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## Partial Deafness Found to Not Be a Disability Under the ADAAA

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*Special to the Legal*

There is a perception that since the passage of the Americans with Disabilities Act Amendments Act in 2008 and the issuance of the U.S. Equal Employment Opportunity Commission's guidelines in 2011, virtually any physical or mental condition will rise to the level of an actionable disability. The recent case of *Mengel v. Reading Eagle*, No. 11-6151, (E.D. Pa. Mar. 29, 2013), belies this perception. The case also is notable for its finding that the employee's complaint about a single potentially racist remark was not an objectively reasonable complaint of discrimination.

### TOTALLY DEAF IN ONE EAR

Christine Mengel was a page designer for the *Reading Eagle*, the principal newspaper of Berks County, Pa., owned by Reading Eagle Co. Mengel had satisfactory evaluations from 2001 to 2008. In 2007, Mengel had surgery for a brain tumor and, as a result, became totally deaf in one ear and began to experience balance problems. Her 2008 evaluation was



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completed shortly after she began to experience these problems and, as noted, it was satisfactory.

In September 2008, Mengel had a meeting with her supervisors and a co-worker, Bill Reber, during which Reber complained that Mengel had not followed his instructions and referred to her as a "tar baby," according to the opinion. Mengel testified in her deposition that she believed the term was used to "demean" her and to "make [her] feel small."

### SELECTED FOR LAYOFF

In January 2009, the paper began to evaluate employees in preparation for a reduction in force (RIF). Managers were to use a matrix rating employees in seven categories. It was understood that the lowest-rated employees would

most likely be affected by the RIF although, at the time the evaluations were performed, the number of employees to be affected had not been determined.

Mengel's RIF matrix was completed in March 2009. She received a score of 13 out of a possible 42 points, including a score of two (out of a possible score of six) in the "performance evaluation" category. Mengel's overall score was 11 points lower than the next-lowest-rated employee in her department.

It is not clear from the decision whether Mengel was aware of the impending RIF and her relatively low matrix score. It is notable, however, that she formally complained about the "tar baby" comment in April 2009, eight months after it was made. When the company did not investigate her complaint to her satisfaction, she filed an EEOC charge claiming that she was discriminated against in retaliation for her complaint, as well as on the basis of her gender and alleged disability. Ten days after Mengel filed her charge, she was laid off, along with two other employees in her department, both

male. She brought suit after the EEOC concluded its investigation and Reading Eagle moved for summary judgment at the conclusion of discovery.

## **NOT SUBSTANTIALLY LIMITING**

The court first considered whether Mengel had set forth a prima facie claim of disability discrimination. The EEOC's regulations to the ADA state that "deafness substantially limits hearing" and that hearing is a major life activity. As such, deafness is a disability covered by the act. However, the evidence was that Mengel was deaf in only one ear and that the only impairment that she suffered was that she "had difficulty hearing in noisy environments." The court noted that "even under post-ADAAA regulations, 'not every impairment will constitute a disability within the meaning of the ADA.'" Although Mengel testified that she "didn't hear some things," she was not able to cite any specific instance where her hearing loss caused a problem. As such, the court found that Mengel was not "disabled" as a matter of law.

## **'REGARDED AS' CLAIM FAILS**

The company's knowledge that Mengel had "balance problems" related to her brain surgery was sufficient to establish a prima facie claim that she was "regarded as" disabled under the ADAAA. This is because "the ADAAA no longer requires a showing that [the plaintiff's] impairment was perceived

to substantially limit a major life activity." Mengel's ADA claim failed, however, because she was unable to establish a causal connection between being regarded as disabled and the termination decision. This was largely because the company had learned of her balance problems well over two years before her termination and her supervisors had given her a satisfactory evaluation shortly after her surgery.

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## **NO OBJECTIVE BELIEF IN ILLEGAL CONDUCT**

Mengel also claimed that she was retaliated against for complaining about her co-worker's use of the term "tar baby." The court observed that the first element of a prima facie retaliation claim is having engaged in "protected activity." The standard is both objective and subjective, requiring that the employee establish that he or she "held an objectively reasonable belief, in good faith, that the activity [he or she] opposed is unlawful under Title VII."

In this case, it would be without dispute that the single use of an

ambiguous term that sometimes (but not always) has racial connotations would not be severe or pervasive enough to create a hostile work environment. But the question was whether it was objectively reasonable for Mengel to have believed that she had been discriminatorily harassed. To this, the court found that "it is not reasonable for an employee to believe that a single, potentially racist remark could violate Title VII."

Moreover, the court found that Mengel did not have a good-faith belief that the comment was unlawful, as she complained only that the term made her "feel small."

The case is useful to counsel and their clients in considering whether a particular condition is covered by the ADA, even after the act was amended. While most conditions will still warrant such coverage, it remains important to analyze each condition, whether at the accommodation stage or in litigation, carefully in order to determine whether it does, in fact, substantially limit a major life activity. •