



# Employment

## Law Briefing

Insights on Legal Issues in the Workplace

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# Use caution when dealing with perceived disabilities

The Americans with Disabilities Act (ADA) bars employers from discriminating against an employee who is perceived to have a disability. But what constitutes a “perceived disability”? That was the question before the Second Circuit in *Jacques v. Dimarzio*.

## Conflicts with supervisors, co-workers

Three years after being hired, a worker who packaged and assembled guitar components told the plant manager that she suffered from severe depression for which she took Prozac. She was later diagnosed as having a chronic form of bipolar II disorder.

The worker’s relations with her co-workers began to decline to the point of becoming “poisonous” with her supervisor and the plant manager. According to the manager, the supervisor couldn’t do her job well because she felt obliged to be overly cautious around the worker and refrain from saying anything to upset her and cause a “scene.” The manager told the worker that he wanted her to work exclusively at home because of her “ongoing conflicts with other workers.”

But before the manager and the worker could agree on the working-at-home terms, a co-worker lodged a complaint against the worker for ongoing harassment. In particular, the co-worker alleged that the worker had answered the phone when the co-worker’s child called the plant, and the child overheard the worker announce that the call was for “that bitch.” The company’s owner then rejected the work-at-home idea and fired the worker based on her numerous conflicts with supervisors and co-workers.

## The worker alleges discrimination

The worker complained to the National Labor Relations Board, alleging that her discharge violated the National Labor Relations Act. The company responded that the worker caused problematic confrontations with co-workers and that the owner saw no reason why his supervisors should be forced to make extreme



efforts to cater to an emotionally unstable person. The NLRB found no violation and dismissed the complaint.

The worker then filed a federal ADA lawsuit, alleging that the company discriminated against her because of:

1. An impairment (bipolar disorder) that substantially impaired her ability to take care of herself, and
2. Her record of an impairment that substantially impaired her ability to take care of herself or work.

The company asked the court to dismiss these claims without a trial, and the court agreed. But it declined to dismiss her third claim: that she was fired because she was regarded as being disabled. The court found that a trial was required to decide whether the company regarded her as regularly having severe problems in her relations with others.

The case went to trial. The jury found that the company fired the worker because it perceived her as being disabled in the major life activity of interacting with others and awarded her a total of \$190,000.

## The company argues error

The company appealed the judge’s jury instruction on the definition of “perceived disability” to the Second Circuit. The company argued that the trial court committed several reversible errors

when it instructed the jury on the claim that the worker was fired because the company “perceived” her as being disabled in the major life activity of interacting with others.

The Second Circuit noted that to prevail under the ADA’s “regarded as” provision, plaintiffs must show more than that their employers regarded them as somehow disabled. Rather, plaintiffs must show that employers regarded them as disabled within the meaning of the ADA.

*This case demonstrates the difficulty employers face when dealing with impaired employees who engage in unacceptable workplace behavior.*

The Second Circuit followed a three-step process in determining whether the plaintiff had an ADA-protected disability. The court had to find whether:

1. The plaintiff suffered from a physical or mental impairment,
2. The life activity the plaintiff relied on for her discrimination claim constituted a major life activity under the ADA, and
3. The plaintiff’s impairment substantially limited the identified major life activity.

To resolve the issue, the court had to determine whether interacting with others was a major life activity protected under the ADA and, if so, what a plaintiff had to show to be considered substantially limited in interacting with others.

## The Second Circuit vacates

The Second Circuit cited a Ninth Circuit ruling that interacting with others was an essential regular function that easily fell within the definition of a major life activity under the ADA. The Ninth Circuit ruled that a plaintiff’s impairment in interacting with others is substantial for ADA purposes only when it is regularly characterized by severe problems — such as consistently high levels of hostility, social withdrawal or failure to communicate when necessary. Mere cantankerousness was not enough to meet this definition.

Here, the Second Circuit agreed that interacting with others was a major life activity under the ADA. But it held unworkable the

Ninth Circuit’s test for determining when a limitation on this activity is substantial for ADA purposes.

