THE LABOR AND EMPLOYMENT LAW SECTION

The CHECKOFF

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An Introduction to Perceived Disability Discrimination Under the ADA for Title VII and ADA Practitioners

by Gary A. Costales

An often overlooked but somewhat significant issue pertaining to Title I of the Americans with Disabilities Act of 1990 (ADA) is the theory of perceived disability discrimination.[1] Under the ADA, it is unlawful for an employer to discriminate against an individual because that employer regarded or perceived that individual to be disabled. Perceived disability first appeared as a covered basis of discrimination in the Rehabilitation Act of 1973.[2] In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court articulated the concern of Congress which lead to the addition of perceived disability as a basis for disability discrimination when it wrote: "[c]ongress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Arline*, 480 U.S. at 284. The following seemingly innocuous scenario illustrates the subtlety with which such an issue may arise.

ABC Corporation employs many assembly workers of all types on its widget line. Beck Hansen is an employee on one of these lines. Hansen has a grand mal seizure while working on the assembly line and breaks his arm in three places. As a result, he is forced to take three months off in order to allow his badly broken arm to heal. Hansen's doctor writes a letter to the company in which he states that Hansen will be ready to return to full duty in three months. Hansen's doctor also states that Hansen is not an epileptic and that the seizure, which was his first, was caused by a new medication that he was taking. Hansen's doctor explains that he switched Hansen to his old medication and that it is not expected that he will have a seizure again. ABC's company doctor concurs with Hansen's doctor. According to ABC's leave policy, the jobs belonging to employees who are absent three months or more are posted. Hansen applied for his job after it was posted at the end of three months. According to the collective bargaining agreement, jobs are awarded based solely on seniority provided that the applicant does not have an impairment which prevents performance in the position. Hansen is confident that he will be selected for his previous position because he has the most seniority of any of the applicants. ABC rejects his application and terminates Hansen because company officials decide that he may have another seizure while working on the line. When questioned, ABC's officials state that they felt that Hansen was not able to perform any of the many assembly line jobs in their factory, including one available position in packing which did not require that he work around machinery. However, the company does allow Hansen to continue to compete in its annual employee golf tournament which takes place three months after the end of Hansen's sick leave. Hansen decides to file an EEOC charge immediately after the golf tournament. Under this scenario, it appears that ABC terminated Hansen because of its perception that he was disabled.

In a perceived disability case, a

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Chair's Message:

Looking Back Over the Year

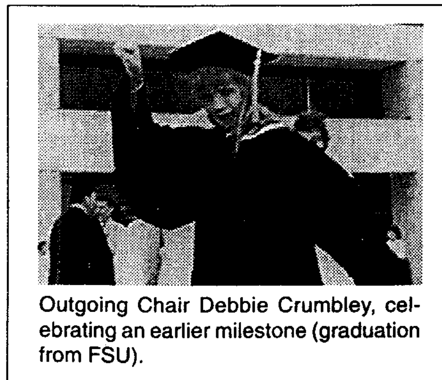
It is with much pride that I look back over my year as Chair of the Labor and Employment Law Section for 1996-97. We began with the approval of a major restructuring of all of the Section's Standing Committees. A mid-year modification brought the addition of one additional committee, the Employee Benefits Committee, which will further enhance our Section structure.

Section educational activities have been strong this year under the leadership of Section CLE Chair Kevin Hyde. Our Bar year began with the very successful *1996 Employment Law Trial Skills Program*, co-sponsored with Stetson University College of Law. A repeat of that program is planned for August 3-8, 1997.

Right on the heels of the Employment Law Trial Skills program was the intermediate level September Litigation seminar, titled *Jury Trial Litigation of Employment Cases*. Chaired by Rich McCrea, the program featured trial lawyers of national prominence like Vincent T. Bugliosi.

In October, the Section co-sponsored the *22d Annual Public Employment Labor Relations Forum* under the cross-Section leadership of Isis Carbajal de Garcia of our Section and Michael Grogran of the City, County and Local Government Law Section.

In February, 1997, Professor Michael Fischl of the University of Miami chaired a special half day program titled *Employee Benefits for Beginners: What Every Labor and Employment Lawyer Needs to Know About Employee Benefits*. It was followed by a one day program chaired by Cathy Beveridge, titled *See Ya in Court*, featuring such timely topics as the interplay between ADA and workers' compensation, same sex harassment and free speech issues.



