

WHEN IS SOMEONE “REGARDED AS DISABLED”?

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ABSTRACT

The term disability has received a great deal of scholarly attention. However, few studies have dealt with the legal definition of the “regarded-as-disabled” clause as one of the three methods of defining disabled. A review of the case law revealed a number of guiding legal principles. In general, it is not what an employer says but how it treats an employee that matters. Most legal problems may be avoided by obtaining a medical evaluation and acting on that advice. Organizations should avoid blanket policies that screen out groups of potential workers because such actions may mean that the organization regards such individuals as disabled. Lastly, should a firm be found to regard an individual as disabled, no legal compulsion exists to provide such individual with a reasonable accommodation, since it would provide the person with accommodation for something s/he does not possess.

In an effort to stem discrimination, both real and imagined, against some 43 million disabled employees and applicants, Congress enacted the Vocational Rehabilitation Act in 1973 to cover federal contractors with contracts exceeding \$2,500 annually [1]. Unfortunately, “the Vocational Rehabilitation Act proved to be insufficient in preventing discrimination against all private sector employers and was inconsistently enforced against federal employers” [1, p. 469]. In 1990, Congress attempted to correct this problem by passing the Americans with Disabilities Act (ADA) [2]. Under this law, all private employers with more

than 15 employees were prohibited from discriminating based on disability and were expected under certain conditions to make a reasonable accommodation to allow workers with disability to participate in the American workforce. These two federal laws now cover most employers.

While there are substantial differences between the two acts, both define the term disability in three ways: 1) a physical or mental impairment that substantially limits one or more major life activities of an individual; 2) a record of an impairment; or 3) *being regarded as having an impairment* [2, 3; emphasis supplied]. A great deal of attention has been paid to the first two clauses of the legal definition, but little advice has come from the academic world about court interpretations of “regarded as having an impairment.” In fact, employment law textbooks pay little or no attention to this issue, and when they do, they generally fail to clearly delineate the guiding legal principles [1, 4]. This article focuses on the third prong of the definition of disability.

“REGARDED AS IMPAIRED” DEFINED

Examining the interpretive regulations from the Equal Employment Opportunity Commission (EEOC), which has regulatory jurisdiction for ADA, the phrase “is regarded as having an impairment” is defined as:

(1) has a physical or mental impairment that does not substantially limit major life activities but is treated by the employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of the employer toward such impairment; (3) or has none of the impairments defined in paragraph h(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment [5].

Despite this guidance from the EEOC, many employers may still be unsure about the legal meaning of these regulations and what they can and cannot do in the workplace. Employers worry that a single word or inadvertent act may cause the justice system to find that a person is disabled when the individual is not [6]. Besides, the definition of “regarded as disabled” is confusing to many, including some Supreme Court justices [7]. These complexities can generate concern that covered individuals might successfully sue their employers even if there was no intentional act of discrimination. Understandably, these trepidations may lead to a kind of “management paralysis” under which the organization fails to address issues related to a potential disability. This inaction can leave such individuals feeling confused, isolated, and inclined to sue the company. In the end everyone loses.

This article is intended to reduce the fear surrounding the “regarded as disabled” clause in these two acts by providing managers with concrete guidance as to what they can actually say and do based on the federal courts’ interpretation of

these statutes, To that end, a LEXIS NEXUS key word search yielded more than 60 federal court decisions (U.S. Supreme Court, federal appellate, and district court cases) addressing this issue. The majority of these cases have been adjudicated since *Sutton v. United Airlines*, where the Supreme Court considered a variety of disability issues and severely restricted coverage under the ADA [8]. The remaining earlier cases are consistent with the the Court’s ruling in *Sutton*.

SUPREME COURT GUIDANCE

The Supreme Court upheld the EEOC regulations pertaining to the “regarded as disabled” clause in its landmark *Sutton v. United Airlines*, ruling where two women were rejected as suitable applicants for positions as airline pilots because of vision impairments [8]. The petitioners argued in part that United Airlines’ actions demonstrated that it regarded them as disabled. However, the Supreme Court agreed with the regulations which required that in order to meet the legal test of regarding someone as disabled, management must either “mistakenly believe that a person has a physical impairment that substantially limits one or more life activities or they mistakenly believe that an actual, nonlimiting impairment substantially limits one or more major life activities” [8, at 407].

