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Focus Labor & Employment

The ADA Amendments Act of 2008

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On January 1, 2009, comprehensive legislation amending the Americans With Disabilities Act of 1990 (ADA) took effect. Believing that courts had strayed from the ADA's original purpose, advocacy groups lobbied for the passage of the Americans With Disabilities Act Amendments Act of 2008 (ADAAA) to attempt to bring the statute back in line with the goal of eliminating discrimination against individuals with disabilities. This article examines the ADAAA revisions, and whether its goals are being met.

The ADAAA was largely designed to overturn two Supreme Court decisions. The first, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), required consideration of mitigating measures such as medications and hearing devices when evaluating whether one's impairment substantially limits a major life activity. The second, *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184 (2002), required an impairment to be "severely restricting" to the performance of a centrally important life activity to qualify as a substantial impairment. By changing these results, Congress intended to increase the pool of individuals eligible for protection under the statute.

Congress also delineated specific major life activities and multiple bodily functions that, if substantially impaired (even if the impairment is not "active"), support eligibility under the ADA, rather than leave such inquiries to individualized, case-by-case assessments.

Many employers believe the ADAAA

goes well beyond what is necessary and was otherwise contemplated by Congress twenty years ago; not surprisingly, advocacy groups still feel the ADAAA does not reach far enough. Aside from the controversy surrounding the enactment of the ADAAA, has anything in fact changed? In terms of legal decisions, the answer appears to be not much, at least not yet.

While courts have refused to apply the new ADAAA legislation retroactively to conduct occurring before January 1, 2009, these same courts have not shied away from expressing what their decision might have been if based on the new standards.

For example, the Fifth Circuit recently held that an employee did not meet the ADA standard of disability because the employee's "hearing impairment is not substantially limiting when it is mitigated through [employee's] use of his electronic hearing aid..." *Kemp v. Holder*, No. 09-30255, 2010 U.S. App. LEXIS 13964, at *7 (5th Cir. June 22, 2010). Yet, the court noted, "Kemp's claim might fare differently if the ADAAA applied." *Id.* at *10.

Similarly, a New York district court held that an employee's sickle cell anemia did not constitute a disability because the employee's condition was merely "episodic." The court also recognized, however, that the temporal restrictions under the ADA were amended by the ADAAA. They now provide that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," suggesting that this decision

would also be different if decided under the ADAAA. *Casseus v. Verizon New York, Inc.*, No. 08-cv-4119, 2010 U.S. Dist. LEXIS 68910, at *54 (E.D.N.Y. July 9, 2010).

There can be little doubt that courts are becoming increasingly aware of the significance of the ADAAA, or that employers should remain vigilant in ensuring they comply with the statute. In particular, it is even more important that employers take seriously the obligation to engage in the "interactive process" with those requesting and/or possibly needing accommodation.

A more measurable change can already be seen in the number of administrative charges of disability discrimination filed since the ADAAA's enactment. According to EEOC statistics, more than 21,451 disability discrimination-related charges were filed in 2009, up 10 percent from 2008, and more than the number of charges in any of the previous 17 years (i.e., since the ADA took effect).

Whether that increase is directly attributable to the substantive revi-

sions of the ADAAA is unclear, though it is plausible to make the connection. But we are likely still years away from answering the most critical inquiry: Will expanding the class of individuals considered "disabled" actually lead to greater employment for persons with disabilities, particularly those with apparent health conditions?

Sadly, certain studies illustrate that one of the unintended consequences of these rights may be a reduction in the total number of persons with disabilities being employed in the first place. Like most statutes, only time will tell whether Congress's purpose will be achieved or whether its impact will be muted or, worse, harmful to the underlying mandate to improve employment opportunities for those with disabilities. **HN**

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