

## “REGARDED AS DISABLED” THE PROBLEM WITH ASSUMPTIONS

**B**oth Oregon statutes and the Americans with Disabilities Act protect not only employees who are disabled but also employees who are “regarded” as disabled. But what does that really mean?

Contrary to what the phrase might seem to imply, an employee is not “regarded” as disabled simply because the employer believes, correctly or mistakenly, that an employee is incapable of doing her job because of her medical condition. An employer only runs afoul of these laws by regarding or perceiving an employee as disabled as that term is defined by law.

Under ORS 659A.100 and 42 USC §12102, an employee is disabled if he “has a physical or mental impairment that substantially limits one or more major life activities.” The statutes go on to explain that “major life activities” include things like taking care of your personal needs (brushing your teeth, getting dressed, showering, etc.), walking, talking, and socializing (think of the difficulty with ordinary interactions for someone who suffers from agoraphobia or a severe speech impediment, for instance). “Work” is also a major life activity, but a person is disabled in this regard only if she is unable to perform a “broad class of jobs.” The inability to do one job is not a “substantial limitation” on the ability to work.

This concern comes up frequently when an employer disciplines or fires an employee with a medical condition for failing to properly perform her job, when that medical condition is related to the performance problem. A recent Ninth Circuit case illustrates the issue. *Walton v. U.S. Marshals Service*, 2007 WL 430426 (9th Cir. 2007).

Naomi Walton worked as a court security officer until an annual physical exam demonstrated she was unable to locate the source of sounds, due to a disparity in the hearing capacity in each ear. For the ordinary person, this might not mean much, but for a security officer, knowing the location of a source of disruption, or worse still, a violent outburst, is crucial, according to the testimony in the case. After several tests, the employer’s doctor stated Walton was “not medically qualified to perform the essential functions of the job.”

As the court pointed out, the United States Supreme Court has indicated there are two ways an employee may be “regarded as” disabled:

1) The employer may mistakenly believe the employee has a physical or mental impairment that substantially limits one or more major life activities (when the employee has no such medical condition); or



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2) The employee has a medical condition which is not substantially limiting, but the employer mistakenly believes the condition is substantially limiting.

Walton asserted her employer believed she was substantially limited in her ability to hear. The court disagreed, noting that although hearing is a “major life activity,” according to EEOC regulations, Walton failed to provide evidence that the company mistakenly believed she was substantially impaired in that activity. The court noted the doctor’s statements “you have only

one functioning ear” and “[y]our inability to [localize sound] poses a significant risk to the health and safety of yourself, other law enforcement officers and the public” really only signified that the employer believed “Walton could not safely do her job.”

As noted above, such a belief does not equate to a belief that a person is disabled.

This case follows a line of other cases making the same point: an employer is entitled to set working standards, some of which may preclude employment for a person with a medical condition that limits her ability to meet those standards, without *automatically* running afoul of the ADA and Oregon disability statutes.

However, this sets up a Hobson’s Choice for employers, as demonstrated below. When contemplating hiring, performance evaluation, discipline, or termination of an individual with a known physical or mental medical condition, an employer should ordinarily evaluate the situation as follows:

- 1) Does the medical condition substantially limit a major life activity? That is, does it make it significantly more difficult to eat or sleep or perform daily tasks the rest of us take for granted?
- 2) If so, is there some accommodation that might allow the person to perform the essential functions of the job (job restructuring, transfer to another position, medical leave for treatment, and/or tools or mechanical aids)?

However, if an employer is unsure of the answer to Question #1, an assumption in either direction poses hazards. If the employer incorrectly assumes the condition substantially limits a major life activity, determines no accommodation is possible, and terminates employment based on that assumption, the employer has “regarded” the employee as disabled and taken adverse employment action on that basis.

If, on the other hand, an employer incorrectly assumes the condition does not qualify as a disability and so does not consider whether an accommodation might allow the individual to do the job, and for that reason decides not to hire the individual, the employer has discriminated against a disabled person.

There is no easy answer, but the key to navigating this maze is the interactive process. In other words, when in doubt, sit down with the individual and discuss the issues. Ask for medical certification from the employee's doctor, after providing a detailed job description and questions for the doctor to answer. Ask the employee if she believes the condition makes it difficult to perform ordinary life tasks, or if he believes there is an accommodation that would allow him to perform his job.

This, too, is not without its perils. If the employee has not disclosed a medical condition, and the employer only suspects there may be a medical problem, it is usually impermissible to ask the employee about the condition. In that situation, the problem should be treated as a performance or standards problem, and addressed as a potential disability issue only if the individual then discloses a related medical condition.

Last but not least, many circuits have held that an employer need not make accommodation to a perceived disability. *See, e.g., Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. East Texas State University*, 161 F.3d 276, 280 (5th Cir. 1998). In other words, if the employer incorrectly believes a person is disabled but fails to provide a reasonable accommodation, it appears the employee has no legal cause of action.

In summary, we've all heard the old bromide: "You know what happens when you 'assume' something, don't you? You make an . . ." In the employment arena as in other areas of life, it is best not to assume anything, and it is especially important not to assume a person is disabled, so as to avoid an allegation that the employee has suffered discrimination because he is "regarded as" disabled.