For example, in an early case involving the Rehabilitation Act, an obese woman was denied a job as a state institutional attendant for the retarded because the manager mistakenly perceived that she was too obese to perform the work adequately and refused to hire her. The courts found this action to be ample evidence to qualify her as being regarded as impaired even though she did not consider herself disabled and could actually perform the work without an accommodation [9].

MAJOR LIFE ACTIVITIES

Interestingly, many of the “regarded-as-disabled” rulings hinge on the stipulation that the impairment must be perceived, however mistakenly, to “substantially limit one or more major life activities such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working” [5]. These major life activities must be central to most peoples’ daily lives [10].

For example, in *EEOC v. United Parcel Service*, the vision standard used by UPS denied a job to anyone who had monocular vision [11]. In reversing a district court’s ruling for the plaintiff, the Ninth Circuit of Appeals noted that:

[T]here is nothing improperly discriminatory about a protocol that qualifies individuals for safe driving of particular UPS vehicles on the basis of a condition that is perceived to be limiting to their ability to see, but not substantially limiting . . . liability attaches only to a mistake that causes the employer to perceive the employee as disabled within the meaning of the

ADA, i.e., a mistake that leads the employer to think that the employee is substantially limited in a major life activity [11, at 1140].

In this situation, there was no evidence to suggest that UPS incorrectly regarded the applicants' vision impairment as substantially and significantly limiting their overall ability to see for the purposes of daily life [11].

In *Sutton v. United Airlines*, the plaintiffs were unable to prove that the airline regarded them as being substantially impaired with regard to seeing. They then argued that United treated them as disabled based on the major life activity of "working," because it would no longer consider them as applicants for an airline pilot position as a result of their vision impairments [8]. However, in order to be misperceived as too impaired to work, the person must be considered incapable of performing a class of jobs or a broad range of jobs in various classes [5] and not just one particular job held or coveted by the person [11, 12]. These plaintiffs could offer no evidence that United regarded them as unable to work in any position other than airline pilot and lost their case [8]. In short, United Airlines did not violate the ADA; rather, it enforced its own safety standard for the particular position of pilot.

Major Life Activity of Working

Many of the relevant cases center around whether the perceived impairment substantially limits the major life activity of "working." Because the regulations require plaintiffs to demonstrate that they cannot perform, not only the job in question, but a class of jobs or a broad range of jobs, their petitions often fail.

Sorensen v. University of Utah Hospital is a typical and often quoted case [13]. An AirMed Flight Nurse was diagnosed with multiple sclerosis (MS) and after missing work for five days was medically released to resume her normal duties (her condition was deemed not to be a physical disability under federal law) [13]. Medical supervisors were concerned about the safety of patients and the risks involved in allowing her to resume her flight nurse duties when there was no guarantee she would not suffer another MS episode. Consequently, she was removed from her job but was provided the opportunity to work in other nursing positions in the hospital (burn unit, intensive care, and emergency room) that would eliminate the risks associated with her job as flight nurse. In finding for the hospital, the Tenth Circuit of Appeals declared, "while the hospital did regard Ms. Sorensen as unable to perform one particular job, it in no way regarded her as unable to perform a broad class of jobs" [13, at 1088].

More recently, in *Bailey v. Georgia-Pacific Corporation*, the plaintiff alleged that the company perceived that he was an alcoholic [14]. However, the First Circuit of Appeals stated that "a plaintiff claiming that he is 'regarded' as disabled cannot merely show that his employer perceived him as somehow disabled; rather, he must prove that the employer regarded him as disabled within the meaning of ADA" [14, at 1168]. "Bailey contended that Georgia-Pacific perceived him to

be substantially limited in the major life activity of working, but he must show that he was perceived as being unable to work in either a class of jobs or a broad range of jobs in various classes as compared to the average person having the comparable training, skills, and abilities” [14, at 1168].

Similarly, Southwestern Bell attempted to place a person who had tested HIV-positive in a noncustomer-contact position and told the victim that he “had a permanent disability and would never allow him to work as a customer service representative” [15, at 401]. Later, the appeals court found that by attempting to place him in other positions, the organization showed that it did not regard him as unable to perform a broad range of jobs—just the particular job of a customer service representative [15].