The Second Circuit found no difference existed between hostile and cantankerous persons, and it also believed that the Ninth Circuit approach would frustrate maintaining a civil workplace environment. To wit, an employer faced with an employee who is an outspoken bigot or boor would have to choose between the risk of litigating that employee’s ADA claim or the claims of others who experience an unchecked hostile work environment resulting from that employee’s behavior.

Thus the Second Circuit held that a plaintiff is substantially limited in interacting with others when a mental or physical impairment severely limits the fundamental ability to communicate with others. The standard is not satisfied by a plaintiff whose basic ability to communicate with others isn’t substantially limited but whose communication is inappropriate, ineffective or unsuccessful.

As a result, the Second Circuit concluded that the trial court erred in the way it instructed the jury on what the worker had to show to establish that she was regarded as having a disability substantially limiting her interaction with others. So the court vacated the jury’s decision and sent the case back to the trial court.



## Employers should focus on behavior

This case demonstrates the difficulty employers face when dealing with impaired employees who engage in unacceptable workplace behavior. So how should employers handle these situations? By focusing only on the behavior — not on the impairment. Thus, an employer may not be able to fire employees because they are alcoholics, but can fire them for poor attendance or for being intoxicated on the job. 🏠

# Complying with the Equal Pay Act

The Equal Pay Act (EPA) requires employers to pay equal compensation — regardless of gender — for the performance of jobs that require equal skill, effort and responsibility and are performed under equal working conditions. In *Wheatley v. Wicomico County*, the Fourth Circuit had to decide if a county in Maryland violated the EPA by paying female department heads significantly less than it paid male department heads.

## Alleging discrimination

After the county evaluated how it paid its 500 employees, it reconfigured its pay schedule to base compensation on seven criteria:

1. Education,
2. Job complexity,
3. Scope and impact,
4. Supervision,
5. Working relationships,
6. Working environments, and
7. Physical demands.



As a result of the study, two female department supervisors' pay increased by about 18%. But because their new salaries were set below their grade midpoints, they sued the county for violation of the EPA. They alleged that male department supervisors were paid significantly more than female department supervisors for substantially equal work. They also alleged sex discrimination in violation of Title VII.

## Offering statistical evidence

When the case went to trial, the plaintiffs offered statistical evidence to demonstrate a pay disparity between male and female department managers. They alleged that:

- Their yearly pay averaged \$25,000 less than their male counterparts' pay in other departments,
- All male counterparts were paid above grade midpoints, and
- Both male and female department managers performed the same general duties, such as conducting staff meetings, preparing budgets and answering to the same governing body.

Before the county put on its case, it moved for judgment in its favor as a matter of law, the facts being undisputed. The trial court granted the motion. The plaintiffs appealed to the Fourth Circuit, which upheld the trial court's ruling.

## Establishing a prima facie case

First, the Fourth Circuit found that to establish a prima facie EPA case, a plaintiff must show that the skill, effort and responsibility required in performing her job are equal to those of a higher-paid male employee. In interpreting the EPA in past decisions, various courts have found that equal means substantially equal.

The Fourth Circuit rejected the plaintiffs' argument that all managers — regardless of department subject matter — ultimately performed the same supervisory duties. The court found that the plaintiffs presented a classic example of how

one can have the same title and the same general duties as another employee and still not meet the EPA’s two textual touchstones — equal skills and equal responsibility. So the plaintiffs’ duties weren’t equal.

*The Fourth Circuit found that to establish a prima facie EPA case, a plaintiff must show that the skill, effort and responsibility required in performing her job are equal to those of a higher-paid male employee.*

## Requiring equal skills

Similarly, the Fourth Circuit rejected the argument that all department-director positions required equal skills. Some of them required graduate degrees, unlike the plaintiffs’ jobs. To accept the plaintiffs’ position would mean that, although market demand for different skills may vary greatly, employers must pay the same salaries skills.

In a similar Fourth Circuit EPA case, *Soble v. University of Maryland*, a female assistant professor sought to compare herself to other assistant professors in a dental school. She taught in the field of community dentistry and held degrees in sociology and social work. But most of her colleagues held degrees in dentistry.

The Fourth Circuit ruled that merely possessing the same “assistant professor” title was not enough to satisfy the EPA requirement of equal skills. She couldn’t make an EPA comparison to them because their professorships in other departments were highly specialized and required distinct skills. Similarly, in *Wheatley*, pointing to the mere appellation of department head didn’t suffice to carry the plaintiffs’ burden under the EPA’s skills prong.

