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TOPIC:

SHIFTING THE PLAYING FIELD: THE ADA AMENDMENTS ACT OF 2008

INTRODUCTION:

When Congress passed the Americans with Disability Act Amendments Act of 2008 (the "Amendments"), it eased the Supreme Court's "demanding standard" for individuals seeking the law's protection. [1] This Note reviews the Amendments' new standard and suggests some best practices for colleges and universities.

DISCUSSION:

Background

The ADA prohibits employment discrimination against individuals based upon a disability. [2] It also makes it unlawful for a place of public accommodation such as a college or university to discriminate against persons with disabilities. [3] By its terms, the ADA protects "qualified individuals" who:

- have a physical or mental impairment that substantially limits one or more major life activities;
- have a record of such an impairment; or
- are regarded as having such an impairment. [4]

In Sutton v. United Air Lines, Inc., [5] Murphy v. United Parcel Service, Inc., [6] and Alberston's, Inc. v. Kirkingburg, [7] the Supreme Court limited those protected under the ADA by excluding from the disabled those for whom "mitigating measures" helped control or cope with their impairments -- such as medications, assistive learning technology, and extra effort. [8]

Claimants also faired poorly under *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, in which the Supreme Court stated that "[m]erely having an impairment does not make one disabled for purposes of the ADA." [9] Rather, the Court required a plaintiff to prove that his impairment "prevents or severely restricts" him from performing a major life activity and admonished lower courts that the ADA "be interpreted strictly to create a demanding standard for qualifying as disabled." [10]

The ADA Amendments Act of 2008

The Amendments greatly expand the number of persons protected under the ADA. The Amendments explicitly reject the Supreme Court's decisions and declare that the ADA's definition of disability "shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this Act." [11]

Mitigating Measures

The Amendments legislatively overturn *Sutton* by eliminating the consideration of mitigating measures, save for eyeglasses and contact lenses, when making disability assessments. This means, for example, that the ameliorative effects of insulin may not be considered when determining whether a person's diabetes is a disability. This will also likely extend ADA protections to learning disabled students and applicants who achieve academic success through mitigating measures. [12] The Amendments did not, however, eliminate all consideration of mitigating measures, but, rather, moved them to a later stage of the analysis. Mitigating measures are still relevant in determining what an effective accommodation might be for a particular condition.

Major Life Activities

The term "major life activities" was undefined in the original ADA legislation. The Amendments define that term to include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." [13]

To that extent, the amended definition is generally consistent with EEOC regulations and several judicial decisions. But the Amendments add a new subgroup of major life activities – "major bodily functions" – which include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." [14] With that expansion, a diabetic employee or student with no outward limitations will qualify as disabled because producing insulin now is considered to be a major life activity.

Consistent with Congress' desire to extend the ADA's reach, the Amendments also make clear that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." [15] Therefore, an employee with cancer in remission is now considered disabled under the statute.

"Regarded As" Disabled

The Amendments also make it easier to prove that a claimant is "regarded as" disabled. In *Sutton*, the Supreme Court held that such a claimant must initially prove that the defendant mistakenly believed that he had a substantially limiting impairment. [16] The Amendments, however, eliminate that requirement: An individual meets the requirement of being 'regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. [17]

Under this standard, the initial inquiry is simply whether the person is regarded as having an impairment, whether or not it is "substantially limiting." Merely meeting the "regarded as" standard does not mean that a person has been the victim of unlawful discrimination. It means only that an individual has a disability protected by the ADA. Whether unlawful discrimination occurred is a separate determination. In addition, employers are not required to provide a reasonable accommodation to individuals regarded as disabled. The "regarded as" standard does not extend to impairments "with an actual or expected duration of six months or less." [18]

Application to Conduct that Predates the Amendments' Effective Date

Which version of the ADA governs conduct that occurred before the legislation's effective date? Because the Amendments are silent regarding retroactivity, the law presumes that they apply only prospectively [19] to conduct that occurs on or after the effective date of January 1, 2009. [20] A recent unreported Sixth Circuit case, however, takes an opposing view. [21]

Recommendations

Policies

Review any policies, forms and web pages to make sure they are consistent with the Amendments. Also, train personnel on who is covered under the ADA and how the Amendments broaden coverage. Because those who can claim protection under the "regarded as" standard is now greater, college and university officials should avoid alluding to an employee's medical condition, unless the employee raises it first. Instead, they should focus on employee conduct and performance. Colleges should also consult in-house or outside counsel before taking an adverse action against an individual who may qualify as disabled under the ADA.

Accommodation Requests

Given ADA's expanded reach, administrators should presume that an employee with a physiological impairment is entitled to the Act's protections. [22] Documentation of the impairment is still required, however. Colleges and universities should instead focus primarily on whether or not they can provide a reasonable accommodation that does not pose an undue hardship or fundamentally alter the nature of a service, program, or activity. The process of determining a reasonable accommodation remains unchanged.