In a related unpublished case, *Avery v. Omaha Power*, the Omaha Power District had transferred Avery from his “safety-sensitive” job as a senior nuclear operator to a nonsafety-sensitive position after management discovered that he was using alcohol [16]. He argued that the act of transferring him to another job demonstrated that his employer regarded him as disabled under the major life activity of “working” [16]. However, the act of providing or offering the affected individual another position generally demonstrates that the organization does not consider the person unable to perform a broad class of jobs and hence does not meet the legal standard with respect to the major life activity of working. As a result, the court upheld Omaha Power.

Work Standards

Situations exist in which workers fail to meet job standards, are terminated, and then allege that the termination demonstrates they are being regarded as disabled under the major life activity of “working.” In *Peters v. City of Mauston*, a worker could no longer handle the lifting requirements of his position after being injured (his condition was deemed relatively permanent) and since no other positions were available, he was terminated [17]. The Seventh Court of Appeals stated,

[W]e previously declined to hold that perception of disability arises solely from the employer’s termination of the plaintiff because an impairment prohibits the employee from performing the job according to the employer’s standards. A terminated employee must present some evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs . . . from which an individual would be excluded because of an impairment [17, at 840].

In another case, Rockwell International required all applicants for jobs to pass nerve conduction tests to identify job applicants susceptible to cumulative trauma disorders such as carpal tunnel syndrome [18]. Several persons denied jobs based on the tests sued under the premise that Rockwell regarded them as disabled. Again, the critical issue involved whether the organization regarded these applicants as substantially impaired with respect to the major life activity of “working.”

The EEOC did not provide any evidence beyond the fact that Rockwell did not consider the plaintiffs after they failed the nerve conduction tests for the specific job for which they had applied. Once again an appellate court noted that for cases involving working as a major life activity, the petitioners “must have evidence that viewed the claimants’ condition as a restriction on their ability to perform ‘a class of jobs or a broad range of jobs in various classes’ in a relevant geographic area” [18, at 1216]. It is worth noting that if the EEOC had presented such evidence, Rockwell would have been in violation of ADA.

Nonlimiting Impairment

In *Schuler v. SuperValu*, an employment offer to an epileptic was withdrawn because the medical evaluation restricted the person from performing certain job functions such as driving forklifts and working around dangerous equipment [19]. SuperValu even admitted that it perceived Shuler as too impaired to perform these activities as it related to his job. However, the court pointed out that the critical question was whether SuperValu perceived him to be substantially incapable of performing either a class of jobs or a broad range of jobs [19]. Paraphrasing the *Sutton* decision, “the employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one’s height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job” [8, at 490-491]. As a result, SuperValu prevailed [19].

Similarly, in *Conant v. City of Hibbing*, a job offer for a general laborer’s position was rescinded after it was medically determined that an applicant’s bad back restricted him from lifting more than 30 pounds [20]. As lifting restrictions generally do not rise to the level of disability [20, 21], the applicant contended that by denying him the job due to this lifting restriction meant that the city regarded him as disabled with respect to the major life activity of working. However, the court noted that “no employer is required to change the essential purpose of the job to comply with federal disability laws. Besides, the city only told him that he could not fulfill the requirements of one specific position. This cannot be construed as regarding Conant from being precluded from working a whole range or class of jobs” [20, at 785].

AWARENESS OF IMPAIRMENT

Importantly, to have a valid lawsuit demonstrating that a person is regarded as disabled, plaintiffs must show that the employer has knowledge of an impairment or a potentially perceived impairment (limiting or nonlimiting) [22]. This knowledge may take a variety of forms: a) it may be gained through casual conversation; b) through first-hand observation; c) through a job physical or periodic company

medical exams; or d) through letters or any other actions that make the company aware of a worker’s possible impairment [22-24].

When there is no evidence that management knew of the condition or when officials possess only “vague or conclusory statements revealing an unspecified incapacity” [22, at 448], inadequate information exists to cross the legal threshold. For example, terminating an employee when the employer did not have any data to suggest that the person was bipolar or when the employer was simply aware that an employee was attending medical appointments and treatment does not demonstrate that the company officials knew the employee was suffering from a physical or mental impairment [25-27] and hence had no preception of disability.

More specifically, in *Morisky v. Broward County*, the plaintiff had requested the county to read a test to him because he was illiterate and enrolled in special education classes [22]. The county refused to do so because reading was a requirement of the custodian job for which he had applied. The plaintiff alleged that this information had put the county on notice that Morisky had a possible impairment, and its refusal to accommodate was proof that the county regarded him as disabled. However, the Eleventh Circuit of Appeals failed to accept this argument. “It does not always follow that someone who is illiterate is necessarily suffering from a physical or mental impairment” [22, at 449]. Similarly, insensitivity toward an employee who appears less intelligent than others (individual was clinically retarded but had told his employer that he was only “slow”) does not infer that management had genuine knowledge that such an appearance was due to a disability or perceived disability [28].

