial behavior. There is little or no objective evidence of the existence of the "disorder" other than the fact that the individual commits antisocial acts. Such cases often turn into a battle of psychiatric experts with one side contending that the individual is a victim of "mental illness" while the other side contends that the individual simply chooses to do bad things.

Fortunately, the resolution of this issue is unnecessary under the ADA because the question of causation is ultimately irrelevant where misconduct is concerned. The ADA requires reasonable accommodation only for "otherwise qualified" disabled employees. (42 U.S.C. § 12112(b)(5)(B).) Disabled employees are to be held to "the same standards of production/ performance as other similarly situated employees without disabilities." (EEOC Technical Assistance Manual VII-7.)

> "An employer should not give employees with disabilities 'special treatment.' They should not be evaluated on a lower standard or disciplined less severely than any other employee." (Ibid.)

A mentally disabled employee who commits acts of misconduct is not entitled to special protection under the ADA. If similar misconduct by a non-disabled employee would result in discharge, the disabled employee is not "otherwise qualified" for the position, even if the employee claims that the misconduct was "caused" by the disability. (See Mancini

v. General Electric Co. (D. Vt. 1993) 820 F.Supp. 141 (factory worker with "emotional condition" not "otherwise qualified" because of insubordinate conduct to supervisor); Adams v. Alderson (D.D.C. 1989) 723 F.Supp. 1531, affd. (D.C. Cir. 1990) 1990 WL 45737 (federal employee with "adjustment disorder" not "otherwise qualified" because of physical assault on supervisor); Fields v. Lyng (D. Md. 1988) 705 F.Supp. 1134, affd. (4th Cir. 1989) 888 F.2d 1385 (federal employee with "borderline personality" not "otherwise qualified" because of shoplifting incidents while on official business); Franklin v. U.S. Postal Service (S.D. Ohio 1988) 687 F.Supp. 1214 (postal worker with paranoid schizophrenia not "otherwise qualified" because of threats against high public officials).[10/] Discrimination laws such as the ADA protect only those who can do their job in spite of their disability, not those who could do it but for their disability. (Fields, supra, at 1136.)

Similar reasoning is applicable when the employee is discharged because of the loss of a license required for the job. If the license is revoked because of the existence of the disability, the protections of the ADA are applicable and the employee may be entitled to reasonable accommodation if the employee can perform the "essential functions" of the position without the license. However, if the license is

[10/] The Board has previously observed that cases decided under the Rehabilitation Act of 1973 can provide useful guidance in construing similar provisions of the ADA (Michael K. Yokum (1993) SPB Dec. No. 93-25). The EEOC also refers to such cases in its Interpretative Guidance to regulations under the ADA.

revoked because of misconduct, the ADA does not apply because disabled employees should be held to the same standards of performance and behavior as non-disabled employees. If a non-disabled employee would be discharged for the loss of a license under similar circumstances, the disabled employee is not "otherwise qualified" for the position, even if the misconduct was "caused" by the disability.

For example, in Michael K. Yokum, supra, SPB Dec. No. 93-25, a warehouse worker, who was an alcoholic, lost his driver's license because of a drunk driving conviction. Although a driver's license was required under the minimum qualifications for the classification, the position required driving only a few times a year and co-workers were more than willing to perform these duties. Had Yokum lost his driver's license because of his status as a recovering alcoholic, there is little question that the employer would have been required to reasonably accommodate the loss of the license. Alcoholism is specifically defined as a disability under the ADA, and the license was not required for the essential functions of the position. However, Yokum did not lose his license because of his status as an alcoholic. He lost it because of criminal misconduct, specifically a drunk driving conviction. Since a non-alcoholic employee who loses a driver's license because of a drunk driving conviction may be terminated without accommodation (George Lannes (1992) SPB Dec. No. 92-10), Yokum could be held to this same standard of conduct. Because he failed to meet this standard, he was not "otherwise qualified"

for the job and could also be terminated.[11/]

The ADA was intended to protect disabled employees from stereotypic assumptions that employers might have about their disabilities. It was not intended to shield disabled employees from the consequences of their misconduct. It is not clear from this record whether the appellant's license restrictions arose from his status as a mentally impaired practitioner or from the allegations of professional misconduct in Washington (see discussion ante, pp. 12-15). To the extent that the evidence shows anything, it tends to show that the license restrictions arose out of misconduct, specifically, the allegations that the appellant engaged in inappropriate sexual contact with patients and overprescribed medications. There is really no other plausible explanation for the 10-year prohibitions against treating female patients or prescribing controlled substances contained in the Medical Board order. Thus, the appellant failed to meet his burden of proof to establish that his license restrictions were imposed "because of" his disability and not because of misconduct that rendered him not "otherwise qualified" for the job.

