

Fifth Circuit Adopts Standard in Disability Cases That Will Make it Harder for Employers to Obtain Summary Judgment

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By [Lawrence D. Smith](#)

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In *Equal Employment Opportunity Commission v. LHC Group Inc.*, the Fifth Circuit Court of Appeals evaluated a trial court's grant of summary judgment to an employer on an employee's disability discrimination claims. In reaching its decision on the disability discrimination claim related to the employee's discharge, the Fifth Circuit adopted a *prima facie* case formulation that will likely make it more difficult for employers to obtain summary judgment in disability discrimination cases involving termination.

Factual Background

The underlying facts of the case are not unusual. The employer, LHC, had hired the plaintiff, a registered nurse, to work as a field nurse. Her daily duties included driving a car to visit patients. The plaintiff later suffered a *grand mal* seizure at work. Her doctor released her to work with restrictions, which included not driving for one year. After her return to work, LHC counseled the plaintiff regarding problems related to her computer skills and other performance deficiencies. After the plaintiff missed a day of work without approval and received a complaint from a patient, LHC decided to terminate her employment. When doing so, LHC allegedly told her that it was letting her go because she was a liability to the company.

The U.S. Equal Employment Opportunity Commission (EEOC) filed an action on the plaintiff's behalf asserting multiple disability discrimination claims. LHC moved for summary judgment on all claims asserted by the EEOC, including the plaintiff's termination claim. The trial court granted summary judgment on the

plaintiff's discriminatory termination claim based in part upon the fact that she had failed to establish a prima facie case of discrimination. The EEOC appealed.

On appeal, analyzing the termination issue, the Fifth Circuit noted that a discrepancy existed within the Fifth Circuit's cases regarding the elements necessary to establish a prima facie case of disability discrimination in a termination case. The court observed that case law consistently required an employee to establish the prima facie elements of having a disability and being qualified for the job held. After that, the case law splintered into three views of the nexus or causal element of a prima facie case.

- One line of cases required the employee to show “that he [or she] was subject to an adverse employment decision *on account of* disability” (emphasis added).
- The second line of cases required the employee to prove that he or she (a) was subject to an adverse employment action and (b) was replaced by a non-disabled person, or was treated less favorably than non-disabled employees.
- The third line of cases required employees to show that they were subjected to an adverse employment action on account of disability or the perception of disability and were replaced by or treated less favorably than non-disabled employees.

The Fifth Circuit adopted the first formulation, requiring an employee to show as part of a prima facie case that he or she was subjected to an adverse employment decision “on account of disability.” The Fifth Circuit based its decision on several factors, including the fact that such a formulation was the first one adopted in the Fifth Circuit. The court also speculated that the adoption of the “less favorable treatment” element was taken primarily from hiring cases, not termination cases. The Fifth Circuit also noted that this formulation mirrored the standard used by other circuit courts of appeal. As a result, the Fifth Circuit concluded that to establish a prima facie case of discriminatory termination under the Americans with Disabilities Act (ADA), a plaintiff must prove (1) that he or she has a disability, (2) that he or she is qualified for the job, and (3) that he or she was subjected to an adverse employment action on account of his disability.

Key Takeaway

The impact of this decision is that it will likely be harder for employers to obtain summary judgment in disability discrimination cases involving terminations. Traditionally, many federal courts in this jurisdiction have permitted employers to obtain summary judgment by providing comparator information to undermine a plaintiff's prima facie case. This type of comparator information—including who replaced the employee or information establishing consistent treatment of similarly situated non-disabled individuals—was easy to obtain and effective in obtaining summary judgment based upon the failure of the employee's prima facie case. Under *EEOC v. LHC*, however, providing such comparator information will not preclude the employee from establishing a prima facie case. As seen in *EEOC v. LHC*, circumstantial evidence on the causal element may be used to defeat a motion for summary judgment based on the failure to establish a prima facie case.

More particularly, in this case, the key to defeating summary judgment on the causal element was the chronology of criticism the plaintiff received *after* her seizure (although that chronology was disputed) and the disputed comment that the plaintiff constituted a liability to the company going forward. The disputed evidence was sufficient to defeat the motion for summary judgment aimed at the plaintiff's failure to establish a prima facie case. Again, while summary judgment can still be obtained by employers in these cases, the prima facie case formulation adopted by the Fifth Circuit in *EEOC v. LHC* will make it more difficult for employers to obtain summary judgment based upon a plaintiff-employee's failure to establish a prima facie case of disability discrimination.

AUTHOR



Lawrence D. Smith

Shareholder, [San Antonio](#)

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