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In *Gelfo v. Lockheed Martin Corporation*, No. B178676 (June 2, 2006), the California Court of Appeal for the Second District held for the first time that California employers must engage in the “interactive process” with, and potentially reasonably accommodate, workers who are “regarded as” disabled. The case underscores the importance of making informed decisions based upon a worker’s inability to safely perform “essential job functions.”

California Edition

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The Importance of Getting It Right: Court Rules Reasonable Accommodation Must be Provided to Workers “Regarded As” Disabled

By Margaret Hart Edwards and Rod M. Fliegel

On June 2, 2006, in *Gelfo v. Lockheed Martin Corporation*, No. B178676 (June 2, 2006), the California Court of Appeal for the Second District decided that an employer who “regards” a worker as “disabled,” even when that worker is not actually disabled, owes the worker two duties under the California Fair Employment and Housing Act (FEHA): (1) the duty to conduct an interactive dialogue about potential accommodations; and (2) the duty to provide “reasonable accommodation.” In so deciding, the court ruled on a question with mixed outcomes is unsettled under the Americans with Disabilities Act (ADA), and had not been previously addressed in any published California state court decisions.

Factual Background

The facts of the case illustrate the kind of fix the employer was in. The plaintiff, Charles Gelfo, had a work-related back injury resulting in significant restrictions on his ability to lift, bend, sit, twist, etc. While Gelfo’s claim for workers’ compensation benefits was pending, he was laid off by Lockheed as part of a reduction in force. During the period Gelfo was eligible for recall, Gelfo accepted and fully completed training from Lockheed as a plastic parts fabricator and assembler. At this point, he was feeling well, believed he had no restrictions, but on the advice of his workers’ compensation attorney, was not providing Lockheed with a “release” from his previous doctor-imposed work restrictions. At the end of the training class, Lockheed offered Gelfo a job as a plastic parts fabricator. Two days later, Lockheed revoked the offer, based on a review of its file showing that Gelfo had medical restrictions that, according to the workers’ compensation doctor, would

prevent him from performing the “essential functions” of the fabricator position. Gelfo told Lockheed that he felt fine, no longer had any restrictions, and had a full release to return to work, but that his attorney told him not to share it with Lockheed. Lockheed then determined that it could not accommodate all of the restrictions it understood Gelfo to have and asked Gelfo if he was aware of accommodations that would allow him to perform essential functions, consistent with his medical restrictions. Gelfo insisted that he could do the job, but did not provide any medical evidence lifting his restrictions. Lockheed stuck to its understanding that Gelfo could not perform the essential functions of the job, and he was not re-hired. Gelfo sued solely under California law for disability discrimination, failure to reasonably accommodate, and failure to engage in what is known as the “interactive process.”

At the conclusion of the evidence in a six-day jury trial, the trial court granted a directed verdict to Lockheed on all claims, except whether Lockheed violated FEHA by refusing to rehire Gelfo because it regarded him as having a disability. That claim was submitted to the jury with a jury instruction stating that Gelfo had the burden to prove that Lockheed “mistakenly believed Plaintiff’s low back injury limited his ability to work,” and that “Plaintiff was able to perform the essential job duties.” The special verdict form asked: “Did Defendant mistakenly believe that Plaintiff’s low back injury limited his ability to work?” The jury answered this question, “No.”

Reversing, in part, the court of appeal ruled that the trial court erred by putting to the jury the question of whether Lockheed regarded

Gelfo as disabled. The court of appeal reasoned that Lockheed had admitted as much during the course of the case, by stating that its decision not to hire Gelfo was based on its belief that his medical restrictions rendered him unable to perform the essential functions of the fabricator job. This issue should not have been submitted to the jury, the court said, but decided by the trial court judge and in favor of Gelfo. This error was compounded, said the court, by the erroneous jury instruction and confusing verdict form. The court found the jury instruction was prejudicial error for two reasons. First, because the instruction used the word “mistakenly,” it wrongly imposed on Gelfo the duty to prove *both* that Lockheed believed him disabled and that the belief in fact was mistaken. The court held the only element that Gelfo had to prove was that Lockheed believed he was disabled, not that Lockheed was mistaken. The court reached this finding in spite of the language of section 12926.1(d) of the FEHA, which states that the Legislature intended “to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.”

The second reason the court found the jury instruction was prejudicial error, was because a plaintiff does not have the burden of proving he or she is able to perform essential functions where the claim is that he or she is regarded as having a disability. The court noted that is only a burden that exists in claims based on *actual* disability.

The court found the special verdict form fatally ambiguous because it could be construed to ask whether Lockheed was mistaken in believing Gelfo’s back injury limited his ability to work as a fabricator, based on two mutually exclusive different states of the facts: (1) that Gelfo did in fact have a physical limitation that limited him, and (2) that he did not.

The appeals court then considered whether the directed verdict was proper on Gelfo’s claims for failure to accommodate and failure to engage in the interactive process. Reviewing the federal case law under the ADA on the former question, and noting a split in the federal circuit courts, the court chose to side against the Eighth and Ninth Circuits, and with the First, Third, Tenth, Eleventh, and to a limited extent Second Circuit, finding persuasive

the reasoning in *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005). It quoted a telling passage from *Williams*, “an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees’ capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.”

The *Gelfo* court was not troubled by the bizarre result that a person who has no impairment, like Gelfo, is entitled to reasonable accommodation of his or her nonexistent impairment. The court found that the statutory language of FEHA and the ADA furnished no reason to treat a person regarded as disabled differently from one who is, in fact, disabled.

Having found that the duty exists to provide reasonable accommodation, the court made short work of finding the duty to engage in the interactive process likewise exists. The court noted this is an independent basis of liability under FEHA. To reach this conclusion, the court had to add an imaginative construction to the word “known,” as FEHA only imposes the duty to conduct an interactive process with an employee or applicant with a “known ... disability.” The court decided that “known” means when the employer is aware, has information, or when the employer perceives a disability, whether mistaken or not.

Practical Implications of the Court’s Decision

This case will influence how plaintiffs plead and prove liability in future cases, as it makes the plaintiff’s burden of proof fairly simple, and suggests that the trial court must find that an employer regarded a plaintiff as having a disability when the employer made a personnel decision based solely on that belief. The case is a warning to employers who make decisions relying on old medical information, when that information is contradicted by the more recent statements of the employee or applicant about his or her condition. In effect, the employer ignores recent nonmedical information at its peril. Even when the employee or applicant refuses to provide up to date medi-

cal information, if the employer relies on the older information (presumably on some safety theory), the applicant or employee may be able to pursue a claim under a “regarded as” disability theory.

Tips for Employers

1. Do not assume a medical report for workers’ compensation purposes answers the legally separate questions of whether an individual can perform essential functions of the job with or without reasonable accommodation.
2. When the employee says he or she has no restrictions, and this contradicts an older medical report, the employer should obtain and rely on more current medical information.
3. Employers should be very cautious about refusing someone a job because the employer believes the person cannot perform the essential functions of the position in question.

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