[11/] Alcoholics are subject to a section of the ADA which explicitly provides that they may be held to the same standards of job performance and behavior as other employees even if their unsatisfactory performance or behavior is related to alcoholism (42 U.S.C. § 12114(c)(4)). However, these same principles are implicit in the general requirement that disabled employees must be "otherwise qualified" for their positions. Thus, Yokum could have been terminated for the loss of his license for drunk driving even in the absence of section 12114(c)(4). (See, e.g., Lemere v. Burnley (D.D.C. 1988) 683 F.Supp. 275, 280, alcoholic federal employee not "otherwise qualified" under Rehabilitation Act of 1973 because of pattern of unscheduled absences.)

III. WAS REASONABLE ACCOMMODATION REQUIRED?

Assuming arguendo that the appellant met his burden of proof to show that his license restrictions came about because of a disability protected by the ADA, he would next have to prove that he could perform the "essential functions" of his position, either with or without reasonable accommodation. (42 U.S.C. § 12111(8).)

> "Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity." (29 C.F.R. § 1630.10 Interpretative Guidance.)

If the appellant could perform the essential functions of his position with reasonable accommodation, respondent would have to offer the accommodation even though the appellant no longer met the stated "minimum qualifications" for his classification (Pandazides v. Virginia Bd. of Educ., supra, 946 F.2d 345, 349). Such accommodation would have to be offered unless the employer could prove that it would impose an "undue hardship" on its business. (42 U.S.C. § 12112(b)(5)(A).)

a. Appellant could not perform essential job functions.

The ADA provides protection for disabled employees "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. § 12111(8).)

> "For the purposes of this title, consideration shall be given to the employer's judgment as to what functions are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the

essential functions of the job." (42 U.S.C. § 12111(8).) "Essential functions" are defined as "fundamental job duties" not including the "marginal functions" of the job. (29 C.F.R. § 1630.2(n)(1).)

> "The determination of which functions are essential may be critical to the determination whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with reasonable accommodation." (Emphasis added. 29 C.F.R. § 1630.2(n) Interpretative Guidance.)

A function is considered "essential" if: (1) the reason the position exists is to perform that function; (2) there are only a limited number of employees who can perform the function; and/or (3) the function is highly specialized and the incumbent was hired for this expertise. (29 C.F.R. § 1630.2(n)(2).)[12/]

In the instant case, the evidence was overwhelming that direct patient care duties and the ability to prescribe medications were essential functions of the appellant's position as a Staff Psychiatrist at the California Medical Facility. The appellant was specifically hired to provide direct patient care services to the inmates at the prison. He

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[12/] Evidence which may be relevant on this question includes: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining contract; (6) the work experience of past incumbents in the job; and/or (7) the current work experience of incumbents in similar jobs. (29 C.F.R. § 1630.2(n)(3).)

was hired for his expertise and specialized training in providing these services. There are only a limited number of psychiatrists at each institution who can provide these services. The State Personnel Board job specification lists numerous direct patient care duties among the typical tasks for such positions. The job description for the appellant's position specifies 50% of the time on direct patient care plus 30% of the time on related record and report-writing on such patients.

It is true that there were occasions when the appellant was taken off direct patient care duties and worked on some special projects. However, the evidence showed that these were temporary assignments which were made during various investigations into the appellant's fitness for employment. The appellant was returned to patient care duties after the investigations were concluded. It is thus concluded that patient care duties and the prescription of medications were essential functions of the appellant's position.

