

Labor and Employment Law Section

The New, Broader Americans with Disabilities Act: Congress Enacts Substantial Changes

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On Sept. 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 amending the Americans with Disabilities Act of 1990. The act, which became effective Jan. 1, 2009, expressly rejects a series of U.S. Supreme Court decisions limiting coverage under the ADA and restores congressional intent to provide *broad* protections to disabled individuals in the employment context.¹

BROADENED INTERPRETATION OF DISABILITY

The ADA prohibits an employer from discriminating against a qualified individual with a disability.² In order to be protected by the ADA, an employee must first show that he or she has a disability within the meaning of the ADA. This has not proved to be an easy task since the statutory definition of disability is vague and courts, following U.S. Supreme Court precedent, narrowly interpreted the statute. Under the ADA, the term “disability” means, with respect to an individual: 1) a physical or mental impairment that substantially limits one or more life activities of such individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment.³ Although the statutory definition of “disability” has not changed, the amendments expand the interpretation of the definition. Indeed, the act includes a findings and purposes section that rejects the use of a “demanding standard” for assessing whether an individual has a disability.⁴ The act also includes

rules of construction providing that the definition of disability “shall be construed in favor of *broad* coverage” and “to the *maximum extent* permitted” by the statute.⁵

CHANGES TO ‘SUBSTANTIALLY LIMITS’ LANGUAGE

The amendments expressly reject the construction given the term “substantially limits” by the Supreme Court in *Toyota Motor Mfg. Kentucky Inc. v. Williams*⁶ requiring an individual to show an impairment that “prevents or severely restricts” the individual from performing activities that are of “central importance” to most people’s daily lives.⁷ In *Toyota*, the court found the plaintiff, who could not wipe down cars coming off the assembly line due to carpal tunnel syndrome, was not substantially limited in the major life activity of performing manual tasks.⁸ Key to the court’s holding was that the plaintiff could still perform a variety of manual tasks important to most people’s daily lives, such as personal and household chores and tending to her personal hygiene.⁹ The amendments criticize the holding in *Toyota* as imposing “a greater degree of limitation than was intended by Congress.”¹⁰ Despite this sharp criticism, Congress did little to provide additional clarity into the definition of “substantially limits” and, instead, tasked the EEOC to develop regulations consistent with the act.¹¹

ELIMINATION OF MITIGATING MEASURES

The act significantly broadens the scope of individuals covered under the ADA by eliminating the consideration of mitigating measures and ameliorative effects in determining whether an individual has a disability.¹² Specifically, the act rejects a series of Supreme Court decisions anchored by *Sutton v. United Air Lines Inc.*,¹³ which allowed courts and employers to consider mitigating measures, such as eye glasses or medications, in determining whether an employee was disabled under the act.¹⁴ In *Sutton*, severely myopic twins were disqualified from consideration for positions as pilots because they failed to meet the airline's minimum, uncorrected vision requirements.¹⁵ The court found that because eye glasses corrected their vision, plaintiffs were not substantially limited in the major life activity of seeing and were, therefore, not disabled under the ADA.¹⁶ The act criticizes *Sutton* for eliminating protections for many individuals Congress intended to protect.¹⁷ Under the amendments, the determination of whether an impairment substantially limits a major life activity "shall be made without regard to the ameliorative effects of mitigating measures," such as, medication, medical supplies, equipment, prosthetics, hearing aids, mobility devices, assistive technology or auxiliary aids.¹⁸ The single exception to this rule is that ordinary eyeglasses or contact lenses can be considered as a mitigating measure.¹⁹

IMPAIRMENTS THAT ARE EPISODIC OR IN REMISSION

The amendments also make it easier for individuals with impairments that are episodic or in remission to meet the definition of an individual with a disability. The act sets forth that an impairment that is "episodic" or "in remission" can still qualify as a disability if it would substantially limit a major life activity "when active."²⁰ For example, an individual whose cancer is in remission could still be disabled under the act if, at the time the cancer was active, the cancer substantially limited a major life activity. This provision could potentially render an individual permanently disabled under the act without regard to the current effects of the impairment.

EXPANDING MAJOR LIFE ACTIVITIES

While the ADA as originally enacted was silent on what constitutes a "major life activity," the amendments contain a lengthy, non-

exhaustive list of activities which are considered major life activities – once again broadening the scope of coverage.²¹ The amendments adopt the list of major life activities listed in the EEOC regulations, including: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.²² The act includes additional activities, such as eating, sleeping, standing, lifting, bending, reading, concentrating and communicating.²³ Most significantly, the act also includes as major life activities "major bodily functions" such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory and reproductive functions.²⁴ Consequently, impairments that do not impact major life activities such as caring for oneself or working, may now be considered disabling if they impact a major bodily function. The act further makes clear that an impairment that substantially limits a single major life activity need not limit any other major life activity in order to be considered a disability.²⁵

'REGARDED AS' COVERAGE

Finally, the act makes it easier for an individual to meet the definition of a person "regarded as" having a disability. The act clarifies that individuals who are "regarded as" having an impairment are covered under the ADA – whether or not an actual or perceived impairment limits a major life activity.²⁶ In imposing a broader interpretation of the "regarded as" prong, the amendments seek to reinstate the Supreme Court's reasoning in *School Board of Nassau County v. Arline*,²⁷ a case brought under the Rehabilitation Act of 1973, holding that the anti-discrimination laws are designed to protect individuals from discrimination because of myths, irrational fears and prejudice.²⁸ However, the amendments exclude from the "regarded as" prong transitory and minor impairments that last less than six months.²⁹ Further, the act provides that employees who are "regarded as" disabled are not entitled to reasonable accommodations under the ADA.³⁰ This provision implicitly rejects the position taken by some courts requiring employers to provide reasonable accommodations to employees who are not in fact disabled, but only regarded as disabled.