Outgoing Chair Debbie Crumbley, celebrating an earlier milestone (graduation from FSU).

In April, 1997, the Section held its annual *Advanced Labor Topics* program, scheduled for Key West, Florida and chaired by Ron Rosengarten. This advanced level program sold out.

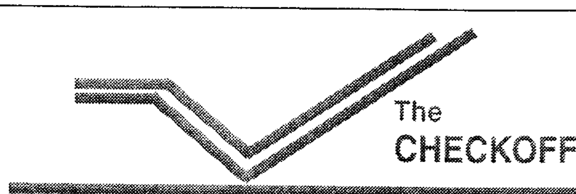
In addition to the CLE programs directly presented by the Section, the Section also co-sponsored three additional programs. The first was the Federal Mediation and Conciliation's first annual *Florida Labor Management Conference* at Indian River Plantation. The Section also co-sponsored *Stetson's 12th Annual National Conference on Labor and Employment Law* in March of this year and was a co-sponsor of Southern Methodist University's *15th Annual Multi-State Conference* in May 1997. We will also be co-sponsoring programs with both the Federal Court Practice Committee and the Florida Association of Women Lawyers at the Annual Meeting on June 26-28, 1997.

Education was not the Section's only focus this year. The Section is continuing its initiatives relating to the technological advancement of the Section and its membership. First, each Committee was assigned the project of attempting to identify Web sites related to the Committee's areas of responsibility. Second, Walter Aye and Greg Hearing, co-chairs of the Section's Pro Bono/Special Projects Committee have been compiling data for the Section to consider in deciding whether to develop its own home page.

The issue of certification has also surfaced once again. Stuart Rosenfeldt has been appointed to chair a special Committee to compile data and analyze the issue, and to report back to the Executive Council in October 1997 with a recommendation for communicating the significant aspects of this issue to the Section. The goal is to develop a Section membership communication plan that will definitively gauge interest in the direction the Section should take on this issue.

In closing out this year, I am proud of the Section's accomplishments during my tenure. While I cannot list here all of those who have helped me to make this year a success, my thanks are with all of the Section membership for your support. My service as Chair has been an important event for me, and an experience I will always look back on with great memories. I wish Chair-elect David Linesch much success in the coming year.

— *Debbie S. Crumbley, Chair*



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PERCEIVED DISABILITY DISCRIMINATION UNDER ADA

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plaintiff must first show that he was perceived as being disabled in order to invoke the coverage of the ADA. More specifically, a plaintiff must show that the employer perceived that he had a physical or mental impairment which substantially limits one or more major life activities.[3] The EEOC's regulations go on to define each of these terms. According to EEOC regulations, an individual may be considered to have been regarded as substantially limited in a major life activity if: (1) the individual has an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment; or (2) the individual has no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment; or (3) the individual has an impairment which is only substantially limiting because of the attitude of others toward the impairment. 29 C.F.R. §1630.2(l). Significantly, the Congressional Record relating to the ADA contains almost identical language.[4]

The EEOC's regulations give three examples which help to illustrate each scenario.[5] An employee may satisfy the first part of the definition, if for example, that employee is reassigned to less strenuous work because of unfounded fears that she may have a heart attack due to the blood pressure medication that she is taking. An employee may satisfy the second part of the definition if, for example, an employer discharges that employee in response to unfounded rumors that the employee has AIDS. An employee may satisfy the third part of the definition in the case of an employee with a facial scar who is terminated because of his employer's fear that customers may be scared away. In such a scenario, it could be postulated that such an employer perceived that the employee's ability to work was substantially impaired.[6]

The ability to work is one of the major life activities specifically mentioned in the EEOC's regulations.[7] Perceived disability cases which involve an employer's perception that an individual has an impairment that substantially limits major life activities such as walking, seeing, and breathing are somewhat easier to recognize and analyze than cases in which there is a perception that an individual's ability to work is substantially impaired. This is because it is not always clear whether one's ability to work was perceived to be substantially impaired.