Even though an employer is aware that a person is impaired or sick does not necessarily mean the company regards the person as disabled. In *Rinehimer v. Cemcolift*, an employee was having breathing problems arising out of a bout with pneumonia (also a temporary condition) [29]. The court held that the plaintiff must still demonstrate that the employer had treated him/her as disabled within the meaning of the act and not just that it was aware of the problem [29].

Casual References

Casual or stray references concerning a person’s disability are generally not enough to constitute regarding someone as disabled [11]. For example, asking, “[H]as anything changed about your disability, or asking for a risk assessment given the nature of her disability” [11, at 1140] fail to qualify. Statements based on a medical evaluation, such as, “I’m not sure if that’s physically a good choice for you” [30, at 708] or stating that a nurse “would be incapable of performing any staff nursing work” [31, at 940] is not enough to trigger protection under the regarded-as-disabled clause. It should be pointed out that in the last example, the hospital did encourage the nurse in question to apply for other positions at the hospital for which she would be medically qualified [31].

ACTIONS THAT REGARD A WORKER AS DISABLED

There are a number of ways an organization's actions can lead to a court to conclude that it regarded someone as disabled, even if the disability was fully controllable through medication. Transferring an asthmatic to another job because the company did not believe the asthma was controllable led to a ruling against the employer. The employer mistakenly believed that the asthma was substantially affecting the major life activity of breathing and not the major life activity of working (so there was no need to show that the employer did not regard him as being unable to perform a broad class of jobs). Consequently, the act of moving the worker to a lower-paying position without supporting medical documentation was enough for the courts to decide that the company regarded the individual as disabled and, therefore, under the protection of the ADA [32].

The key to proving that management illegally regards a person as disabled is the production of objective evidence showing that company officials harbor misperceptions, stereotypes, or misbeliefs about the individual and that they acted on those misconceptions to the person's detriment [5, 8]. This point has proven to be difficult to demonstrate. The authors found relatively few cases in which the courts have established that a company regarded an employee as disabled and then acted in a discriminatory manner. In reviewing these cases, it appears that the victim was able to prevail most often by demonstrating that management ignored medical evaluations or failed to seek such advice. Accordingly, any unfavorable actions pertaining to a particular impairment that are then taken by company officials without medical documentation may be viewed by the legal system as based on misperception, stereotypes, or misbeliefs.

In an early case, the Supreme Court found in favor of an elementary school teacher who had been successfully treated for tuberculosis but was terminated due to fears by school authorities and parents that she was contagious [33]. However, medical evaluations indicated that the risk was small and that there were ways to easily reduce the risk even further [33]. Moreover, in *Nassau County v. Arline*, the Supreme Court specifically required medical opinions regarding disability cases to be sought and followed [33].

Actions Without Medical Support

Well-intentioned actions can also go awry. In *Gibson v. Wal-Mart*, a stroke patient was released to work without restrictions [34]. But after observing Gibson breathing heavily during his first day back to work, management offered him several other positions that were thought to be less-strenuous and with less impact on his health (these jobs also paid less). The employee sued on the basis that Wal-Mart deemed him disabled because it felt that his major life activity of breathing was substantially impaired. The Sixth Circuit, in reversing a lower court's summary judgment for the defendant, agreed that these transfer offers

could be sufficient evidence to convince a jury that Wal-Mart regarded Gibson as disabled [34] because there was no supporting medical documentation.

Similarly, in *Harris v. H & W Contracting Company*, the company’s comptroller, a woman, suffering from Graves’ disease (which did not interfere with her work or other life activities), experienced a “panic attack” due to an error in the manufacture of the drug controlling her disease and was absent from work for a period of time [35]. Soon after returning to work, she was told to find another job even though she had an unrestricted work release and was eventually terminated. Management admitted in court that it felt her perceived impairment could put the firm in jeopardy even though Ms. Harris had been a good employee for 16 years. Because the company did not have any medical evidence to support its position, the courts found that Ms. Harris’s termination without cause so soon after her “panic attack” was enough to demonstrate to a jury that company management illegally regarded her as disabled [35].

