

PERCEPTION IS REALITY . . . AND PERHAPS LIABILITY

BY DALLAS D. JONES



Dallas D. Jones

Nearly every employer is aware that the Americans with Disabilities Act (ADA) prohibits employers from discriminating against individuals on the basis of a physical or mental impairment that substantially limits one or more of the individual's major life activities. However, did you know that the ADA also prohibits discrimination against individuals whom the employer *regards* as having such an impairment? According to the Equal Employment Opportunity Commission (EEOC), so-called "regarded as" claims were the most frequent ADA claims made by employees in 2006.

Congress defined a protected "disability" to include "being regarded as disabled" because it recognized that the discrimination suffered by individuals who are regarded as disabled is the functional equivalent to the discrimination suffered by those who are in fact disabled by virtue of their conditions. An individual may be regarded as disabled if she has an impairment which is not substantially limiting but which the employer *perceives* as substantially limiting. Such an individual would be entitled to relief under the ADA because her employer's *attitude* toward her conditionally limits her opportunities. Thus, while the focus of the typical claim is on the impairment of the applicant/employee, the focus in a "regarded as" claim is on the *perceptions* of the employer. "Regarded as" claims come about in three ways.

Regarded as Having a Substantially Limiting Condition

An individual may be regarded as disabled if he has an impairment which is not substantially limiting but which the employer *perceives* is a substantially limiting impairment. For example, an employee who is able to control his high blood pressure has an impairment. Because he is able to control the high blood pressure, it is not substantially limiting. If his employer fears that he may suffer a stroke if he continues to perform a particular job, and therefore reassigns the employee to less strenuous work, the employee would be regarded as disabled because of the employer's *perception*.

Substantially Limited by the Attitudes of Others

An individual may establish that he is regarded as disabled under the ADA by showing that he has an impairment that is substantially

limiting only because of the attitudes of others. For example, an impairment such as facial disfigurement does not substantially limit a major life activity. But it does so indirectly if the employer discriminates against that individual for fear of the negative reactions customers might have to the disfigurement.

Not Impaired but Regarded as Such

An individual may be regarded as disabled if he does not suffer from any impairment at all, but is nevertheless regarded by his employer as substantially limited in a major life activity. For example, an individual who is discharged because of a false rumor that he suffers from HIV would be protected by the ADA.

The best evidence as to what one thinks is what one says. Accordingly, the most obvious form of evidence used to establish that an employer regards an applicant or employee as being substantially limited are statements the employer has made in the course of his or her interactions with that individual. For example, one well-meaning expression of concern by a manager about the future attendance and performance of an employee with cancer may be sufficient to prove that the employee's subsequent termination from employment was because the employer regarded the employee as disabled.

The next best evidence as to what one thinks is what one does. For example, consider a manager who received a bonus every year prior to developing some low back problems, did not receive a bonus afterwards, and was referred to by management as a problem employee and a "back case." The employee would likely have a claim that would at least enable him to get his case heard by a jury as to whether his termination from employment was because the employer regarded him as disabled.

The "regarded as" prong of the ADA is one which employers can unknowingly violate. One negative, sarcastic or insensitive comment may be enough to enable an employee to prove that the employer *perceives* him as being disabled. Employers must be mindful that not only are individuals with substantially limiting impairments, or a record of such impairments, protected by the ADA, so too are those individuals who are *perceived* by the employer as having such an impairment.

PROPOSED AMENDMENT TO LAW ON VACATION PAY AND COMMISSIONS

BY GAIL S. PERRY



Gail S. Perry

"Vacation pay" and "commissions" have been the subject line of a lot of email communication between employers and their lawyers and business organizations and legislative representatives after the *Roseland* and *Sanford* cases last fall. Both cases created unexpected liability for employers when cutting the final paychecks for former employees.

Employers have been asking how to amend their payroll practices, employee handbooks and employment compensation agreements given what the Nebraska Supreme Court said about commissions (earned future commissions are wages and are not forfeited upon termination) and vacation pay (accrued unused vacation leave is not forfeited upon termination).

After the proposal of several bills in the Nebraska Unicameral and after much discussion, LB 255 is ready for final reading as of the time of this printing. For the final language and/or legislative action, see our website at www.bayloreven.com.

If LB 255 passes in its present form, employers can expect the Nebraska Wage Payment and Collection Act to include the following changes:

1. Earned but unused vacation leave will still be part of the wages due and payable at the time of separation, but all other fringe benefits, including other kinds of paid leave, are not included in wages payable.

2. The employer and employee may timely agree (at the commencement of employment or 90 days prior to separation, whichever is later) to alter the statutory definition of commission and when it is paid. Otherwise, wages include commissions on all orders delivered and all orders on file with the employer at the time of the separation of employment, less any orders returned or canceled at the time suit is filed.

3. Unpaid wages constituting commissions are due on the next regular payday following the employer's receipt of payment for the goods or services which generated the commissions. Employers must provide the employee an accounting of outstanding commissions until they have

been paid, or orders returned or canceled by the customer.

4. The law as amended would be effective when passed.

VACATION PAY:

Employers who have allowed uncapped accrual of vacation under a "use it or lose it" policy will still have the liability of paying for those hours at some point. Some employers are clearing those hours off the books by paying out the balances at year end or in installments to avoid large payouts dictated by the timing of employee terminations or retirements. Many employers are instituting leave policies where employees stop earning additional time until leave is used and the balance goes below the cap.

If the statute is amended in the bill's current form, there will be some incentive to distinguish sick leave from vacation leave, reversing a trend to provide "personal leave" and avoid personal issues of the employee's health and wellness.

COMMISSION:

The proposed amendments to the commission sections of the Act provide needed clarification and recognition of the reality of commission sales. For example, commissions are commonly payable upon payment by the customer, they are often subject to reduction because of returns, cancellation or non-payment, and the former employee needs information to know what to expect for payment.

Perhaps most important, the proposed amendments recognize that what the employer and employee agree upon in terms of commission compensation ought to control over the statutory definition. Thus if the bill passes, that agreement would be recognized. Wise employers will put the commission structure into a written document for signature by both employer and employee, without accidentally creating a contract that may interfere inadvertently with the "employment-at-will" employee status recognized under Nebraska law.



WELLS FARGO CENTER

1248 "O" STREET, SUITE 600

LINCOLN, NEBRASKA 68508

PHONE: 402.475.1075

FAX: 402.475.9515

EMAIL: INFO@BAYLOREVNEN.COM

WWW.BAYLOREVNEN.COM

Q & A

Q. We employ an Information Technology (IT) support specialist. Does she automatically qualify for the computer employee exemption of the Fair Labor Standards Act (FLSA)?

A. Certain IT specialists can qualify as exempt professionals from both minimum wage and overtime pay provisions of the FLSA. The employee must be paid on either a salary or fee basis at a weekly rate not less than \$455 or hourly rate not less than \$27.63. The specialist's "primary duty" must include systems analysis and consultation with users to determine hardware, software, or system specifications; design or development of computer systems or programs based on user or system design specifications; design or modification of computer programs related to machine operating systems; or a combination of these activities. Employees whose work is highly dependent upon the use of computers and computer software programs but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations are not exempt computer professionals. Thus, if your IT specialist installs and configures computers and performs associated tests and troubleshooting, but does not engage in the additional skills involving systems analysis or programming, the employee is likely covered by the minimum wage and overtime provisions of the FLSA.