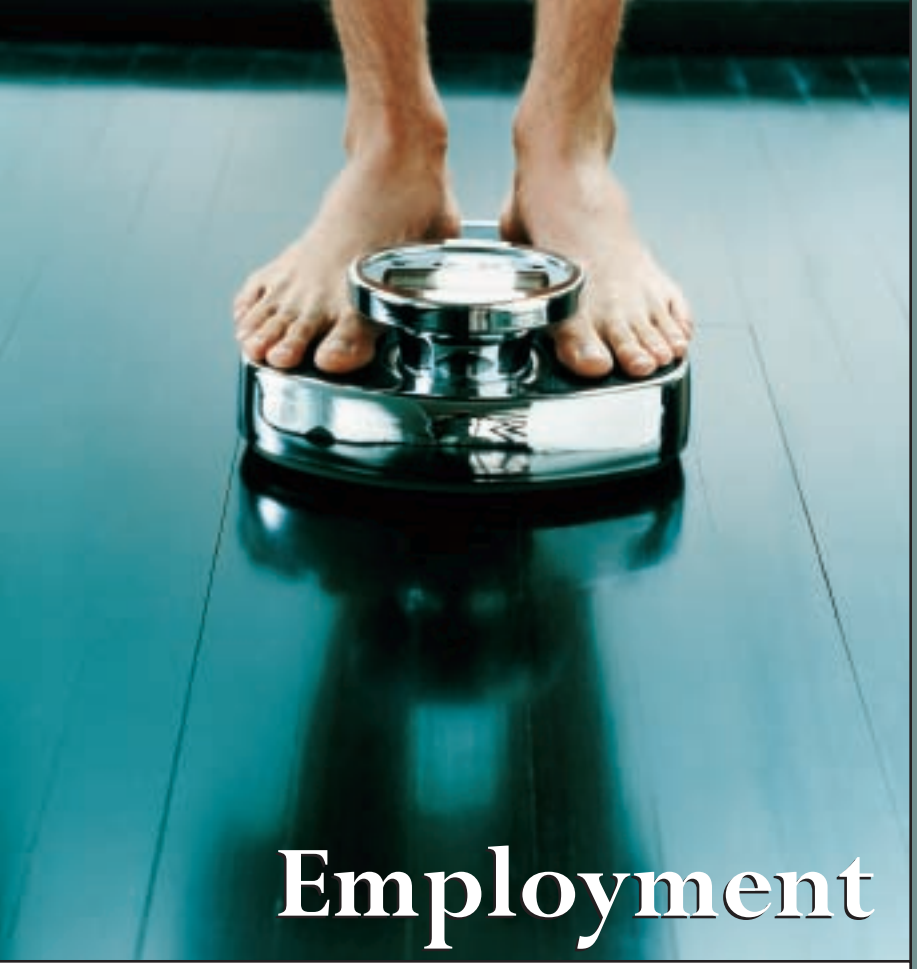

Employment Law Briefing

Insights on Legal Issues in the Workplace

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Is obesity a disabling impairment under the ADA?

That was the question before the Eleventh Circuit in *Greenberg v. BellSouth Telecommunications Inc*. The case involved a plaintiff who installed and maintained telephone service.

Policy limits weight

BellSouth policy provided that employees in jobs that required climbing could weigh no more than 275 pounds. Because the plaintiff's weight exceeded this safe-load limit, his supervisor handpicked assignments to exclude jobs that required climbing.

After outsourcing employee-weight tracking, BellSouth began to apply the weight-limit policy uniformly and required the plaintiff to lose 50 pounds in 25 weeks. When he failed, BellSouth gave him 60 days to find — with the help of its human resources department — another job within the company. Again he failed, and more than four months later BellSouth fired him.

The plaintiff alleged employment discrimination under the Americans with Disabilities Act (ADA). At the close of discovery, the court granted BellSouth's motion to throw out the suit because the facts were undisputed, and the company was entitled to judgment as a matter of law. The plaintiff appealed.

Episodic or medication-controlled conditions aren't disabilities

Does asthma constitute a disability under the Americans with Disabilities Act (ADA)? In *Wofsy v. Palm Shores Retirement Community*, a federal trial court held it doesn't.

Two years after a Florida retirement community hired a driver, he submitted a doctor's note recommending restricting his driving to the St. Petersburg area because of his asthma. His employer complied with this restriction until it bought a bus and then required him to drive outside the St. Petersburg area. When he refused, the employer reduced his hours and hired a bus driver.

