

Amendments to the Americans with Disabilities Act: Restoring the ADA's Broad Protections

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Pressing for new employment legislation has not been the Bush Administration's top priority. However, President Bush, with the support of the business and civil rights communities, recently signed the Americans with Disabilities Amendments Act of 2008 (the Act). As expressed by Congress, this law, which became effective January 1, 2009, was intended to "restore" the broad protections afforded by the Americans with Disabilities Act of 1990 (ADA). See *Pub. L. 110-325, 122 Stat. 3553, 3554 (2008)*. As a result, lawyers for employers and employees must reevaluate ways in which they advise clients concerning disability-related issues in the workplace and strategies for litigating disability discrimination cases.

The Act's most significant provisions address the ADA's definition of "disability." In the Act's preamble, Congress stated that it viewed the Supreme Court's narrow interpretation of the ADA's definition of disability to be contrary to its original purpose to protect the disabled. Congress did not change the ADA's basic definition of disability which provides that a disability is "an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment." *42 U.S.C. §12102(2)*. Instead, Congress took aim at *Sutton v. United Airlines, 527 U.S. 471 (1999)* and *Toyota Motor Manufacturing Corp. v. Williams, 534 U.S. 184 (2002)*, the key Supreme Court decisions that narrowed the scope of the ADA's disability definition.

In *Sutton*, the Court held that whether an impairment substantially limits a major life activity must be determined with reference to the ameliorative effects of mitigating measures. *527 U.S. at 475*. And in *Toyota*, the Court concluded that the terms "substantially" and "major" in the disability definition had to be strictly construed to create a "demanding standard" for qualifying as disabled. *534 U.S. at 197*. It further ruled that to be "substantially limited in a major life activity," a person must have an impairment that "prevents or severely restricts the [person] from doing activities that are of central importance to most people's daily lives." *Id. at 198*. The majority relied principally on findings in the original ADA that only 43 million Americans are disabled, and that they are "a discreet and insular minority," reasoning that if it interpreted the disability definition broadly, well more than 43 million Americans would be disabled – not a discreet and insular minority. *Sutton, 527 U.S. at 484-85; Toyota, 534 U.S. at 197*.

To override *Sutton* and *Toyota*, the Act made several important changes:

- It struck the findings that the Court relied on to limit the ADA's reach and replaced them with a rule of construction providing that "the definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum terms permitted by the [ADA]." *Pub. L. 110-325 §§1(a) & 3*.

- It expanded the definition of a major life activity 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." *Id. at § 3.*
- It clarified that major life activity also includes the operation of bodily functions, including the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. *Id.*
- It provided that episodic impairments or impairments in remission must be considered in their active state for purposes of determining if a person is disabled. *Id.*
- It eliminated the rule that the "substantially limits a major life activity" determination must include the ameliorative effect of mitigating measures, except that the effect of eyeglasses or contact lenses should be considered. *Id.*
- Finally, it instructed the Equal Employment Opportunity Commission (EEOC) to provide a more generous definition of the term "substantially limits." *Id. at §6.*

In addition to these changes, Congress made important changes to the "regarded as" prong of the disability definition, including that:

- A person is regarded as disabled if an employer regards the person as having an impairment, even if the employer did not regard the impairment as substantially limiting a major life activity. *Pub. L. 110-325 §3.*
- Transitory (lasting six months or less) and minor impairments are excluded from coverage under the "regarded as" prong. *Id.*
- Employees "regarded as" disabled are not entitled to reasonable accommodations. *Id. at §6.*

What do these changes mean for lawyers practicing in the disability law arena? Essentially, they shift the field on which the game is played. Previously, employers prevailed in most ADA cases by arguing that an employee was not disabled. Given Congress' clear statement that the disability definition is broad, employers can no longer successfully defend most cases this way. Therefore, the issues that will be litigated will undoubtedly shift from the threshold issues of determining disability status to questions concerning evidence of discriminatory animus and whether an employer was required to provide a disabled employee with a reasonable accommodation.

In cases where an employer has taken an adverse employment action against a disabled employee, the employer's motive will be the question that is most likely litigated (as it is in other types of discrimination cases). But in disability cases, this can be particularly tricky because the effects of the impairment often cause the poor performance that led to the employer's action.

Because virtually all of these impairments now constitute disabilities, employment counsel will have to work more closely with management to advise them on how to handle performance issues, including the ways in which supervisors address and document these kinds of problems. Sloppy management practices will likely result in many "smoking gun cases" because of references made by supervisors to performance problems that the supervisor may believe result from impairments.

In this regard, the EEOC has recently published guidance entitled, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, which counsel should review to help advise on these issues.

On the reasonable accommodation side of the ADA, instead of litigating the threshold disability determination, lawyers are more likely to be contesting what is an essential function of a job, what is required by the interactive process to identify an accommodation, what kinds of accommodations are reasonable, and when does a requested accommodation become an undue hardship. Thus, to prepare for the issues that will now be at the forefront of most cases, employment counsel should make it a priority to review their clients' job descriptions (which are critical to the essential job function analysis), policies for engaging in the interactive process, and procedures for implementing accommodations.

These amendments will undoubtedly reshape the ADA, and employment lawyers will be dealing with them for years to come. But, the most immediate question is whether the Act will apply to pending cases. In other words, will courts apply the changes retroactively?

There is a presumption that changes in civil law do not apply retroactively. See *Landgraf v. USI Films*, 511 U.S. 244, 272 (1994). But this presumption can be overcome by evidence of congressional intent to apply a law to pending cases. *Id.* at 280. The Act does not state explicitly that Congress intended it to apply retroactively, and employers will undoubtedly seize on the January 1, 2009, effective date to argue that Congress intended it to apply only to subsequent cases. See *Id.* at n. 10 ("[T]he 'effective upon-enactment' formula [is] an especially inapt way to reach pending cases"). However, several findings accompanying the Act indicate that Congress intended the Act to clarify the meaning of the original ADA and not to impose new substantive requirements on employers.

These findings will support an argument by employees that the Act should apply retroactively because statutes designed merely to clarify existing law do apply to pending cases. *United States v. Monroe*, 943 F.2d 1007 (9th Cir. 1991) (*clarifying amendments are entitled to retroactive application just as though they had been enacted as part of original legislation*). The law concerning retroactivity is currently before the Supreme Court in *AT&T Corp. v. Hulteen*, argued on December 10, 2008, which considers the retroactivity of the *Pregnancy Discrimination Act* to *Title VII*. The decision in this case could further complicate whether the Act is applied retroactively. How courts will resolve this retroactivity question is uncertain; what is certain is that it will be resolved soon.

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