The minimum qualifications for the class of Staff Psychiatrist include:

> "Possession of the legal requirements for the practice of medicine in California as determined by the California Board of Medical Quality Assurance or the Board of Osteopathic Examiners."

In the appellant's case, these minimum qualifications accurately measured his ability to provide direct patient care and prescribe medications to inmates at the California Medical Facility. With the restrictions placed on the appellant's license by the Medical Board, the appellant lacked the legal

requirements to perform these functions. The minimum qualifications thus actually measured the essential functions of the position as required by Pandazides v. Virginia Bd. of Educ., supra, 946 F.2d 345, 349. The appellant's nonpunitive termination for failure to meet these requirements was proper.

b. Job-restructuring was not available.

The appellant's contention that the respondent should have reasonably accommodated his license restrictions by restructuring his job to eliminate direct patient care duties and the prescription of medications is rejected.

"Reasonable accommodation" can include job restructuring. (42 U.S.C. § 12111(9)(b).) Such job restructuring is meant to "enable a qualified individual with a disability to perform the essential functions of [the] position." (29 C.F.R. § 1630.2(o)(1)(ii).) This is done by "reallocating or redistributing nonessential, marginal job functions." (Emphasis added. 29 C.F.R. § 1630.2(o) Interpretive Guidance.) However,

> "[a]n employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be qualified for the position." (Ibid.)

Reallocation of patient care duties and prescription of medications to others is not required because these are essential functions of a Staff Psychiatrist. The appellant's suggestion that he could have provided assistance to other psychiatrists by reviewing files for them, conducting special studies, or performing administrative work is unavailing since

he himself cannot perform the essential functions of the position. There is no requirement in the ADA that the Department accommodate the appellant by removing the essential functions from the position and assigning him other duties.

c. No vacant positions were available in the Department.

If other methods of reasonable accommodation will not permit an employee to perform the essential functions of the present position, the employer may nevertheless be required to accommodate the employee's disability by "reassignment to a vacant position." (42 U.S.C. § 12111(9)(B).)[13/] The employer should reassign the employee to an equivalent position if the employee is otherwise qualified and the position is vacant within a reasonable amount of time. The employer may reassign an employee to a lower-graded position if there are no vacant equivalent positions for which the individual is qualified.

In the instant case, the evidence failed to establish that there were any vacant positions as a psychiatrist or physician for which the appellant was qualified in the Department of Corrections. The only evidence of such a position offered by the appellant was an organization chart which listed various positions in the Health Care Services Division including a Medical Consultant II (Psychiatrist) position in Region I. However, the chart contains both current and future positions and does not indicate whether such a position was funded or available at or near the time of

[13/] This requirement applies only to current employees and not applicants. (29 C.F.R. § 1630.2(o) Interpretive Guidance.)

the appellant's termination. Moreover, the appellant's Staff Psychiatrist position was equivalent in salary only to a Medical Consultant I position. Transfer to the class of Medical Consultant II (Psychiatrist) would have required a promotion (Gov. Code § 18525.1).[14/] There is no obligation under the ADA for an employer to promote a disabled employee as part of reasonable accommodation. (29 C.F.R. § 1630.2(o) Interpretive Guidance.)

d. Vacant positions in other departments.

The appellant's next contention is that the "State of California" as a whole was his employer and that the Department of Corrections was required to seek out vacant positions for him in other state agencies.

The ADA provides that a "covered entity"[15/] must offer reasonable accommodation to employees "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." (42 U.S.C. § 12112(b)(5)(a).) "The term 'undue hardship' means an action requiring significant difficulty or expense. . ." (42 U.S.C. § 12111(10)(A).) One of the factors to be considered in determining "undue hardship" is

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[14/] Official notice is taken of the pay scales for these classifications.

[15/] "The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee." (42 U.S.C. § 12111(2).)

> "the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." (42 U.S.C. § 12111(10)(B)(iv).)

The concept of undue hardship is not limited to financial cost. It includes any accommodation that would be "extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." (29 C.F.R. § 1630.2(p) Interpretive Guidance.)

