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Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Disabling the Americans with Disabilities Act

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ESSAY

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. V. WILLIAMS: DISABLING THE AMERICANS WITH DISABILITIES ACT

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The least controversial issue in many discrimination cases is determining whether or not a plaintiff is, in fact, a member of a protected category. Skin pigment determines color, lineage determines national origin, anatomy determines gender and a quick look at a driver's license will immediately clear up whether age discrimination can be alleged.[1] In disability discrimination cases, however, the main issue often centers around one initial question: Are you disabled?

In the Americans with Disabilities Act (ADA) Congress provided a hazy definition of "disability" and, not surprisingly, the federal courts have struggled to apply that definition. However, in 2002 the Supreme Court provided unequivocal guidance to federal courts by indicating who is and who is not disabled. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[2] the Court cemented the recent trend of curtailing the potential pool of ADA plaintiffs, thus quashing the hopes of those who would like to see greater legal protections for employees with physical or psychological limitations.

The Court's decision in *Toyota* also assured movement on three fronts relevant to ADA litigation. First, ADA litigation will become particularly fact-intensive with increased scrutiny of the day-to-day activities of those purporting to be disabled. Second, there will be increasingly intense pressure on Congress to amend the ADA to make coverage broader and scale back the impact of *Toyota.* Third, as the pool of potential plaintiffs drains with *Toyota's* more restrictive view of what is and is not a disability, plaintiffs will utilize the ADA's provisions prohibiting discrimination against those "regarded as"[3] disabled with greater frequency.

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1. Under the Age Discrimination in Employment Act, 29 U.S.C. § 621(2000), 29 U.S.C. § 631(a) (2000), claimants must be 40 or older.

2. 534 U.S. 184 (2002).

3. *See infra*, note 42.

I. THE ACT

The ADA was passed in 1991 and prohibits discrimination against a "qualified individual with [a] disabilit[y]."[4] The ADA also requires that employers of fifteen or more individuals provide reasonable accommodations to such individuals so that they can perform the essential functions of their jobs.[5] Such accommodations include, but are not limited to, job reconfiguration, assistive devices, transfers, extended leave and schedule changes. Due to these constraints, many employers are hesitant to provide reasonable accommodations for a number of reasons, including cost, employee morale (i.e., "Why does *she* get the preferable shift?") and confusion as to application of the act.

Accordingly, employers have an overriding interest in knowing exactly who qualifies as disabled for purposes of managing their workforce. In fashioning its definition of "the qualified individual with a disability," Congress did not do employers any favors, nor, as demonstrated below, did it assist the federal courts in this regard.[6]

Pursuant to the ADA, an individual with a disability is someone who has a mental or physical impairment that substantially limits a major life activity.[7] Mental or physical impairment is defined broadly by the statute.[8] Moreover, the hurdle of whether an ADA plaintiff's impairment affects a

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4. A qualified individual with a disability is defined by the ADA as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2000). This article only addresses the parameters for defining an individual as "disabled" under the ADA.

5. The ADA also prohibits discrimination against individuals with "a record" of disability or who are "regarded as" disabled. 42 U.S.C. § 12102(2)(B)-(C) (2000).

6. Justice O'Connor recently criticized Congress' drafting of the ADA, commenting, "[t]hat the act is one of those that did leave uncertainties as to what Congress had in mind." Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague,* Mar. 15, 2002, at A2.

7. 42 U.S.C. § 12102(2)(A) (2000).

8. The ADA defines physical or mental impairments as follows:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (2002).

major life activity is a low bar. It is uncertain, however, whether working is considered a "major life activity" as defined by the ADA.[9] "Major life activities" are one's daily "basic" activities, like walking, breathing, talking and hearing. As a result, the bulk of the dispute in ADA litigation concerns whether or not a plaintiff is "substantially limited" in performing these activities.

