

Disability Law Update—Selected Recent Authorities

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Cases

Christensen v. Titan Distribution, Inc., ___ F.3d ___, 2007 WL 1052461 (8th Cir. April 10, 2007)

- employer's belief that plaintiff could not work as third shift supervisor, together with fact that supervisory position required that person to perform all the duties of the workers who reported to him, did not necessarily indicate a belief that plaintiff was unable to perform all of the duties of all those positions
- sufficient evidence of an actual disability
- sufficient evidence to support the punitive damages award because employer was aware that federal law prohibited disability discrimination, and none of the employer's decision-makers were willing to take responsibility for the refusal to hire prospective employee

EEOC v. Schneider, ___ F.3d ___, 2007 WL 841035 (7th Cir. March 21, 2007)

- absent evidence that employer exaggerated the severity of plaintiff's impairment and the risk it posed to truck driving, employer did not violate ADA by following "zero tolerance" policy for that condition
- employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job

Gambini v. Total Renal Care, Inc., 480 F.3d 950 (9th Cir. 2007) (state law; follows ADA)

- conduct resulting from a disability is part of the disability and not a separate basis for termination

EEOC v. E.I. Du Pont de Nemours & Co., 480 F.3d 724 (5th Cir. 2007)

- plaintiff proved "regarded as" disability based on employer's belief that she was incapable of walking and its order that she not walk anywhere at the company site, suggesting employer also regarded her as restricted from all of employer's jobs
- sufficient evidence that evacuating office building was not essential job function

- plaintiff did not pose “direct threat” because she was able to safely ambulate the evacuation route without assistance
- punitive damages can be awarded in absence of compensatory damages, at least if there is a back or front pay award
- punitive damages supported by cruel remarks, employer’s years-long effort to get plaintiff to take disability retirement, and placing her printer 100 feet from her desk despite knowing her walking difficulties and despite fact others had printers at their desks

EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007)

- if plaintiff cannot perform essential job functions without an accommodation, he or she need only make a facial showing that a reasonable accommodation is possible; burden of production then shifts to employer to show that it is unable to accommodate the employee
- fact that experts did not observe plaintiff using accommodations or performing job duties did not defeat the “facial showing”
- burden of proof on affirmative defense of direct threat is on the employer

Wishkin v. Potter, 476 F.3d 180 (3d Cir. 2007) (Rehabilitation Act)

- although plaintiff procured letter from his physician stating he was unable to continue working, there was evidence it was produced under duress and as a result of a calculated attempt to force similarly situated employees with disabilities to take disability retirement
- plaintiff had been performing essential job functions for many years, and there was no evidence of recent changes to his health status or ability to work
- fact that supervisor requires fitness for duty examinations of all employees with disabilities, and consistent and routine warnings given to the disabled employees regarding their job status, supported contention that the adverse action was motivated by discrimination

Chalfant v. Titan Distribution, Inc., 475 F.3d 982 (8th Cir. 2007)

- sufficient evidence to support “regarded as” disability; employer said plaintiff could not pass the physical, even though the evidence suggested his position did not require unique or strenuous lifting, and vocational expert testified that if employer believed plaintiff was unable to perform the duties of his job (which was classified as having light to medium strength demands), the plaintiff would have been prevented from performing 70% of jobs in the Dictionary of Occupational Titles

- sufficient evidence to undercut employer’s claim significant walking and heavy lifting were essential job functions
- although employer’s doctor actually passed the plaintiff, employer told plaintiff he could not work because he failed the physical exam, providing sufficient evidence that decision not to hire plaintiff was discriminatory
- sufficient evidence to support punitive damages based on fact employer was familiar with the law, employer’s inconsistent behavior at the time of decision and inability to explain its behavior until a “sudden memory improvement at trial”

Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033 (9th Cir. 2006)

- plaintiff named the state and state agency as the only defendants in her ADA case, but those entities are immune under the Supreme Court’s decision in *Garrett*
- when immunity was raised, plaintiff only sought leave to add individual-capacity claims against supervisors, but there is no individual liability under the ADA, and *Ex parte Young* requires an official capacity claim to avoid immunity
- because plaintiff did not intend to return to work, she had no need for prospective injunctive relief remedy available under *Ex parte Young*

Pittari v. American Eagle Airlines, Inc., 468 F.3d 1056 (8th Cir. 2006)

- plaintiff with cognitive impairments from closed-head injury did not show employer regarded him as substantially limited in working
- employer only regarded plaintiff as unable to perform one particular job—that of flight attendant
- employer also considered restriction to be temporary
- restrictions based on doctor’s detailed evaluation and recommendations are not based upon myths or stereotypes and thus do not show a perceived disability

