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Appellate Court Finds Connecticut Fair Employment Practices Act Does Not Prohibit Employers from Discriminating Against Employees Perceived as Physically Disabled, if They Are Not Disabled

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The Connecticut Fair Employment Practices Act (CFEPA) prohibits discrimination based on an employee's physical disability, and provides a broad definition as to what constitutes a physical disability. While the federal Americans with Disabilities Act (ADA) explicitly forbids discrimination against employees who are actually impaired, and against employees who are "regarded as" or perceived as disabled,[1] there has been disagreement between the federal and state courts in Connecticut as to whether "perceived as" disability claims are valid under the CFEPA.[2] In *Desrosiers v. Diageo North America, Inc.*,[3] a Connecticut appellate court recently resolved this disagreement, finding that the CFEPA does not authorize claims of discrimination based on a perceived, but not actual, physical disability.

Factual Background

Mireille Desrosiers worked for Diageo North America, Inc. (Diageo). In 2001, Diageo merged with another company and Desrosiers' position was consequently eliminated. Diageo transferred Desrosiers to a new position, but she struggled in it. During the next several years, her performance progressively deteriorated. She was put on a performance improvement plan in September 2004. Two months later, Desrosiers met with her supervisor. According to Desrosiers, he told her that "her progress was satisfactory" and "she was no longer in need of the performance improvement plan." Upon returning to work from a two-week vacation in January 2005, she told her supervisor she "need[ed] to take time off from work to undergo surgery for a tumor on her right shoulder." The following day, Diageo terminated Desrosiers' employment because she failed to improve her performance.

1 *See* 42 U.S.C. § 12102(1)(C) & 3(A).

2 *Compare Beason v. United Techs. Corp.*, 337 F.3d 271, 279-82 (2d Cir. 2003) (concluding that Connecticut law does not provide a cause of action for discrimination based on a perceived physical disability), and *Setkoski v. Univ. of Conn. Health Care Center*, 2012 Conn. Super. LEXIS 1264, at **9-10 (May 10, 2012) (stating that a cause of action based on a perceived disability is not a legally recognized action in Connecticut), *with Graham v. Boehringer Ingelheim Pharms.*, 2007 Conn. Super. LEXIS 2816, at **30-31 (Oct. 19, 2007) (finding support for perceived physical disability claim based on agency interpretation of CFEPA), and *Young v. Precision Metal Products*, 599 F. Supp. 2d. 216, 228 n.1 (D. Conn. 2009) (disagreeing with the *Beason* court).

3 137 Conn. App. 446 (Aug. 14, 2012).

Desrosiers brought suit against Diageo. She claimed, among other things, that she was discriminated against based upon her physical disability and/or perceived physical disability. The trial court dismissed the latter claim on the grounds that "a cause of action based on a perceived disability is not a legally recognized action in Connecticut."[4] After a jury returned a verdict in favor of Diageo on the disability discrimination claim, Desrosiers appealed that decision, arguing that Connecticut General Statutes section 46a-60(a) prohibits employers from discriminating against employees based upon a perceived physical disability.[5]

Connecticut Appellate Court's Decision

The appellate court affirmed the trial court's decision, finding the statute was "clear and unambiguous" in not authorizing a claim for discrimination based upon a "perceived" physical disability. Seeing no need to consider the law's legislative history, the appellate court focused on the statutory definition of physically disabled as "any individual who ***has*** any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device . . . ."[6] The court found that the use of "has" in the definition "evince[d] the [state legislature's] intent to protect those who actually suffer from some type of handicap, infirmity or impairment, not those whose employer may incorrectly regard as being disabled."

The appellate court also noted that the legislature included the phrase "regarded as" in the CFEPA's definition of "mental disability," but omitted it from the definition of "physical disability." Recognizing this distinction, the court stated:

"[I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous . . . . Put differently, [t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings . . . ."

Because the legislature did not include "regarded as" or "perceived as" in the definition of "physical disability," the appellate court held that it "clear[ly] and unambiguous[ly]" did not intend for the CFEPA to prohibit discrimination based upon a perceived physical disability.

Possible Appeal or Legislative Fix?

The *Desrosiers* decision makes an interesting counterpoint to the decision of the Connecticut Supreme Court in *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390 (2008), which held that the CFEPA implicitly requires employers to provide reasonable accommodations to disabled workers. In *Curry*, the Connecticut Supreme Court followed a longstanding interpretation of the Connecticut Commission on Human Rights and Opportunities (CHRO) that the CFEPA implicitly imposes a duty to accommodate in the statutory prohibition against discrimination based upon physical disability. In *Desrosiers*, the appellate court rejected a similar, longstanding view of the CHRO that the CFEPA also implicitly bans "perceived as" physical discrimination.

Although the appellate court's textual analysis of the CFEPA is compelling, the Connecticut Supreme Court may rule differently if it considers *Desrosiers* on appeal. Alternatively, the exceedingly employee-friendly majority in the Connecticut General Assembly may consider legislation to negate the decision in *Desrosiers* by adding "perceived as" language to the CFEPA's definition of "physical disability."

What this Means for Employers

Barring reversal through appeal or legislative action, the practical effect of the Desrosiers decision will be mainly on small Connecticut employers with 3 to 14 employees as they are subject to the requirements of the CFEPA, but not the ADA, which prohibits larger employers from discriminating against employees because of a perceived physical disability. For larger employers, the appellate court's decision in Desrosiers serves primarily as a reminder that discriminating against an individual perceived as disabled violates the ADA even if the individual is not actually disabled.

4 *Desrosiers v. Diageo N. Am., Inc.*, 2010 Conn. Super. LEXIS 2267, at **23-24 (Sept. 9, 2010).

5 Section 46a-60(a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness . . . .".

6 Conn. Gen. Stat. § 46a-51(15) (emphasis added).

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