IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

June 30, 1998

Cecil Crowson, Jr.

Appellate Court Clerk

LARRY W. BARNES,	)	
	)	
Plaintiff/Appellant	)	Obion Chancery No. 16,153
	)	
vs.	)	
	)	
THE GOODYEAR TIRE AND RUBBER COMPANY,	)	Appeal No. 02A01-9707-CH-00157
	)	
	)	
Defendants/Appellees.	)	

APPEAL FROM THE CHANCERY COURT OF OBION COUNTY
AT UNION CITY, TENNESSEE

THE HONORABLE MICHAEL MALOAN, CHANCELLOR

For the Plaintiff/Appellant:

Dan M. Norwood
James R. Becker, Jr.
Memphis, Tennessee

For the Defendants/Appellees:

James M. Glasgow, Jr.
Union City, Tennessee

Tim K. Garrett
Michael S. Moschel
Nashville, Tennessee

REVERSED

HOLLY KIRBY LILLARD, JUDGE

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HEWITT P. TOMLIN, JR., SP.J.

OPINION

This is a suit for wrongful termination under the Tennessee Handicap Act. After denying the employer's motion for a directed verdict, the trial court sent the case to the jury to determine whether the employer regarded the plaintiff as handicapped. The jury found that the employer regarded the plaintiff as handicapped and awarded $150,000 in back pay and $150,000 for humiliation and embarrassment. Invoking remittitur, the trial court reduced the damages to $100,000 for back pay and $75,000 for emotional damages and ordered the defendant to pay plaintiff approximately $30,000 for attorney's fees and court costs. Both parties have appealed. We reverse and direct a verdict for the employer.

Plaintiff/Appellant Larry W. Barnes ("Barnes") was employed by Defendant/Appellee Goodyear Tire & Rubber Company ("Goodyear") at its tire manufacturing facility in Union City, Tennessee. Goodyear hired Barnes in 1970. At the time that his employment was terminated, Barnes was employed as a Process Control ("PC") Operator in the Final Finish Process Control unit ("the Unit") and earned approximately $15 per hour. As a PC Operator, Barnes' primary duty was to assure the quality of the tires manufactured at the facility. The Unit consisted of six employees, with David Nelms ("Nelms") as the supervisor.

During Barnes' employment, he suffered recurring knee problems. Barnes also developed a temporary case of Bell's Palsy during the summer of 1989. Bell's Palsy is a condition of the nervous system that affects the facial muscles. Barnes' Bell's Palsy caused him to be absent from work for five or six weeks. Barnes' Bell's Palsy caused distortion of the facial muscles, paralysis of his eye, and slurred speech. All of these symptoms were temporary. Barnes alleged that his co-workers ridiculed him because of his Bell's Palsy, and that they were uncomfortable in his presence.

Also during the summer of 1989, the Unit was reorganized. Barnes had been working on the first shift starting in the morning. After the reorganization, Barnes was switched to the second shift. The PC Operators chose their shifts based on their seniority. After the most senior Operator chose the first shift, Barnes, second in seniority, chose the second shift. Nelms testified that Barnes was upset about the shift change and refused to communicate with the first shift Operator during shift changes. A performance evaluation completed by Nelms for 1989 states that Barnes needed to "improve beginning and end of shift communications" and that his "reaction to the shift change was poor." Barnes, however, testified that he was not upset at the first shift Operator, and that he was

not bothered by the transition to the second shift because he enjoyed hunting in the morning. Barnes refuted Nelms' contention that he did not communicate well during shift changes.

In August 1990, Goodyear notified its North American plants that it would reduce its salaried work force by twenty percent over the next three years. The Union City plant implemented its layoffs based on job performance. Job performance was measured by an elaborate performance appraisal scheme that had already been implemented by Goodyear. Management utilized performance appraisals for the 1989 calendar year in making its layoff decisions. Of eighty-eight quality assurance inspectors at the facility, Barnes received the fifth lowest performance evaluation. In September 1990, Goodyear laid off the seven lowest ranked quality assurance inspectors, including Barnes.