EEOC v. Heartway Corp., 466 F.3d 1156 (10th Cir. 2006)

- sufficient evidence that Hepatitis C was a perceived disability
- “class of jobs” and a “broad range of jobs” are objective standards, and do not require an onerous evidentiary showing; the reference to the number and types of jobs only requires evidence of general employment demographics and/or recognized occupational classifications that indicate the approximate number of jobs (e.g., few, many, most) from which an individual would be excluded because of an impairment
- supervisor told plaintiff that “you having Hepatitis C, you will not work in our kitchen,” indicated fear of a “mass exodus” if it became know, and asked EEOC

investigator “How would you like to eat food containing her blood?”; this showed attitudinal barriers

- jury might reasonably believe employer thought plaintiff was limited in any kitchen job, or any job with the possibility of getting cut, and found sufficient evidence that a “class of jobs” was implicated, based testimony of vocational expert
- even assuming plaintiff lied about Hepatitis on application, a reasonable jury could have nonetheless concluded that she was actually fired because of her disability
- sufficient evidence to support punitive damages based on supervisor’s testimony that he had “some” ADA training in past jobs and knew it was against the law to fire someone because of a disability, or simply because someone had been diagnosed with Hepatitis C

Bates v. United Parcel Service, 465 F.3d 1069 (9th Cir. 2006), *rehearing granted*

- employer’s qualification standard that is stricter than that required by federal law violates the ADA; disallowing all hearing impaired people who cannot pass the DOT hearing tests violates the ADA, unless employer could show that such a ban is justified by business necessity
- when plaintiffs challenge an employer’s use of a safety-based qualification standard, they need not establish generally that they can perform the essential function of doing the job safely, but need only show that they are “qualified” in the sense that they satisfy prerequisites for the position not connected to the challenged criterion
- if plaintiffs show they are “qualified,” and also show that the standard screens out or tends to screen out persons with disabilities, the burden shifts to the employer to establish that the challenged qualification standard is job-related and consistent with business necessity

EEOC v. Watkins Motor Lines, 463 F.3d 436 (6th Cir. 2006)

- morbid obesity is not a “physical impairment” under the ADA unless it is “physiological,” i.e., has a physiological cause or effect

Yindee v. CCH Inc., 458 F.3d 599 (7th Cir. 2006)

- infertility resulting from cancer treatment is a disability
- plaintiff’s vertigo, for which she sought accommodation, was not related to her disability

Graves v. Finch Pruyn & Co., 457 F.3d 181 (2d Cir. 2006)

- summary judgment for employer reversed where employer cut off plaintiff's implied accommodation request for unpaid leave
- granting leave of a "couple of weeks" to allow the doctor to evaluate the possibility of returning to work was not a request for indefinite leave and thus was not unreasonable

Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006)

- With few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination
- In cases involving a request for medical leave as a reasonable accommodation, the lack of definite return date is not an undue hardship per se, and employer should still consider the individual circumstances
- fact issue existed as to whether plaintiff could have been accommodated through reassignment because employer must consider not only available positions but also those that will become available within a reasonable period, and there was evidence of openings at some point after plaintiff's firing
- employer claim that reason for termination was misconduct is suspect because the plaintiff was not immediately fired after the incident and instead was subjected to a medical examination to determine his fitness for the position

Taylor v. Rice, 451 F.3d 898 (D.C. Cir. 2006)

- which functions are "essential" is an issue for the jury
- although employer labeled the function as essential, but there was contrary evidence, including that others were excused from requirement
- accommodation that requires a policy change is not necessarily unreasonable or an undue hardship
- employer cannot claim that accommodation would pose fundamental alteration if it permits it for others
- plaintiff presented evidence suggesting pretext, and that HIV was the true reason he was not hired

Gasser v. District of Columbia, 442 F.3d 758 (D.C. Cir. 2006)

- insufficient vocational testimony to show substantial limitation in working
- substantial limitation in a broad range or class of jobs depends, not just of the number of jobs one cannot do, but on the number of jobs still open to plaintiff

- expert erred in determining the jobs the employer believed the plaintiff was excluded from; expert looked at whether preclusion from engaging in heavy physical exertion disqualified the plaintiff from a substantial class or broad range of jobs, but instead should have presented evidence of the number of jobs he would be unable to perform because they involve a risk of trauma

Turner v. Hershey Chocolate U.S., 440 F.3d 604 (3d Cir. 2006)

