



## Walton v. U.S. Marshals Service: When Is An Employee "Regarded As" Disabled?

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A recent Ninth Circuit Court of Appeals decision sheds important light on what an employee must show in order to establish that s/he is "regarded as disabled" under the Rehabilitation Act (the "Act"). *Walton v. U.S. Marshals Service*, 476 F.3d 723 (9th Cir. 2007). Fortunately for employers, *Walton* holds that an employer's mere awareness of an employee's impairment is insufficient to satisfy the "regarded as" requirement. Instead, an employee must also prove that the employer believed that the impairment substantially limited her/his major life activities or that s/he was, in fact, so limited.

### What Happened

The employee worked as a court security officer with a private company that provided security to federal courthouses. The company's contract with the court mandated that security officers: (1) undergo annual physical examinations; and (2) meet certain physical requirements determined by the U.S. Marshals Service ("USMS"). The employee failed to meet the mandated hearing requirements during an annual physical examination. Specifically, a USMS doctor responsible for reviewing employee physicals determined that the employee had a significant disparity between her two ears' ability to detect sound, and that this disparity affected her ability to localize sound. Consistent with the company's policy, the employee underwent a second audiological test, which she also failed. Based on the employee's test results, the reviewing doctor concluded that the employee had, in essence, "one functioning ear." He additionally concluded that she was "[n]ot medically qualified to perform the essential functions of the job" based on his determination that she was "unable to detect where sound is coming from." Thus, he concluded, the employee posed "a significant risk to the health and safety of [herself], other law enforcement officers, and the public." Use of a hearing aid would not adequately address her hearing impairment because it "might malfunction or become dislodged in critical situations."

Based on the USMS doctor's conclusions, the company terminated the employee. The employee then sued the USMS under the Act arguing that she was disabled under the Act because she was "regarded as" disabled. The trial court dismissed her claim and concluded that she failed to show that she was disabled under the Act. The employee appealed.

### The Ninth Circuit's Opinion

To be considered as disabled under the Act, an employee must show that s/he: (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is "regarded as" having such an impairment. The issue on appeal before the Ninth Circuit Court of Appeals was whether an employer's mere awareness of an employee's impairment is sufficient to establish that the employee is "regarded as" disabled under the Act (or, under identical standards, under the Americans with Disabilities Act ("ADA")).

The court held that, in order to state a "regarded as" claim, an employee must establish that the employer believes the employee has an impairment *and* either: (1) the employer *subjectively believes* that impairment substantially limits the plaintiff in a major life activity; or (2) the impairment *objectively does limit* a major life activity. As to the employee in *Walton*, the court concluded that, although the employer believed that the employee had a hearing impairment that disqualified her from her current job as a security officer, there was no evidence that the employer *subjectively* believed that she was substantially limited in the major life activities of hearing or working; nor was there evidence that her level of hearing impairment *objectively* limited her in the major life activities of hearing or working. Thus, the court upheld the lower court's dismissal of the employee's claim.

### **What Walton Means For Employers**

*Walton* is good news for employers because it both clarifies and narrows the manner in which an employee may satisfy the "regarded as" requirement of the Act and the ADA. An employee may not rely on an employer's mere *awareness* that s/he has an impairment. Instead, *Walton* makes clear that the employee must go a step further by showing either that: (1) the employer *believes* the impairment to be substantially limiting on one or more of the employee's major life activities; or (2) the employee is, *in fact*, so limited.

The case is an important reminder to employers to:

- Avoid all assumptions about an employee's physical or mental limitations;
- Maintain job descriptions that identify essential job functions and contain physical requirements that are job-related and consistent with business necessity (utilize a job analysis, if necessary);
- Secure a medical assessment of the employee's ability to perform the essential functions of a job from the employee's health care provider and, if necessary, a provider paid for by the employer;
- Take action based upon objective medical evidence, rather than the employer's subjective assessment of, or assumptions about the employee's condition.

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