## Requiring equal responsibilities

In *Wheatley*, the Fourth Circuit also found that the plaintiffs fell short of satisfying the EPA requirement that their jobs and the jobs of other department heads carried substantially equal responsibilities. Jobs are considered unequal — despite having

the same general core responsibilities — if the more highly paid job involves additional tasks that:

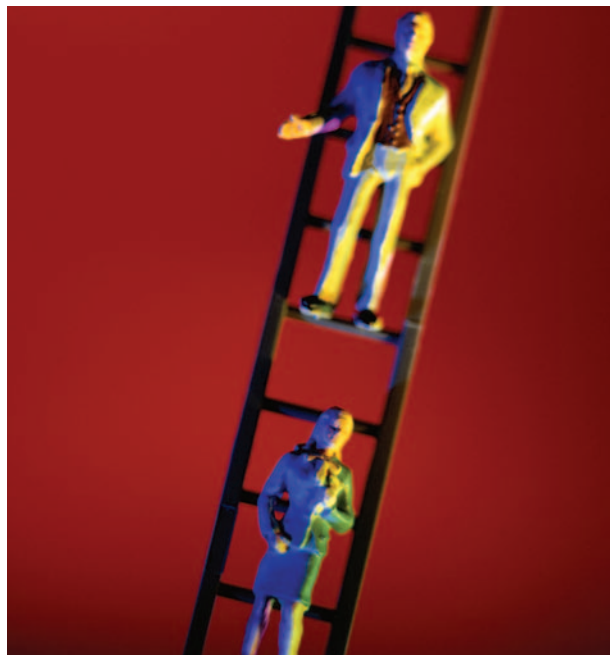
1. Require extra effort,
2. Consume significant time, and
3. Are of an economic value commensurate with the pay differential.

In enacting the EPA, Congress chose the word “equal” over the word “comparable” to show that the jobs involved should be virtually identical. The Fourth Circuit ruled that accepting the plaintiffs’ argument would be unfaithful to the EPA’s text. In effect, the plaintiffs were trying to convert the EPA equality standard into a similarity test.

The court rejected the argument that having a similar title plus similar generalized responsibilities is equal to having equal skills and equal responsibilities. Adopting that position “would deprive compensation structures of all flexibility and deny employers the chance to create pay differentiations that reflect differing tasks and talents.”

## Validating compensation levels

The lesson in *Wheatley* is that employers must be prepared to validate their compensation levels when they pay different salaries to male and female employees who arguably perform the same work. To avoid litigation, review compensation levels to determine if any differentials exist, and examine the reasons for them. 🏠



# “Confederate Southern-American” alleges unlawful termination

A security guard claimed his employment was terminated in violation of Title VII because of his national origin (“Confederate Southern-American”) and religion (Christian). Here’s how the Third Circuit decided the case, *Storey v. Burns International Security Services*.

The controversy arose when the guard put Confederate-flag stickers stating “The South was Right” and “Heritage not Hate” on his lunch box and pickup truck. His supervisors told him that under the company’s new diversified-hiring program, he would have to remove the stickers. When he refused, they explained the company’s zero-tolerance policy with respect to displaying Confederate symbols.

## No compliance, no job

The company ordered the guard to report to headquarters in Pittsburgh where four supervisors tried to convince him to remove or cover his stickers because they might offend other employees. He responded that, as a Christian, some work occurrences — particularly other employees’ use of profanity — offended him but that he accepted them as things he had to deal with.

The next day, the company terminated his employment for refusing to remove the Confederate stickers.

The guard sued the company in federal court, alleging national-origin and religious discrimination. He based his national-origin claim on his self-proclaimed identity as a Confederate Southern-American and his display of the Confederate battle flag in the workplace. He based his religion claim on the same claimed identity and the Confederate-flag design.

The trial court dismissed the guard’s complaint on grounds that:

1. “Confederate Southern-American” didn’t qualify as a national origin under Title VII, and
2. He had failed to establish that displaying the Confederate flag was essential to maintaining a sincerely held religious belief.

