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Does the ADA Protect Employees from Discrimination Based on Potential Future Disabilities?

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The Americans with Disabilities Act (ADA) does not protect employees from discrimination based on potential future disabilities, according to a recent ruling by the 11th Circuit Court of Appeals, which covers Florida, Georgia, and Alabama. However, employers in other parts of the country should be more cautious. For example, federal courts in Illinois reached the opposite conclusion holding that an employee may be protected from discrimination based on potential disabilities. Additionally, recent amendments to the Illinois Human Rights Act protect employees from discrimination based on "perceived" disabilities.

The 11th Circuit case involved an employee of a massage studio who requested time-off to visit her sister in Ghana during the Ebola outbreak in 2014. Although her request was initially approved, one of the owners of the studio later told her that she would be fired if she went on her trip. The owner was concerned that she would be infected with the Ebola virus while there (even though there was no Ebola outbreak in Ghana), would bring it home with her, and infect others. The employee refused to cancel her trip and was terminated.

The EEOC filed a lawsuit in federal court claiming that the employer violated the ADA by terminating

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the employee because it regarded her as disabled. The EEOC later moved to amend its complaint to add claims that the employer interfered with the employee's right to an accommodation if she had developed Ebola and her right to associate with disabled people, specifically, people in Ghana with Ebola. The court dismissed the case, holding that an employee cannot be "regarded as" disabled because the employer perceives the employee to be healthy but with the potential to become disabled in the future due to voluntary conduct. It also found that employee had no rights under the ADA when she was fired because she was not disabled at the time and had not associated with anyone who was disabled.

On appeal, the Eleventh Circuit affirmed the decision, finding that the ADA does not protect individuals with a potential future disability. It also affirmed the dismissal of the associational discrimination claim on the ground that the EEOC did not allege that the employer knew that the employee had an association with a specific disabled individual in Ghana. The court found that the EEOC's allegation that the employer believed that she might come into contact with unknown people who might have Ebola was too attenuated to sustain a claim.

Although the 11th Circuit decision is good news for employers, one of the judges on the Eleventh Circuit was persuaded by the EEOC's arguments. He dissented, finding that this was "the sort of stereotyping" that the ADA was meant to prevent. He is not alone in this interpretation of the ADA. For example, last year, a federal court in Illinois held that the employer could have discriminated against the plaintiff based on potential disabilities (for example, sleep apnea, diabetes, or heart disease) that he was at risk of developing as a result of his obesity. Another federal court in Illinois similarly held that no reasonable jury could fail to find that the employer regarded the plaintiff as disabled due to its fear that he may develop carpal tunnel syndrome again. Like the dissent in *Lowe*, the court found that this was the

type of stereotyping that the ADA was designed to combat. Moreover, recent amendments to the Illinois Human Rights Act protect employees from discrimination based on "perceived" disabilities. *See Avalanche of New Laws Create Additional Requirements for Illinois Employers*.

Will other courts follow the Eleventh Circuit's example or will they be persuaded by the dissent in Lowe and the decisions by the courts in Illinois? Akerman Labor and Employment attorneys will continue to monitor future developments in this area.
