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COOK V. STATE OF RHODE ISLAND: EXPANDING THE APPLICATION OF "PERCEIVED DISABILITY" UNDER U.S. DISABILITY LAWS

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ABSTRACT

The federal district court for the District of Rhode Island has recently ruled that a morbidly obese woman is entitled to protection under the Vocational Rehabilitation Act because her obesity was "perceived" as a disability. Though certain aspects of this ruling are specific to the particular actions of the employer in this case, a precedence for future rulings based on perceived disabilities has been created. This is of particular concern as the requirements for establishing "perceived disability" under the Rehabilitation Act are essentially the same as those covered by the more inclusive Americans with Disabilities Act.

On November 22, 1993 the Federal District Court for the District of Rhode Island ruled that the Rhode Island Department of Mental Health, Retardation, and Hospitals (MHRH) had violated the Rehabilitation Act of 1973 [1] by denying the complaining party a position as an institutional attendant for the mentally retarded (IA-MR) because she was "morbidly obese" [2]. Medically, an individual is considered to be morbidly obese if that individual weighs more than twice that individual's optimal weight or is in excess of 100 pounds of their optimal weight [3]. The popular press immediately concluded that this interpretation of federal disability laws would provide Equal Employment Opportunity (EEO) protection

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to obese people [4]. As will later be seen, this is not entirely the case because the *Cook* decision is focused more on an employer's *perception* of a complaining party's obesity being a disability, than on the obesity itself. In rendering this decision, the district court has recognized that this ruling is of benchmark proportions and has gone as far as to declare it a "pathbreaking 'perceived disability' case . . ." [5].

The purpose of this article is to examine the *Cook* decision and the court's rationale in applying a broad interpretation of the Rehabilitation Act in instances where a disability is perceived by the recipient. Because the language and goals of the Rehabilitation Act and the Americans with Disabilities Act (ADA) [6] are so similar, a brief discussion of the potential application of "perceived disability" claims under the ADA is also provided, especially in distinguishing the concepts of "perceived" and "actual" disabilities. Finally, this article briefly discusses the possible implications this and similar decisions pose for employers, particularly in situations not normally thought to be covered under the Rehabilitation Act.

THE FINDINGS OF FACT

To enhance the reader's understanding of the issues addressed in the *Cook* decision, a brief synopsis of the findings of fact in the case is now provided. The complaining party, Bonnie Cook, was a 5′2″ tall, 320 pounds female when she applied for a vacant institutional attendant for the mentally retarded (IA-MR) position. During the prehire physical, a MHRH nurse noted that Cook was morbidly obese, but found no limitations to her ability to perform as an IA-MR. Ms. Cook had, in fact, worked in this position on two previous occasions [7] and had, in the words of the court, a spotless work record. However, the MHRH rejected her most recent application on the grounds that Cook's obesity hampered her ability to evacuate patients in the eventuality of an emergency, that it *placed her at a greater risk of developing serious ailments,* and that her obesity could increase the likelihood of Cook filing worker's compensation claims [5, at 22 n. 13].

In response to this action, Cook filed suit in federal district court alleging the MHRH had denied her employment, even though she was qualified for the position, based solely on her *perceived handicap* [8]. As a result of this initial jury trial, Cook was awarded $100,000 in compensatory damages, and injunctive relief. In response, the MHRH then filed a motion to overturn the jury's verdict and for a new trial.

Burdens of Proof Under the Rehabilitation Act

First, it should be noted that because MHRH was a recipient of federal financial aid, the applicable statute in this case is the Rehabilitation Act of 1973. To sustain

a claim under the Rehabilitation Act, the complaining party must satisfy four elements:

1. The complaining party applied for a position in a federally-funded program or activity.
2. At the time of application the complaining party suffered from a *cognizable* disability.
3. Despite the disability, the complaining party was qualified for the position in question.
4. The complaining party was not hired *solely* due to the disability [9].

