

Court Says Conn. Workers With 'Perceived Disabilities' Can File Bias Claims

Christian Nolan, The Connecticut Law Tribune

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Until now, only people with actual disabilities could claim they were discriminated against in Connecticut.

But following a state Supreme Court ruling, judges and juries will start hearing claims by plaintiffs alleging that they were discriminated against based on a perceived disability, regardless of whether they are actually disabled.

"I think it's a victory for every employee in the state," said the plaintiff's lawyer, John Bochanis, of Daly, Weihing & Bochanis in Bridgeport. "The same discriminatory act is there, just that one turns out to be true and the other does not. Why shouldn't the employee still be protected?"

The precedent-setting decision came in the employment discrimination case of Mirielle Desrosiers. Desrosiers began working for Fairfield County-based Diageo North America in 1993. She was the only black employee within her department. After working for the company for about a decade, she claims her new boss went out of her way to single her out and pick on her more than her colleagues.

Desrosiers is of Haitian heritage and her boss often complained that she could not understand what Desrosiers was saying. The boss allegedly often made Desrosiers rewrite emails and criticized her communication skills. In the fall of 2004, Desrosiers was placed on a 90-day probationary period following a poor review. She claims she never received poor reviews.

By November 2004, a company manager told her she was no longer on probation and that her work progress was satisfactory. Desrosiers then used the last of her four allotted vacation weeks that year. (Company policy barred vacation time from being carried over into the next year.) On returning to work, Desrosiers told her manager that she needed surgery on a tumor in her right shoulder. She asked if a date in January 2005 was OK; her supervisor said it was.

The next day, the supervisor let Desrosiers leave early to pick up her child, whose school had early dismissal because of inclement weather. The boss asked Desrosiers to call into work once she got home. When Desrosiers did so, she was fired over the phone.

In a meeting after the termination, a human resources representative told Desrosiers that she was fired for not successfully completing her probationary period. Desrosiers then hired a lawyer and sued the company for discrimination based on race, color, age

and physical disability, including perceived physical disability. The latter allegation was apparently linked to Desrosiers' announcement to her supervisor that she needed surgery.

The trial court granted summary judgment in favor of her employer with regard to the alleged perceived disability claim, finding that Connecticut does not recognize a cause of action for discrimination based on a perceived physical disability. A jury trial was held on the remaining counts, resulting in a defense verdict. Desrosiers appealed, arguing that a claim for discrimination based on a perceived physical disability exists under Connecticut law.

The Appellate Court disagreed with her, affirming that the state statute protects only those who actually have some type of physical disability. Desrosiers again appealed and the Supreme Court agreed to take up the argument.

In the majority opinion written by Justice Carmen Espinosa, the Supreme Court overruled the trial court and Appellate Court. Desrosiers' case will likely go to trial again on just the perceived disability claim.

"The legislature's over-arching intent to 'stamp out discrimination on the basis of physical disability and a wide range of other disabilities (mental disability, learning disability, and mental retardation),' coupled with its efforts to be as inclusive as possible in defining the term physical disability, is consistent with interpreting [the statute] to protect individuals who are perceived to be physically disabled," Espinosa wrote in the majority opinion.

Justice Richard Palmer wrote a short separate concurring opinion. He believes the state statute is worded in such a way that it is clear that discrimination claims for a perceived disability—even when an actual disability does not exist—is allowed under the statute.

Justice Peter Zarella penned a separate dissenting opinion. He believes the trial court and Appellate Court interpreted the statute correctly in not allowing Desrosiers to proceed with a claim for perceived physical disability.

"In my view, the majority misses the point. The legislature's clear statement is that 'discrimination based on a physical disability is prohibited'; not that discrimination based on a perceived disability is prohibited," wrote Zarella. "Although the majority's interpretation of the relevant statutory language may be the better public policy, and although the legislature might adopt that policy if the matter is brought to its attention, that is not sufficient reason for abandoning the plain and unambiguous directive in the statute itself."

Diageo North American was defended by Kenneth Gage, of Paul Hastings in Chicago. Gage declined to comment.

Bochanis said he intends to return to the Judicial District of Fairfield at Bridgeport and seek a trial on the perceived disability claim. "Now on retrial of the case we don't have to prove she had a physical disability," said Bochanis. "We just have to prove the employer perceived her to have a physical disability and took adverse action against her because of that."

After the Supreme Court agreed to hear the case, both the state Commission on Human Rights and Opportunities and the Connecticut Business and Industry Association submitted friend-of-the-court briefs. Based on their stances, the CHRO should be pleased with the ruling and the CBIA should not. Lawyers for both groups did not return calls seeking comment.

"A discriminatory practice is proven by showing that an individual intended to discriminate," Charles Krich, principal attorney for the CHRO, wrote in court documents. "The intent to discriminate is the same whether the physical disability is real or perceived. An employer who is wrong about whether the employee has a disability should not be able to benefit from its misconceptions."

Attorneys Michael Soltis and Justin Theriault of the Stamford office of Jackson Lewis wrote a brief on behalf of the CBIA.

"If policy considerations could trump statutory language, the confidence of the public, including employers, in state labor and employment laws would erode," the brief stated. "Needless litigation would ensue; the cost of being a Connecticut employer would increase. No public policy favors this outcome."

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