INTRODUCTION

In an effort to stem the discrimination against some 43 million disabled employees and applicants, Congress enacted the Vocational Rehabilitation Act of 1973 (Bennett-Alexander, 2001). Unfortunately, the Vocational Rehabilitation Act was insufficient to prevent discrimination against all private-sector employees, since it only covered federal contractors (Bennett-Alexander, 2001). Consequently, Congress passed the Americans with Disabilities Act (ADA) in 1990, which also covers all private employers with more than 15 employees. Under these two federal laws, nearly all employers are covered.

The term disability under these two acts is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, has a record of such impairment, or is regarded as having an impairment. While there has been a great deal written in the literature concerning the first two parts of the legal definition of disabled, there has been comparatively little advice related to court interpretation dealing with the regarded as having an impairment clause. The interpretive regulations from the Equal Employment Opportunity Commission (EEOC), which has regulatory jurisdiction for ADA, states that "is regarded as having an impairment" means:

"(1) has a physical or mental impairment that does not substantially limit major life activities but is treated by the employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of the employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment {29 C.F.R. 1613.702(2)}."

Despite this guidance from the EEOC, many employers are still unsure as to what this actually means in terms of what they can and cannot do in the workplace. They are understandably worried that a single word or inadvertent act may cause the justice system to find that a person is disabled when, in fact, the individual is not. Many managers even think that employers cannot refer to someone as disabled or even change a potentially disabled person's job without such an action triggering legal sanctions. More importantly, many firms fear that so covered individuals might file successful legal actions against them even though there was no intentional act of discrimination. Understandably, these trepidations can often lead to "management paralysis" (failing to address issues related to the potential disability) or even to avoid dealing with the worker on a daily basis. This inaction can leave such individuals feeling confused, isolated, and inclined to sue the company. Sadly, in the end everyone loses due to misunderstanding and misinformation.

This article is intended to remove much of the myth and fear surrounding the "regarded as disabled" clause in these two acts by providing management with concrete advice as to what they can actually say and do based on the federal courts' interpretation of these statutes. To that end, a LEXIS NEXUS key word search yielded over one hundred federal court decisions (Supreme, appeals, and district court cases). The vast majority of these cases have been adjudicated since Sutton v. United Airlines where the Supreme Court addressed a variety of disability issues and severely limited the manner in which persons may be covered under the disability laws. The remaining earlier cases are consistent with the high court's ruling in Sutton. All of the assembled cases were analyzed for guiding principles and practices. The results of which are discussed below.

EEOC REGULATIONS

The Supreme Court upheld the EEOC regulations in Sutton v. United Airlines. The Supreme Court went on to explain that in order to meet the legal test of regarding someone as disabled, management must either "mistakenly believe that a per-
son has a physical impairment that substantially limits one or more life activities or they mistakenly believe that an actual, nonlimiting impairment substantially limits one or more major life activities (Sutton v. United Airlines at 3)." For example, an obese woman was denied a job for a state as an institutional attendant for the retarded because the manager in charge mistakenly perceived that she was too obese to adequately perform the work at the institution and refused to hire her. The courts found this action to be sufficient to qualify her as handicapped and even though she did not consider herself disabled, she could actually perform the work without an accommodation (Cook v. State of Rhode Island).

AWARENESS OF IMPAIRMENT

Employers must first have knowledge of an impairment (limiting or nonlimiting) in order to incur liability for adverse actions taken against a potentially disabled individual (Morisky v. Broward County). This knowledge may take a variety of forms: (a) management acquires knowledge of the physical or mental impairment through casual conversation, (b) management observes first-hand any likely impairment, (c) the company receives written material in the form of a job physical, or periodic company medical exams, (d) the employer is furnished letters or through any other actions which makes the company aware of a worker’s possible impairment (Hedberg v. Indiana Bell; McInnis v. Alamo Community College, Morisky v. Broward County).

When there is no evidence that management knew of the condition or when officials possess only "vague or conclusory statements revealing an unspecified incapacity," there is simply inadequate information to create a legal awareness of an impairment (Morisky v. Broward County). For example, terminating an employee when the employer did not have any data to suggest that the person was bipolar or when the employer was simply aware that an employee was attending medical appointments and treatment, does not demonstrate that the company officials knew the employee was suffering from a physical or mental impairment (Gorbitz v. Corvilla, Inc., Klein v State of Florida, Miller v. National Casualty Co.).