In the specific case of *Cook,* the proofs were viewed in the following order. She had indeed applied for the position of IA-MR at the MHRH, which was the recipient of federal financial assistance, hence the authority of the Rehabilitation Act was appropriately applied. Next, Cook could be classed as disabled under the Act because she had been *perceived* as being disabled by her perspective employer. Moreover, she was deemed by the court to be qualified for the position despite her *perceived* disability because of her two previous tenures in that same position and her previous work record while performing in those positions. Finally, the recipient had excluded Cook from employment solely because of her *perceived* disability, being overweight (distinguishing between perceived and actual disability will be discussed in a later section). From the district court's perspective, every element was neatly satisfied [10].

The MHRH Arguments

The employer, MHRH, countered by contending that morbid obesity was not considered a disability under the Rehabilitation Act on two grounds, mutability and voluntariness [10, at 10-12]. First, the MHRH asserted that morbid obesity is a mutable condition and that the complaining party can simply eliminate the condition by losing weight. In essence, dieting and exercise would eventually alleviate the morbid obesity. Because the complaining party could, conceivably, change her disqualifying characteristic (obesity), it could not be a "disability" within the meaning of the act.

The MHRH also claimed that because the complaining party's obesity was caused (or at least aggravated) by voluntary behavior, it could not meet the conditions necessary to be an "impairment" as defined by the Act [10, at 12]. This argument was based on the belief that the employer should not be accountable for any impairments that were essentially self-inflicted. In short, if the complaining party's disqualifying condition occurred by her own volition, why should the employer be held liable?

The district court dismissed both of these arguments on the rationale that there is nothing in the Rehabilitation Act (or the Americans with Disabilities Act, for

that matter) that mentions either mutability or voluntariness as a disqualifier [10, at 10 n. 7, 13].

DISTINGUISHING BETWEEN "ACTUAL" AND "PERCEIVED" DISABILITY

A "disability" within the meaning of both acts is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual [11]. "Physical and mental impairment" are further defined as:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities [12].

Once a physical or mental "impairment" has been established it must then be demonstrated that this "impairment" substantially limits at least one major life activity. To do so, the "impairment" would have to significantly restrict the individual's ability to care for him/herself, perform manual tasks, walk, see, hear, speak, breathe, learn, or work the so-called major life activities component of the disabilities definition [13].

Only after the above criteria have been satisfied can it be said that an "actual" or "tangible" disability under either the ADA or the Rehabilitation Act exists. However, because both statutes were concerned with eradicating stereotyping based on disabilities, they also incorporated provisions to explicitly protect individuals who were merely *thought* to be disabled and treated accordingly. As a consequence, an individual who is denied a particular employment benefit may receive Rehabilitation Act or ADA protection if s/he can show that the denial was based on a "record of impairment" (of which the condition no longer exists) or on an impairment that the individual is "regarded as having" (but does not exist) [14].

PERCEIVED DISABILITIES AS A PROTECTED CLASS

The District Court, by its own admission, conceded that "perceived disability" cases are a rarity and, therefore, had very little precedence to follow in formulating this ruling [14, at 6-7]. As a consequence, its decision in *Cook* may very well be the mold from which future rulings are cast. At the center of this decision is the development of a framework for analysis that allows a person who is "perceived" to have a disability to be accorded the same legal protection as an individual who

actually has a disability. Because the ADA contains essentially the same language and intent as the Rehabilitation Act, both statutes will be examined concurrently in regard to the applicability of the "perceived disability" assessment.

As a review, the major differences between the ADA and the Rehabilitation Act do not lie so much in their provisions, which are very similar, but in the employers they respectively cover. The Rehabilitation Act of 1973 applies only to employers who either are government contractors or subcontractors who hold federal contracts in excess of $2,500 [15], or any program or activity receiving federal financial assistance [15, at 6-7]. The ADA, as an amendment to the Civil Rights Act of 1964, applies to a far broader audience by including all employers subject to the Civil Rights Act [16].