II. "SUBSTANTIALLY LIMITED"

Federal regulations define an employee as being "substantially limited" if the employee is "unable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity."[10]

In determining whether an individual is substantially limited in a major life activity, the regulations instruct that the following factors should be considered: "[t]he nature and severity of the impairment; [t]he duration or expected duration of the impairment; and [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."[11]

III. *TOYOTA V. WILLIAMS*

Ella Williams was an assembly line worker at Toyota.[12] Shortly after she began work, she had problems with her hands, wrists and arms and was diagnosed with carpal tunnel syndrome and tendonitis.[13] Toyota accommodated her medical restrictions for a time, but after a change in policy requiring that employees in Williams' position perform all tasks of the position – including tasks requiring Williams to use her hands, wrists and arms—Williams requested that she be allowed to perform some, but

9. Most circuit courts consider working a "major life activity". The Supreme Court, however, has never ruled on the issue and, in fact, has cast doubt on the validity of working as a "major life activity". *See Toyota*, 534 U.S. at 200 ("[b]ecause of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much and we need not decide this difficult question today.").

10. 29 C.F.R § 630.2(j) (2001).

11. *Id.* §§ 1630.2(j)(2)(i)-(iii).

12. *Toyota*, 534 U.S. at 187.

13. *Id.*

not all of the tasks of her job.[14] Toyota denied her request, and she subsequently brought suit in federal district court under the ADA.[15]

The district court agreed with Toyota's contention that Williams was not disabled in the "major life activity" of performing manual tasks because she was not substantially limited.[16] The district court granted defendant's motion for summary judgment and found that Williams' claim, that she was substantially limited in performing manual tasks, was "irretrievably contradicted by [respondent's] continual insistence that she could perform the task in assembly [paint] and paint [second] inspection without difficulty."[17]

The United States Court of Appeals for the Sixth Circuit reversed the district court, rejecting the lower court's reliance on Williams' ability to perform some of her job functions.[18] Instead, the Sixth Circuit applied the Equal Employment Opportunity Commission's (EEOC) guidance, on how to evaluate whether an individual is substantially limited in the major life activity of working, and evaluated Williams' claim that she was substantially limited in the major life activity of performing manual tasks.[19] Under the Sixth Circuit's analysis, Williams would have to demonstrate that "her manual disability involve[d] a 'class' of manual activities."[20] Specifically, the Sixth Circuit concluded that:

> Williams' ailments are analogous to having missing, damaged, or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs, and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.[21]

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14. *Id.* at 189.

15. *Id.* at 190.

16. *Id.*

17. *Id.* at 191.

18. *Id.* at 191-192.

19. *Id.* at 192. The EEOC has identified several factors the court should consider when determining whether ADA plaintiffs are substantially limited in the major life activity of working. They include whether a plaintiff is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. 29 C.F.R. § 1630.2(j)(3)(i).

20. *Toyota,* 534 U.S. at 199 (citing Williams v. Toyota Motor Mfg., 224 F.3d 840 (6th Cir. 2000).

21. Williams v. Toyota Motor Mfg., 224 F.3d 840, 843 (6th Cir. 2000).

As such, the Sixth Circuit ruled that Williams' impairment prevented her from performing manual tasks of the "class" associated with her job, and she was therefore akin to an individual with an impairment affecting the major life activity of "working."[22] Because Williams was barred from a class of manual tasks associated with her job, she qualified as disabled under the act.

The Supreme Court reversed the Sixth Circuit, holding that it had confused the administrative guidance with regard to the major life activity of "working" and had erred by "focusing on respondent's inability to perform manual tasks associated only with a job."[23] The Court concluded that in evaluating whether a plaintiff is "substantially limited" in a major life activity:

> [t]he central inquiry is whether the plaintiff is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the task associated with her specific job . . . because an inability to perform a specific job always can be recast as an inability to perform a 'class' task associated with that specific job.[24]

IV. THE FUTURE

The post-*Toyota* world has been unforgiving for ADA plaintiffs. Many circuits have relied on the unequivocal language of the *Toyota* decision to deny disabled status to ADA plaintiffs. For example, the Sixth Circuit, from which *Toyota* emanated, has applied the Supreme Court's strict analysis with devastating results for an ADA plaintiff. In *Black v. Roadway Express, Inc.*,[25] the plaintiff, Douglas Black, a truck driver, claimed that he was disabled because of a knee injury. The injury required three surgeries between 1995 and 1997. Black requested what would seem to be a relatively reasonable accommodation – that he only drive trucks with cruise control.[26] Black sued, and Roadway moved for summary judgment arguing that Black was not disabled because he was not substantially limited in his proffered major life activities of walking, kneeling, stooping, jogging, lifting, sitting in confined restricted positions,

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22. *Id.*

23. *Toyota*, 534 U.S. at 200.

