YEAR IN REVIEW
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LABOR AND EMPLOYMENT LAW

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The New Year heralds a significant change to federal anti-discrimination law. On Jan. 1, 2009, the ADA Amendments Act of 2008 (ADAAA), signed into law on Sept. 25, 2008, by President George W. Bush, takes effect. The ADAAA amends the Americans with Disabilities Act (ADA), originally signed into law in 1990 by President George H.W. Bush. The ADAAA aims to "restore the intent and protections of the [ADA]," which, among other safeguards, prohibits discrimination against individuals with disabilities. Rejecting the strict construction of the ADA by the U.S. Supreme Court and the U.S. Equal Employment Opportunity Commission (EEOC), the ADAAA expands the statute's coverage by broadening the interpretation of "disability."

The ADA defines disability as having "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," having "a record of such an impairment," or "being regarded as having such an impairment." While the ADAAA leaves this basic definition intact, it enlarges its reach by expanding the interpretation of three key terms: substantially limits, major life activities, and regarded as having a disability.

The "Before" Picture

A 2002 U.S. Supreme Court decision restricted the ADA's coverage by strictly interpreting the "substantially limits" and "major life activity" components of the definition of disability "to create a demanding standard for qualifying as disabled." In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, the Supreme Court held that to be substantially limited in a major life activity, an individual must have an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[1] Mirroring this narrow construction, the EEOC regulations interpreted "substantially limits" to mean "significantly restricted."[2]

Further, three 1999 Supreme Court decisions tightened the ADA's scope by holding that "mitigating measures," such as medication, assistive devices, and learned ameliorative behaviors, must be considered in determining whether an individual had a disability covered by the ADA.[3] A number of federal appellate courts applied this principle to exclude from the ADA's coverage those individuals whose medical conditions, such as diabetes, epilepsy, heart disease, or cancer, were inactive, in remission, or otherwise under control.[4]

Moreover, in its 1999 decision in *Sutton v. United Airlines, Inc.*, the Supreme Court narrowly interpreted the third prong of the definition of disability. Under *Sutton*, to be regarded as having an impairment required a showing that the employer perceived the employee to have an impairment that substantially limited him or her in a major life activity.[5]

The "After" Shot

The ADAAA expressly rejects the Supreme Court holdings and EEOC regulations prescribing narrow interpretations of the terms underlying the definition of disability. Instead of defining "substantially limits," the ADAAA requires the phrase to be "interpreted consistently with the findings and purpose of the [ADAAA]" — namely, "in favor of broad coverage." The ADAAA also directs the EEOC to revise its current regulations strictly construing the "substantially limits" requirement to be consistent with the ADAAA.

The ADAAA also overrules *Sutton* and its progeny by specifically prohibiting the consideration of mitigating measures in determining whether an individual is disabled, with the notable exceptions of "ordinary eyeglasses" and "contact lenses." Further, the ADAAA provides that an episodic impairment or a medical condition that is in remission is a disability "if it would substantially limit a major life activity when active." Thus, individuals who successfully manage their impairments using various means or whose impairments are inactive may be within the statute's protections.

In addition, the ADAAA adds a non-exhaustive list of *per se* "major life activities" to the text of the statute itself. Until now, the ADA has not enumerated specific activities; guidance has come almost exclusively from case law and administrative regulations. The ADAAA essentially codifies this guidance by specifying that "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working" are major life activities. The ADAAA also identifies the operation of "major bodily functions," such as neurological, respiratory, and reproductive functions, as major life activities. These changes do not represent a major shift in current law, as most, if not all, of the "major life activities" listed have been recognized as such by the courts.

The ADAAA's most significant change may be its overhaul of the "regarded as" prong of the definition of disability. Contrary to the interpretation of the ADA by virtually every court considering the issue, including the Supreme Court, the ADAAA provides that an individual is "regarded as" disabled if he or she has been subjected to discrimination "because of an actual or perceived … impairment *whether or not the impairment limits or is perceived to limit a major life activity.*" (Emphasis added.) This provision does not apply, however, to impairments that are minor and transitory (having an actual or expected duration of six months or less). The ADAAA also resolves a split among some federal circuit courts by relieving

employers of any obligation to provide reasonable accommodations to employees who qualify as disabled solely under the "regarded as" prong of the definition.

Lasting Effects

The efficacy of the amendments to the ADA can and will be debated, but there is no doubt that they will change the current legal environment in which employers operate. Most notably, a significant body of case law that evolved over the last 15 years providing guidance on various issues under the ADA may now provides less certainty to employers, employees, and their attorneys. Guidance will come, albeit slowly, from the courts as they start anew considering the issues of old with revised statutory and regulatory guidelines.

Notes

1. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002).
2. 29 C.F.R. §1630.2(j). Although no agency was given authority to issue regulations interpreting the meaning of "disability" under the ADA, the EEOC nevertheless did so. See 29 C.F.R. §§1630.2(g)–(l).
3. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (truck driver with monocular vision whose brain developed subconscious mechanisms for compensating for such impairment not disabled); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999) (mechanic with high blood pressure not disabled because condition could be controlled with medication); *Sutton v. United Airlines, Inc.*, 527 U.S. 472, 488–89 (1999) (myopic twin pilots not disabled when corrective lenses were taken into account).
4. See, e.g., *MacKenzie v. City and County of Denver*, 414 F.3d 1266 (10th Cir. 2006) (employee with heart condition who was able to perform her job without restrictions after heart attack not disabled); *Brunke v. Goodyear Tire & Rubber Co.*, 344 F.3d 819 (8th Cir. 2003) (epileptic employee whose seizures were under control during relevant time not disabled); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (diabetic pharmacist who controlled his diabetes by taking insulin and monitoring diet not disabled); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) (company president whose cancer was in remission and who had six monthly chemotherapy sessions remaining not disabled).
5. *Sutton*, 527 U.S. at 489.

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