> In both statutes, the term "disability" is defined as, . . . a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such impairment [17].

The clause, "is regarded as having such impairment," is the basis for the perceived disability standard enunciated in *Cook.* Though the district court did note that the *Cook* jury had not specifically found that the complaining party had a disability, the court did describe how they "could plausibly" have done so [10, at 8]. However, because MHRH had treated the complaining party as though she had an impairment, it was not necessary to establish the actual existence of a disability to be protected under the Rehabilitation Act [18] (this would be equally true for the ADA [19]). In essence, the MHRH's perception that Cook was morbidly obese was manifested in a conclusion that this condition would result in increased absenteeism and workers' compensation claims. Consequently, MHRH, in the district court's opinion, had clearly treated her as though she suffered from a disqualifying disability. From the court's vantage it became irrelevant whether she was in fact disabled, as the statute required only that she be "regarded as" having a disability in order to be protected [10, at 8].

At this point, the MHRH could have still prevailed if it had based its decision not to hire Cook on some factual basis rather than an unsubstantiated opinion that she could not perform specific tasks or might increase workers' compensations expenses. This case could have had an entirely different outcome had the MHRH actually tested Cook's ability to evacuate patients under simulated emergency situations. It can be argued that patient safety is an integral part of operating a MHRH facility. Since patient safety is connected to the "essence" of the IA-MR position, it could satisfy the conditions necessary to establish a bona fide occupational qualification (BFOQ) [20] and the complaining party could legally be excluded if she failed to adequately perform the aforementioned task. Inability to perform such patient safety tasks would probably satisfy the "substantial limits" component of major life activities as they relate to work [21].

AN ILLUSTRATIVE EXAMPLE

The analysis framework used in this case allows a wide variety of behaviors and/or problems to be considered as a perceived disability, thus entitling them to protection under the Rehabilitation Act or the ADA. Consider, for example, a situation in which an applicant for a position smokes cigarettes. Assume that this person applies for a position at an organization covered under Rehabilitation Act or the ADA. Through the prehire process, it has been determined this individual possesses the necessary qualifications for this particular position. However, during the interview phase it is learned that s/he smokes cigarettes. The employer, who is very conscious of rising health care costs, believes employees who are cigarette smokers are more likely to develop lung cancer, emphysema, and other respiratory illness, thus increasing the cost of medical insurance, workers' compensation, and lost productivity. Consequently, this potential candidate is rejected. The candidate is then informed that s/he is not to be hired because of his/her cigarette smoking and the associated increased cost of health coverage. The question now arises: Is this individual entitled to protection under the Rehabilitation Act or the ADA?

Examination of this seemingly innocuous situation using the burdens of proof outlined earlier might indicate that cigarette smoking is a perceived disability. The applicant had applied to an organization covered under one of our two statutes. The employer regarded the applicant as being disabled at the time of the application. Particularly, the employer treated the applicant as though the smoking *had* already caused increased medical expenses. The applicant was qualified for the position and was denied employment solely due to the disability. As a consequence, this individual could conceivably be entitled to the protections and remedies prescribed under either the Rehabilitation Act or the ADA.

IMPLICATIONS FOR EMPLOYERS

Though the *Cook* decision appears to be fairly straightforward and relies on a fairly rigid interpretation of the term "disability" under the Act, it has also increased the potential for litigation. The impact of the *Cook* decision rests on the protection of individuals with "perceived" disabilities, hence "actual" disabilities covered under the Rehabilitation Act and the ADA need not exist. More employees, therefore, are likely to seek redress under these statutes, because any physical or mental characteristic an employer *believes* may inhibit that individual's performance would potentially qualify for protection as a perceived disability. If the individual with the perceived disability is then able to perform the job in question, there is little doubt the employer's risk of liability is substantially increased under either statute. What's an employer to do?