24. *Id.* at 200-201.

25. 297 F.3d 445 (6th Cir. 2002).

26. Indeed, during the time he worked for Roadway, Black also worked for two other trucking companies both of which provided him with trucks equipped with cruise control. Roadway also had trucks with cruise control in its fleet. *Id.* at 447.

running, climbing and working.[27] The district court agreed and granted summary judgment for Roadway.[28]

Armed with (or burdened by) *Toyota*, the Sixth Circuit affirmed. Despite evidence from Black's orthopedic surgeon, Dr. Johnson, that Black had "significant restrictions as to the condition, manner or duration under which he can perform activities," the orthopedic surgeon also stated "Mr. Black is not precluded at this time from engaging in these activities, [the] limited basis as his condition will tolerate, but he should not engage in these activities on a prolonged or repetitive basis."[29] Indeed, Black submitted his own affidavit stating that: he could not sit for extended periods with his right leg in one place; he had a constant limp; his knee became dysfunctional after attempting to walk two miles; he could not stand for long periods; he could not exercise a full range of motion with his leg; and he was unable to run or jog at all.[30]

Citing *Toyota*, the Sixth Circuit held that "on the basis of Black's and Johnson's affidavits alone, then, it does not appear that Black is substantially limited from any major life activity."[31] In short, the Sixth Circuit held that if you are going to allege a disability with regard to the major life activity of, for example, "walking," then you had better not be able to walk under almost any circumstance.[32]

In light of this trend, the post-*Toyota* world looks bleak for those who prefer an ADA with maximum reach. If a plaintiff's physical impairment

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27. *Id.* at 447, 450.

28. *Id.* at 447.

29. *Id.* at 451.

30. *Id.* at 450.

31. *Id.* at 451.

32. *See also* McCoy v. U.S.F. Duggan, Inc., 42 Fed. Appx. 295, 297, 2002 U.S.App. LEXIS, 13271 (10th Cir. 2002) (relying on Toyota and holding that an employee with multiple sclerosis was not substantially limited in the major life activity of walking because even though she could no longer bowl, dance, play tennis or ride a bicycle and had to hold onto the wall when walking, she could still walk); Carrol v. Xerox Corp., 294 F.3d 231, 240-41 (1st Cir. 2002) (relying on Toyota in determining that plaintiff's anxiety disorder and job related stress was not substantially limiting in the major life activity of "working" because plaintiff had in fact worked successfully after the alleged discriminatory action); Pollard v. High's of Baltimore, Inc., 281 F.3d 462 (4th Cir. 2002); Cartwright v. Lockheed Martin Utility Services, Inc., 40 Fed. Appx. 147, 152, 2002 U.S. App. LEXIS 13688 (6th Cir. 2002) (relying on Toyota in finding that plaintiff's proffered disabilities of sleep apnea, hypertension and depression did not substantially limit his major life activities of "sleeping" and "working" because plaintiff could still sleep and could work other jobs that were less stressful).

of carpal tunnel syndrome can be disregarded as a disability because he can also brush his teeth and tie his shoes, depositions will become very difficult for ADA plaintiffs. Imagine, for example, the deposition testimony of a professional golfer like Casey Martin, as an employee of a corporation, asserting his right to a reasonable accommodation by lawsuit:[33]

Attorney: What is your alleged disability?
Martin: Klippel-Trenaunay-Weber Syndrome, a rare circulatory disorder that makes my right leg extremely weak.
Attorney: How are you restricted by this syndrome?
Martin: The longer I walk on my leg, the more my bones are eroded. It is a circulatory disorder and if I overuse my right leg, it may have to be amputated.
Attorney: May have?
Martin: That is a possibility.
Attorney: A possibility?
Plaintiff's attorney: Is that a question?
Martin: Yes, it is a possibility.
Attorney: Didn't you win the 1994 NCAA Golf Championship?
Martin: Yes, with other players.
Attorney: Didn't you get a degree?
Martin: Yes.
Attorney: How did you get to class?
Martin: I walked.
Attorney: And that was eight years ago?
Martin: Yes.
Attorney: And could you walk to class today?
Martin: Yes. With some pain.
Attorney: But you could walk to class?
Martin: Yes.