In *Doebele v. Sprint*, a financial analyst had a high-pressure job that in part resulted in her being diagnosed as bipolar and suffering from attention deficit disorder and hyperthyroidism [36]. After a period of treatment and short-term disability leave, she returned to work free of restrictions, only to be terminated shortly thereafter for performance problems (attendance problems and personal effectiveness). While she was unable to meet ADA’s legal definition of disabled, the appeals court did overturn a lower court’s summary judgment for the company and held that a jury could find that she had been regarded as disabled. There was evidence that her co-workers and supervisors knew she was having psychological problems even before her diagnosis but there was also evidence that at least one member of management felt that one supervisor was encouraging her fellow workers to think that she posed a physical threat to them. Further actions suggesting that management mistakenly regarded her as disabled included having security guards present when the plaintiff received her final warning and management’s concern with her productivity, attendance, and the potential lability that might result from her mental impairments. However, none of these actions or concerns was based on medical evaluations. Moreover, the court noted that her supervisors regarded her as substantially limited to perform a broad class of jobs, because they failed to consider her for other positions in the firm [36]. This action of failing to consider a potentially disabled person for other jobs within the firm usually leads courts to conclude that the employers actually consider them incapable of performing other jobs because of some perceived disability.

Misreading or Going Beyond Medical Evaluations

In *Ollie v. Titan Tire Corporation*, the company misinterpreted a doctor’s written evaluation that stated, “has asthma, may have difficulty in areas with dust or fumes” [37, at 684]. The company took this to mean that the applicant could not work around any areas with dust or fumes and refused to consider him further for

any of its positions. Since he had applied for any open position, the courts found this sufficient proof that the company regarded him as disabled with respect to the major life activity of working [37].

Employer mistakes in interpreting medical evaluations can become problematic. In *Taylor v. Pathmark*, Taylor was terminated even though the attending physician had notified the company that Taylor's ankle problem was only temporary and subject to short-term work restrictions [38]. Apparently, the company mistakenly read the medical evaluation to mean that the work restrictions were permanent and so informed Taylor. Taylor's attempts to rectify the miscommunication fell on deaf ears. Even though this was an "honest" mistake, the courts judged the company actions to be such that it regarded Taylor as disabled with respect to the major life activity of working because it would not correct the error and terminated him without considering him for any other positions [38].

Ignoring or going beyond a physician's orders to the determinant of the employee can often place the organization in legal jeopardy. For instance, in *Johnson v. Paradise Valley Unified School District*, a groundskeeper suffered a severe leg injury when hit by a golf cart, but was eventually released back to work with the following restrictions: "no prolonged standing, no prolonged walking, allow frequent changes in position" [39, at 1224]. However, the school district had a policy of not allowing workers to return to work under limited releases. The district also refused to consider her for 13 other different maintenance and groundskeeping jobs.

The appeals court felt these actions were sufficient to allow a jury to conclude that the school district mistakenly regarded Johnson as disabled with regard to the major life activity of working. The policy of not accepting partial work releases, in the mind of the court, could demonstrate that an organization regarded the individual as unable to perform a broad class of jobs [39]. Likewise, in *Henderson v. Ardc*, the Sixth Circuit of Appeals found that organizations having a 100% heal rule before returning to work, when "applied to mildly impaired persons to exclude them from a broad class of jobs, it may be treating them as disabled even if they are not, thereby qualifying them for protection under ADA and parallel statutes, and activating the individual assessment rule" [40, at 651].

In *Riemer v. Illinois Department for Transportation*, the Seventh Circuit Court of Appeals refused to overturn a lower court ruling for an asthmatic who had been ordered to obtain a second medical opinion [32]. The asthmatic had been having breathing problems at work and was directed to obtain the initial evaluation. The worker's own doctor concluded that he was medically fit to return to work and that his asthma was fully controlled [32]. However, company management demanded a second opinion, which recommended that "Mr. Riemer be given a permanent field position out of doors because, in her opinion, the conditions in the fabrication shop were triggering his asthma attacks" [32, at 802]. The Seventh Circuit Court of Appeals felt that ordering the second medical opinion after the first had medically cleared Mr. Riemer could be interpreted by a jury as evidence that the firm was

relying on unsubstantiated fears and stereotypes and therefore did regard him as disabled with respect to the major life activity of breathing [32].