The driver sued for disability discrimination. Before the trial started, he asked the court to rule in his favor on grounds that the facts were undisputed, and he was entitled to judgment as a matter of law.

The court refused. It found that the record established that the driver *could* regularly perform his job duties. It also found that the driver had failed to:

- Establish that his asthma substantially limited the life activities of breathing or working or both,
- Specify how and to what extent his asthma limited his ability to perform his job,
- Have his physician complete his employer's medical questionnaire to clarify specific physical limitations and work restrictions, and
- Produce medical evidence showing that his asthma 1) wasn't episodic, and 2) couldn't be treated or controlled by readily available medication.

So the court concluded that the driver had failed to establish that his asthma was a "disability" as defined under the ADA.

Establishing prima facie case

The Eleventh Circuit found that, to establish a prima facie ADA discrimination case, plaintiffs must demonstrate that they:

1. Are disabled under the ADA,
2. Are qualified for their jobs, and
3. Have been subjected to unlawful discrimination because of their disabilities.

Under the first element, plaintiffs qualify if they:

1. Have a physical or mental impairment that substantially limits at least one major life activity,
2. Have a record of such impairment, or
3. Are being regarded as having such impairment.

The rules provide that obesity is rarely considered a disabling impairment. Still, the plaintiff showed that hypertension, hypothyroidism and a variety of endocrinology-affecting disorders prevented him from losing weight and that he suffered from diabetes.

Showing limit on major life activity

The question then was whether the plaintiff had an impairment that substantially limited a major life activity. People are "substantially limited" in a "major life activity" if they can't care for themselves or "at a minimum" are "unable to work in a broad class of jobs." But the plaintiff admitted that he

bathed and dressed himself and performed household chores. And when asked if he had an interest in any position other than his previous position, he responded in the negative. He also presented no evidence showing a record of impairment or having been regarded as impaired.

So the Eleventh Circuit concluded that the plaintiff wasn't disabled under the ADA and upheld the trial court's ruling.

Don't make assumptions

The plaintiff might have been successful if he had been able to show that the company had perceived him as being disabled as a result of his obesity. For this reason, employers should avoid making assumptions about the capabilities of employees who have medical conditions. Savvy employers assume an employee is capable of performing a job unless an accommodation is requested.

Definitions key in determining FMLA eligibility

In *Novak v. MetroHealth Medical Center*, the Sixth Circuit held that denying leave to care for an adult daughter and a newborn grandchild didn't violate the Family and Medical Leave Act (FMLA).

A termination

An employer fired an employee for excessive unexcused absences. The employee sued, alleging that the FMLA protected several of her absences because she had to care for both her adult daughter who suffered from postpartum depression and a newborn grandson.

The court granted the employer's motion to rule for it without a trial because the facts were undisputed, and it was entitled to judgment as a matter of law. The employee appealed.

FMLA basics

The FMLA permits an employee to take leave to care for a parent, spouse or child suffering from a serious health

condition. But the FMLA doesn't entitle an employee leave to care for a grandchild, and it authorizes leave to care for children who are 18 or older *only* if they suffer from a serious health condition and are "incapable of self-care because of a mental or physical disability."

Nevertheless, the employee contended that her daughter's temporary postpartum depression amounted to a "mental or physical disability" entitling the employee to FMLA leave to care for her.

Disability defined

FMLA rules define "physical or mental disability" as a "physical or mental impairment that substantially limits one or more … major life activities" as the Americans with Disabilities Act (ADA) defines these terms. The ADA rules provide that a person is "substantially" limited in a major life activity if he or she is unable to perform, or is significantly restricted in performing, a major life activity.

When determining whether a person is substantially limited in performing a major life activity, courts consider the impairment's:

- Nature and severity,
- Duration or expected duration, and
- Permanent or long-term impact.

And the EEOC's ADA guidelines state that "temporary, nonchronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."

No substantial limitation

The Sixth Circuit concluded that the daughter wasn't substantially limited in any major life activity and so wasn't disabled for FMLA purposes. The employee provided no evidence or medical certification that her daughter was in fact unable to care for herself. The doctor's certification related only to the daughter's difficulty in caring for her newborn. So the sum total of the evidence regarding the daughter's claimed disability was her testimony that she couldn't "follow the doctor's orders without some help" and that she was afraid she might "freak out and not know how to deal with a newborn."