On appeal to the Third Circuit, the guard argued that “Confederate Southern-American” was a valid national origin under Title VII because members of this group share a common culture and persecution history dating back to the Civil War. He also claimed that the Confederate flag was a religious symbol because it incorporated the Saint Andrew cross — a venerated religious symbol. He contended that displaying that symbol was similar to displaying a traditional cross or the Star of David.

The guard alleged that “the ancestors of Confederate Southern-Americans have bequeathed a precious heritage of honor, chivalry and Christian virtues to their descendants. Confederate Southern-Americans bear the scars of a people victimized and nearly destroyed by total war, loss of civil rights, living in ‘conquered provinces’ under reconstruction and a persecution that continues to the present day.”

## No cause of action, no suit

For purposes of deciding the case, the Third Circuit first assumed that “Confederate Southern-American” constituted a valid national origin and that the Confederate flag had some religious significance for members of this group. The court found that, although the guard alleged that he was fired because of his national origin and religion, in fact he was fired for his refusal to cover or remove his Confederate-flag symbols when his employer told him to. If he had complied, he wouldn’t have been fired.

So, even if the Third Circuit assumed that the guard was a member of a protected class and accepted his claim that the Confederate flag was a religious symbol, he lacked a cause of action. Moreover, he hadn’t argued that his employer was ever aware of the religious symbolism he attached to the Confederate flag. In fact, before he was fired, his employer tried to convince him to cover or remove his stickers during work so that he could remain an employee despite his claimed national origin and religion, and he failed to state that he could not remove them because of his religious beliefs.

## No conflict with sincerely held beliefs

The Third Circuit found that nothing in the guard's complaint suggested that his employer's requirement conflicted with a sincerely held belief that was endemic to his professed national-origin or religion claims. By his own account, he displayed these stickers only because he was "proud of being a Confederate Southern-American" and was interested in sharing with others his passion for his heritage.

The guard hadn't claimed that anything fundamental to his national origin or religion required the display of Confederate symbols. The court noted that his personal need to share his heritage couldn't be equated with something endemic to national origin or with a religiously mandated observance, and he didn't argue otherwise.

So the Third Circuit affirmed the dismissal of the guard's suit. The court noted that against the historical backdrop of the Confederate flag, co-workers might understandably feel offended,

*The Third Circuit noted that a personal need to share a heritage couldn't be equated with something endemic to national origin or with a religiously mandated observance.*

harassed and even threatened by the flag in the workplace — even if those displaying the flag do so with no ill will.

## No lightly taken claims

The lesson from this case for employers is that no matter how tenuous a claim may appear, employers should expect courts to analyze it seriously. This case went to the U.S. Court of Appeals, only one level below the U.S. Supreme Court. A case that sounds thin may need as much attention as one that seems more serious. Employers shouldn't ignore any case on the assumption that it will just go away. 🏠

## Concurring opinion finds "Confederate Southern-American" not a national origin

In *Storey v. Burns International Security Services*, one judge (on the Third Circuit's three-judge panel that heard the appeal) agreed in a concurring opinion with the result but not with the other judges' reasoning. The concurring opinion concluded that the security guard's discharge did constitute an "adverse employment action," but that he had failed to establish a prima facie case for either national-origin or religious discrimination.

On the national-origin claim, the concurring judge concluded that "national origin" refers to the country where a person is born or where his or her ancestors came from. But a former regional or political group within the United States — such as the Confederacy — doesn't constitute a basis for a valid national-origin classification.

On the religious-discrimination claim, the judge found that the guard had to show that he:

- ☛ Held a bona fide religious belief that conflicted with an employment requirement,
- ☛ Informed the employer of this belief, and
- ☛ Was disciplined for failing to comply with the conflicting employment requirement.

Because he had failed to inform his employer that displaying the Confederate flag was in any way related to his religious beliefs or observances, he failed to state a prima facie case for religious discrimination.

Unclear was why the majority opinion chose not to tackle these issues. Instead, the majority assumed — for the sake of argument — that the guard could state valid claims for national-origin and religious discrimination.

The concurring opinion states what may seem obvious: that "Confederate Southern-American" is neither a national origin nor a religion.

# A message to our clients and friends ...

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have.

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