

President Bush Signs ADA Amendments into Law

ADA's changes to go into effect January 1, 2009

September 26, 2008

With his signature yesterday, President Bush signed into law amendments to the Americans with Disabilities Act (ADA) that essentially wipe out four U.S. Supreme Court decisions over the last decade that many felt had limited the scope and coverage of that law.

Supreme Court Cases Invalidated

Among the Supreme Court decisions invalidated are *Sutton v. United Air Lines, Inc.*, *Murphy v. United Parcel Service, Inc.*, and *Albertson's, Inc. v. Kirkingburg*, the trio of cases in which the Court had held that employers, when determining whether an individual was "substantially limited" in one or more major life activities, could take into account "mitigating measures" - such as medications or assistive devices like walking canes - that an individual used to cope with the effects of an impairment.

The ADA's amendments provide that the determination of whether an impairment substantially limits a person in a major life activity should now be "made without regard to the ameliorative effects of mitigating measures," such as medication, prosthetics, low-vision devices, hearing aids, cochlear implants, oxygen therapy equipment, and learned behavioral or adaptive neurological modifications. The new law will make an exception, however, to permit employers to consider an applicant's or employee's use of corrective lenses, such as normal eye-glasses or contact lenses, in determining whether the person has a vision-related disability.

The ADA's amendments also overturn the Supreme Court's decision in *Toyota Motor Mfg., Ky., Inc. v. Williams*, a 2002 case in which the Court imposed an arguably more restrictive standard for employees to show that they were substantially limited in performing major life activities. The ADA amendments retain the requirement that an individual show she is "substantially limited" in one or more major life activities to be covered by the law, but also direct the EEOC to essentially remove from its ADA regulations any requirement for an individual to meet the more restrictive Toyota standard. By returning to what the new law's proponents call the original intent and scope of the ADA, individuals with impairments such as insulin-controlled diabetes or cancer in remission will be covered even if they are not presently experiencing any effects of their impairments.

Employers Must Still Provide Reasonable Accommodations - and Not Discriminate

Practically speaking, nothing has changed regarding the ADA's requirement that an ADA-covered employer - that is, an employer with at least 15 employees - provide reasonable accommodations for applicants or employees with covered disabilities, unless doing so would create an undue hardship or pose a direct threat to the individual's or coworkers' health or safety. And in Michigan, of course, these obligations apply to smaller employers through Michigan's ADA counter-part, the Persons With Disabilities Civil Rights Act, which is not directly impacted in any way by the ADA's amendments.

As of January 1, 2009, the ADA will still prohibit discrimination against an individual who has an ADA-covered disability, who has a record of such a disability, or who is regarded as having a disability. The amendments clarify, however, that an individual is "regarded as" having a disability merely by being the victim of discrimination on the basis of a real of

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perceived disability, regardless of whether the employer perceived the individual to have an ADA-covered disability.

What It All Means

Employers subject to the ADA will need to be more cautious now about denying accommodation requests from employees who were arguably not entitled to ADA protection under the now-defunct Supreme Court case standards cited above. And employment counsel defending employers against ADA lawsuits will win fewer cases now simply by arguing that the plaintiff employee was not disabled as defined by the ADA.

This means that, come January 2009, heightened attention should be given to the interactive process that is to lead to decisions about whether and what reasonable accommodations can be made for individuals with disabilities. With likely fewer ADA lawsuits dismissed on the grounds that the individual did not have an ADA disability, more litigation attention will be focused on whether employers properly accommodated their employees (and applicants) with disabilities.

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