According to the Commission's regulations, an employer might perceive that an individual's ability to work is substantially impaired if it perceives that an individual's impairment (or perceived impairment) significantly restricts the individual's ability to perform "either a class of jobs or a broad range of jobs in various classes in comparison to the average person having comparable training, skills and abilities." 29 C.F.R. §1630.2(j)(3)(i). The geographical area to which the individual has reasonable access should also be considered when making such a determination.[8] In most scenarios the difficult inquiry is how to define "class of jobs." This is because there is no objective classification system for classifying jobs which is routinely used in such cases. Such determinations are handled on a case-by-case basis.[9]

Courts have often looked to the language used by an employer when referring to an employee or the way in which an employee's work or leave status is classified in order to determine whether the employer considered the employee to be a disabled individual. For example, in *Pritchard v. Southern Services*, 92 F.3d 1130 (11th Cir. 1996), the Eleventh Circuit found that when the plaintiff was put on paid and then unpaid disability leave on two occasions, this constituted evidence which created a genuine issue of material fact as to whether she was perceived as having an impairment. Similarly, in *Harris v. H&W Contracting*, 102 F.3d 516, 523 (11th Cir. 1996), the Eleventh Circuit held that the defendant-employer's remarks to the Georgia Department of Labor that the plaintiff was putting the company in jeopardy due to her illness created a genuine issue of material fact as to her perceived disability. It would appear that many courts are reluctant to grant motions for summary judgment in favor of defendant-employers in cases where there is even a hint that the employer perceived an individual to be disabled.[10] However, in the future courts may not always choose to not rely on evidence such as the type of leave an employee takes (as was the case in *Pritchard*) in light of the sometimes differing standards used to determine whether an individual is eligible for disability leave under state or federal law as compared with whether an individual was considered by an employer to be disabled under the ADA.[11]

In Hansen's situation it is apparent that he does not have a disability. Hansen has a temporary impairment which substantially limits one or more major life activities on a temporary basis.[12] However, ABC Corporation perceived that Hansen could not perform any of its jobs because of his seizure. ABC relied on its own myths and stereotypes regarding people who have had a seizure when making this determination. Although ABC perceived that Hansen was able to play golf, it also perceived that his ability to work various jobs in a class of jobs (assembly work) was substantially impaired. Hansen therefore comes within the purview of the ADA.

Once it has been established that an individual was perceived to have been disabled, that individual comes within the purview of the ADA. The next inquiry which naturally follows in most cases is whether the individual was subjected to disparate treatment because of his disability.[13] Ordinarily, the analytical framework used by *McDonnell Douglas* and its progeny would apply in such cases.[14] Under such a framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination.[15] In perceived disability cases an inference of unlawful discrimination is inferred once it is established that a defendant-employer's actions were based its perception that an individual had an impairment which substantially limited one or more major life activities. 29 C.F.R. §1630.2(l) app. Once that is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the

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adverse action at issue.[16] It is at this point that in the analysis that the ADA's legislative history provides some guidance which seems to detract from this framework.

According to the Congressional Record, if an employer cannot articulate a "legitimate *job-related reason*" for the adverse action at issue, a perceived concern about persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test. House Comm. on the Judiciary, HR Rep No. 485 (III) 101st Cong., 2d Sess. at 30 (1990) (emphasis added). Thus, according to the Congressional record, a discriminatory intent for an adverse action can be inferred in the absence of a legitimate, job-related reason. This is similar to the analytical framework utilized in Title VII disparate treatment cases, but with one slight variation. In garden variety disparate treatment cases, an employer only needs to articulate a *legitimate nondiscriminatory* reason for the adverse action at issue. In perceived disability cases, it would appear that the defendant must articulate a legitimate, *job-related* reason for its decision. At first blush, the need to articulate a job-related reason appears to heighten the Defendant's articulation burden ever so slightly. Notably, EEOC regulations enunciate the same standard, but with one slight variation. According to the EEOC's regulations, if an employer cannot articulate a *nondiscriminatory* reason for taking action against an individual based on its perception of disability, "an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn." 29 C.F.R. §1630.2(l) app. (emphasis added). Thus, it would appear that Congress has imposed slightly higher requirement for defendant-employers to meet than the Commission.

