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ADA: Does "Regarded As" Still Matter?

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William A. Nolan
Partner
Columbus
Managing Partner

One of the things that makes the Americans with Disabilities Act distinctive among discrimination laws is its "regarded as" prong. It protects not only people who in fact *are* disabled from discrimination, but also people who are *regarded as* disabled. R is for "regarded as" and what it means for most employers and employees in 2014.

While the question of what conduct is "because of" sex and therefore covered by Title VII's sex discrimination prohibition is a hot topic and somewhat analogous, generally discrimination statutes do not have regarded as protections. You are either a member of a protected class or you are not. The "regarded as" prong was intended to protect people from the stigma of disability even if they were not in fact disabled. This concept has come up recently here with the Ebola scare.

As many readers will know, prior to the ADAAA amendments in 2009, a remarkable number of ADA cases were won or lost on the question of whether individuals even counted as disabled or regarded as disabled under a complicated set of rules. Literally 5 of the first 9 ADA cases to reach the U.S. Supreme Court were about the question of whether an individual was even covered by the statute. Employers often were able to knock ADA cases at the summary judgment stage by winning the definition game. Therefore, it was critical to avoid regarding an employee as disabled, because it might bring an employee who did not meet the definition of disabled within the coverage of the statute. So we chose our words very carefully in communications to employers so as not to raise a regarded as claim, and we thought long and hard before suggesting an employee call the EAP for fear it might trigger this prong of the law.

The ADAAA changed all that. It was intended to expand the coverage of the law to what was said to be its original intent (and while I am on the employer's side, having been a new lawyer charged with writing lots of speeches and articles for partners around the time the ADA was being passed, I think the ADAAA in fact does represent the original intent), and make ADA cases about whether there was discrimination or whether a reasonable accommodation was provided, not about whether a person with a health issue is disabled.

It has worked. While the EEOC's statistics, for example, do not separately track regarded as claims, anecdotally we spend much less time talking with employers about avoiding regarded as claims. (The last BTCurrents

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post seems to have been almost two years ago – that simply would not have happened in 2008.) The fact is, if we are having the discussion about an employee's rights and obligations with respect to a health issue, the employee in most cases *has* a disability under the broadened definition of disability under the law, and whether there is also a regarded as claim is less important. Certainly for minor health issues a regarded as claim might be pivotal – see this case involving a knee injury, though that employee's attempt to use the regarded as prong was unsuccessful – but generally regarded as claims are a much smaller part of our life than they were just a few years ago.

This development certainly does not diminish the importance of best employer practices such as keeping information about employee health issues on the strictest need to know basis. And as always, regardless of who is covered by what laws, decisions made for well-documented business reasons are the best way to avoid liability related to termination decisions.