

Emerging Trend: ADA Does Not Cover Potential Future Disabilities

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Heeding the adage “no one knows what the future may hold,” the Seventh, Eighth and Eleventh Circuits have uniformly refused to extend protections of the Americans with Disabilities Act (ADA) to employees with a perceived risk of a potential impairment.

In each case, an employer either declined to hire an applicant or terminated an employee based on the perceived possibility that the individual – who otherwise did not have an actual disability – would later develop a medical condition that could impair their capacity to perform essential job functions or otherwise pose a safety concern. In a September 2019 case before the [Seventh Circuit](#) and in an April 2016 case out of the [Eighth Circuit](#), both involving the same employer, a transportation company declined to hire a job applicant with a BMI of over 40 (therefore classified as obese) for a safety sensitive position because of the perceived risk that the applicant could develop certain medical conditions in the future that could cause sudden incapacitation while working, such as sleep apnea or heart disease (it is noted that, in both circuits, the courts held that obesity alone is not a protected disability under the ADA). And in September 2019, the [Eleventh Circuit](#) addressed a case where an employer terminated a massage therapist who requested time off to travel to Ghana to visit family because of the perceived risk that the employee would contract the Ebola virus, due to recent outbreaks of the disease in neighboring countries.

In all of the cases, the plaintiffs argued that because the ADA includes in its definition of “disability” situations where an individual is “regarded as” having an impairment that substantially limits one or more major life activities, ADA protections should apply because the employers were regarding the individual as having a risk of developing such an impairment. The courts were therefore confronted with the question: does an employer relying upon a potential future disability as the basis for an adverse employment action violate the “regarded as” protections under the ADA?

In a rare display of unity regarding interpretations of the ADA, all three circuits concluded that an employee may only pursue a claim under the “regarded as” anti-retaliation provision if the adverse action in question occurred as a result of the employer’s perception of a current, actual disability. Based on the ADA’s statutory language defining “disability” as including situations where individuals are “being regarded as having a physical or mental impairment,” the courts found that the statute is intended to encompass only current impairments, not future ones. The courts also noted that the appendix to the ADA’s governing regulations (as promulgated by the EEOC) states that an “impairment” under the law does not include “predisposition to illness or disease.” As such, the courts concluded that an employer cannot discriminate against an applicant or employee based on a perception of potential disability. As the Eleventh Circuit summarized, “the disability definition in the ADA does not cover [a] case where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future.”

Despite the unanimity of these Circuit Court decisions and its own regulations to the contrary, the EEOC has argued in at least one *amicus* submission that a potential future condition *does* satisfy the ADA’s “regarded as” definition of “disability” as long as the condition in question otherwise qualifies as a protected disability under the statute. In attempting to limit the scope of its own ADA regulations, the EEOC argued that its regulation that an employee’s “characteristic predisposition to illness or disease” is not a covered impairment applies only to “regarded as” disabilities based on physical, psychological, environmental, or other characteristics that are not otherwise impairments under the ADA. For instance, under the EEOC’s interpretation of this regulation, an individual’s predisposition to developing a disease because of poverty or other socio-economic circumstances would not be protected by the ADA, whereas predisposition to a disease because of a health condition – such as obesity – would be entitled to ADA protections. Thus, notwithstanding the trend at the Circuit Court level regarding speculative future disabilities, the agency may pursue enforcement actions based on its own interpretation of its regulations.

As always, we will continue to monitor developments in this area.

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