

THE AMERICANS WITH DISABILITIES ACT FINALLY GETS SOME TEETH

Since it was originally enacted in 1990, the courts have narrowed and narrowed the Americans with Disabilities Act making it virtually useless to most Americans with disabilities. In a series of cases issued by the U.S. Supreme Court in 1999, the high Court ruled that a disability was not a disability for ADA purposes if mitigating factors controlled the condition. In other words, if a diabetic person did not have any symptoms because s/he took insulin, the person would not be considered disabled under the ADA.

The effect of these Supreme Court cases was to cause the litigation to focus on whether or not the person was disabled. Tens of thousands of lawsuits have been dismissed because the courts found that the person was not disabled "enough" for the ADA. Meanwhile, the intent of the Act, which was to require employers to accommodate persons with disabilities, was completely ignored.

In 2002, the U.S. Supreme Court issued another hostile decision in which it ruled that a very high standard should apply in determining if the individual was "substantially limited" in major life activities. Therefore, those few people who cleared the "disabled" hurdle, now had to pass an even higher standard to show that they were almost completely restricted from performing any job or a major life activity. Again, the result was that thousands of more cases were dismissed because disabled American workers could not meet this almost insurmountable bar.

As a result of these restrictive Court decisions, the Americans with Disabilities Act of 1990 did very little to actually help disabled Americans in the work place. Accordingly, the Democratic Congress worked very hard to pass the Americans with Disabilities Act Amendments Act of 2008, also known as the ADAAA. The ADAAA overturns these oppressive Supreme Court decisions and restores badly needed protection to persons with disabilities.

Effective January 1, 2009, the focus of court decisions should no longer be on whether the individual is disabled as Congress made clear that whether or not a person is disabled "should not demand extensive analysis."

It expressly stated that in evaluating whether an individual is disabled, the consideration should be **without** regard to mitigating measures. Therefore, conditions such as diabetes and depression should clearly be covered.¹ It also stated that episodic conditions or conditions in remission are disabilities for the ADA purposes if they substantially limit a major life activity when active. This is a huge change that means that conditions such as post traumatic stress disorder, cancer and epilepsy should be covered.

Congress also explained that to “substantially limit” a major life activity does not mean that the individual is “prevented or severely restricted” from the major life activity and it is not necessarily permanent or long term. The ADAAA does state that it may not be a transitory or minor condition and is probably not for impairments of 6 month duration or less. While it left it to the EEOC to further define “substantially limit,” Congress did state that it should be interpreted with the Act’s broad remedial purpose in mind. Congress did, however, include a non-exhaustive list of major life activities including the operation of major bodily organs such as the immune system, bowels, digestive system, reproductive system and others.

One final beneficial change is that Congress made clear that the line of cases that held that a person was only “regarded as” disabled if they were unable to perform a broad range of jobs is no longer good law. Now, if an employee can show s/he suffered an adverse employment action because of a perceived impairment, regardless of whether the impairment is perceived to limit a major life activity or not, the employee will have met the “regarded as” requirement.

As a result of the ADAAA, the focus in disability cases should now be on the employers’ duties. The question will be whether there was a reasonable accommodation and if the employer met that reasonable accommodation, rather than focusing on whether the employee has a disability and whether that disability substantially limits a major life activity. Finally, almost two decades after it was originally passed, the ADA looks like it will finally protect disabled workers in the work place.

The EEOC is expected to issue new regulations in the upcoming months which will further clarify and define the effects of new Act. It is yet

¹ Congress did make clear, however, that the typical need for corrective eye wear such as contacts or glasses did not make one disabled.

to be determined if the new law will have retroactive effect on cases currently in the legal system. If your Collective Bargaining Agreement defines disabilities, you may want to contact the legal department to see if it complies with the new law.