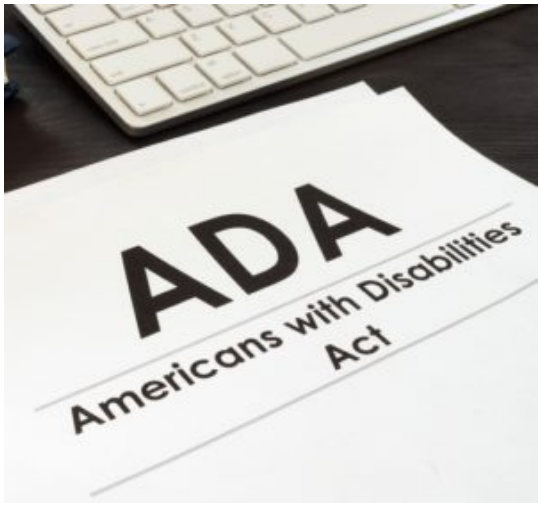
ADA Does Not Apply To Healthy Employee Perceived To Be At Risk For Future Impairment

by Dennis J. Merley - Thursday, September 26, 2019



While the Americans with Disabilities Act (ADA) prohibits discrimination against people perceived as disabled, a Federal Appeals Court just ruled that the law does not protect a healthy person whom the employer believes might become disabled in the future.

Kimberly Lowe, a massage therapist at a Massage Envy outlet in Tampa, Florida, asked for time off so she could visit her sister in the West African nation of Ghana. Although the leave was approved initially, co-owner Ronald Wuchko told Lowe right before she was scheduled to leave that he would fire her if she went to Ghana. Wuchko was aware of an Ebola epidemic in other West African countries and was worried that Lowe would "bring [Ebola] home to Tampa and infect everyone." Lowe refused to cancel her trip and Wuchko fired her on the spot.

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Lowe filed a disability discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), who found in Lowe's favor. EEOC then sued the employer on Lowe's behalf claiming that they violated the ADA in two distinct ways: (1) terminating her because they regarded her as disabled; and (2) terminating her due to her association with people in Ghana whom they believed to be disabled by Ebola. The lower court dismissed the case, prompting the EEOC to take the case to the Eleventh Circuit Court of Appeals.

Under the ADA, an employer may not discriminate against a person because that person has a disability, has a record of a disability or is regarded as having a disability. To be "regarded as" having a disability, the individual must demonstrate adverse action because of an actual or perceived physical or mental impairment that limits, or is perceived to limit, a major life activity.

The Eleventh Circuit affirmed the dismissal of the claim, ruling that the ADA does not cover an individual whom the employer perceives to be "presently healthy with only a potential to become ill and disabled in the future…" The Court explained that the statute must be read naturally and that an employer simply cannot fire someone because of a perceived impairment if the employer does not actually perceive the employee as having that impairment.

Interestingly, the Eleventh Circuit cited the EEOC's own interpretive guidance for support. That guidance provides that a "characteristic predisposition to illness or disease" does not constitute a physical impairment under the ADA. By analogy then, the Court concluded that a "heightened risk of developing the disease Ebola in the future due to her visit to Ghana" also would not qualify as an impairment.

All Alone

The Court then turned to the EEOC's "association" claim. The ADA bars employers from discriminating against applicants and employees due to the "known disability of an individual with whom the [applicant or employee] is known to have a relationship or association."

The Court found no indication that the employer knew that Lowe had an association with a specific disabled individual in Ghana when terminating her employment. The only person whom they know Lowe would be visiting was her sister, who did not have Ebola. Moreover, Lowe never said she was traveling to Ghana to work with or visit Ebola victims, nor to assist in an Ebola crisis in any way. Finally, there actually was no Ebola outbreak in Ghana and even if there was, alleging that Lowe might casually come in contact with an Ebola sufferer simply was not sufficient to make out a claim that she "associated with someone with a disability."

Bottom Line

This is a helpful decision but Minnesota employers should be still cautious. For one thing, this case arose in the Eleventh Circuit (covering the Southeastern states) and it is not certain that the Eighth Circuit will follow this line of reasoning. Moreover, we can be pretty sure that the EEOC will continue to press their interpretation that the ADA does protect employees from the perception of future impairment.

Remember too that other forms of discrimination may enter the picture. An employer that screens out employees of a particular protected class (e.g. gender, race, national origin or age) because of a belief that such a group poses a heightened risk of illness or disability will likely end up facing a serious discrimination case sooner or later.

That being said, it is good to see that some courts are choosing to limit application of the ADA

to those people for whom the statute was actually enacted to protect.

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