

Louisiana Employment Law Letter

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DISABILITY HARASSMENT

Reality *ER*: Physician with hepatitis C sues hospital under ADA

Courts have consistently refused to say that certain impairments are disabilities as a rule within the meaning of the Americans with Disabilities Act (ADA). Rather, they favor a case-by-case analysis, taking into consideration the nature of the impairment and its particular limitations on the employee and the requirements of the specific job at issue. The U.S. Fifth Circuit Court of Appeals in New Orleans recently conducted that type of analysis in attempting to decide whether an emergency room (ER) physician who tested positive for hepatitis C was disabled within the meaning of the ADA.

This case not only reaffirms the case-specific approach that courts and employers must use in addressing ADA issues but also highlights unique questions that face your companies when you're dealing with contagious illnesses in the workplace. This article is a refresher course for those of you needing to brush up on ADA basics and a news flash for those interested in medical issues in the modern workplace.

Comments about physician's condition set the stage for real court battle

Brenda Gowsky, a physician, was accidentally exposed to the hepatitis C virus while assisting a patient in the ER. She eventually tested positive for hepatitis C and ceased active work at the hospital, although she maintained staff privileges and continued to attend staff meetings. That practice continued for the next two years, during which time she received chemotherapeutic treatment for the infection.

Gowsky eventually reported that she was in remission and inquired about returning to work in the ER. According to the doctor, the administrator questioned whether she could return to work in the ER and said he would need to confer with the hospital's attorneys and another doctor and that she would need to complete some refresher courses and have weekly blood draws. According to the doctor, the administrator also told her that he didn't think she could work in the ER again, he wouldn't go to a dentist who had hepatitis C, and he wouldn't allow her to suture his child.

Gowesky then spoke with the director of emergency medicine and claimed he told her she would have to prove that she could perform the work and that she wouldn't be infectious before being allowed to return to the ER. He also allegedly asked if she knew of any other ER physicians who had hepatitis C.

Shortly thereafter, Gowesky was scheduled to return to work in the ER. She underwent two previously scheduled carpal tunnel surgeries but confirmed that she would attend the refresher courses and return to work as scheduled. She also agreed to provide a letter from her doctor confirming her ability to perform her duties in the ER.

In the meantime, the hospital underwent corporate restructuring that affected the ER. The hospital planned to transfer ER staffing responsibilities to another company and expected the transition to be complete within a matter of months. As part of the plan, the hospital gave each of its ER physicians a formal 60-day notice of termination along with a promise of future employment with the new company. Gowesky was treated like all the other ER physicians in that regard.

Gowesky, allegedly bothered by the comments she attributed to the administrator and the director of emergency medicine, was displeased about the notice of termination and objected. She didn't report to work as scheduled, and a follow-up letter from her attorney advised that she had no plan to return to work at the hospital.

Instead, Gowesky sued the hospital in federal court, alleging that she was discriminated against and harassed on the basis of a disability in violation of the ADA. The trial court granted the hospital's request to dismiss her ADA claims, and she appealed the decision to the Fifth Circuit.

Court scrutinizes employer's comments and actions

The Fifth Circuit began its analysis by addressing the threshold question of whether Gowesky was "disabled" within the meaning of the ADA. By now, you're probably familiar with the recitation that an ADA disability is an impairment that substantially limits an individual's ability to perform one or more major life activities.

Gowesky, however, didn't allege that she was actually disabled within the meaning of the ADA. Rather, she claimed she was perceived or "regarded as" having a disability under the Act. The court explained that an individual who doesn't have an actual disability may pursue a "regarded as" claim under the ADA if she:

- has an impairment that isn't substantially limiting but that the employer perceives as constituting a substantially limiting impairment;
- has an impairment that's substantially limiting only because of the attitudes of others toward such an impairment; or
- has no impairment at all but is regarded by the employer as having a substantially limiting impairment.

Gowesky claimed that she was regarded as having a substantially limiting impairment by the administrator and the director of emergency medicine based on their alleged comments about her ability to return to work in the ER.

The court disagreed, observing that "[a]t most, the comments cited by Gowsky question her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the hepatitis C virus to spread." The court concluded that the comments in no way suggested she couldn't work in another environment in which the potential for transmission of the virus to others would be less likely. The court explained that the hospital officials would have had to regard her as unable to work in general or unable to perform a broad range of jobs to regard her impairment as substantially limiting within the meaning of the ADA. Regarding an individual as unable to perform a particular job or a narrow range of jobs isn't enough to show a violation of the Act.