After Goodyear notified Barnes that he had been laid off, Barnes claims that he confronted Nelms. At trial, Bames testified as follows:

> I said, "Why am I being laid off? Is it because of my job performance, my attitude, my attendance?" He said, "Naw." I said, "Is it because I had Bell's palsy and I missed time and nobody else didn't?" He said, "That's right." He got up and left.

Nelms testified that he did not remember having such a conversation with Barnes. Nelms maintained that he never regarded Barnes as being handicapped and that he never considered Barnes' Bell's Palsy as a factor in his performance evaluation.

Goodyear designated Barnes' layoff as "recallable," meaning that he was eligible for recall for a four year period. Goodyear also offered Barnes a position with Hamilton-Ryker, an affiliate of Goodyear. Barnes rejected this offer. He enrolled in barber school in July 1991.

In September 1991, Barnes filed this suit, alleging that Goodyear violated the Tennessee Handicap Act ("THA"), Tennessee Code Annotated § 8-50-103 (1993), by terminating his employment based on his handicap or perceived handicap. In the meantime, Barnes graduated from barber school and began working as a barber. In July 1993, Goodyear recalled Barnes to an hourly position. Barnes earned over $16 per hour for this position. Approximately one year later, Barnes took a medical disability from Goodyear due to a knee injury and has not returned.

Barnes' lawsuit against Goodyear went to trial in May 1996. At the conclusion of Barnes' proof, Goodyear moved for directed verdict, arguing that Barnes had failed to demonstrate that he was "handicapped" pursuant to the THA. The trial court held that Barnes had failed to demonstrate that he actually suffered from or had a record of a handicap. The trial court, however, denied

Goodyear's motion with respect to the issue of whether Goodyear "regarded" Barnes as handicapped.

The jury returned a verdict in favor of Barnes and awarded damages of $150,000 for back pay and $150,000 for humiliation and embarrassment. Goodyear filed a motion for a directed verdict or, in the alternative, for a new trial. In the alternative, Goodyear suggested remittitur. In an order dated February 14, 1997, the trial court upheld the jury's finding of liability, but suggested a remittitur of Barnes' damages to $100,000 for back pay and $75,000 for humiliation and embarrassment. The trial court also ordered Goodyear to pay Barnes $28,690 for attorney's fees and $1,073.37 for court costs. Barnes accepted the remittitur under protest and appealed. Goodyear appeals as well.

On appeal, Barnes contends that the trial court erred by reducing the damages awarded by the jury. Barnes also appeals the calculation of the attorney's fees awarded by the trial court. On appeal, Goodyear argues that the trial court erred by failing to direct a verdict for Goodyear on the issue of whether Goodyear regarded Barnes as suffering from a handicap. In the alternative, Goodyear asserts that the trial court should have reduced Barnes' damages beyond the suggested remittitur due to his failure to mitigate his damages.

We first address Goodyear's appeal of the trial court's denial of its motion for directed verdict. When reviewing a trial court's denial of a directed verdict motion, an appellate court "must take the strongest legitimate view of the evidence in favor of the plaintiff, indulging in all reasonable inferences in his favor, and disregarding any evidence to the contrary." ***Williams v. Brown***, 860 S.W.2d 854, 857 (Tenn. 1993) (quoting ***Cecil v. Hardin***, 575 S.W.2d 268, 271 (Tenn. 1978)). A directed verdict is only appropriate "if there is no material evidence in the record that would support a verdict for the plaintiff, under any of the theories that he has advanced." ***Id.***; ***Conaster v. Clarksville Coca-Cola Bottling Co.***, 920 S.W.2d 646, 647 (Tenn. 1995).

The Tennessee Handicap Act forbids discrimination by private employers "based solely upon any physical, mental or visual handicap of the [employee], unless such handicap to some degree prevents the [employee] from performing the duties required by the employment sought or impairs the performance of the work involved." Tenn. Code Ann. § 8-50-103(a). Since the THA does not define "handicap," courts turn to three sources for its interpretation: (1) the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. § 4-21-102(9)(A) (Supp. 1997); (2) the comparable federal

statutes, the Americans with Disabilities Act, 42 U.S.C.A. § 12102 (2)(1995), and the Rehabilitation Act, 29 U.S.C.A. § 706(8)(B) (Supp. 1998), and (3) federal and state case law interpreting these statutes.[1] ***Cecil v. Gibson***, 820 S.W.2d 361, 364 (Tenn. App. 1991).