More specifically, in Morisky (Morisky v. Broward County), the plaintiff had requested the County to read a test to him since he was illiterate and enrolled in special education classes. The County refused to do so since reading was a requirement of the custodian job for which he had applied. The plaintiff alleged that this information had put the County on notice that Morisky had a possible impairment, and its refusal to accommodate was proof that the County regarded him as disabled. However, the Eleventh Circuit of Appeals saw otherwise when it refused to recognize this argument in its ruling opinion which stated, "It does not always follow that someone who is illiterate is necessarily suffering from a physical or mental impairment (Morisky v. Broward County, at 4)." Similarly, insensitivity toward an employee who appears less intelligent than others (individual was clinically retarded but had told his employer that he was only "slow") does not infer that management had genuine knowledge that such an appearance was due to a disability (Cody v. Cigna Health Care of St. Louis, Inc.).

ACTIONS THAT DO NOT REGARD A WORKER AS DISABLED

Even though the employer may be conscious of a particular employee’s impairment, it does not inevitably indicate that management’s actions represent recognition that such persons are disabled. For example, in Taylor v. Nimock’s Oil, Ms. Taylor, who had suffered a heart attack and was undergoing treatment, received a "get well" card and a note concerning possible work restrictions from her employer. Just because an employer demonstrates concern for a worker’s well being or the impact of possible work restrictions does not mean that they regard the person as disabled. Being sick, ill, or injured does not necessarily imply that a person has an impairment that substantially limits a major life activity (Wanda Taylor v. Nimock Oil).

More importantly, employers often have prospective impaired persons evaluated by qualified physicians. The courts have consistently ruled that such action, as long as job related, is not verification that an employer regards the employee as handicapped. In Richard Sullivan v. River Valley, for instance, Sullivan was displaying rather "strange" behavior on school premises and was subsequently ordered to undergo a mental and physical examination by the school board. However, the Courts said in no way did this order suggest that the school board regarded Sullivan as disabled (Richard Sullivan v. River Valley School District). Similarly, being repeatedly asked to see a psychologist, because the person seems to exhibit psychiatric problems, is not viewed as treating someone as disabled or demonstrating stereotypical prejudices (Cody v. CIGNA, Sharon Vinson v. Cummins Engine Co.).

Similarly, disparaging remarks related to a worker’s impairment does not automatically qualify as proof the organization regards the worker as disabled. A morbidly obese corrections officer was told by his Sheriff that he was "too fat" to subdue unruly inmates and could not do the job (major life activity of working). This was despite the fact the officer had held the job for many years. However, the Sheriff’s office did offer him a transfer to another position. Consequently, liability was avoided since the Sheriff did not act in such a manner that denied or regarded the officer as unable to perform a broad class of jobs (Carl Mckibben v. Hamilton County).

Likewise, a maintenance worker had lost most of the use of his right hand. Subsequently, his field supervisor began referring to him as the "one-armed man." However, the worker could generally perform his job, and his employer did eventually transfer him to other work that he could also perform. He was eventually terminated for reasons unrelated to his impairment (e.g., positive drug test and absenteeism). Consequently, the court ruled that the company did not regard him as disabled or unable to perform a broad class of jobs (Richard Long v. City of Leawood). Similarly, in Bobreski v. Ebasco-Rayethon, a supervisor continually mocked an electrician’s cleft palate; however, other than move him to another job with similar responsibilities, he did not adversely affect his work.

MAJOR LIFE ACTIVITIES

As mentioned earlier, these cases are rather difficult to prove, particularly since the Sutton v. United Airlines ruling
where the Supreme Court greatly restricted the definition of disability. In fact, studies (Colker, 1999; Diller, 2000) reveal that employers now prevail in 84-92 percent of all disability lawsuits.

This high failure record by plaintiffs is primarily due to the stipulation in the EEOC regulations and by the Supreme Court in both Sutton and Murphy (Vaughn Murphy v. United Parcel Service) that an impairment must be perceived, however mistakenly, to substantially limit one or more major life activities, "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working (EEOC regulations)."

In the overwhelming majority of these cases, the employer misperceives that the individual cannot perform the job (major life activity of working) and then frequently changes their employment in some manner to their detriment. However, in order to be perceived as too impaired to work, the person must be considered incapable of performing a broad class of jobs and not just one particular public job held or coveted by the person (Sutton v. United Airlines, Vaughn Murphy v. United Postal Service).

Sorensen v. University of Utah Hospital is a typical case. In Sorensen, Ms. Sorensen was diagnosed with Multiple Sclerosis (MS) and after missing work for five days obtained a medical release to resume her regular duties as an AirMed Flight Nurse. The medical supervisor was quite concerned about the safety of patients and the risks involved by allowing Ms. Sorensen to return. She said we will not protect anyone who would not suffer another MS episode at work. Consequently, she was provided additional positions in the hospital (burn unit, intensive care and emergency room) that would eliminate the risks involved with her condition. In finding in favor of the hospital, the appeals court declared, "While the hospital did regard Ms. Sorensen as unable to perform one particular job, it is in no way regarded her as unable to perform a broad class of jobs (Laura Sorensen v. University of Utah Hospital)."