33. In its May 29, 2001 decision, the Supreme Court declared that Title III of the ADA (the public accommodation section of the law) provided Casey Martin protection and required the Professional Golf Association (PGA) to afford Martin reasonable accommodation on the golf course. Without discussion, the Court stated that Martin was "an individual with a disability as defined in the American with Disabilities Act of 1990." PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001).

Attorney: And you can play golf, can't you?
Martin: Yes. With a cart.
Attorney: How did you get to this deposition today?
Martin: I drove.
Attorney: So you can drive?
Martin: Yes.
Attorney: And how did you get in this room today?
Martin: My lawyer carried me.
Attorney: Up six flights of stairs?
Martin: Yes. I find it quite a coincidence that on the day of my deposition your elevators were out of order.[34]

The exchange above is but a snippet of how a post-*Toyota* deposition might read. Whereas before *Toyota*, defense counsel may have concentrated on what a plaintiff could *not* do as a result of his alleged disability, given the Court's reliance on the fact that Williams could perform two of the manual tasks required by her job as well as brush her teeth, wash her face, bathe, tend to her flower garden, fix breakfast, do laundry and pick up around the house, post-*Toyota* depositions will certainly focus long and hard on all of the things a plaintiff *can* do in spite of an alleged disabling condition. Indeed, ADA cases may soon spawn a cottage industry of private investigators offering services similar to those provided to workers' compensation carriers.

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34. For a real life example of such deposition questioning, *see also* Jacques v. DiMarzio, Inc., 200 F.Supp. 2d 151, 158 (E.D.N.Y. 2002):

Q. So from 1992 . . . until the time you were terminated, was there ever a period of time that the mental problems interfered with your ability to otherwise function outside of work?
A. Outside of work?
Q. Right, outside of work. In other words, did it interfere with your ability to have a normal social life?
A. My mental condition or medical?
Q. Mental between 1992 and 1996.
A. I don't think so.
Q. During that period of time, were you always able to take care of your home?
A. From 1992 to 1996?
Q. Yes.
A. Most times, yeah, it didn't interfere with me taking care of my home.
Q. Or yourself, personal hygiene?
A. Oh, no. Absolutely not.

Moreover, while an individual with Klippel-Trenaunay-Weber Syndrome, like Mr. Martin, may have difficulty with the "major life activity" of walking, the fact that he can still play golf and walk from the cart to the green to putt militates against his condition being considered "substantially limiting." As the Court noted with regard to Ms. Williams' carpal-tunnel syndrome and tendonitis, while it caused her to avoid sleeping and dancing and reduced how often she played with her children, tended to her garden and drove long distances, the change to her life did "not amount to such severe restrictions in the activities that are of central importance to most people's lives that they establish a manual-task disability as a matter of law."[35]

Consequently, the restrictive *Toyota* decision may also draw a legislative reaction similar to what occurred in 1991. In that year, a series of Supreme Court decisions significantly limited plaintiffs' rights under Title VII and Congress constructively intervened.[36] While expansion of rights under the ADA may seem less plausible, with both the House of Representatives and the Senate in the hands of Republicans, and the White House held by President Bush, the ADA itself was passed under a Republican administration—with the enthusiastic support of our current president's father.[37] In addition, there are presently several bills in both Houses of Congress proposing amendments to the ADA.[38] In the words of

35. *Toyota*, 534 U.S. at 202.

36. In 1991, Congress passed the Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1991), in significant part, to blunt or reverse Supreme Court decisions involving Title VII. *See, e.g.*, Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (holding that a plaintiff may show disparate impact only by demonstrating that specific practices adversely affected a protected group); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (holding that the time in which a neutral seniority system can be challenged as discriminatory runs from the adoption of that system, not when the plaintiff is negatively affected by the system). The Act also expanded the remedies available to plaintiffs under Title VII to include awards of compensatory and punitive damages. Moreover, the Act gave plaintiffs the right to a jury trial.

37. President George H.W. Bush signed the ADA, into law, on July 26, 1990 after it passed both Houses of Congress with overwhelming Republican support. The ADA was passed by the United States Senate on September 7, 1989 by a vote of 76-8 and by the United States House of Representatives on May 22, 1990 by a vote of 403-20.