The court found that this nonspecific nonexpert testimony was insufficient grounds on which to find that the daughter's impairment was severe. Furthermore, the undisputed facts clearly showed that her condition lasted only a week or two, and a short-term restriction on a major life activity such as this generally doesn't constitute a disability.

So the Sixth Circuit upheld the trial court's ruling, holding that the FMLA didn't authorize the employee's leave because grandchildren aren't covered, and she had failed to establish that her adult daughter suffered from a disability.

Consult all the rules

This case demonstrates the importance of employers carefully consulting not just FMLA rules, but also ADA rules defining "disability," to determine eligibility for coverage.

Internal affairs

Don't leave your business open to disparate-treatment charges

Can a woman who had an extramarital affair with a male co-worker claim gender discrimination when the company fires only her, not the co-worker? That was the question before the Seventh Circuit in *Hossack v. Floor Covering Associates*.

Affair discovered

A week after her husband discovered her 18-month affair with a male co-worker, a retail store saleswoman suggested to the storeowner and its HR director that it might be in the store's best interest if she quit because her husband didn't want her to continue to work with the salesman.

The storeowner proposed three solutions:

1. The saleswoman could continue to work at the store with the salesman,
2. She could resign, or
3. The company could transfer the salesman to a store in a neighboring suburb.

The saleswoman said she preferred that the store transfer the salesman but later admitted at trial that the storeowner had clearly stated that he couldn't guarantee this option because he hadn't discussed it with the salesman and the executive VP.

Transfer ruled out

After further discussion, the HR director, the executive VP and a supervisor ruled out transferring the salesman because he was the best salesman at that store. They also felt that the saleswoman's continued employment would be disruptive because her husband had at least twice warned the salesman by phone to stay away from his wife. The salesman then reported that the saleswoman had just informed him that she would resign, and the group accepted her resignation.

But that evening, the saleswoman told the VP that she and her husband had reconciled, and she would return to work. The VP told her that the company had accepted her resignation, and she wouldn't be rehired. The company neither discharged nor disciplined the salesman for his role in the affair.

Discrimination alleged

The saleswoman alleged sex discrimination, and a jury awarded her $250,000 in damages. But the trial court granted the company's motion for judgment as a matter of law and vacated the jury's verdict. The court reasoned that — based on the evidence in the record — no reasonable jury could have found that the saleswoman was a victim of intentional discrimination without indulging in speculation. She appealed.

The Seventh Circuit had previously ruled that, once a case reaches trial, the sole legal issue is whether the plaintiff's evidence suffices to permit a rational jury to find that she was the victim of intentional discrimination. Here, the jury had adequate basis to reject the company's contention that the saleswoman had resigned and to find that she had been fired.

Nevertheless, the record showed incontrovertibly that management:

1. Had fired the saleswoman because it feared her husband might disrupt the workplace, and
2. Hadn't fired the salesman because — as the top-earning salesman at that store — he was more important to the organization.

> *The Seventh Circuit noted that the company hadn't disciplined either party for having had an affair.*

The Seventh Circuit noted that the company hadn't disciplined either party for having had an affair. So the saleswoman erred when she tried to establish that she was similarly situated to the salesman. She was similarly situated only to other employees who threatened workplace disruption.

The Seventh Circuit also stressed that the company had never discharged an employee for having an illicit affair. The court concluded that — based on this evidence — no rational jury could find that the saleswoman had been discriminated against.

Importance of equal treatment

This case demonstrates the importance of equal treatment of employees who engage in misconduct. A company that treats these workers differently must be prepared to show that it had a legitimate reason that can withstand scrutiny.

Harassers needn't know victim's actual national origin

In *EEOC v. WC&M Enterprises*, the Fifth Circuit decided that a Muslim car salesman from India could sustain his suit for national origin and religious harassment even though his alleged harassers had mistakenly called him "Arab" and "Taliban."

Harassment begins after 9/11

A practicing Muslim born in India worked as a car salesman in Texas. Immediately after Sept. 11, 2001, co-workers and supervisors began to continually harass him. After the U.S. invasion of Afghanistan, his co-workers and supervisors began calling him "Taliban." One co-worker asked him, "Why don't you just go back where you came from since you believe what you believe?"

> *The EEOC guidelines broadly define "discrimination based on national origin" to include discrimination against persons who have "the physical, cultural or linguistic characteristics of a national origin group."*

Co-workers also mocked his religious dietary restrictions and his need to pray during the workday. They often referred to him as an "Arab," even though he told them many times that he was from India. And a co-worker once broadcast a Taliban joke over a sales-floor speaker.