However, going beyond medical advice and seeking a second medical opinion can be justified as long as it is alleged that the company regards the individual as disabled with respect to the major life activity of working and as long as it seriously considers the person for other positions within the organization [41]. Providing temporary light duty to a worker who had been diagnosed with lower back pain due to improper lifting techniques is not evidence that the organization regards the person as disabled (even though the doctor did not request a light-duty assignment for the worker), particularly when the worker does not suffer any job detriment [42].

In *Pollard v. High's of Baltimore, Inc.*, a convenience store supervisor who had back surgery was under temporary work restrictions which prevented her from fulfilling her normal area supervisory duties [43]. She was placed in a store clerk position until she recovered. Eventually she was cleared by her doctor to return to work as a supervisor, subject to a 25-pound and bending restriction. However, the employer would not restore her to the supervisory position until she could demonstrate that she could work an entire eight-hour shift, which she was incapable of doing in her then-current temporary work position. The court, in denying her claim, noted that her supervisors believed that her impairment was temporary per the doctor's evaluation and never treated her condition as permanent, in that after she could work a full eight hours she would be returned to her original position [43].

Perceived Alcoholism

While the ADA does not specifically protect alcoholics, under some conditions an organization may act in such a way as to treat an employee as an alcoholic, as occurred in *Myers v. Cargill Communications* [44]. In this case, a new manager, a past alcoholic himself, suspected his promotions director of excessive drinking and driving a company vehicle under the influence. After having her followed (she was seen having five drinks at a restaurant) and confronting her as she was attempting to enter the company van, she was given the choice of enrolling in an alcohol treatment program or being terminated. She refused treatment and was subsequently terminated for violation of company rules.

In reversing the district court's summary judgment for the company, the Eighth Circuit found that no written policy on the subject existed nor had such a policy ever been communicated to the promotions director. Besides, there was no attempt to determine whether she was actually under the influence at the time the manager confronted her after she left the restaurant (she weighed more than 250 pounds and might have easily passed a sobriety test). Moreover, she introduced evidence that other radio station employees often drank with management's knowledge before driving company vehicles. Consequently, the appeals court came to the conclusion

that a jury could conclude that the manager was acting on stereotypes, fears, and unfounded suspicions and regarded her as disabled [44, *cert denied* 45].

LEGAL ACTIONS

Even though an employer may be conscious of a particular employee's impairment, it does not inevitably indicate that management's actions represent recognition that the person is disabled. For example, in *Taylor v. Nimock's Oil*, Ms. Taylor, who had suffered a heart attack and was undergoing treatment, received a "get well" card and a note concerning possible work restrictions from her employer [46]. Just because an employer demonstrates concern for a worker's well-being or discusses the impact of possible work restrictions does not mean that it regards the person as disabled. Besides, being sick, ill, or injured does not necessarily imply that a person has an impairment which substantially limits a major life activity or that management automatically regards the person in question as disabled [46].

More importantly, employers often have prospectively impaired persons evaluated by qualified physicians. The courts have consistently ruled that such action, as long as it is job-related, is not proof that an employer regards the employee as disabled. In *Richard Sullivan v. River Valley*, for instance, Sullivan was displaying rather "strange" behavior on school premises and was subsequently ordered by the school board to undergo a mental and physical examination [47]. However, the courts said this order did not suggest that the school board regarded Sullivan as disabled [47]. Similarly, repeatedly asking an employee to see a psychologist because the person seems to exhibit psychiatric problems is not viewed as treating someone as disabled or demonstrating stereotypical prejudices [28, 48].

Furthermore, any correspondence between medical personnel and company authorities when asking for clarification on the impairment is not evidence that the organization regards the person as disabled unless the firm violates the medical evaluation [49]. Moreover, even proof that a supervisor ignores the medical evaluation and acts in a manner that regards the individual as disabled, may not be sufficient evidence to find the company liable unless said supervisor had decision-making authority over the impaired person [49].

Even disparaging remarks related to a worker's impairment do not automatically qualify as proof the organization regards the worker as disabled. A morbidly obese corrections officer was told by his sheriff that he was "too fat" to subdue unruly inmates and could not do the job (major life activity of working), even though the officer had held the job for many years [50]. However, the sheriff's office did offer him a transfer to another position. Liability was avoided since the sheriff did not act in a way that denied the officer work or regarded the officer as unable to perform a broad class of jobs [50, unpublished decision]. Likewise, in *Bobreski v. Ebasco-Rayethon* (another unpublished opinion), a supervisor continually mocked an electrician's cleft palate. However, other than

move him to another job with similar responsibilities, his employment was not adversely affected, therefore, the definition of the major life activity of working was not met [51].