The Tennessee Human Rights Act provides as follows:

> "Handicap" means, with respect to a person:
> (i) A physical or mental impairment which substantially limits one (1) or more of such person's major life activities;
> (ii) A record of having such an impairment; or
> (iii) Being regarded as having such an impairment;

Tenn. Code Ann. § 4-21-102(9)(A). The two elements of a prima facie case under the Tennessee Handicap Act are:

> (1) proof that the plaintiff is handicapped or is regarded as such by the defendant and
> (2) proof that the plaintiff is capable of performing the job from which he or she was fired notwithstanding the actual or perceived handicap.

Watkins v. Shared Hosp. Services Corp., 852 F.Supp. 640, 644 (M.D.Tenn. 1994) (citing ***Cecil***, 820 S.W.2d at 365-66).

The trial court directed a verdict in favor of Goodyear on the first two prongs of the handicap definition.[2] Tenn. Code Ann. § 4-21-102(9)(A) (i) and (ii). The trial court declined to direct a verdict on the third prong of the handicap definition, finding that Barnes had presented sufficient facts from which the jury could determine that Goodyear had "regarded [him] as having such an impairment." ***Id.*** § 4-21-102(9)(A)(iii). Goodyear contends that in order for Barnes to prevail on this third prong, he needed to demonstrate not only that Goodyear regarded him as having an impairment, but also that Goodyear regarded that impairment as one which "substantially limits one (1) or more of [Barnes'] major life activities." ***Id.*** § 4-21-102(9)(A)(i). Goodyear asserts that Barnes presented no material evidence indicating that Goodyear regarded Barnes' impairment as

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[1] The definition of "handicap" in the THRA is virtually identical to the definition of "disability" in the Rehabilitation Act. Therefore, Tennessee courts seek guidance from both federal and state case law when interpreting the THRA definition. ***Cecil***, 820 S.W.2d at 361.

[2] Barnes does not appeal this ruling.

substantially limiting one or more of his major life activities. Consequently, Goodyear contends that the trial court should have directed a verdict in Goodyear's favor on the entire suit.

Under the third prong of the definition of a handicap, plaintiff may recover under the THA if he suffers from "an impairment [that] might not diminish [the] person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." ***School Bd. of Nassau County v. Arline***, 480 U.S. 273, 283, 107 S.Ct. 1123, 1128-29, 94 L.Ed.2d 307 (1987). An employee is not "regarded" as handicapped simply because the employer is aware that the employee has an impairment; rather, the employer must regard the employee's impairment as substantially limiting at least one major life activity. ***See e.g., Kelly v. Drexel Univ.***, 94 F.3d 102, 109 (3d Cir. 1996). Thus, two requirements must be met: 1) the employer must perceive the employee as having an impairment, and 2) the employer must perceive that impairment as substantially limiting a major life activity. ***See, e.g., Cecil***, 820 S.W.2d at 366; ***Kocsis v. Multi-Care Mgmt., Inc.***, 97 F.3d 876, 884 (6th Cir. 1996); ***Johnson v. Boardman Petroleum, Inc.***, 923 F.Supp. 1563, 1568 (S.D.Ga. 1996).

The parties do not dispute that Goodyear perceived Barnes' bout with Bell's Palsy[3] as an impairment.[4] The parties also do not dispute the trial court's finding that Barnes' past bout with Bell's Palsy, in and of itself, did not substantially limit one or more of Barnes' major life activities. The issue is whether Goodyear *perceived* that the Bell's Palsy still substantially limited one or more of Barnes' major life activities.