In many of these cases, as in the one above, the company generally reassigns or offers the impaired worker other positions within the organization. In Avery, the Omaha Power District transferred Avery from his "safety sensitive" job as a senior nuclear operator to a non-safety sensitive position after management discovered that he was using alcohol. The act of providing or offering the affected individual another position shows that the firm does not consider the person unable to perform a broad class of jobs and hence does not meet the legal standard under the major life activity of working (Phillip Avery v. Omaha Power District). As a result, Omaha Power received a favorable judgment.

**ACTIONS THAT REGARD A WORKER AS DISABLED**

Provided that management has constructive knowledge of an impairment, there are several ways management can be found to be regarding someone as disabled. In at least one instance, even though the disability was 100 percent controllable through medication, transferring an asthmatic to another job because the company did not believe the asthma was controllable (affecting the major life activity of breathing) was enough for the courts to decide that the company regarded the individual as disabled (Riemer v. Illinois Department of Transportation).

As in the case described above, the key to proving management illegally regards a person as disabled is through providing objective evidence that company officials harbor misconceptions, stereotypes or misbeliefs about the said individual and then acting on those misconceptions to the person's detriment (EEOC regulations, Sutton v. United Airlines). However, this point has proved to be relatively difficult to demonstrate. In fact, the authors found comparably few cases where the courts have established that the company regarded the employee as disabled and then acted in a discriminatory manner.

In reviewing these cases, the victim was able to prevail in most situations by demonstrating that management ignored medical evaluations or failed to seek such advice. Accordingly, any actions then taken by company officials were based on misconception, stereotypes, or misbeliefs concerning their particular impairment.

In an early case, the Supreme Court, where it recognized someone could be regarded as handicapped, found in favor of an elementary teacher who had been successfully treated for tuberculosis but was terminated due to fears by school authorities and parents that she was contagious. However, medical evaluations noted the risk was small and there were ways to reduce the risk even further (Nassau County v. Arline). Moreover in Arline, the Supreme Court specifically required medical judgments be sought and followed regarding the disability cases.

In another illustrative case, supervision acted unlawfully (termination) when they mistakenly believed that a salesman suffering from a heart attack would not be able to return to work within four to five months even though his doctor had notified the company he would be able to recover within this time period (Steven Weissman v. Dawn Joy Fashions).

Likewise, one manager, after experiencing a remission in her cancer, was certified by her doctors as having a positive prognosis for recovery and cleared her to work even though she was still undergoing periodic treatment (these were scheduled on her off days). Nevertheless, she was demoted and her salary reduced by half because her superiors felt she could not positively do her job due to the ongoing cancer treatment. This action was ample evidence to convince the courts that the firm viewed her as handicapped and had unlawfully affected her employment (EEOC v. R.J. Gallagher).

In a related action, Browning-Ferris illegally discharged an employee with Crohn's Disease, a type of inflammatory disease, because it believed the employee would not be able to work around waste (the nature of work was waste disposal) despite her own physician's release to the contrary (EEOC v. Browning-Ferris). It is important to note in this case that "waste work" was found by the court to encompass a broad class of jobs.

Even employer mistakes in reading a medical evaluation can be problematic in court. In Taylor v. Pathmark, Taylor was terminated even though the attending physician had notified the company that Taylor's ankle problem was only temporary.
and subject to short-term work restrictions. Apparently, the company mistakenly read the medical evaluation form to read that the work restrictions were permanent and informed Taylor of such. Taylor’s attempts to rectify the miscommunication went unheeded. In fact, he was told by his former manager that, "I don’t care (Joseph Taylor v. Pathmark Stores)." Even though an "honest" mistake, the courts judged the company actions to be such that it regarded Taylor as disabled and had illegally ended his employment.

Well intentioned actions can also go awry. In Gibson v. Wal-Mart, a stroke patient was released to work without restrictions. However, in a well-meaning effort to help the unfortunate worker, Wal-Mart, after observing Gibson breathing heavily during his first day back to work, offered him several other positions that were thought to be less strenuous and have much less impact on his health (also lesser jobs). The employee sued on the basis that Wal-Mart deemed him disabled since it felt that his major life activity of breathing was substantially impaired. The Sixth Circuit in reversing a lower court’s summary judgment for the defendant agreed that these offers were sufficient evidence to convince a jury that Wal-Mart regarded Gibson as disabled (Clifton Gibson v. Wal-Mart).