- plaintiff's statements on long-term disability and Social Security disability applications did not judicially estop ADA action because they were "hardly a statement of total disability," and did not discuss accommodations
- fact issues existed as to whether employer's job rotation scheme was essential job function, in part because job description made no reference to it
- fact issues also existed as to whether employee's requested modification to rotation scheme was a reasonable accommodation

Ferraro v. Kellwood Co., 440 F.3d 96 (2d Cir. March 7, 2006) (state law; follows ADA)

- although there was evidence supervisor was a short-tempered and foulmouthed supervisor, there was no complaint that his outburst was motivated by any discriminatory animus
- there was no evidence employer ignored or resisted complaints against the supervisor, and thus no reason to justify plaintiff's failure to file a complaint

Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006)

- sufficient evidence that plaintiff with visual impairment could perform essential functions of operating a forklift because he maintained a forklift license, operated a forklift without any problems while working for employer and afterwards, was never asked about his vision limitations or whether he was able to operate a forklift, and his forklift certification did not require a vision exam
- driving between customer locations was not an essential job function as plaintiff could have arranged his own transportation
- sufficient evidence that employer failed to participate in the interactive process because the supervisor who discussed accommodations with plaintiff had no authority to offer plaintiff a position and was told to discontinue his discussions, while supervisors with real authority did not contact plaintiff regarding accommodations, never investigated other options, and delayed offering accommodation for two years until after summary judgment was denied
- employer's belief that plaintiff's suggested accommodations were impractical did not relieve it of obligation to discuss other possible accommodations

Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006)

- sufficient evidence that employer regarded plaintiff with depression and anxiety as substantially limited in working because supervisors perceived him to be potentially violent, which would preclude him from most jobs
- sufficient to establish hostile work environment based on such constant ridicule about mental impairment that it required him to be hospitalized and eventually to withdraw from the workforce
- although harassment that occurred before supervisor knew of plaintiff's depression was not actionable, after being informed of the diagnosis, superiors continued harassment, frequently mentioning the disability
- sufficient evidence of retaliation because within a few weeks of plaintiff's filing harassment complaint, the harassment intensified to include threats of firing, screaming, and efforts to interrupt his union grievance

Battle v. United Parcel Service, Inc., 438 F.3d 856 (8th Cir. 2006)

- sufficient evidence that plaintiff's depression and anxiety substantially limited his ability to think and concentrate, based on testimony that despite counseling and medication, plaintiff thinks and concentrates at a laborious rate, has to spend significant extra time working on projects, and cannot think and concentrate about matters unrelated to work
- evidence that employer failed to engage in interactive process by insisting that it could not accommodate his need to avoid the marginal function of memorizing minute details
- employer's argument that plaintiff's requested accommodation was unreasonable undercut by fact that employer later instituted a similar accommodation for others

Armstrong v. Burdette Tomlin Memorial Hosp., 438 F.3d 240 (3d Cir. 2006)

- plaintiff has to request accommodation, but does not have to request correct one
- where there are others doing the same job who are capable of doing the functions the plaintiff cannot do, it is a reasonable accommodation to assign those particular functions to the coworkers

Todd v. City of Cincinnati, 436 F.3d 635 (6th Cir. 2006)

- plaintiff need not prove that employer regarding him as having a disability was the sole reason for the adverse employment action
- sufficient evidence that hiring official regarded plaintiff as having a disability

Rodriguez v. ConAgra Grocery Products Co., 436 F.3d 468 (5th Cir. 2006)

- summary judgment for plaintiff in perceived disability case
- employer's refusal to consider plaintiff for *any* of its jobs was evidence that the employer regarded plaintiff as substantially limited in working
- rejecting the plaintiff for an unskilled job (that any able-bodied person could do) is evidence that it regards the plaintiff as substantially limited in working.
- uninformed, stereotyping statements from the employer help prove a "regarded as" claim
- if there is such a defense as "failing to control a controllable impairment," it does not apply in "regarded as" cases
- absence of ill-will is not a defense
- employer cannot rely on its own doctor's opinions if the opinions are based on a cursory exam rather than on an individualized assessment of the plaintiff

Heiko v. Colombo Savings Bank, FSB, 434 F.3d 249 (4th Cir. 2006)