The Equal Employment Opportunity Commission ("EEOC") provides guidelines concerning the third prong. 29 C.F.R. § 1630.2 (West, Westlaw through Jan.1, 1998). "Major life activities" include:

> functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Id. § 1630.2(I). The term, "substantially limits," is defined as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner,

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[3] Although Barnes leaves open the possibility that Goodyear may also have regarded him as handicapped in light of his knee problems, the record contains no evidence that Goodyear ever considered this as a factor in any of its employment decisions.

[4] Goodyear concedes this point on appeal.

> or duration under which the average person in the general population can perform that same major life activity.

Id. §1630.2(j)(1). Factors that should be taken into account when considering whether a person is "substantially limited in a major life activity," include:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Id. § 1630.2(j)(2). In addition, "[w]ith respect to the major life activity of working":

> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. § 1630.2(j)(3). The EEOC states further that a person who is "regarded as having such an impairment,"

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or
> (3) Has none of the impairments defined in [other portions] of this section but is treated by a covered entity as having a substantially limiting impairment.

Id. § 1630.2(l).

In ***Cecil v. Gibson***, 820 S.W.2d 361 (Tenn. App. 1991), we addressed this third prong of the definition of handicap. The plaintiff in ***Cecil*** applied for a position as a police officer trainee. He was denied employment because he could not comply with visual standards. The plaintiff then filed suit under the THA. ***Id.*** at 363. The Court found that the plaintiff did not meet the first prong of the definition of handicap, because his visual impairment did not, in fact, substantially limit one or more of his major life activities. ***Id.*** at 365. The Court then considered whether the defendant nevertheless "regarded" the plaintiff as handicapped. ***Id.***

The only evidence presented by the plaintiff that he was regarded as visually handicapped was the defendant's rejection of his job application. ***Id.*** at 366. The Court stated:

> [u]nder our statutes, the proper inquiry is whether the employer regards the applicant as having a physical or mental impairment *which substantially limits one or more of the applicant's major life activities*.

Id. (emphasis added). After discussing the EEOC guidelines, the Court noted that "[a]n impairment must limit a person's general employability in order to substantially limit a major life activity," and

that "[w]hile 'working' is a major life activity, working at the specific job of one's choice is not." ***Id.*** at 364-65 (internal citations omitted). The Court found that the defendant did not regard the plaintiff as handicapped merely because it determined that the plaintiff failed to meet the job requirements for that particular job. ***Id.*** at 366. The inability to perform one particular job is not considered a substantial limitation of a major life activity. ***Id.*** at 365-66. The Court concluded that the plaintiff failed to demonstrate that the defendant regarded him as having an impairment that substantially limited one or more of his major life activities. ***Id.*** at 366.

Goodyear cites ***Czopek v. General Elec. Co.***, 4 A.D. Cases 1231 (N.D.Ill. 1995). In ***Czopek***, the plaintiff was an employee whose job requirement called for routine lifting. ***Id.*** at 1232. After suffering a heart attack, the plaintiff was absent from work for one month and then returned to work on light duty. ***Id.*** The plaintiff was later terminated because he failed to satisfy the lifting requirements. He filed suit under the Americans with Disabilities Act ("ADA"). ***Id.*** The plaintiff argued that he was "substantially limited in the major life activities of performing manual tasks and working." ***Id.*** at 1233.

The ***Czopek*** court found that the plaintiff had failed to demonstrate that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes," and therefore held that the plaintiff had failed to demonstrate that a major life activity was substantially limited. ***Id.*** (quoting 29 C.F.R.§ 1630.2(j)(3)). The court also held that the plaintiff had failed to proffer any evidence showing that he was regarded as "limited in any other way than his ability to lift more than twenty pounds or to perform his former position." ***Id.*** Noting that the employer attempted to place the plaintiff in another position within the company, the court stated:

> This demonstrates that defendants did not regard plaintiff as having an impairment that substantially limited his major life activities; rather, defendants regarded plaintiff as having a physical impairment that limited him in his previous job.

Id. Thus, the court granted summary judgment to the defendants. ***Id.; see also O'Dell v. Altec Industries, Inc.***, 4 A.D. Cases 1776, 1995 WL 611341, at *4 (W.D.Mo. Oct. 16, 1995) ("There is no indication that defendant regarded plaintiff as suffering from anything other than the relatively narrow lifting restriction, which does not amount to a substantial limitation.")

