

## Perception Is Reality

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Every first year law student learns that if a shooter aims at person A and misses, but his bullet accidentally hits and kills person B, the shooter is still guilty of murder because his intent to kill transfers. Similarly, if an employer discriminates against an employee because it perceives that employee as disabled – even though the employee is not actually disabled – the Americans with Disabilities Act expressly provides that the employer is liable for discrimination. Title VII of the Civil Rights Act of 1964 (prohibiting discrimination based on race, sex, religion, and national origin), however, does not expressly provide for “perceived as” claims. Thus, the U.S. District Court for the District of Hawaii recently had to decide an issue of first impression when this theory was raised by a plaintiff.

In *Henao v. Wyndham Vacations Resorts, Inc.*, a Colombian employee who spoke with a “thick Spanish accent” sued his employer based on the actions of his supervisor, who clearly thought the plaintiff was Mexican. The supervisor made numerous discriminatory remarks, used Mexican slurs when referring to plaintiff, and also called him “Pancho Villa” and “amigo.” In denying the employer’s bid for summary judgment as to plaintiff’s national origin discrimination claim, the court stated that even though Title VII does not expressly authorize “perceived as” claims, the supervisor should not be let off the hook due to his ignorance. The Court held:

The anti-discrimination statutes at issue in this case were enacted to prohibit certain kinds of discrimination. An employer cannot escape liability for prohibited discrimination simply because the discrimination flows from the employer’s mistake about the precise nature of a person’s characteristics. To hold otherwise would allow prohibited discrimination to go unredressed on the basis of an error in no way diminishing the harm to the victim of the discrimination.

Thus, the Colombian plaintiff was allowed to proceed with his discrimination claim based on anti-Mexican remarks. Although it is not certain whether other circuits will follow the District of Hawaii’s lead, the lessons derived from the case ring true across the board. Companies will find themselves in deep water (and facing what will most likely be an unsympathetic court) in the face of discriminatory behavior directed toward an employee, even if based on faulty premises or mistaken assumptions.

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