Written warning

After this harassment had continued for more than a year, a supervisor told the salesman that all employees had to attend a United Way meeting. When he questioned what — if any — connection existed between the United Way and his job, the supervisor said, "This is America. That's the way things work over here. This is not the Islamic country where you come from."

After that confrontation, the company warned him in writing that he "was acting like a Muslim extremist" and that the supervisor couldn't work with him because of his "militant stance."

A few days later, a co-worker banged on the partition separating the salesman's office from the sales floor and said, "Got you." He responded by banging on the partition, saying, "Don't do that." The co-worker then allegedly told the salesman that he couldn't tell the co-worker what to do because the co-worker was a manager. The salesman complained to the general manager about the continual harassment, and the company fired the salesman two days later.

Case thrown out

The salesman filed a charge of discrimination with the EEOC, which filed suit. The court ruled for the company without a trial on grounds that the facts were undisputed, and the company was entitled to judgment as a matter of law. The trial court found that the EEOC couldn't prevail on its claim that the salesman was harassed based on national origin because none of the alleged harassment related to the fact that he was from India.

On appeal, the Fifth Circuit found that none of the harassing comments directly referred to his actual national origin. But nothing in EEOC guidelines requires basing discrimination on a victim's actual national origin. Instead, the guidelines broadly define "discrimination based on national origin" to include discrimination against persons who have "the physical, cultural or linguistic characteristics of a national origin group."

So the Fifth Circuit held that the EEOC's evidence sufficiently supported its claim that the salesman was subjected to a hostile work environment based on both religion and national origin.

Employers, beware

Since 9/11, many cases have dealt with harassment of Muslim employees. To avoid exposure to discrimination charges, employers must halt this harassment when brought to their attention.

Involving the police held to be protected conduct

Scarbrough v. Board of Trustees involved a plaintiff who had called police during an employment dispute concerning sexual harassment. The employer argued that the plaintiff's involving the police was unnecessarily disruptive and so constituted a legitimate reason to fire him. The Eleventh Circuit disagreed, finding that Title VII protected his conduct.

The harassment begins

Shortly after being hired, an academic advisor at a university's nursing school alleged that his direct supervisor subjected him to inappropriate and unwanted sexual advances. When she required him to meet with her at her home on a Saturday, she made an overt sexual advance. He left immediately, and she was severely hostile to him thereafter.

The advisor reported the incident and ensuing episodes of hostility and mistreatment to the university's Equal Opportunity Programs officer and the nursing-school dean. The dean — after speaking with the supervisor — told the advisor that her attitude should improve. It didn't.

Before leaving for holiday break in mid-December, the dean recommended promoting the advisor to the position of student coordinator. A few days later, the advisor's supervisor confronted him in his office, attacked him abusively and profanely, spat in his face, and knocked papers from his hands. The advisor immediately reported the incident to the provost's office, and the assistant dean gave him permission to take the rest of the year off.

Suit is filed

Returning from holiday break, the advisor sued his supervisor and the university for sexual harassment. When the supervisor learned of his suit, she confronted him (ostensibly about an office telephone bill) and profanely threatened him with violence.

Fearing for his personal safety, the advisor immediately called the campus police. When an officer arrived, the advisor told him that, had he been a woman, the university would have addressed the problem "a long time ago when [the] harassment first began." He immediately went to the county courthouse and sought an injunction against the supervisor and gave the dean a copy of the police report and the injunction papers.

After receiving the papers, the dean withdrew her recommendation to promote the advisor to the position of student-affairs coordinator and fired him the next day for "unprofessionalism."

Protected conduct

The trial court ruled for the university without a trial on grounds that the facts were undisputed, and the university was entitled to judgment as a matter of law. The advisor appealed.

The Eleventh Circuit found that involving police in an employment dispute isn't always protected conduct that bars retaliatory action. But when it derives from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it can't be deemed "unprofessional" conduct for which an employee can be fired.

The court explained that employees don't waive their rights to police protection simply because police involvement may disrupt a workplace. So the Eleventh Circuit concluded that the advisor's call to the police constituted protected activity under Title VII and couldn't constitute a legitimate nonretaliatory firing basis.

Avoid punishing the victim

This case is typical of situations in which an employer punishes the victim instead of the offending person. This usually leads to a bad result, as here.