38. Moreover, states with analogs to the ADA retain the option of revising their own disability laws in response to *Toyota*. For example, California has already revised its state law barring discrimination against the disabled in response to the Supreme Court's decision in Sutton v. United Airlines, 527 U.S. 471 (1999).

one of the original sponsors of the ADA, Congressman Steny Hoyer, (D-MD):

> Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word. We can decide whether the employment policy effectively put into place by the Supreme Court's interpretations of the ADA is a solid one. Or we can decide to rewrite the statute. In either case, Congress must look at this landmark civil rights law and determine whether it is carrying out the promise and potential we all celebrated in 1990.[39]

Finally, employers can expect a new emphasis on "regarded as" ADA suits. With the parameters for having an actual disability so circumscribed by *Toyota*, the more malleable status of being "regarded as" having a disability will become more attractive to ADA plaintiffs. To be included in the "regarded as" class of ADA claimants, one can be as 'healthy as a horse.' Accordingly, ADA pleading will often be in the alternative, *i.e.* count I will allege disability discrimination, and count II will allege that the plaintiff was "regarded as" disabled. If plaintiffs cannot meet the hurdle of an actual disability, they will fall back on their alternative theory. Under that theory, plaintiffs can maintain ADA actions even if they are not substantially limited in a major life activity. Specifically, employees have cognizable ADA claims if they have: physical or mental impairments that do not substantially limit major life activities but are treated by employers as constituting such a limitation; physical or mental impairments that substantially limit major life activities only as a result of the attitude of others toward such impairment; neither a physical or mental impairment but are treated by an employer as having a substantially limiting impairment.[40]

There is a great deal more latitude in addressing the central issue of how an employee is "treated" or assessing "the attitudes of others" to an impairment, as opposed to actually demonstrating to a trier of fact that one is substantially limited in a major life activity.[41] In short, being

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In response to *Sutton's* holding, that mitigating factors such as corrective lenses or medications are to be taken into consideration in determining whether an individual is disabled under the ADA, the California legislature amended state law to read just the opposite. CAL. GOV'T. CODE § 12940(e)(1) (2002).

39. Steny H. Hoyer, *Not Exactly What We Intended, Justice O'Connor*, WASHINGTON POST, Jan. 20, 2002, at B5.

40. 29 C.F.R. § 1630.2(L)(1)-(3).

41. As stated by one commentator:

"regarded as" disabled is the equivalent of allowing ADA claimants to "talk the talk" without having to "walk the walk." ADA claimants utilizing the "regarded as" theory can redirect the inquiry away from the limiting facts of their own condition towards their employer's state of mind.[42]

A review of a successful "regarded as" suit drives the point home. In *Johnson v. Paradise Valley Unified School District*,[43] the plaintiff, Linda Johnson, had been employed with the defendant as a groundskeeper for approximately fourteen years.[44] On July 9, 1995, Johnson's leg was crushed by a golf cart and she suffered an injury in which skin, muscle and nerve tissue were pulled away from the bone on her leg.[45] After surgery, Johnson was able to return to work from September until December of 1995.[46] Johnson, thereafter, met with defendant's director of employment and stated that she was in constant pain and did not know if and when she would ever be able to return to work. She went on indefinite leave.[47] On February 5, 1996, Johnson received a release from her doctor to return to work with some restrictions.[48] Johnson alleged that her employer told her that she could not return to work until she had a full, rather than a partial, release.[49] On May 13, 1996, Johnson was informed that she had to resign

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> The 'regarded as' prong of the ADA is a powerful alternative to the actual disability prong because it addresses society's and the covered entity's fears about disease and illness. AIDS and HIV infection fit nicely within the framework of the 'regarded as' prong because of the intensely negative social responses they receive...[t]he solution to discourage courts from distorting the definition of actual disability to avoid finding plaintiffs disabled under the ADA is to sidestep the 'actual' disability test in favor of the 'regarded as' disabled test.

Brian K. Esser, *Beyond 43 Million: The "Regarded As" Prong of the ADA and HIV Infection – A Tautological Approach*, 49 AM. U. L. REV. 471, 491-492 (Dec. 1999).

42. In order for an employee to prove that he or she has been "regarded as" disabled under the ADA, the employer must be shown to "believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton*, 527 U.S. at 489. While this remains a formidable burden, it again redirects the inquiry away from the plaintiff's ability and towards an employer's belief.

