Split Circuits: Do 100 Percent Healed Policies Violate the ADA?

By Howard S. Lavin and Elizabeth E. DiMichele

Can an employer require an employee to be 100 percent healed before returning to work from medical or disability leave? Almost all circuit and district courts find “fully healed” policies to be a *per se* violation of the Americans With Disabilities Act of 1990, as amended (the ADA).1 Although somewhat of an oversimplification, these courts have reasoned that in requiring employees to be 100 percent healed as a condition of returning to work, employers are not making an individualized determination about whether the employees can perform the essential functions of the job—with or without a reasonable accommodation—and, thus, regard such employees as being disabled. In direct contrast to other federal courts, the Tenth Circuit in, *Dillon v. Mt. Coal, L.L.C.*,2 held that a 100 percent healed policy did not violate the ADA. Specifically, the court held that the employer’s no-restrictions policy did not, by itself, indicate that the employer regarded the employee as disabled.3

The United States Supreme Court denied *certiorari* in *Dillon*,4 leaving this circuit split unresolved.

**Statutory Background**

The ADA prohibits, among other things, disability-based discrimination against a qualified individual with a disability in:

- Recruitment and job application procedures;
- Training and promotion;
- Compensation and benefits;
- Termination; and
- All other terms, conditions, and privileges of employment.

An employer violates the ADA if it fails to provide a reasonable accommodation for a known disability, unless doing so constitutes an undue hardship. A reasonable accommodation is a change to a job or work environment, such as job restructuring—swapping or eliminating marginal or non-essential job functions5—and modifying work schedules, even if the employer does not do so for other employees.6
In litigating ADA claims in federal court, employers have been particularly successful; they have prevailed in over 90 percent of the cases decided each year. Although these cases have presented complex legal issues, and have been decided on a variety of grounds, in many instances, a significant factor in employer-defendant victories has been their ability to argue successfully that the employee-plaintiff is not “disabled” within the meaning of the ADA. With the express purpose of reversing this trend and expanding the pool of individuals deemed disabled, Congress passed the ADA Amendments Act of 2008 (ADAAA), which became law effective January 1, 2009.

The Equal Employment Opportunity Commission (EEOC) estimates that the ADAAA will result in approximately one million more individuals being “disabled” for purposes of the ADA. Specifically, the EEOC’s draft regulations clarify that under the ADAAA, the “determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity,” including, among other things, the individual’s ability to work. As a practical matter, this means that more employees will be eligible for reasonable accommodations and the focus of ADA litigation will change. Going forward, ADA cases are likely to address whether:

1. The applicant or employee is qualified (i.e., can the individual perform the essential functions of the job with or without a reasonable accommodation); and
2. A given accommodation is reasonable or an undue hardship.

Decisions of the Majority of Circuits Regarding 100 Percent Healed Policies

So-called “fully healed” or “100 percent healed” policies require an individual to bring a note from his or her doctor or medical provider stating that he or she is able to return to work after a medical or disability leave with no restrictions or that the employee is disability free. Almost all courts that have examined these practices have concluded that they are per se unlawful under the ADA. The Ninth Circuit, in McGregor v. Nat’l. R.R. Passenger Corp., held that 100 percent healed policies discriminate against qualified individuals with disabilities because such policies permit employers to “substitute a determination of whether a qualified individual is ‘100% healed’ from their injury for the required individual assessment of whether the qualified individual is able to perform the essential functions of his or her job with or without accommodation.”

District courts across the country have adopted this reasoning. Likewise, courts have found that employers with such policies discriminate against every employee who ever takes medical or disability leave, regardless of whether the employee actually has a disability, by regarding the employee as disabled and, therefore, violating the ADA.

The Tenth Circuit’s Dillon Decision

Dillon involved a maintenance mechanic who injured his neck and back when part of a machine fell on him while he was performing his job duties. As a result of his injury, the employee was unable to return to work for six months. After six months, the employee’s doctor said he had reached “maximum medical improvement” and imposed lifting restrictions that were less than what the employee’s job required. Because the employer had a policy that “would not permit any employee with medical restrictions from working in any capacity,” the employee was terminated.