In ***Kocsis v. Multi-Care Mgmt, Inc.***, 97 F.3d 876 (6th Cir. 1996), a nurse filed suit against her former employer under the ADA for failing to promote her, for reassigning her, and for constructively discharging her. The plaintiff suffered from health problems that included arthritis, fibromyalgia, and the possibility of multiple sclerosis. ***Id.*** at 878-79. The trial court granted summary judgment to the defendant, finding that the plaintiff had failed to present any material evidence showing that the defendant was liable under the ADA. ***Id.*** at 881-82. On appeal, the plaintiff argued that the defendant regarded her as suffering from a substantially limiting impairment. ***Id.*** at 885. The plaintiff relied on performance evaluations indicating that the defendant was aware of the plaintiff's "health problems, lack of energy, and mood swings." ***Id.*** Based on this evidence, the plaintiff argued that the "defendant viewed her activities as substantially limited." ***Id.***

The Sixth Circuit affirmed the trial court's finding that the plaintiff proffered insufficient evidence to support her claim:

> While the defendant may have perceived that [the plaintiff's] health problems were adversely affecting her job performance, there is no evidence that defendant regarded [the plaintiff] as being unable to care for herself or to perform all of the duties of her job.

Id. Consequently, the Court found that the plaintiff failed to "establish that she had a disability under the 'regarded as' prong of the definition." ***Id.***

Johnson v. Boardman Petroleum, Inc., 923 F.Supp. 1563 (S.D.Ga. 1996), also involved a suit brought under the ADA. The plaintiff was a district supervisor of eight of the defendant's stores. The defendant informed her that she was being terminated for failure to investigate and remedy cash shortage problems in her stores. ***Id.*** at 1566. The plaintiff alleged that she was being terminated because the defendant regarded her as physically and mentally disabled. ***Id.***

The plaintiff cited three incidents: 1) her supervisor gave her time off after her husband died and told her to seek professional help; 2) her supervisor required a release from her doctor before she could return; and 3) when she was terminated, her supervisor told her that she was "physically and mentally incapable of continuing" her job. ***Id.*** at 1568. The court granted summary judgment to the defendant, finding that the defendant's acknowledgment that the plaintiff was suffering from emotional problems, standing alone "does not rise to the level of demonstrating [that the defendant] thought she had a mental disability or that she was unable to work because of this disability." ***Id.***

In ***Howell v. Sam's Club #8160***, 959 F.Supp. 260 (E.D.Pa. 1997), the plaintiff sued his former employer under the ADA after he was terminated from his employment as a maintenance worker. The employer notified the plaintiff that he was being terminated due to sexual harassment. ***Id.*** at 263. The plaintiff, however, claimed that this stated reason was a pretext and that he was discriminated against due to a back and knee disability. ***Id.*** After first finding that the plaintiff failed to show that he suffered from or had a record of an impairment that substantially limited one or more of his major life activities (the first two prongs of the "disability" definition), the court considered whether the plaintiff had presented sufficient proof that the employer had regarded him as suffering from such an impairment. ***Id.*** at 264-68.

The court granted summary judgment in favor of the employer on the third prong as well. ***Id.*** at 269-70. The only evidence presented by the plaintiff was proof that the employer was aware of his impairment. ***Id.*** at 269. The court held that the employer's mere awareness of an impairment was insufficient to demonstrate a claim under the third prong. ***Id.*** (citing ***Kelly***, 94 F.3d at 109). Because the plaintiff failed to offer any evidence that the employer "perceived him as having an impairment that substantially limited his ability to work," the court dismissed the plaintiff's claim. ***Id.***

The court in ***Howell*** contrasted the case with ***Olson v. General Electric Astrospace***, 101 F.3d 947 (3d Cir. 1996). ***Howell***, 959 F.Supp. at 269. In ***Olson***, an applicant brought suit under the ADA and its New Jersey counterpart against an employer. ***Olson***, 101 F.3d at 949. The applicant had been previously employed by the employer but had been laid off. ***Id.*** The former employer was aware that the plaintiff had been hospitalized for four months for depression. ***Id.*** The plaintiff alleged that a substantial portion of his job interview was devoted to questions relating to the current status of his health, such as medication he was taking and medical tests that had been performed. ***Id.*** at 950. The district court ruled that the plaintiff failed to show that he was "disabled" under any of the prongs of the "disability" definition, and the plaintiff appealed. ***Id.*** at 952-53.

