

# On Second Thought, That Bum Shoulder Is a Disability

## Labor & Employment Law Update

By Beverly Alfon on January 22, 2016

A federal appellate court unanimously found that an individual's difficulty with lifting his right arm above his shoulder, constituted a disability under the ADA Amendments Act of 2008, which amended the Americans with Disabilities Act of 1990 (ADA), *Cannon v. Jacobs Field Services North America, Inc.*, Case No. 15-20127 (5<sup>th</sup> Cir., 1/13/16).

In this case, a construction firm offered the plaintiff, Michael Cannon, a job as a field engineer. Cannon participated in a pre-employment physical, which revealed a rotator cuff injury. The doctor cleared him for work, but only with accommodations: no driving of company vehicles, no lifting, no pushing or pulling of more than 10 pounds, and no working with his hands above shoulder level. On the same day the company received the doctor's paperwork, they determined that Cannon was not physically capable of performing the job and then rescinded the offer. The company told Cannon that the reason for the rescission was his inability to climb a ladder – an essential function of the job. Despite Cannon's multiple attempts to prove otherwise (even sending a video of himself doing so), the company ceased communication. Cannon filed suit. The lower court granted summary judgment to the company, concluding that the injured rotator cuff did not constitute a disability under the ADA.

The appellate court reversed the lower court, finding that the lower court ignored the ADA amendments' more relaxed standard of "a degree of functional limitation" versus the higher standard of "substantially limits" a major life activity. The appellate court also found that the company's "belief" that Cannon suffered from a substantial impairment was also enough to satisfy the disability element of the claim. Ultimately, the court concluded that the company "never cited a reason for rescinding Cannon's offer [...] which is divorced from his physical impairment."

This brought the court to the next question of whether or not, despite Cannon's impairment, he was still qualified for the field engineer position. The court reasoned that in light of evidence that the candidate could climb a ladder (i.e., the video footage), it was enough to reverse summary judgment and force the case to jury trial. The Court pointed out that had the company conducted a more thorough inquiry after learning about the injury, it would have been able to get to the bottom of the ladder climbing question.

**Bottom line:** The ADA 2008 amendments made it much easier for a plaintiff to establish a disability. Your defense should focus on the issue of whether or not an individual is qualified for the position, despite any impairment. This requires you to fully engage in the interactive process and build a solid record of evaluation of the candidate's qualifications before making a decision to rescind an offer.

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