As a result of his termination, the employee brought an action in the United States District Court for the District of Colorado alleging that he was unlawfully terminated from his position because his
employer regarded him as disabled. The district court granted the employer’s motion for a judgment as a matter of law, reversing the jury’s ruling in the employee’s favor, finding, inter alia, the evidence was insufficient for a reasonable jury to find the employer regarded the employee as disabled. The employee appealed the district court’s decision to the Tenth Circuit.

The Tenth Circuit found that the jury was entitled to believe the employer regarded the employee as substantially limited in performing his own job due to the 100 percent healed policy, but there was not enough evidence to show the employer regarded the employee as unable to perform a class of jobs. The Tenth Circuit affirmed the judgment of the district court, holding there was insufficient evidence that the employer regarded the employee as “unable to perform a broad range of jobs in various classes in the geographic area.” Notably, this is inconsistent with the ADAAA, which changes the standard so that employers must now look at whether an individual can meet the qualifications for a “type of work” as opposed to a “broad range of jobs.”

Looking Ahead

Is the Tenth Circuit decision in Dillon a harbinger of things to come or an aberrant decision? Given the number of courts that have plainly held 100 percent healed policies are a per se violation of the ADA along with the ADAAA’s focus on employers making individual determinations regarding an employee’s ability to perform the essential functions of his or her job, with or without reasonable accommodations, it appears the Tenth Circuit decision is an outlier that is inconsistent with the language and intent of the ADAAA. Accordingly, employers should consider promulgating policies that enable them to make individual determinations. Specifically, employers should consider requiring all employees returning from medical or disability leave to bring a fitness-for-duty certification from their doctor or health care provider that confirms their ability to return to work and perform the essential functions of their job, with or without a reasonable accommodation.

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Notes

1. 42 U.S.C. § 12101, et seq.
2. 569 F.3d 1215 (10th Cir. 2009), cert denied (U.S. Jan. 25, 2010).
3. Id. at 1220.
6. Id. at question 22.
7. For example, a recent ABA survey of 2008 ADA cases found that employers prevailed in 424 of 507 cases, or 97.8 percent of the cases decided in federal court (Amy L. Albright, 2008 Employment Decisions Under the ADA Title I—Survey Update, 33 MPHYDLR 363 (2009)).
8. Congress intended “disability” to be construed broadly, but the Supreme Court had narrowed the scope, thereby eliminating protection for many individuals Congress intended to protect. See Congressional Record, H8286 (Sept. 17, 2008).
10. See, e.g., *Henderson v. Ardo, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001) (“All courts that have examined the question … agree that a 100 percent rule is impermissible as to a disabled person”); *McGregor v. Nat’l. R.R. Passenger Corp.*, 187 F.3d. 1113 (9th Cir. 1999) (holding policies that preclude employees from returning to work unless they are 100 percent healed are per se violations of the ADA); *E.E.O.C. v. Yellow Freight System, Inc.*, No. 98 Civ. 2270 (THK), 2002 WL 3101859 (S.D.N.Y. 2002) (“[c]ourts have consistently found that policies prohibiting injured employees from returning to work unless they can do so ‘without restrictions’ violate the ADA”).

11. 187 F.3d at 1116.

12. See, e.g., *Furman v. City of New York*, No. 07-CV-1014 (RRM)(JO), 2009 WL 4626706 (E.D.N.Y. 2009) (“a requirement that an employee return to work only when he is fully healed discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is ‘100% healed’ from their injury for the required individual assessment of whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation”) (internal quotations and citations omitted); *Heise v. Genuine Parts Co.*, 900 F.Supp. 1137, 1154, and n. 10 (D. Minn. 1995) (same); *Hutchinson v. United Parcel Serv., Inc.*, 883 F. Supp. 379, 397 (N.D. Iowa 1995) (same).

13. *Wansley v. New York City Transit Auth.*, 308 F. Supp. 2d 114 (E.D.N.Y. 2004) (finding employer regarded every former employee who had taken medical leave as substantially limited in his ability to work in a broad range of jobs because reinstatement policy required that an employee be “disability free” before returning to work).

14. 569 F.3d at 1216–1217.

15. *Id.* at 1217.

16. *Id.* at 1219.


18. *Id.* at *5.

19. *Id.*

20. 569 F.3d at 1220.
