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Employment Law

Ushering in a New Era Under the ADA Amendments Act

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As most employment lawyers know, the passage of the Americans with Disabilities Act, or ADA, in 1990 dramatically changed the way employers did business, and guaranteed opportunities to hundreds of thousands of disabled employees. Not only did the ADA ban disability discrimination in the workplace, it also imposed the requirement of providing a reasonable accommodation to disabled employees. Rather than being a burden on employers, Congress envisioned that the ADA would ensure that scores of people would be able to remain part of the workforce with employers providing the assistance disabled workers needed to be equally as effective as their non-disabled coworkers.

While the ADA helped countless people gain and retain their employment, and allowed people to work in more suitable conditions, the spirit and intent of the ADA were hampered by the courts. Despite being a remedial statutory scheme meant to eliminate discrimination, ADA lawsuits became much more about proving one's disability, making justice infinitely more difficult than Congress had intended.

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Over the course of its 18-year life, the ADA's intended purpose was mishandled by those who were meant to implement it. The focus in court was on defining one's impairment and proving its effect on a major life activity. The ADA soon became the only anti-discrimination law where you could lose the case for not even belonging to the protected class. Clearly Congress did not intend for every person to be classified as "disabled" under the act. But Congress also did not intend to make people who are disabled struggle through an unclear yet intensive analysis of their medical conditions to be able to prove a need for an accommodation.

On Sept. 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008, or ADAAA, which brought sweeping changes to the ADA, ushering in a new era of hope and change for disabled Americans. In sum, these changes relieve some of the burden on employees trying to prove their disability, and refocus the inquiry on the interactive process and the employer's compliance with the law. These amendments are sure to bring more individuals under the protections of the ADA, and to make it more difficult for employers to deny accommodations.

On the first of this year, the new law went into effect, which expanded the definition of "disability" in response to the restricted view given to it by the U.S. Supreme Court and other federal courts that were interpreting the definition too narrowly.

The ADAAA retained the original three-prong definition of disability, which states that a disability can be: a physical or mental impairment that substantially limits one or more major life activities; a record of having such an impairment; or being regarded as having such an impairment (known as a "perceived disability"). Previously, the

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Equal Employment Opportunity Commission defined the phrase "substantially limits" as requiring the impairment to be one that "significantly" or "severely" restricted a major life activity. Congress has found this to be too much of a limitation and has directed the EEOC to revise its regulations accordingly. In doing so, the ADAAA specifically rejected the standards adopted in *Toyota Motor Mfg. v. Williams,* which required an impairment of only those major life activities that are of central importance to most people's daily lives.

Since the ADA did not specifically define "major life activities," the ADAAA has now 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 expanded term now also includes "major bodily functions" such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

Perhaps more importantly, though, is Congress' decision to overturn the Supreme Court holding in S *utton v. United Air Lines Inc.* , which previously required courts to consider the ameliorative effects of mitigating measures in assessing whether a person actually has a disability. Under the ADAAA, employees receive protection regardless of any ameliorating measures that they do or do not utilize. This relieves individuals from choosing between taking mitigating measures like using medication, prosthetics and interpreters, or receiving a reasonable accommodation at work. Instead, if an individual is disabled but the disability is, in whole or in part, mitigated or remedied by use of an assistive device or by medication, he or she is still a qualified individual protected by the ADA. Thus the focus is placed back on the employer's obligation to accommodate and not discriminate against a disabled employee, rather than on what the employee has done in attempting to mitigate the disability's effect on his or her daily life.

A minor or transient impairment, i.e., one that lasts for less than six months, is still not covered but an episodic condition or a condition that is in remission is now clearly covered. Individuals with post-traumatic stress disorder, cancer, HIV, diabetes and other conditions were covered by the ADA when the individuals were in symptomatic stages. What was less clear was whether they were still to receive ADA protection when a major life activity was not being limited because the condition was in remission or asymptomatic. Congress responded to this situation by providing full protection for such conditions, which relieves the employee's burden of going through the accommodation process multiple times and never quite being sure if they were "disabled" or not.

A key indicator that the ADA was meant to be broad and remedial is that it protects non-disabled individuals who are "regarded as" disabled by their employer or commonly referred to as having a "perceived disability." Congress was concerned about freeing people from unlawful discrimination, but the standards for being "regarded as" having a disability were never quite clear. The ADAAA reaffirms the holding of *Nassau County v. Arline* and explains that, when an employee believes she is being discriminated against because of a perceived impairment, she only has to show that the discrimination occurred. She no longer needs to prove that the perceived disability substantially impaired a major life activity. This is because the intent of the ADA is to protect employees and regulate the conduct of employers. Does this mean that an employer could get in trouble even though, had the impairment actually existed in the individual, the impairment would not even qualify under the ADA? Perhaps. But again, Congress is concerned with removing discrimination from the workplace, not on an individual's ability to prove a condition. Congress is also aware of this oddity, as it does not impose an obligation on an employer to provide a reasonable accommodation to an employee with a perceived disability.

As a whole, the ADAAA appears to qualify many more individuals as "disabled," and makes it more difficult for employers and courts to reject such claims. The amendments are a reminder from Congress that the ADA inquiry is not about defining and proving one's impairment, but instead should be ensuring that the employer is in compliance with the law and is treating their employees fairly.

Moving forward, it is highly advisable that disabled employees who have been denied a reasonable accommodation should be counseled to renew their request for accommodation with their employers. This will begin the reasonable accommodation process anew, potentially creating new claims with new statutes of limitations. Under the new guidelines employers will be hard pressed to justify years of litigation over whether epilepsy or post-traumatic stress disorder or diabetes are really disabilities. As with the original intent of the ADA, the focus should shift back to the interactive process and whether accommodations are feasible. •

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