43. 251 F.3d 1222 (9th Cir. 2001).

44. *Id.* at 1223.

45. *Id.*

46. *Id.*

47. *Id.* at 1223 -1224.

48. *Id.* at 1224.

49. *Id.*

or be fired. The next day she resigned.[50] Three weeks later, she received a full release from her physician, and on July 10, 1996 she applied for another groundskeeper position.[51] She was not hired for that position, nor was she hired for twelve other open positions over the next several months.[52]

Johnson brought suit alleging that she was discriminated against because of her disability and that, in the alternative, she was discriminated against because she was "regarded as" disabled.[53] Summary judgment was granted for the employer on Johnson's straight disability claim.[54] The district court determined that she did not, as a matter of law, suffer from a physical impairment that substantially limited her in any major life activity.[55] Nonetheless, Johnson's "regarded as" claim survived summary judgment.[56]

At trial, Johnson alleged that her employer's refusal to allow her to return to work without a full release; her constructive discharge; a refusal to allow her to extend her leave of absence; and her employer's failure to consider her subsequent applications all occurred because she was "regarded as" disabled.[57] After deliberation, the jury returned a verdict for Johnson in the amount of $237,345.[58]

After the jury's verdict, however, the district court granted the employer's motion for judgment as a matter of law on her "regarded as" disability claim, holding that there was not sufficient evidence for the jury to conclude that the employer regarded Johnson as disabled.[59] The United States Court of Appeals for the Ninth Circuit reversed, holding that there was in fact substantial evidence that the employer regarded Johnson as disabled in the major life activities of walking, working or standing.[60] The substantial evidence relied upon by the Ninth Circuit should give employers pause and serve to demonstrate the elasticity of the "regarded as" analysis.[61] Specifically, the Ninth Circuit disagreed with the district

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1225.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1225-26.
60. *Id.* at 1226.
61. *Id.* at 1227.

court's crediting of the employer's testimony that it was a custom to rely on medical opinion rather than the "jury's apparent inference that, in forming [an] opinion [the employer] relied on Johnson's statement that she did not know if or when she would ever work again."[62] The Ninth Circuit allowed the jury to conclude that by relying on Johnson's own description of her medical condition, it accepted that description and thereafter "regarded her" as disabled.

The Ninth Circuit found other substantial evidence from which the jury could have concluded that the employer regarded Johnson as disabled. Such evidence included the fact that her employer refused to consider her for thirteen different maintenance and groundskeeping jobs and testimony that the employer enforced a policy of refusing to accept partial releases for employees in any job category.[63] In addition, the Ninth Circuit rejected the district court's reliance on remarks, made by the employer to Johnson, as evidence that the employer considered Johnson employable and, therefore, did not regard her as disabled.[64]

Johnson is instructive not only in delineating an alternative route for ADA plaintiffs, but in demonstrating how fact intensive the "regarded as" analysis can become.

V. CONCLUSION

Toyota has confirmed that the road for ADA plaintiffs remains difficult. In short, as long as they are able to perform basic functions essential to their daily lives, ADA plaintiffs will often be viewed as physically or mentally handicapped, but not legally disabled. Unless Congress acts, ADA litigation will become an ever-widening inquiry into almost all aspects of the lives of ADA plaintiffs.[65] In turn, by use of the "regarded

62. *Id.*

63. *Id.* at 1228.

64. *Id.* (The district court relied on comments such as – "maybe you'll get a release" and "you can apply for another job" as well as a comment offering to write Johnson a letter of recommendation.).

65. In the words of one commentator, "[t]he Supreme Court's decision precludes courts from focusing on the cherry-picked major life activities asserted by the plaintiff as the test for whether an individual is disabled. The plaintiff's work and private life now will be scrutinized to determine just how impaired an individual really is." Richard Alaniz and David Barron, Case Alters How Disability Discrimination Claims Litigated, TEXAS LAWYER (March, 2002) *at* http://store.law.com/TX_search_resultsnews.asp?lqry=Alaniz&lsrchmode=advance&lmode=0&intArea=&pracCenter=All&pubWithin=0&lpubTime=0&pDis1=afte

as" prong of the ADA, plaintiffs will attempt to redirect the focus to the attitudes of the employer.

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