EEO/Diversity Offices

EEO/Diversity Offices should not close a discrimination case investigation unless it is clear that an individual would not be disabled under the statute. Prudent administrators should not rely on older internal cases regarding similar impairments. Instead, the primary analysis should focus on whether discrimination occurred.

Litigation

The Amendments will probably have their greatest impact on the types of issues litigated. These will switch from whether the individual has a disability to whether discrimination occurred and whether there were failures to accommodate. This change will make ADA cases more similar to other discrimination cases (age, gender, race) and will probably make it harder for employers to prevail on summary judgment.

CONCLUSION:

The ADA Amendments alter the playing field for colleges and universities faced with ADA claims and accommodation requests. Just how the courts will interpret the Amendments remains to be seen. It does appear, however, that more individuals will now enjoy the ADA's protection.

FOOTNOTES:

FN1. Pub. L. No. 110-325, 125 Stat. 3553.

FN2. 42 U.S.C. § 12112 (1990).

FN3. *Id.* at § 12182(a).

FN4. *Id.* at § 12102.

FN5. 527 U.S. 471, 482 (1999).

FN6. 527 U.S. 516, 521 (1999).

FN7. 527 U.S. 555, 565-66 (1999).

FN8. See McGuinness v. Univ. of N. M. Sch. of Med., 170 F.3d 974, 978-79 (10th Cir. 1998) ("Mr. McGuinness admits that, in the past, he has been able to mitigate his anxiety in chemistry and math by altering his study habits. . . . Under the law of this circuit, we must consider the plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity. . . . Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety."); Gonzales v. Nat'l Bd. of Med. Exam'rs, 225 F.3d 620, 630 (6th Cir. 2000) ("Even if self-accommodations enhanced Plaintiff's performance to that of most people, he is not disabled under the ADA. Recently, the Supreme Court ruled that in determining whether individuals are disabled under the ADA they should be examined in their corrected state.").

FN9. 534 U.S. 184, 195-96 (2002).

FN10. *Id.* at 196-97.

FN11. ADA Amendments at § 4.

FN12. Contra McGuinness, 170 F.3d at 979; Gonzales, 225 F.3d at 630.

FN13. ADA Amendments at § 3(2)(A).

FN14. *Id.* at § 3(2)(B).

FN15. *Id.* at § 3(3)(D).

FN16. There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual-it must believe either that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. *Sutton*, 527 U.S. at 489.

FN17. ADA Amendments at § 3(A).

FN18. *Id.* at § 3(B).

FN19. Legislative enactments "will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). *See also Equal Employment Opportunity Comm'n v. Argo Distribution, LLC*, No. 07-60447, 2009 WL 95259, at *5 n. 8 (5th Cir. Jan. 15, 2009)("Congress recently enacted the ADA Amendments Act of 2008, . . .but those changes do not apply retroactively."); *Schmitz v. Louisiana*, C.A. No. 07-891-SCR, 2009 WL 210497, at *3 (M.D. La. Jan. 27, 2009)("Clearly, the new [ADA Amendments] related to the definition of disability create new legal consequences for events completed before its enactment, and broaden the scope of an employer's potential liability under the statute. With no clear evidence of retroactive intent, the fact that Congress passed the amendments to counteract Supreme Court decisions and restore the intended scope of the ADA is not sufficient to overcome the presumption against retroactive application."); *Kirkeberg v. Canadian Pac. Ry.*,

Civil Action No. 07-4621 (DSD/JJG), 2009 WL 169403, at *5 n.7 (D. Minn. Jan. 26, 2009)(the ADA Amendments apply prospectively only); *Supinski v. United Parcel Service, Inc.*, C.A. No. 3:CV-06-0793, 2009 WL 113796, at *5 n. 6 (M.D. Pa. Jan. 16, 2006)(""[I]t appears that every court that has addressed the issue has concluded that the 2008 Amendments cannot be applied retroactively to conduct that preceded its effective date."); *Rudolph v. U.S. Enrichment Corp.*, No. 5:08-CV-0046-TBR, 2009 WL 111737, at *5 (W.D. Ky. Jan. 15, 2009)(Amendments apply prospectively only).

FN20. ADA Amendments at § 8.

FN21. Jenkins v. Nat'l Bd. Med. Exam'rs, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009)(The ADA Amendments apply retroactively to a case seeking prospective relief that had been pending on appeal when the Act was passed.)

FN22. "[T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act §2(b)(5).

AUTHORS:

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RESOURCES:

Statutes:

- ADA Amendments Act of 2008
- The Americans with Disabilities Act of 1990, Titles I and V

Cases:

- Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)
- Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999)
- Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999)
- Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)

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