Disability Law Update







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Findings and Purposes of the ADAAA



* Broad coverage was originally intended by Congress.

* Statute will now say courts and the EEOC have interpreted definition of disability too narrowly.

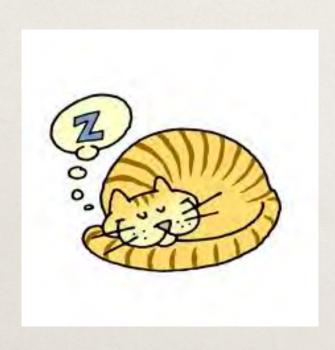
Findings and Purposes

* Overrules large parts of Supreme Court holdings in Sutton v. United Airlines and its companion cases and Toyota v. Williams.

* EEOC's regulatory definition of "substantially limits" is too narrow.



New Definition of Actual Disability



* Expanded View of Major Life Activities

- * Major Life Activities will now include lifting, bending, sleeping, learning, reading, concentrating, thinking, communicating and working.
- * Major Bodily Functions are now MLAs.

 These include immune system, digestion,
 bowel, bladder, respiratory, cell growth,
 neurological, brain, circulatory, endocrine,
 and reproductive functions.

New Definition of Actual Disability

* Disability will now be determined without reference to mitigating measures (medication, prosthetics, hearings aids, mobility devices, etc.), except for ordinary eyeglasses and contact lenses.

* Episodic conditions or conditions in remission to be considered as if active.



New "Regarded As" Definition



- * "Regarded as" prong of definition of disability applies irrespective of whether impairment is perceived to limit a major life activity.
- * "Regarded as" does not apply to transitory and minor impairments.
- * Transitory defined as actual or expected duration of 6 months of less.
- * No duty to accommodate regarded as.

Construction



- * Disability <u>shall</u> be construed broadly
- * No "reverse" disability discrimination claims
- * EEOC expressly authorized to issue regulations defining disability

Other Items - Take Note



* No change to burden of proof

* Effective January 1, 2009

* Not retroactive. See E.E.O.C. v. Agro Distribution LLC, 555 F.3d 462, 469, at fn. 8 (5th Cir. 2009).

Significance For Employers

- * Much broader universe of covered individuals
- * If disability is in question, individual is likely disabled (*de facto* presumption)
- * More requests for accommodation (beware of retaliation)
- * More internal complaints (beware of retaliation)

Significance For Employers (cont.)

- * More EEOC charges
- * More federal court lawsuits
- * More ADA suits filed by EEOC
- * Fewer summary judgments
- * Litigation focus shifts to qualifications, essential job functions and reasonable accommodation



Proactive Steps Employers Should Take



* Review and revise job descriptions and other documents showing essential functions

* Review and revise documents showing qualification standards (advertisements, requisitions, internal postings)

Proactive Steps Employers Should Take

- * Train supervisors and managers
 - * To understand broader definition
 - * To focus on qualifications
 - * To document and manage essential job functions
 - * To recognize accommodation requests and handle those appropriately
- * Engage Human Resources and Legal in ADA process



Proactive Steps Employers Should Take

- * Have in place a formalized interactive process and accommodation policy and process
 - Request for accommodation form/confirmation of accommodation request
 - ✓ Document possible accommodations considered
 - Document subsequent interactive steps and discussions with employee
 - ✓ Document contacts with outside resources (if applicable)
 - ✓ Consider involving higher management in decision
 - Document employer's decision (include reasons if request denied)
 - Communicate decision to employee in compassionate way, and document same
 - ✓ Consider accommodation log to track and help ensure the above

Some of the ADA was not Changed



- ✓ Still the employee's obligation to initially invoke the interactive process (see Taylor v. Principal Financial Group).
- Fairly reasonable burden employers have to satisfy their initial obligations under the interactive process remains unchanged (see Loulseged v. Akzo Nobels).

Still No Duty To Make "Unreasonable" Accommodations



* No duty to grant indefinite leave. *Reed v. Petroleum Helicopters.*

*No duty to relieve an employee of any essential functions of his or her job. *Robertson v. The Neuromedical Center.*

*No duty to make other employees work harder or longer. *Turco v. Hoechst Celanese Chemical Group*.

Some of the ADA was not Changed

- And, employers may still screen out employees whose disabilities are medically proven to pose a "direct threat" to health and safety. See Turco v. Hoechst Celanese Chemical Group.
- ✓ But, be careful there. *See Rizzo v. Children's World Learning Centers*.

And, The Fifth Circuit Is Getting Strict

- * E.E.O.C. v. Chevron Phillips Chemical Co. (5th Cir. 2009)(taking employer to task for terminating worker, rather than engaging in robust interactive process).
- * Carmona v. Southwest Airlines Co., 604 F. 3d 848 (5th Cir. 2010) (affirming jury verdict for the plaintiff even though he was not able to attend work regularly employer's tolerance of same for years suggested that regular attendance was not an essential function).



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