

Ruling explains how federal, state laws protect employees with no impairment

By David C. Henderson



Statutes and court decisions concerning disability and handicap discrimination frequently give credence to a lament (mostly by employers) that the laws of the workplace are too complicated to be managed on a day-to-day basis without continually calling on an employment lawyer.

In that context, *Izzo v. Genesco, Inc.*, decided recently by the U.S. District Court, stands out as a clear explanation of abstruse law. And it is an explanation of a particular aspect of the law's complexity that Massachusetts managers are likely to find especially confusing.

Izzo involved an employer's motion for summary judgment on an employee's two claims that he had been wrongfully discharged from a retail sales manager position.

In Count I, the employee alleged violation of federal "disability" protections in the Americans with Disability Act, as amended.

In Count II, he alleged violation of analogous "handicap" protections in the Massachusetts Fair Employment Practices Act.

And in support of both counts, the employee produced at least some evidence (generally disputed by the employer) showing that he had been fired because of the employer's incorrect belief that he abused alcohol or drugs.

One of the reasons *Izzo* is interesting is that the employer did not try to show that the employee actually had a substance abuse problem. Indeed, the employer denied that it had fired the employee at all, and it instead

offered contrary evidence showing that the employee had resigned.

That combination of circumstances was enough to require the court to examine exactly what it takes under the law to qualify as "disabled" (within the meaning of the ADA) or "handicapped" (within the meaning of the FEPA). And as the judge explained, each statutory definition has three parts.

For example, in federal law, the ADA defines "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) in certain circumstances, being regarded as having such an impairment.

Likewise, the analogous FEPA definition is almost, but not quite, identical. A "handicap" is (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) being regarded as having such impairment.

In other words, under either federal or Massachusetts law, an employee can have disability/handicap protection because of the statutory "regarded as" language, even though he or she has no physical or mental impairment whatsoever. That, by itself, is likely to surprise many managers.

But the managerial surprises are unlikely to stop there. As the judge also explained in *Izzo*, the employee's *prima facie* showing that he had been discharged because of a nonexistent substance abuse problem was enough to make pertinent an even more arcane point relating to the ADA. The judge explained this as follows:

"Because this case involves perceived drug use and/or drug addiction, the Court must also refer to Section 104 of the ADA, which contains a carve-out for current drug users as well as a safe harbor for drug addicts and falsely perceived drug users. Under Section

104, employees 'currently engaging in the illegal use of drugs' are expressly excluded from protection under the ADA, where an employer acts on the basis of such use. 42 U.S.C. § 12114(a). Under the same section, recovered or recovering drug addicts and individuals 'erroneously regarded as engaging in' illegal drug use are expressly protected. 42 U.S.C. § 12114(b)(1)-(3). As a result, if an employee is terminated for illegal drug use, and he is in fact engaging in such use, he does not qualify as disabled under the ADA. If an employee is not currently engaging in the illegal use of drugs, however, but is erroneously regarded as engaging in such use, then he does qualify for protection under the ADA."

As a result, even though the employer in *Izzo* produced evidence showing that it fired the employee because of a legitimate, non-discriminatory reason (poor performance), the employee nevertheless was able to defeat the employer's summary judgment motion on the ADA claim because of conflicting evidence tending to show that the employee instead had been fired because he was incorrectly "regarded as" a substance abuser.

The result was different, however, under Massachusetts law. On the basis of the very same evidence, the judge allowed the employer's summary judgment motion as it related to the handicap discrimination claim under the FEPA.

That difference in outcomes, the judge explained, was because Massachusetts has not amended the FEPA in ways that track the federal amendment of the ADA in 2008.

As a result, only the ADA states in a clarifying statutory provision that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived

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physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*" (Emphasis added.)

The result is that it is only the FEPA that still takes a "narrower" view of "regarded as" discrimination, by requiring that the employer regard the employee as having an impairment that substantially limits a major life activity.

Further, under FEPA case law going back to 2003, an employee can be considered "substantially limited" in the major life activity of working, as the employee in *Izzo* contended, only if the impairment perceived by the employer "prevents or significantly restricts the individual from performing *a class of jobs or a broad range of jobs* in various classes." On that point, the *Izzo* court cited *City of New Bedford v. Massachusetts Comm'n Against Discrimination*, 440 Mass. 450, 799 N.E.2d 578 (2003).

Thus, the employee in *Izzo* could not forestall summary judgment in favor of the

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employer on the FEPA claim, because he had not produced evidence showing that his employer considered him unfit for any position other than his own retail sales manager position. The judge explained this as follows:

"That [the employer] would not allow [the employee] back to the store and his current

job indicates only that [the employer] may have believed [the employee] unfit for his current job, but does not also indicate that [the employer] perceived [the employee] as so disabled that he was unfit for a broad range of jobs."

Izzo thus shows, among other things, how nuanced and counterintuitive discrimination/handicap law can be, even with the most basic of its definitions.

And it also shows how the complexity is exacerbated even further when a manager has to consider subtle differences between federal and Massachusetts law.

On the very same evidence, an employee with no physical or mental impairment who cannot take a disability discrimination claim to a jury under the ADA nevertheless will be able to take a handicap discrimination claim to a jury under the FEPA.

It's a very good time to be an employment lawyer. **MLW**



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