In a somewhat bizarre case, a clinic administrator was fired for poor performance one month after he had notified his employer that he had lymphoma (symptoms had not yet manifested themselves). Apparently his performance deficiencies had been fabricated due to his supervisor’s past experience with a former employee whose performance had been affected by the disease. This past experience with a former lymphomatous employee was sufficient to convince an appeals court that a jury could find that the employer regarded the administrator as disabled (Heyman v. Queens Village). In fact, fabricating evidence or attempting "to get" (in this case non-renewal of his contract) an employee who exhibits an impairment such as slurring of speech and walking unsteadily due to an automobile accident (but cleared to work as an instructor by a physician) is enough to show that the employer perceived him as disabled (Melinnis v. Alamo Community College).

Similarly, in Harris v. H & W Contracting Company, a lady suffering from Graves' disease experienced a "panic attack" due to an error in the manufacture of the drug controlling the disease but was told to find another job as comptroller even though she had an unrestricted work release. Management provided no reason for her termination but the manager in charge did admit in court that Ms. Harris had been a good employee for sixteen years. Consequently, the courts found that Ms. Harris’s termination without cause so soon after her "panic attack" was enough to demonstrate that company management illegally regarded her as disabled (Ellen Harris v. H & W Contracting Company).

RECOMMENDATIONS

After reviewing the legal record, a number of guiding principles and recommendations emerge. First, management personnel must be aware of an impairment that could limit a major activity of an employee or potential employee. Mere knowledge of a person’s actions or behavior such as doctor appointments, illness, or condition (e.g., bad back) that could be associated with impairment does not demonstrate knowledge of a disability (Morisky v. Broward County).

Next, management should seek medical advice and closely follow the recommendations. Should there be a mistake in reading the evaluation, the company must rectify the mistake. Moreover, whenever company officials question the physician’s assessment, the company should seek other medical opinions. Federal statute and the courts normally allow second opinions at the company’s own expense.

In line with Arline, organizations should take full advantage of the law and order medical evaluations when there is any doubt of a person's ability to perform the job. Such actions do not constitute regarding an individual as disabled. Besides, following medical evaluations actually protects the company from many lawsuits (Jowers v. GTE). In Jowers v. GTE, for example, Jowers suffered a back injury and was subsequently released to work under certain lifting restrictions, which caused him to be unable to perform the essential functions of his job. The company placed him on medical leave and gave him thirty days to transfer to another position. Jowers did not meet the technical definition of disability but he argues that the company’s conduct toward him showed that it regarded him as disabled. The courts disagreed in that the company was simply complying with the doctor’s orders (Robert Jowers v. GTE).

Absent a medical evaluation, firms can preclude employees from performing a particular job in most situations, but should transfer or at least offer the person involved another job within the company. This action will protect companies from most common suit by plaintiffs where they allege the company views them as incapable of the major life activity of "working."

However, the best course of action is to first always obtain a medical evaluation before changing a worker’s employment. This strategy is an especially sound course of action when major life activities other than "working" are affected. Not ordering a medical or psychological appraisal in these situations will tend to produce negative court results.

Management also should refrain from derogatory or demeaning remarks concerning a person’s impairment. Even though these remarks by themselves do not constitute regarding a person as disabled, it does affect a person’s morale and inclination to sue the company.

CONCLUSIONS

When proving that an employer regards someone as disabled, from a legal standpoint it is less important what a company says and more important how it actually treats the impaired person. If employers would utilize and follow qualified medical evaluations and treat the potentially disabled person in a humane and dignified manner, employers should experience little or no legal problems in this area.
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Book Review continued from page 5

crashes are historically correlated with sharp declines in GDP and employment, as with Mexico in 1995-99 and Southeast Asia from 1997 to present, abrupt currency account reversals from deficit to surplus are not. Thus, developing countries need to institute the policies necessary to insure that macroeconomic stability is in place so as to prevent sudden and sharp currency devaluations and to be less concerned with current account deficits.

The last two papers in this volume by Jeffrey Frenkel and Peter Kenen are the minutes of panel discussions centering on the Asian crisis and the moral hazard created by the IMF bailout.

In conclusion, the decade of the 1990's has produced a major reappraisal of the causes and impacts of currency crises. As more countries link their economies through multilateral trading institutions such as the World Trade Organization, and as regional trade blocs continue to expand, e.g., the EU admission of nations from Eastern Europe and the creation of the Free Trade Area of the Americas in the Western Hemisphere, the contagion effect of the collapse of one currency on others will only escalate. The papers in this volume represent the latest thinking on these crises, "...captured at a moment in which some of the best minds in economics were focused on the theory and practice of speculative attacks on currency," p. 6. In that all nations and their respective citizens stand to gain from freer international trade, it behooves the interested reader to peruse what these "best minds" have to say on a very relevant economic issue.

REFERENCES