The most likely course of action to follow is to conduct good job analysis, as one would do before engaging in any equal employment opportunity hiring. As a result of job analysis, the employer should be able to identify the essential tasks associated with each job in question [22]. Once these essential job components are isolated, it is then a matter of establishing minimum performance standards for those tasks. When any applicant applies for a position (*all* applicants must be subjected to the same test and standard), s/he would be required to demonstrate at least a minimal proficiency. Note that in *Cook* the employer erred by *assuming* the complaining party could not adequately evacuate patients in case of an emergency because he *assumed* her obesity limited her mobility [10, at 9]. There was no tangible evidence that Cook could not evacuate patients. Had the employer actually tested her ability to do so by simulating an emergency evacuation, he would either have found that his fears were groundless or that Cook was legitimately unqualified for the position. Assuming that patient safety is an essential component to the IA-MR position, and further assuming that there are no reasonable means for accommodating a deficiency in this area, the case could have had a different ending for the employer.

The message conveyed in *Cook* is clear. It is at the employer's own risk to merely speculate whether potential employees can or cannot complete an essential job task in any employment situation. Instead, an employer should establish valid criteria to evaluate potential employees as to their ability to complete essential job tasks within the realm of reasonable accommodation. *Cook* is yet another example of how, in today's regulated workplace, any employment action not based on valid testing and evaluation creates a work environment ripe for litigation. As tedious and drab as it is, there is no substitute for job analysis as the basis for framing workplace decisions.

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ENDNOTES

1. 29 U.S.C. § 794 (1993 Supp.).
2. No. 93-1093, slip. op. (D.C.R.I. 1993).
3. Merck Manual 950, 950 (15th ed. 1987).
4. U.S. Says Disabilities Act May Cover Obesity, *N.Y. Times,* November 14, 1993, at Y17.
5. No. 93-1093, slip. op. at 2.
6. 42 U.S.C. 12101, *et. seq.*
7. Cook had been an IA-MR at the MHRH's Ladd Center from 1978 to 1980, and again from 1981 to 1986. On both occasions she had departed voluntarily [5].
8. *Cook v. Rhode Island,* 783 F.Supp. 1569 (D.R.I. 1992).
9. *Joyner By Lowry v. Dumpson,* 712 F.2d 770 (2d Cir. 1983, citing *Doe v. New York University,* 666 F.2d 761, 774-775 (2d Cir. 1981).
10. No. 93-1093, slip. op. at 21-22.
11. 29 C.F.R. § 1630.2(g); 45 C.F.R. § 84.3(j).
12. 29 C.F.R. § 1630.2(h); 45 C.F.R. § 84.3(j)(2)(i).
13. 29 C.F.R. § 1630.2(i); 45 C.F.R. § 84.3(j)(2)(ii).
14. *Taylor v. U.S. Postal Service,* 946 F.2d 1214, 1219 (6th Cir. 1991).
15. 29 U.S.C. § 793 (a).
16. For a more detailed description of covered employers under the ADA, refer to 29 C.F.R. § 1630.2(e) (July 1, 1993).
17. Cited as 29 U.S.C.A. § 706 8(B)(i) through (iii) under the Rehabilitation Act, and as 42 U.S.C.A. § 12102(2)(A) through (C) under the ADA.
18. See also, *Taylor v. U.S. Postal Service,* 946 F.2d 1214, 1216-1217 (6th Cir. 1991) and *Harris v. Thigpen,* 941 F.2d 1495 (11th Cir. 1991); and *Leckett v. Board of Commissioner's of Hospitals District No. 1,* 909 F.2d 820, 825 (5th Cir. 1990).
19. It should be noted that the only significant difference in the definitions and discrimination prohibition contained in the two statutes is that the employer is referred to as a "recipient" in the Rehabilitation Act, and a "covered entity" under the ADA.
20. *Western Airlines, Inc. v. Criswell,* 472 U.S. 400, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985).
21. 29 C.F.R. § 1630.2(j)(3).
22. For a more detailed description of job analysis in employee selection see R. Arvey and R. Faley, Fairness in Selecting Employees (2d ed. 1988).

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