The plaintiff pointed to the job interview as demonstrating that the employer regarded him as suffering from an impairment. ***Id.*** at 954. The plaintiff also proffered a performance evaluation completed during the plaintiff's prior employment which contained "multiple references" to the fact that [the plaintiff] had missed a significant amount of work because of illness." ***Id.*** Consequently, the evaluation stated that "[h]is work habits are questionable." ***Id.*** Under these circumstances, the

appellate court reversed the trial court and held that "a reasonable fact-finder could infer that [the employer] perceived [the plaintiff] to be disabled." ***Id.*** at 955.

Another case in which the plaintiff presented a prima facie case under the third prong is ***Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hosps.***, 10 F.3d 17 (1st Cir. 1993). In ***Cook***, the plaintiff applied for a position as an institutional attendant for a mental hospital. Although the plaintiff passed her physical examination, the defendant hospital refused to hire her. ***Id.*** at 21. The defendant felt that the plaintiff was "morbidly obese," and that this condition

> compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments (a "fact" that [the defendant's] hierarchs speculated would promote absenteeism and increase the likelihood of workers' compensation claims).

Id. The plaintiff sued the hospital under the Rehabilitation Act. The jury found that the defendant had regarded the plaintiff as disabled under the Act and the defendant appealed. ***Id.***

On appeal, the First Circuit considered whether the plaintiff had presented sufficient evidence to show that the defendant regarded her as suffering from an impairment that substantially limited one or more of her major life activities. ***Id.*** at 25. The Court first considering the phrase, "major life activities." The plaintiff proffered the testimony of the hiring physician, who testified that he refused to hire the plaintiff because he believed that her condition "interfered with her ability to undertake physical activities, including walking, lifting, bending, stooping, and kneeling, to such an extent that she was incapable of working as an [attendant]." ***Id.*** After quoting the applicable EEOC guidelines, the Court found that the physician's testimony alone demonstrated his belief that the "plaintiff's limitations foreclosed a broad range of employment options in the health care industry." ***Id.*** Thus, the Court held that the plaintiff presented sufficient evidence from which a reasonable jury could conclude that the defendant regarded the plaintiff as suffering from an impairment that substantially limited a major life activity, the plaintiff's ability to work. ***Id.*** at 25-26.

In this case, on appeal, we must construe the evidence in the light most favorable to Barnes. ***Williams***, 860 S.W.2d at 857. Barnes points to two portions of the record: 1) the alleged conversation between Barnes and Nelm in which Nelms allegedly admitted that Barnes was laid off because he had Bell's Palsy and missed time as a result; and 2) the 1989 performance evaluation of

Barnes prepared by Nelms in which Barnes was criticized for communication problems. Barnes also disputes Nelms' assertion that Barnes had a communication problem.

The fact that Nelms regarded Barnes as suffering from Bell's Palsy is insufficient to establish a cause of action under the third prong. ***Cecil***, 820 S.W.2d at 366; ***Kocsis***, 97 F.3d at 884; ***Kelly***, 94 F.3d at 106; ***Howell***, 959 F.Supp at 269. Barnes does not appeal the trial court's finding that the Bell's Palsy did not substantially limit one or more of his major life activities. Consequently, Barnes was required to prove that Goodyear regarded the past bout of Bell's Palsy impact as substantially limiting one or more of Barnes' major life activities.