The appellant was an employee of the State Department of Corrections. The State of California has a decentralized personnel system with each department separately budgeted and administered. Each department has a Director who is the "appointing power" for that department and has the exclusive authority to hire employees (Gov. Code §§ 18524; 19050). The appointing power also has the exclusive authority to discharge, demote, or transfer employees within the department (Gov. Code §§ 19574; 19997; 19994.1). Although transfers between departments are permissible, no appointing power has the authority to insist that another state agency accept a transfer of one of its employees (Gov. Code § 19050.3; Cal. Code Reg., tit. 2, § 425). Moreover, there is no reliable system in place for one state agency to keep track of the vacancies in all other departments.

In light of the "the composition, structure, and functions" of the State Civil Service and the "geographic separateness, administrative, or fiscal relationship" of the various state agencies, it would impose major changes on the structure of state government to require individual departments to search for vacant positions in other state agencies and to require an agency to accept a mandatory transfer from another department. The ADA does not impose such burdensome changes on the way an employer does business.

This conclusion is fortified by reviewing state law regarding the hiring of disabled persons in the State Civil Service.[16/] Government Code section 19230(c) provides:

> "It is the policy of this state that a department, agency, or commission shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on its program." (Emphasis added.)

Like the ADA, state law includes "reassignment to a vacant position" as a form of "reasonable accommodation." (Gov. Code § 19231(a)(2)(A).) In defining "undue hardship," however, the statute explicitly provides that the focus of the reasonable accommodation effort is to be the individual department and not the state work force as a whole. Government Code section 19231(b) provides:

16/ These statutes were amended in 1992 with the express purpose of strengthening state law to provide at least as much protection as the ADA (Stats. 1992, c. 913, § 1).

> "Undue hardship on a department's program shall be judged on all of the following:
>
> "(1) The overall size of the department's program with respect to the number of employees, the number and type of facilities, and the size of the department's budget.
>
> "(2) The type of departmental operation, including composition and structure of the department work force.
>
> "(3) The nature and cost of the accommodation needed." (Emphasis added.)

The Legislature's judgment that the department is the appropriate unit for reasonable accommodation purposes is consistent with the Board's own long-standing administrative interpretation (see, e.g., Guide for Implementing Reasonable Accommodation (State Personnel Board, Affirmative Action and Merit Oversight Division, May 1992) pp. 18-19). It is also consistent with the statutory procedures for medical terminations in state service which provide that an appointing power may not medically terminate an employee unless it "concludes that the employee is unable to perform the work of his or her present position, or any other position in the agency." (Emphasis added. Gov. Code § 19253.5(d).)[17/] Under these circumstances, respondent was not required to search for vacancies in other departments as part of its reasonable accommodation obligation.

[17/] This analogy is much closer than the collective bargaining statute which the appellant cites. That statute provides that the Governor, through the Department of Personnel Administration, negotiates the state's collective bargaining contracts (Gov. Code § 3517). However, individual departments are on the management bargaining teams and bargain some issues directly with the union when the subject matter relates only to the department (see, e.g., Appellant's Exhibit F, pp. 71).

e. Leaving the appellant on the payroll.

The appellant's final contention that he should have been permitted to remain on the Department of Corrections payroll while he searched for another position in state service is rejected. The appellant has cited no authority for requiring an employer to maintain an employee on the payroll who cannot perform the essential functions of the position while the employee searches for other employment. Under the ADA, an employer who reassigns an employee to a lower-paying position as a reasonable accommodation because there are no higher-paying positions available is not required to maintain the reassigned individual at the higher rate of pay if it does not so maintain reassigned employees who are not disabled. (29 C.F.R. § 1630.2(o) Interpretive Guidance.) Using similar logic, the Department was not required to maintain the appellant on the payroll to look for other jobs since the state does not provide such treatment to non-disabled employees in similar circumstances (George Lannes (1992) SPB Dec. No. 92-10).

* * * * *

WHEREFORE IT IS DETERMINED that the nonpunitive termination taken by respondent against Stanley McNicol effective January 15, 1993, is hereby sustained without modification. The appellant's request for attorneys' fees is denied.

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I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: March 29, 1994.

PHILIP E. CALLIS
Philip E. Callis, Administrative Law Judge, State Personnel Board.