

## Labor and Employment Law Notes

### **When “Regarding” An Employee As Having a Physical or Mental Impairment Constitutes A Disability For Purposes of Proving Disability Discrimination**

The Americans with Disabilities Act (“ADA”) protects individuals with a *disability*, as defined by the statute and its implementing regulations. An individual is **considered to be disabled if he or she:**

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such an impairment; or
3. **Is regarded as having a physical or mental impairment.**

See 42 U.S.C. § 12102(2), 12112(b)(5); 29 C.F.R. § 1630.2(g). The third category of disability is the least discussed, often leading to confusion on the part of employers when they are sued for discrimination because they regarded an employee as having a mental or physical disability.

The United States Supreme Court has identified two ways an individual may fall within the “regarded as disabled” definition of disability:

1. The employer mistakenly believes that the employee has a physical (or mental) impairment that substantially limits one or more major life activities (i.e., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working), or
2. The employer mistakenly believes that an actual non-limiting (physical or mental) impairment substantially limits one or more major life activities.

See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

The Equal Employment Opportunity Commission (“EEOC”) has identified three categories of being “regarded as disabled”:

1. If the employee has a physical or mental disorder that’s not substantially limiting, but is treated by a covered entity as one that substantially limits the employee in some major life activity; or

2. If the employee has a physical or mental disorder that substantially limits major life activities, but only as a result of the attitudes of others; or
3. If the employee has no disorder at all, but is treated by the employer as having a physical or mental disorder that substantially limits a major life activity.

See 29 C.F.R. § 1630.2(1). The employer, however, must perceive that the impairment substantially limits one or more major life activities of the employee. It is not enough that the employer simply regards an employee as having an impairment. See *Murphy v. United States Postal Service*, 527 U.S. 516 (1999) (holding that evidence that employer fired a mechanic because it regarded his hypertension as preventing him from obtaining a DOT health certificate did not demonstrate that the company regarded the employee as substantially limited in a major life activity).

The EEOC's Interpretive Guidance to ADA Title I Regulations provides several examples of individuals who would satisfy the "regarded as" definition of disability:

1. **An Employee has controlled high blood pressure:** although the condition does not in fact substantially limit a major life activity, the employer fears the employee will suffer a heart attack if the employee continues to perform a particular job, and as a consequence, the employer reassigns the employee to less strenuous work. Although the high blood pressure condition in fact does not limit a major life activity, because of the employer's perceptions, the employee would be regarded as disabled.
2. **An Employee with prominent a facial scar or disfigurement, or who has a condition that periodically causes an involuntary facial jerk:** The employee may not be limited in a major life activity, but if the employer discriminates against the employee because of fear of negative reactions from customers, the employer would be regarding the employee as disabled and would be acting on the basis of that perceived disability, hence the employee with the scar or involuntary tick would be regarded as disabled.
3. **An Employer who discharges an employee in response to a rumor the employee is infected with HIV:** Where the rumor is totally unfounded, and the employee has no impairment at all, the employee is considered an individual with a disability because the employer perceives the employee as being disabled.

See 29 C.F.R. App. § 1630.2(1). Employers should keep in mind that the discrimination laws in a particular state may differ and in many cases make it easier to meet the "regarded as disabled" definition of disability than the ADA definition of the same. For example, in California the Fair Employment and Housing Act ("FEHA") states that a mental or physical disability includes:

1. Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental or physical condition that makes achievement of a major life activity difficult; or

2. Being regarded or treated as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability that limits a major life activity; or
3. Being regarded or treated as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability that limits a major life activity. (See West's Ann.Cal.Gov.Code § 12926).

Employers should also note that the ADA requires “substantial limitation” of a major life activity as part of the requirement to satisfy the “regarded as” definition of disability, while the California FEHA in definition 1, *supra*, requires only a mental or physical condition that “makes achievement of a major life activity difficult.” Definitions 2 and 3, *supra*, do not require “substantial” limitation of a major life activity, but only the “limitation” of a major life activity, to satisfy the “regarded as” definition of disability. Moreover, the ADA uses the term physical or mental “impairment” while the FEHA uses the term physical or mental “condition.” Also, under the Illinois Human Rights Act (“the Act”) if an employer perceives the employee as handicapped, rightly or wrongly, then acts against the employee based on that perception violate the Act. See *Lake Point Tower, Ltd. v. Illinois Human Rights Com'n*, 291 Ill.App.3d 897 (1st Dist. 1997). A word of caution is that these are only two example of state law affording employees more protection than the ADA. The ADA is only the floor and not the ceiling on the protections afforded individuals with a disability.

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If you have questions or would like to discuss the implications of this employment law issue further, please feel free to contact Stephen Heil at Cray Huber Horstman Heil & VanAusdal LLC, 303 W. Madison, Suite 2200, Chicago IL 60606; 312-332-8709.