

The Duty to Accommodate Employees 'Regarded As' Being Disabled

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What obligations does an employer have under the Americans With Disabilities Act (ADA) to accommodate the impairments of employees who are “regarded as,” but not “actually,” disabled? This tricky question has created a split in the U.S. Circuit Courts of Appeal, leaving employers with little uniformity or clarity on the issue.

The ADA's plain language provides that employees that are regarded by their employers as being “disabled” are protected under the statute, even if their actual condition falls short of the statutory requirements for a “disability” — i.e., a physical or mental impairment that substantially limits one or more major life activities. See 42 U.S.C. § 12102(2). Since the statutory scheme does not differentiate between “regarded as” and actually disabled employees, the ADA's plain language suggests that an employee incorrectly perceived to have a qualifying disability is nonetheless entitled to receive a reasonable accommodation.

How the Courts See It

Despite the apparent clarity of the statutory language, the Fifth, Sixth, Eighth and Ninth Circuits have held that employees who are merely regarded as being disabled are not entitled to receive reasonable accommodations under the ADA. In *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000), the plaintiff, a sales manager with a history of heart disease, hypertension, anxiety and related conditions, was terminated when he refused his employer's request to relocate out of state. The plaintiff brought a lawsuit alleging violation of the ADA, and the jury rendered a verdict against the plaintiff on his perceived disability claim. On appeal, the plaintiff argued that the district court erred in failing to give a “reasonable accommodation” instruction. The Eighth Circuit affirmed, holding that an employer need only accommodate actual disabilities. The court reasoned that imposing liability on employers who fail to accommodate employees who are mistakenly regarded as disabled “would lead to bizarre results ... The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employer's misconceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.” 186 F.3d at 916-17.

Applying the facts of *Weber*, the court explained that, under the plaintiff's theory, if his heart condition prevented him from relocating, but did not substantially limit any major life activity, defendants could terminate plaintiff without exposing themselves to any liability under the ADA. If, however, defendants mistakenly believed that the plaintiff's heart condition substantially limited one or more major life activities, the defendants would be required to reasonably accommodate the plaintiff's condition by, for instance, delaying his relocation. The plaintiff would then be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.

The Ninth Circuit, in *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir.), *cert. denied*, 540 U.S. 1049 (2003), agreed with the Eighth Circuit's reasoning in *Weber*. The court looked first to the plain language of the ADA, but concluded that the absence of a stated distinction between the alternative prongs of the “disability” definition was “not tantamount to an explicit instruction by Congress that ‘regarded as’ individuals are entitled to reasonable accommodations.” 323 F.3d at 1232. The court reasoned that a “formalistic” reading of the statute in this context would lead to a “perverse and troubling” result, as “impaired employees would be better off under the statute if their employers treated them as disabled even if they were not.” *Id.* The court explained:

Were we to entitle “regarded as” employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers' misconception of a disability. *Id.*

The Fifth and Sixth Circuits have also held, without any analysis, that the ADA does not require a reasonable accommodation for employees regarded as being disabled. See *Newberry v. East Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

The Opposite Conclusion

The First, Third, Tenth and Eleventh Circuits, on the other hand, have reached the opposite conclusion. The First Circuit assumed, without analysis, that the duty of accommodation applies to employees “regarded as” disabled. See *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996).

In *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004), cert. denied, 544 U.S. 961 (2005), the Third Circuit disagreed with the reasoning of *Weber and Kaplan*. First, the court noted that the ADA's statutory text does not distinguish between actually disabled and "regarded as" disabled employees in requiring accommodation. The court then discussed the legislative history of the ADA's "regarded as" provision, which "acknowledged [that] accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 380 F.3d at 774. The court found further support for its ruling in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a U.S. Supreme Court decision holding that "regarded as" employees are entitled to reasonable accommodations under the Rehabilitation Act (the statute after which the ADA was patterned):

Given that the "regarded as" sections of both Acts play a virtually identical role in the statutory scheme, and the well-established rule that the ADA must be read "to grant at least as much protection as that provided by ... the Rehabilitation Act," the conclusion seems inescapable that "regarded as" employees under the ADA are entitled to reasonable accommodation in the same way as those who are actually disabled.

Id. at 775 (citation omitted). Notably, neither the *Weber* nor *Kaplan* decisions address *Arline*.

The Tenth Circuit, in *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005), rejected the Ninth Circuit's reasoning in *Kaplan* that a "formalistic reading" of the statute would have a "perverse and troubling result." The Tenth Circuit responded: "We fail to understand the point, for it is in the nature of any 'regarded as disabled' claim that an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—'regarded as' disabled." 410 F.3d at 676. The court further noted that, under the Ninth Circuit's ruling, "the real danger is not that an employee will fail to educate an employer concerning her abilities, but that '[t]he employee whose limitations are perceived accurately gets to work, while [the employee regarded as disabled] is sent home unpaid.'" *Id.* (quoting *Williams*, 380 F.3d at 775).

In *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005), the Eleventh Circuit relied upon the plain text of the ADA, along with the Supreme Court's ruling in *Arline*, to reach the "inescapable" conclusion that "'regarded as' employees under the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled." In rejecting the reasoning of *Weber and Kaplan*, the court held that those decisions "ignore[] the vital principle that '[c]ourts are not authorized to rewrite a statute because they deem its effects susceptible of improvement.'" 422 F.3d at 1238 (citation omitted). The Eleventh Circuit explained that the Eighth and Ninth Circuits' concerns about "anomalous results" were misplaced:

[B]ecause we could craft a hypothetical that produces a result we might find anomalous is insufficient reason for disregarding the terms of the statute.... '[t]he plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"...

Insofar as the ADA will sometimes entitle one employee with a particular impairment to an accommodation while not entitling another with the same impairment to the same accommodation, it is because these individuals are not similarly situated: the employee entitled to statutory protection will have suffered some wrongful adverse employment action that the other has not.

Id. at 1238-39 (citations omitted).

Conclusion

It does not appear that the split will be resolved anytime soon, as the Supreme Court has already declined, on three separate occasions, to grant *certiorari* in cases raising the issue. Although the more recent circuit court decisions have held that "regarded as" employees are entitled to a reasonable accommodation under the ADA, a substantial divide still exists. Twenty-three states are within the boundaries of the four circuits holding that no accommodation is required for "regarded as" employees, while the four circuits holding to the contrary cover sixteen states, plus the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Employers with facilities in both camps must understandably be frustrated. The best advice may be to play it safe and treat any employee who might possibly be "regarded as" disabled as if s/he were actually disabled and engage in the required "interactive process" of determining a reasonable accommodation. Of course, under the current case law, employers in the Fifth, Sixth, Eighth and Ninth Circuits should not concede that they have a duty to do so.

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