However, it is unclear from the Congressional Record whether Congress intended to alter the analytical framework established by the Supreme Court to analyze disparate treatment cases.[17] Courts have not opted to change the traditional disparate treatment framework when adjudicating perceived disability cases.[18] Indeed, it is difficult to envision a scenario in which an employer articulates a reason for an adverse action which is not job-related. Therefore, it would appear that the language contained in the Congressional Record would not have an effect on the disposition of perceived disability cases even if followed.

In Hansen's situation, ABC corporation has articulated a job-related reason for its failure to select him for the position he formerly held. However, ABC's reason is not legitimate because it is based on its own unfounded fears and stereotypes relating to Hansen's condition. ABC ignored the advice of its doctor as well as Hansen's doctor.

Conclusion

Much like the entire area of disability law, the area of perceived disability discrimination is a new one which needs to be fleshed out by the courts. The EEOC's regulations, which essentially mirror the Congressional Record, provide a good starting point for employers, judges and litigants who are grappling with ADA issues. The EEOC's Technical Assistance Manual is also an excellent guide for employers and attorneys alike to utilize. Such resources are greatly needed in the area of perceived disability discrimination based upon the unique nature of this type of employment discrimination as well as the relatively short period of time in which the ADA has been in existence. Unlike other areas of employment discrimination, perceived disability cases can sometimes require some degree of analysis in order to prove the first element of proof needed in any employment discrimination case — membership in a protected group. Additionally, unlike other areas of employment discrimination law, the Defendant's articulated reasons for implementing an adverse employment decision are often intertwined with and become part of the plaintiff's prima facie burden.[19] Finally, perceived disability cases differ from actual disability cases in that the focus in perceived cases is on the attitude of the employer and not on the effect of the actual or perceived impairment.

Endnotes:

[1] 42 U.S.C.A. §§12101-12213 (1995).

[2] 29 U.S.C.A. §791 (1995).

[3] 29 C.F.R. §1630(g).

[4] In fact, as at least one court has found, the EEOC's regulations pertaining to the ADA in large part mirror the Congressional record. *See, e.g., Sicard v. City of Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996).

[5] 29 C.F.R. §1630.2(l) app.

[6] While customer preference is almost never a valid defense under Title VII, it may become an issue in the area of disability law, depending on the nature and severity of a individual's disfigurement, as well as the type of job at issue. It does not appear that customer preference has ever been asserted as a defense in an ADA case. Notably, in *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997) the Fourth Circuit found that an epileptic shoe salesman, who was prone to have seizures while working, was not a "qualified individual with a disability" because he was unable to perform one essential function of the job — maintaining store security. Although customer preference was not relied upon as a defense or as a basis for the decisions at the District or Circuit level, it was alluded to at the District Court level. Customer preference would most likely not prove to be a valid defense in the vast majority of disability cases.

[7] 29 C.F.R. §1630.2(h)(2)(i).

[8] This is one of the factors which may be considered when determining whether an individual's ability to work was perceived to have been substantially impaired. The other two factors are: (1) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills and abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (2) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). 29 C.F.R. §1630.2(j)(3)(ii)(B) and (C).

[9] 29 C.F.R §1630.2(j) app.

[10] *See, e.g., Jimeno v. Mobil Oil Co.*, AD Cases (BNA) 1646 (9th Cir. 1995) (employer perceived plaintiff-mechanic as being disabled under the California Fair Employment and Housing Act when it precluded his working, arranged for vocational rehabilitation training and suggested that he was eligible for long-term disability benefits); *see also, e.g., Stroud v. Cessna Aircraft Co.*, 4 AD Cases (BNA) 1007, 1011 (D. Kan. 1995) (employer's completion of form designating plaintiff as being "handicapped" coupled with supervisor's observation that he had difficulty walking creates a factual issue as to whether he was considered to be disabled under the ADA); *Derbis v. U.S. Shoe Corp.*, 3 AD Cases (BNA) 223 (D.C. Me. 1994) (employer's suggestion that Plaintiff, who injured her hand, apply for long-term disability raises factual issue as to whether it considered her to be disabled). *But cf., Weaver v. Florida Power & Light*, 5 AD Cases (BNA) 1514 (S.D. Fla. 1996) (statement by company official that plaintiff was covered under the ADA because of her back condition was deemed insufficient to created genuine issue of material fact as to whether the plaintiff was regarded as disabled because the statement did not show that defendant-employer perceived that she was substantially limited in any major life activity).