Employment Law

Differing Definitions of Disability Under ADAAA and PHRA

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As many employment lawyers are now well aware, determining what is and what is not a "disability" under the applicable laws can be a litigation minefield. With the enactment of the ADA Amendments Act (ADAAA) on Jan. 1, 2009, there were supposed to be sweeping changes to the way the Americans with Disabilities Act (ADA) was being interpreted. The new law expanded the definition of "disability" in response to the restricted view given to it by the U.S. Supreme Court and other federal courts, which were interpreting the definition too narrowly.

The ADAAA retained the original three-prong definition of disability. Since the original ADA did not specifically define "major life activities," the ADAAA clarified the term to include specific activities like seeing, hearing, eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating and working. The ADA was enacted, and eventually amended, to prohibit employment discrimination against people with disabilities that substantially limit one or more of their major life activities, but who, with or without accommodation, can perform the essential functions of the job they hold or desire.

The changes to the ADA were intended to refocus the inquiry away from the issue of whether the employee was disabled and hone in on the interactive process and the employer's compliance with the law. For decades the ADA and the Pennsylvania Human Relations Act (PHRA) were interpreted co-extensively leading to very little distinction in the ways the claims were analyzed. In the years since the enactment of the ADAAA, however, courts in this district are looking much more closely at whether the employee fits the definition of "disability" under the ADA and the PHRA.

One such example arises in a case decided last week captioned *Sowell v. Kelly Services* (E.D. Pa. Oct. 13, 2015, No. 14-CV-3039). Tanika Sowell sued her former employer for violations of the Family and Medical Leave Act, ADA and PHRA. The district court considered the employer's motion for summary judgment and in so doing allowed the employee's claims under the ADA to proceed to trial. For the court, finding that Sowell was a person with disability under the ADA did not require any extensive analysis. The same was said for the employee's regarded-as claim under the ADA.

Once the district court got to the PHRA claim, the analysis took a bit of a sudden turn. The court noted, "Courts in this circuit are split on this issue of whether the ADAAA continues to be substantively identical to the PHRA 'with the majority concluding that because the Pennsylvania Legislature has not enacted a similar amendment to the PHRA, the disability prong of discrimination analysis under the PHRA should be analyzed in the same manner as pre-ADAAA claims,'" citing *Berkowitz v. Oppenheimer Precision Products* (E.D. Pa. Oct. 28, 2014, No. 13-CV-4917). Under the pre-ADAAA analysis, whether one meets the definition of disability was a much more stringent standard, hence the purpose of the amendments.

In *Sowell*, the evidence that supported the plaintiff's disability claims under the less stringent ADAAA was apparently not enough to support the PHRA claims. The court reasoned that the plaintiff had not presented sufficient facts that she would be considered disabled under the PHRA because she merely stated that she has trouble lifting and standing, without giving specific examples of how frequently, to what degree, or for how long those limitations last. The court was also not persuaded that Sowell's conditions were anything other than "temporary." From a practical perspective, it is difficult to understand how the court could find sufficient evidence of a permanent disability under the ADAAA but not under the PHRA.

Furthermore, the court relied on a series of cases purporting to hold that the ADAAA and the PHRA should now be analyzed under two different standards. While retracing the origin of the cases cited in the *Sowell* opinion, it appears that *Sowell*'s reliance on the *Berkowitz* case may have been misplaced. *Berkowitz*, which was an ADAAA case, in turn cited *Riley v. St. Mary Medical Center* (E.D. Pa. Apr. 23, 2014, No. 13-CV-7205), for the proposition that there is a split among district courts as to whether two different standards apply. While *Berkowitz* does indeed reference a judicial split, on closer review, however, *Riley* (which was also an ADAAA case) makes no such distinction, does not address different standards, and does not even address a split among courts.

In fact, the judge in *Riley* (the same author of the *Sowell* opinion) declared that the standard is actually the same for both laws. Therein, the court wrote that the ADA and PHRA are "to be interpreted consistently, and have the same standard for determination of liability," citing *Macfarlan v. Ivy Hill SNF LLC*, 675 F.3d 266, 274 (3d Cir. 2012). Recall that the *Riley* case, like the *Berkowitz* and *Sowell* cases, all involved claims under the ADAAA.

Following the logic of the majority of the courts in this circuit, each of the aforementioned cases should have used two different standards, with the more stringent one applicable to the PHRA. Again, this is hard to reconcile with *Riley*'s edict that the ADA and the PHRA are to be interpreted consistently, as required by the Third Circuit in *MacFarlan*. In my opinion, reliance on *MacFarlan* for the proposition that the ADAAA and the PHRA should be analyzed differently is somewhat out of left field because the facts in *MacFarlan* did not even arise under the ADAAA at all. There, the panel applied pre-ADAAA law because the facts giving rise to the claim occurred before Jan. 1, 2009. Moreover,*MacFarlan* relied exclusively on the definition of "disability" derived from the *Sutton v. United Airlines*, 527 U.S. 471, 478 (1998), case, which, as many know, was explicitly overturned by Congress in amending the ADA in 2008. Thus, *Sowell*'s reliance on *Berkowitz*, which relied on *Riley*, which relied on *MacFarlan*,is a classic example of whisper down the lane.

All that said, we are still left with split decisions from the Eastern District with respect to analysis of ADA/PHRA claims. There is another school of thought that the reason the PHRA was never amended like the ADA was because the definition of disability under the PHRA was actually less

onerous than the pre-ADAAA. That argument, however, will have to wait for another day, as clearly it will need to be decided by the court of appeals.

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