UNRESOLVED ISSUES

Although the amendments were meant to clarify and ultimately streamline issues under the ADA, the amendments raise numerous

questions. For example, it remains to be seen how the inclusion of “major bodily functions” will affect claims under the ADA, particularly where certain “major bodily functions,” such as reproductive functions, have no impact on the employee’s ability to perform his or her job duties. Under the amendments, does an employer have an obligation to provide time off to an employee undergoing fertility treatments as a reasonable accommodation?

The amendments further leave unresolved the issue of whether a plaintiff must show that he or she is restricted in the ability to work in a broad class of jobs (as opposed to a particular job) in order to be “substantially limited” in the major life activity of working. In *Sutton*, the Supreme Court rejected the “single job rule” and held that an employee must demonstrate that he or she is substantially limited in performing a broad range of jobs in order to establish a disability under the ADA.³¹ The amendments specifically reject the holdings in *Sutton* regarding mitigating measures and the “regarded as” disabled prong, but do not address the holding in *Sutton* regarding the “single job rule.”³² This issue, however, may not be pressed given the significant broadening of the “regarded as” disabled prong, where an employee simply has to show that he or she has an impairment and that the employer’s adverse employment decision was based on the impairment.

Also unresolved is the issue of whether transitory and minor impairments may constitute a disability. The amendments address transitory and minor impairments in the context of the new “regarded as” prong. The amendments are silent with regard to whether transitory and minor impairments may constitute an actual disability. Does this statutory silence indicate that temporary or transitory impairments will be considered under the actual disability prong? Further, it remains to be seen how the courts will treat impairments that are episodic or in remission when the impairment has not been active for a significant period of time. Will the courts accept the creation of a class of permanently disabled individuals? These and many other questions are likely to be addressed in both the forthcoming EEOC regulations and future cases brought under the ADA.

1. ADA Amendments Act of 2008 §2(b)(1). Notably, early versions of the amendments were entitled ADA Restoration Act of 2007. See H.R. 3195, 110th Cong. §1 (2007).
 2. 42 U.S.C. §12112.
 3. ADA Amendments Act of 2008 §3(a)(1).
 4. ADA Amendments Act of 2008 §2(b)(4).

5. ADA Amendments Act of 2008 §3(a)(4)(A) (emphasis supplied). Notably, the amendments strike certain findings in the original ADA, including the finding that: 1) some 43,000,000 Americans have one or more physical or mental disabilities; and 2) these individuals constitute a “discrete and insular minority.” See ADA Amendments Act §3 of 2008 Codified Findings and 42 U.S.C. §12101 (a)(1) and (7). Earlier Supreme Court decisions relied on these findings to narrowly interpret coverage under the ADA. Striking these provisions is consistent with the mandate in the amendments that the ADA be construed broadly.
 6. 122 S.Ct. 681 (2002).
 7. *Id.* at 691.
 8. *Id.* at 694.
 9. *Id.*
 10. ADA Amendments Act of 2008 §2(a)(7).
 11. ADA Amendments Act of 2008 §2(b)(6).
 12. *Id.*
 13. 119 S.Ct. 2139 (1999).
 14. See *id.* at 2144. Similarly, in one of the *Sutton* companion cases, *Murphy v. United Parcel Service Inc.*, 119 S.Ct. 2133, 2137 (1999), the Supreme Court held that the plaintiff’s high blood pressure, which was controlled by medication, did not substantially limit a major life activity and that the plaintiff was not “disabled” under the ADA. The Supreme Court held in the other *Sutton* companion case, *Albertson’s Inc. v. Kirkingburg*, 119 S.Ct. 2162, 2168-69 (1999), that an individual’s learned or natural ability to compensate for the effects of an impairment could be a mitigating measure considered in assessing whether that individual is “disabled” under the ADA.
 15. *Id.* at 2149.
 16. *Id.*
 17. ADA Amendments Act of 2008 §2(a)(4).
 18. ADA Amendments Act of 2008 §3(a)(4)(E).
 19. ADA Amendments Act of 2008 §3(a)(4)(E)(ii).
 20. ADA Amendments Act of 2008 §3(a)(4)(D).
 21. ADA Amendments Act of 2008 §3(a)(2).
 22. *Id.*
 23. *Id.*
 24. *Id.*
 25. ADA Amendments Act of 2008 §3(a)(4)(C).
 26. ADA Amendments Act of 2008 §3(a)(3)(A).
 27. 107 S.Ct. 1123 (1987).
 28. *Id.* at 1129-30.
 29. ADA Amendments Act of 2008 §3(a)(3)(B).
 30. ADA Amendments Act of 2008 §6(h).
 31. *Sutton*, 119 S.Ct. at 2139.
 32. ADA Amendments Act of 2008 §2(b)(2) and (3).

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