Accommodating Someone Regarded as Disabled

Under some circumstances, after it has been determined that a worker is regarded as disabled, the question becomes what kind of accommodation must be made? In *Kaplan v. City of North Las Vegas*, a peace officer who had been injured in the line of duty argued that the city mistakenly thought he was permanently disabled by rheumatoid arthritis and terminated him [52]. However, he did fully recover and argued that he had been regarded as disabled by the city because of the misdiagnosis and thus should have been provided with reasonable accommodations to allow him to continue working.

Nevertheless, the Ninth Circuit took a position similar to most other appeals courts [53, 54, *cert denied* 55, 56, 57] when it stated “if we were to conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result under a statute aimed at decreasing stereotypic assumptions not truly indicative of the individual ability of people with disabilities” [52, at 1232]. Consequently, employers are under no legal obligation to accommodate someone that is regarded as disabled.

The courts generally further argue that accommodating a person who is regarded as disabled “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’ misperception of a disability” [52, at 1232]. Unfortunately, this court interpretation allows these individuals to be legally discriminated against. For example, the peace officer in *Kaplan v. City of North Las Vegas* wouldn’t have lost his job if there had been a reasonable accommodation.

RECOMMENDATIONS

After reviewing the legal record, a number of guiding principles and recommendations emerge. First, for the “regarded-as-impaired” standard to be operative, management personnel must be aware of an impairment that could limit a major activity of an employee or potential employee. Mere knowledge of a person’s actions or behavior, such as doctor appointments, illness, or condition (e.g., bad back) that could be associated with impairment does not demonstrate knowledge of a disability [22].

Next, management should seek medical advice and closely follow the recommendations. Should there be a mistake in reading or interpreting the evaluation, the company must rectify the mistake. Company officials should exercise care in questioning an employee's personal physician's assessment that clears the employee to return to work. However, the company may seek other medical opinions when such evaluations do not release the employee back to work.

In line with *Arline* [33], organizations should take full advantage of the law and order medical evaluations when there is any doubt of a person's ability to perform the job. Such actions do not constitute regarding an individual as disabled. Besides, following medical evaluations can actually protect the company from many lawsuits [58, unpublished decision].

Absent a medical evaluation, firms can preclude employees from performing a particular job in most situations, but should transfer or at least offer the person involved another job within the company. This action will protect companies from most common lawsuits by plaintiffs alleging the company views them as incapable of the major life activity of "working."

However, the best course of action is to obtain a medical evaluation before changing a worker's employment. This strategy is an especially sound course of action when major life activities other than "working" are affected. Not ordering a medical or psychological appraisal in these situations may lead to a negative outcome in court.

Organizations should refrain from broad policies such as a 100% heal rule that restricts employees from returning to work. Additionally, firms should exercise care when requiring broad application standards such as passing nerve condition tests, since plaintiffs may in time begin producing evidence that such actions regard them as being able to perform a broad class of jobs.

Management should also abstain from derogatory or demeaning remarks concerning a person's impairment. Even though these remarks by themselves do not constitute regarding a person as disabled, they do affect a person's morale and inclination to sue the company.

CONCLUSIONS

Regarded-as-disabled cases are often complex and confusing from a legal standpoint. However, following a few basic rules can prevent most legal problems.

In general, employers should utilize and follow qualified medical evaluations and treat the potentially disabled person in a humane and dignified manner. Moreover, rather than applying blanket rules to work standards, employers should utilize more individualized assessments such as those the ADA requires for those actually impaired. And when it is determined that an individual cannot perform a particular job with or without a reasonable accommodation, the employer should consider the individual for other positions within the company.

Finally, management training should incorporate this subject and its attendant principles, Only in this manner will the fear and trepidation concerning this issue be removed.

ENDNOTES

1. D. D. Bennett-Alexander and L. P. Hartmn, *Employment Law for Business*, 4th ed. Irwin McGraw-Hill, Boston, 2004.
2. Americans with Disabilities Act 42 U.S.C. Sec 12102, 1990.
3. Rehabilitation Act 29 U.S.C. Sec 706, 1973.
4. D. P. Twomey, *Labor & Employment Law*, 12th ed. Thompson/Southwestern West: United States, 2004.
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