Barnes does not specify which "major life activities" that Goodyear regarded as being substantially limited. The only major life activities that conceivably may apply include "working," "performing manual tasks," and "speaking." 29 C.F.R. § 1630.2(i). There is no evidence that Goodyear perceived Barnes as suffering from a speaking limitation. The performance evaluation at issue does not suggest that Barnes had difficulty talking as a result of the Bell's Palsy; it suggests that Barnes had personality problems with his co-workers during shift changes. Barnes argues that the alleged communication problem was a pretext for Goodyear's criticism of the sole fact that Barnes had Bell's Palsy. Even if the alleged communication problem were a pretext, the fact that Goodyear regarded Barnes as suffering from Bell's Palsy, standing alone, is insufficient to satisfy the third prong. ***See, e.g., Johnson***, 923 F.Supp. at 1568-69; ***Howell***, 959 F.Supp. at 269.

Barnes argues that Nelms' statement about Barnes missing work due to his Bell's Palsy indicates that Goodyear regarded Barnes as substantially limited in the ability to work or perform manual tasks. Taking adverse employment action against an employee for past absenteeism as a result of an impairment is not a violation of the THA. Tenn. Code Ann. § 8-50-103(a) ("There shall be no discrimination . . . based solely upon any . . . handicap . . . unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved."). An employer may terminate an employee for a *consequence* of a disability but not the disability itself. ***See, e.g., Matthews v. Commonwealth Edison Co.***, 128 F.3d 1194, 1198 (7th Cir. 1997). A violation, however, may occur if an employer's comment or concern about an employee's absenteeism indicates the employer's belief that the employee will be substantially limited from working in the future. ***See, e.g., Olson***, 101 F.3d at 954-55 (evidence demonstrated the employer's concern of future absenteeism by the employee as a result

of the employee's impairment); ***Cook***, 10 F.3d at 21, 25-26 (same).

In this present case, Nelms' alleged comment about Barnes' period of absence resulting from his temporary bout with Bell's Palsy refers to a past period of absenteeism. The trial court concluded that this extended absence did not substantially limit any of Barnes' major life activities. There is no evidence in the record that Goodyear was concerned that Nelms would be frequently absent in the future. Thus, Nelms' alleged comment does not suggest that Goodyear regarded Barnes as suffering from an impairment that substantially limited any of his major life activities.

After reviewing the record, the evidence is insufficient to permit the jury to infer that Goodyear violated the third prong. There is not sufficient evidence that Goodyear perceived that Barnes' past impairment would be an impairment in the future. The impairment was only temporary, and there is no evidence that Goodyear anticipated the duration of the impairment to be beyond its actual scope. ***See*** 29 C.F.R. § 1630.2(j)(2)(ii) and (iii); ***Ogburn v. Gas & Water Dept, City of Clarksville***, No. 01-A-01-9702-CH-00056, 1997 Tenn. App. Lexis 585, at *6 n.1 (Tenn. App. Aug. 27, 1997) ("[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."); ***Roush v. Weastec, Inc.***, 96 F.3d 840, 843 (6th Cir. 1996) ("Generally, short-term, temporary restrictions are not substantially limiting.").

Moreover, there is no evidence that Goodyear regarded Barnes as physically unable to perform his specific job as a PC Operator, much less perform a broad range of jobs. 29 C.F.R. § 1630.2(j)(3); ***Cecil***, 820 S.W.2d at 366. In fact, Goodyear offered Barnes a position with its affiliate, Hamilton-Ryker. ***See Czopek***, 4 A.D. Cases at 1233. Thus, Barnes has failed to demonstrate that Goodyear regarded Barnes as substantially limited in his ability to work or perform manual tasks.

The evidence is insufficient to permit a jury to find that Goodyear regarded Barnes as suffering from an impairment that substantially limited a major life activity. Therefore, the trial court erred by failing to direct a verdict in favor of Goodyear. Accordingly, we reverse the trial court's decision and direct a verdict in favor of Goodyear. The remaining issues on appeal are pretermitted by this holding. The cause is remanded to the trial court for further proceedings consistent with this Opinion.

The decision of the trial court is reversed and a verdict is directed in favor of Goodyear. The cause is remanded to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed to Barnes for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

HEWITT P. TOMLIN, JR., SP.J.