

# 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, hearing 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 or less.
- \* No duty to accommodate regarded as.

# Construction



- \* Disability shall 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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