

CLIENT ALERT

Employment, Labor & Immigration

November 2004

Volume VI No. 7

Circuit Courts Address ADA Issues: Difficult Employees, Employees Undergoing Dialysis, and Reasonable Accommodation

Courts continue to clarify employer obligations under the Americans with Disabilities Act (“ADA”). In recent decisions, the Second and Third Circuits addressed what is a disability and whether someone who is “regarded as” disabled is entitled to a reasonable accommodation.

The ADA

Establishing an ADA claim requires proof that: (1) the plaintiff’s employer was subject to the ADA; (2) the plaintiff was disabled; (3) the plaintiff was otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) the plaintiff suffered an adverse employment action due to the disability. An individual is disabled if he or she has an impairment that substantially limits one or more major life activities. An individual is also disabled if he or she has a “record” of such an impairment or is “regarded as” suffering from such an impairment.

Interacting With Others

In *Jacques v. DiMarzio, Inc.*, the Second Circuit considered whether the ADA protects employees who cannot get along with others.

Audrey Jacques was a factory worker for DiMarzio. Since long before her employment, Jacques, who had bipolar disorder, suffered from and was treated for severe depression. Jacques informed DiMarzio about her condition.

Jacques had various conflicts with supervisors and co-workers and was ultimately discharged. She sued DiMarzio under the ADA. The jury returned a verdict in her favor, concluding that DiMarzio had terminated her because it “perceived” her as disabled in the major life activity of “interacting with others.”

On appeal, DiMarzio argued that interacting with others is not a major life activity and,

therefore, Jacques was not disabled under the ADA. The Second Circuit considered the approaches taken by the First Circuit (“ability to get along with others” is not a major life activity) and Ninth Circuit (“interacting with others” is a major life activity).

The Second Circuit held that “interacting with others” is a major life activity, explaining that one is “substantially limited” in this activity when her impairment severely limits the ability to communicate with others. The Court explained that the “standard is satisfied when the impairment severely limits the plaintiff’s ability to connect with others, *i.e.*, to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these activities.” The Court stated that the “standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful.” Plaintiffs who can perform their jobs with or without reasonable accommodation may satisfy the standard by establishing “isolation resulting from ... profound cases of: autism, agoraphobia, depression or other conditions.”

The Second Circuit concluded that the jury instructions had not set forth the proper standard, and remanded for a new trial.

Kidney Failure

In *Fiscus v. Wal-Mart Stores, Inc.*, the Third Circuit considered whether someone with kidney failure was limited in a major life activity and protected by the ADA.

Cathy Fiscus worked for Wal-Mart at one of its Sam’s Warehouse Club Stores. During her employment, Fiscus was diagnosed with end-stage renal disease, leaving her with near-total kidney failure. She required regular dialysis to clean and eliminate waste from her blood. While assigned to the

bakery department, she underwent dialysis at work. After Fiscus told her manager that she would need assistance lifting heavy objects, Wal-Mart removed her from the bakery.

The manager suggested an alternative position, but denied her request to continue dialysis at work. Fiscus took leave until Wal-Mart discharged her for exceeding its one-year limit.

Fiscus sued Wal-Mart under the ADA. Wal-Mart sought summary judgment, arguing that Fiscus was not disabled because she was not significantly limited in a major life activity. Fiscus responded that she was limited in the major life activities of processing body waste and cleaning her blood.

The District Court granted Wal-Mart's motion, reasoning that impairment of an organ is not, by itself, a limitation on a major life activity. The Third Circuit reversed.

The Third Circuit explained that the absence of kidney function was a physical impairment as a result of which Fiscus could not clean her blood or eliminate waste, which are major life activities. The Court explained that a "major life activity need not constitute volitional or public behavior." The Court stated that the "touchstone" of a major life activity is its importance to life. Because the absence of blood cleaning or waste elimination are fatal, they are major life activities.

Wal-Mart argued that dialysis mitigated Fiscus' kidney disease, removing any limitation on her major life activities. The Court agreed that corrective measures should be considered, but so should side-effects and other collateral limitations. The Court remanded the case for the trial court to consider whether dialysis eliminated the limits on Fiscus' major life activities.

"Regarded As" Disabled

In *Williams v. Philadelphia Housing Authority Police Department*, the

Third Circuit considered whether someone "regarded as" disabled under the ADA was entitled to a reasonable accommodation.

Edward Williams, a veteran of the Philadelphia Housing Authority Police Department ("PHA"), was suspended after making threatening and profane remarks to a superior officer. Williams subsequently made comments to a psychological services counselor about "going postal."

Williams was diagnosed with severe depression. PHA's psychologist ultimately cleared him to work in an administrative or clerical capacity, but noted that he should not carry a weapon for at least three months.

Williams' request to be assigned to the training unit was denied. Williams then requested assignment to the radio room, but PHA did not respond. PHA asked Williams to apply for another medical leave, but he did not and PHA discharged him. Williams sued PHA under the ADA. The District Court dismissed Williams' claims on summary judgment. On appeal, the Third Circuit reversed.

The Third Circuit held that Williams had an actual disability under the ADA, a mental impairment preventing him from carrying a firearm, substantially limiting him, as a law enforcement officer, in the major life activity of working. The Third Circuit held that Williams was also "regarded as" having an ADA disability. As Williams argued, "PHA regarded him as having a limitation (*i.e.*, the inability to have access to or be around others carrying firearms) far greater than the actual limitation (*i.e.*, the inability to carry a firearm) that resulted from his mental impairment."

According to the Third Circuit, an "inability to have access to or be around others carrying firearms would prevent him from serving in virtually all law enforcement positions." As a result, "a trier of fact

could determine that PHA regarded [Williams] as being substantially limited in the major life activity of working because of its perception that he could not hold any law enforcement position."

The Court considered whether, as an employee "regarded as" having a disability, Williams was entitled to a reasonable accommodation (such as a transfer to the training unit or the radio room). Noting a split among circuit courts, the Third Circuit adopted the reasoning of the First Circuit that a "regarded as" employee is entitled to reasonable accommodation. In reaching this conclusion, the Court relied, among other things, upon the statute's plain language, which requires reasonable accommodation of an employee with a disability, and defines disability as including being "regarded as" having a disability.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair
Employment & Labor
973.643.6390
dgarland@sillscummis.com

Lester Aron, Co-Chair
Employment & Labor
973.643.5795
laron@sillscummis.com

For further Corporate Immigration information, please contact:

Susan Storch, Chair
Corporate Immigration
973.643.5983
sstorch@sillscummis.com

New Jersey

One Riverfront Plaza
Newark, NJ 07102
Tel: 973-643-7000
Fax: 973-643-6500

www.sillscummis.com

New York

399 Park Avenue
New York, NY 10022
Tel: 212-643-7000
Fax: 212-643-6550