NOVEMBER 21, 2019

SIXTH CIRCUIT RULES "SMOKING GUN" EMAIL MAY SHOW EMPLOYEE "REGARDED AS" DISABLED WAS FIRED UNDER FALSE PRETEXT

On November 6, the Sixth Circuit Court of Appeals clarified the standard to establish a claim under the "regarded as" prong of discrimination under the Americans with Disabilities Act ("ADA") and explained the type of evidence that supports an inference that an employer's reasons for an employee's termination are "pretextual" and actually motivated by discrimination.

FACTUAL BACKGROUND

A nurse anesthetist, Paula E. Babb, insisted her former employer ("Employer"), a Tennessee-based anesthesiology group, "fired her because it thought she was visually disabled, even though, in reality, she is not visually disabled." The Employer, however, argued that the sole reason for Babb's termination was clinical errors wholly unrelated to her degenerative eye condition.

Babb began working at the company in June of 2015. Approximately a month into her employment, a physician owner observing Babb allegedly asked her why she was "'placing her face very close to a computer screen.'" Babb claimed that she had a "degenerative retinal condition" that made it hard for her to read certain screens and medical records but reassured the owner the condition did not affect her ability to perform her job duties. According to Babb, the condition merely meant she needed to hold written records "'close to [her] eyes'" to be able to read them. It did not inhibit her ability to read medical records as a matter of course, or impact her ability "'to perform anesthesiology.'" Shortly after this dialogue, two other individuals reported similar concerns about Babb's vision.

In October 2015, a little over four months into Babb's employment, Babb met with the physician-owners at the company about their concerns. At the meeting, ownership allegedly asked Babb to consult her ophthalmologist and report back, while reassuring her, vision issues notwithstanding, she was a "'good fit'" and "'doing well."' They went on, Babb claimed, to ask her if she had "'disability insurance'" because "'she might have a disability.'"

After the meeting, the physician-owners had an internal email conversation where they acknowledged they "'all kn[e]w that'" an ophthalmologist couldn't issue an opinion definitively "'clearing'" Babb to practice anesthesiology (because ophthalmologists generally do not make those kinds of calls), Babb's situation might require them to "'talk to [their] attorney.'" In the months that followed, Babb's apparent vision problems appeared even more acute to her colleagues, who were instructed by management to assist Babb with reading charts to ensure she was not misreading vital signs.

In January, approximately seven months into her employment, Babb was fired. The Employer maintained the basis for termination was "'clinical errors'" which demonstrated that "'[Babb] could not provide safe and appropriate patient care.'" Specifically, the Employer cited two occasions occurring in her first and last month of Babb's employment respectively; an incident where Babb had apparently woken up a patient too early, and another occasion where a patient she treated had an allegedly high number of twitches, suggesting insufficient paralysis of the patient pre-surgery.

THE LAWSUIT

Babb brought suit against her employer in the Eastern District of Tennessee. The district court had granted summary judgment in favor of the defendant Employer for lack of evidence in support of Babb's claim that she was fired for her perceived disability. The Court of Appeals reversed, finding that, among other issues, there was a "genuine dispute of fact" as to (1) whether the Employer "regarded" Babb as disabled; and (2) the clinical errors were just a pretext for terminating Babb because of her disability.

"REGARDED-AS" DISABLED UNDER THE ADA

The ADA prohibits a covered employer from discriminating against an employee because the employee is disabled because the employee has a record of being disabled, *or* because the employer "regards" the employee as disabled.

The Court clarified that to make a "regarded as" claim under the ADA, an employee need only show that their employer believed they had a "physical or mental impairment," whether or not the purported impairment qualifies as a disability under the ADA. The employer may then rebut this showing by proving "that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived

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impairment) both transitory and minor."

In Babb's case, according to the Court, there was plenty of evidence that the Employer was concerned about vision issues and that Babb's former employer "regarded" her as disabled.

PRETEXTUAL FIRING

On the issue of pretext, the Employer argued that even if Babb's clinical errors were not as serious as they had thought, the honest belief rule protects the employer because it "reasonably and honestly relies on particularized facts in making an employment decision." The Court clarified that an employee can overcome this argument by showing "the employer failed to make a reasonably informed and considered decision before taking its adverse employment action." In Babb's case, expert testimony cast significant doubt as to whether an anesthesiology practice would have fired a clinician for the types of clinical errors attributed to Babb.

Significantly, an "even more glaring" factual dispute precluded summary judgment: a "smoking gun" email sent by a first-year CRNA informing all other nurses that Babb's failure to "'provide documentation from her eye specialist saying that she was safe to practice,'" due to "'major issues with her eyesight,'" "'in addition to a few other issues,'" "'ha[d] forced the group'" to terminate her. This email created a question of fact as to whether clinical errors "actually motivated" Babb's termination. In its defense, the Employer argued that the email did not create a factual dispute since it was sent by a colleague, not an owner and because it sounded in "'rumor and innuendo.'" The Court flatly rejected this argument, finding that the email was sent at the direction of an owner and that "[i]f this kind of 'smoking gun' evidence cannot get an employment discrimination plaintiff past summary judgment on the question of pretext, it is hard to imagine what could."

PRACTICAL TAKEAWAYS

This decision touches on several significant issues that are important to employers in all industries, and particularly health care:

- In the words of the Sixth Circuit – under the ADA, "your employer can't fire you because they *think* you are disabled, even if, in fact, you are *not* "
- While requesting medical evaluation or clearance for employees operating in a clinical setting is not a "per se" violation of the ADA if the examination "is shown to be job-related and consistent with business necessity," employers should remain extremely cautious and aware of the situations giving rise to such requests as they may create a case for liability.
- Personnel records should reflect all incidents and observations that may form the basis for termination, notably, had the employer in *Babb* documented the clinical errors and brought them to the plaintiff's attention when they had occurred, a "pretextual" termination argument would be far less convincing.
- Communications by non-managerial employees made at the behest of supervisors can be considered as factual support for termination/employment-related decisions.

If you have any questions or would like additional information, please contact:

- Saniya Khare at (248) 457-7852 or skhare@hallrender.com;
- Jon Rabin at (248) 457-7835 or jrabin@hallrender.com; or
- Your regular Hall Render attorney.

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