Most important, the court concluded that the hospital couldn't have regarded Gowsky as disabled because it continued to reassign her to the ER schedule and she simply chose not to return to work. An employee can't succeed in proving a "regarded as" claim when the employer doesn't limit or prohibit her from performing the full range of her job duties.

The court, however, didn't end its inquiry there. Although it could have upheld the dismissal of Gowsky's claim for her failure to show that she was "regarded as" disabled alone, it nonetheless analyzed whether she offered evidence of disability-based harassment or discrimination (assuming for the sake of argument that she could satisfy the threshold inquiry). The court reiterated that the ADA prohibits disability-based harassment, just as Title VII of the Civil Rights Act of 1964 prohibits harassment based on other protected classifications.

To prove a disability harassment claim, the employee must demonstrate that she belongs to the protected group, she was subjected to unwelcome harassment, the harassment was based on her disability (or perceived disability), the harassment affected a term, condition, or privilege of her employment, and the employer knew or should have known of the harassment but failed to take prompt remedial action.

The standard for showing that conduct is unlawful disability-based harassment is "high." The harassment "must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment," the court explained. Gowsky pointed to another case involving an HIV-positive employee in which the Fifth Circuit concluded that the alleged conduct could be enough to support a disability-based harassment claim. In that case, the employee alleged that after the supervisor discovered her HIV status, the following events occurred:

- her supervisor ceased socializing with her, intercepted her telephone calls, and eavesdropped on her conversations;
- the company president became "distant," refused to shake her hand, and went to great lengths to avoid her or her office;
- despite her outstanding performance history, she received two write-ups and was placed on probation; and
- after the first probationary period expired, she was placed on probation again in a meeting in which the president made vulgar sexual accusations toward her.

The Fifth Circuit noted that the facts as Gowsky recounted them were quite different than the earlier case involving the HIV-positive employee. According to the court, the conditions that the hospital imposed on her return to work in the ER were "eminently reasonable," given the nature of her work and the risk of infection to patients and co-workers. The court found that the

hospital was justified in requiring her to perform all the required ER duties and not present a risk of infection to her patients and that she continue to assure her patients and the hospital of her continuing "noninfectious" status. The court further noted that even if those conditions were considered unreasonable, they wouldn't in and of themselves be sufficient to meet the high standard set for showing unlawful harassment. Additionally, the court concluded that the alleged comments about dentistry and sutures — even if hurtful — weren't severe or pervasive enough to meet the standard.

As for Gowsky's claim that she was treated less favorably than others because of her perceived disability, the court noted that she failed to show any adverse employment action against her by the hospital, an element of any discrimination claim. The court reiterated that the hospital scheduled her to return to work in the ER after her hepatitis C therapy and carpal tunnel surgeries but that she refused to return.

Moreover, all the other ER physicians were given the same notice of termination and promise of employment with the new company that Gowsky received. That didn't amount to less favorable treatment, according to the court. Thus, the court upheld the dismissal of her claims. *Brenda A. Gowsky, M.D. v. Singing River Hospital System*, 2003 U.S. App. LEXIS 2054 (5th Cir. February 6, 2003).

Kind words for employee — words of caution for employers

The Fifth Circuit's final words in this case offer a valuable lesson:

The court doesn't doubt that Dr. Gowsky has suffered greatly since her accidental infection in February 1997. The discomforts occasioned by chemotherapy, surgery, and several years of involuntary unemployment could only have been aggravated by her supervisors' apparent lack of eagerness to take advantage of her likely considerable talents. This must be especially grating in light of the selfless manner in which her infection occurred.

The court continued, however, by explaining that not all suffering gives rise to a compensable legal action. Moreover, when it comes to safety, employers may have an obligation to take reasonable steps to guard against the transmission of infectious diseases. Of course, the existence and extent of that obligation and the reasonableness of the employer's actions should be given careful consideration in advance and with the benefit of legal counsel.

Perhaps this lawsuit could have been avoided in the absence of the alleged comments about not going to a dentist who had hepatitis C or not allowing the physician to suture a child. While the hospital disputed those comments, many comments like them are the source of hard feelings that later become lawsuits and potential liability that could have easily been avoided.

Remember that one of the ADA's goals is to eradicate employment discrimination and harassment based on myths and stereotypes about individuals who are disabled or perceived as being disabled. Comments such as those alleged in this case are often the determining factor in whether an employee sues and a jury finds liability. Properly training supervisors and managers to avoid careless comments and imposing appropriate discipline when they don't is one way to minimize your risk of litigation and liability. And when it comes to complying with the ADA, remember that an ounce of prevention (in this case, legal advice and training on the front end) is worth a pound of cure.

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