- elimination of bodily waste is a major life activity
- employee with end-stage renal disease was substantially limited his ability to eliminate waste as a matter of law because in order to accomplish the equivalent of urination, he had to "insert a needle into his surgically-fashioned fistula and tether himself to a dialysis machine three afternoons per week, for a total of twelve hours," not including travel and set-up time, on an unyielding schedule, and whereas urination does not have side effects, after dialysis plaintiff felt nauseous and depleted, unable even to stand in the shower
- although dialysis enabled plaintiff to eliminate waste, the ADA "addresses substantial limitations on major life activities, not utter inabilities"
- fact that plaintiff received a kidney transplant some years after separation and does not now require dialysis does not defeat his claim that he had a disability at the times relevant to this case

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75 (1st Cir. 2006)

- employer did not establish affirmative defense to vicarious liability for harassing conduct by co-workers and supervisors because although it had an open door policy, it did not take any corrective action after plaintiff complained
- sufficient evidence of hostile work environment based on constant mockery and harassment by co-workers and supervisors leading to resignation, together with fact that supervisors knew about conduct and rather than stop it, participated in it

- award of punitive damages warranted because jury could have concluded that employer's open door policy was a sham designed to give the appearance, but not the reality, of an effort to comply with the law, and that employer acted with reckless disregard of plaintiff's rights
- sufficient evidence that managers who taunted plaintiff and ignored his complaints were acting within the scope of their employment

Josephs v. Pacific Bell, 432 F.3d 1006 (9th Cir. 2005)

- claim for discriminatory refusal to reinstate or re-employ was separately actionable claim from discriminatory discharge if there are "new elements of unfairness, not existing at the time of the original violation"
- sufficient evidence that employer regarded plaintiff as having a disability because it believed plaintiff was unemployable because he had spent time in a "mental ward" and might "go off" on a customer
- there was sufficient evidence that plaintiff was qualified to perform his job servicing phones despite his past violent acts

Smith v. District of Columbia, 430 F.3d 450 (D.C. Cir. 2005)

- employer granted summary judgment in retaliation case because plaintiff failed to show nondiscriminatory reasons was pretextual

Cutrerera v. Board of Sup'rs of Louisiana State University, 429 F.3d 108 (5th Cir. 2005)

- fact issue existed as to whether employee with macular degeneration—who did not believe she could drive safely, and who had significant difficulty reading small type, handwriting, or any writing with poor contrast—was substantially limited in seeing
- plaintiff sufficiently requested an accommodation by asking for a meeting with the ADA coordinator, and by indicating that she was having trouble seeing her work, was consulting with a vocational specialist, and wanted to keep her job
- employer had affirmative obligation to participate in the interactive process once plaintiff requested accommodation but instead it terminated employment before completing the interactive process

Recent EEOC Fact Sheets

- *health care workers* – Questions and Answers about Health Care Workers and the Americans with Disabilities Act (EEOC Feb. 26, 2007)
http://www.eeoc.gov/facts/health_care_workers.html
- *accommodating lawyers* – Reasonable Accommodations for Attorneys with Disabilities (EEOC July 27, 2006)
<http://www.eeoc.gov/facts/accommodations-attorneys.html>
- *deafness & hearing impairments* – Questions and Answers about Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act (EEOC July 26, 2006)
<http://eeoc.gov/facts/deafness.html>
- *telecommuting* – Work At Home/Telework as a Reasonable Accommodation (EEOC Oct. 27, 2005)
<http://www.eeoc.gov/facts/telework.html>
- *emergency evacuation planning* – Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (Oct. 27, 2005)
<http://www.eeoc.gov/facts/evacuation.html>
- *blindness & visual impairments* – Questions and Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act (EEOC Oct. 24, 2005)
<http://eeoc.gov/facts/blindness.html>
- *associational discrimination* – Questions and Answers About the Association Provision of the Americans with Disabilities Act (EEOC Oct. 17, 2005)
http://www.eeoc.gov/facts/association_ada.html
- *cancer* – Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA) (EEOC Aug. 3, 2005)
<http://eeoc.gov/facts/cancer.html>
- *job applicants* – Job Applicants and the Americans with Disabilities Act (EEOC March 21, 2005)
<http://www.eeoc.gov/facts/jobapplicant.html>
- *food service employers* – How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers (EEOC Oct. 28, 2004)
http://www.eeoc.gov/facts/restaurant_guide.html
- *intellectual disabilities* (“mental retardation,” etc.) – Questions and Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (EEOC Oct. 20, 2004)
http://eeoc.gov/facts/intellectual_disabilities.html

- *epilepsy* – Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA) (EEOC Aug. 24, 2004)
<http://eeoc.gov/facts/epilepsy.html>
- *diabetes* – Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA) (EEOC Oct. 29, 2003)
<http://www.eeoc.gov/facts/diabetes.html>

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