



Americans with Disabilities Act

M A N U A L

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EEOC Fails to Approve Proposal For ADA Amendments Act Regulations

After a contentious public meeting, the Equal Employment Opportunity Commission Dec. 11 voted along party lines not to approve a notice of proposed rulemaking on the ADA Amendments Act (P.L. 110-325), which is slated to take effect Jan. 1, 2009.

The commission voted 2-2 on Chair Naomi Earp's motion to approve proposed rules that had been drafted by EEOC's Office of Legal Counsel and presented to EEOC members and commission stakeholders in private meetings over the past two months. Under commission rules, the tie vote means that the motion is not approved. Earp and Commissioner Constance Barker, both Republicans, voted in favor of the motion while Commissioners Stuart Ishimaru and Christine Griffin, both Democrats, voted no.

On Sept. 25, President Bush signed the new law, which overturns U.S. Supreme Court decisions that had narrowly interpreted the coverage of the Americans with Disabilities Act, after Congress had passed the measure by large margins (17 ADAM 85, 10/16/08).

Process Began in August.

Beginning in late August, when it became clear that a law was likely to be enacted, commission lawyers began drafting new ADA regulations and changes to the relevant EEOC interpretive guidance, Associate Legal Counsel Peggy Mastroianni said at the Dec. 11 meeting. That process included a meeting with the disability rights groups, business representatives, and others who formed the coalition that crafted the compromise bill in Congress, she said. Lawyers from OLC also met with the commissioners and their staffs before producing the documents under consideration at the public meeting, Mastroianni said.

At the opening of the Dec. 11 meeting, Earp said she thought EEOC had met the criteria under the Administrative Procedure Act for issuing an interim final rule, which would have taken effect by Jan. 1 but allowed for subsequent public comment. Earp said because of objections raised by some disability rights organizations, however, she had agreed that EEOC would take the more traditional route of issuing a notice of proposed rulemaking, with 60 days of public comment after review by the White House's Office of Management and Budget and publication in the *Federal Register*.

As the meeting progressed, however, it became clear that Ishimaru and Griffin considered the public meeting on the proposed rules premature and that they would block Earp's attempt to clear a notice of proposed rulemaking for OMB review.

Politics Rears Its Head.

Griffin said politics was driving the chair's push for EEOC to approve proposed regulations under the ADA Amendments Act before the Bush administration leaves office. "This is an attempt by the Republican administration to get their views out in public knowing full well that we disagree," Griffin said. The administration "knew we have a stalemate but decided to have a meeting

anyway,” Griffin said. “I resent the way this was done and how it was portrayed.”

Ishimaru said EEOC’s deliberations on the proposed rules are incomplete and he tried to block Christopher Kuczynski, director of the ADA Policy Division in EEOC’s Office of Legal Counsel, from discussing the substance of the proposed rules. Although the commission approved Ishimaru’s motion not to waive its “pre-decisional privilege” to discuss draft rules in private, Chair Earp allowed Kuczynski to describe the proposal in public after the chair received advice from EEOC Legal Counsel Reed Russell that a waiver was unnecessary.

Commissioner Barker, a Republican who joined EEOC this summer, objected to Griffin’s statement that politics was driving the commission’s agenda. “We should not be here to promote any particular political agenda, period,” Barker said. “Our fundamental responsibility is to enforce the federal employment discrimination laws and to get our regulations out when Congress improves those laws.”

Prior to the final vote, Barker said even if the draft proposed rules were not perfect, “our job today is to at least start the process.” Given the act’s Jan. 1 effective date, Barker said, EEOC has some responsibility to get a proposal out for public comment and it could improve and revise proposed rules, if necessary, after reviewing those comments. “I don’t see that we do anything for anybody by stopping the process,” she said.

Earp said in her experience at EEOC, which includes more than two years as chair, commissioners usually “work collaboratively” and “very rarely” have party politics intruded. “I resent deeply the intimation” that

the public meeting on the proposed rules “has anything to do with George Bush leaving office,” Earp said. The chair added that she did not want to leave an impression that the Office of Legal Counsel’s work is somehow “flawed or tainted” because it coincides with the end of the Bush administration.

Griffin responded that she did not think OLC’s work is “tainted,” just that it “isn’t finished.” Griffin said given the incomplete nature of the proposal, “we shouldn’t be talking about it” in public.

No Congressional Deadline.

Ishimaru said he wants to begin the process of EEOC rulemaking on the ADA Amendments Act but, “I believe we’re not ready to start yet.” Instead, Ishimaru said he wants to “get it right” and not go public with proposed rules until EEOC has a document with which “a majority of commissioners are comfortable.”

Ishimaru warned that once EEOC approves a proposal for public comment, “it takes on a life of its own” and may be more difficult to change later. “Whatever gets out there carries weight and carries momentum,” he said. “I don’t think today is the right time to get into some serious disagreements we have on substantive issues” raised by the draft proposed rules.

Griffin and Ishimaru observed that although the act directs EEOC to revise its current regulations, Congress did not place any deadline on commission action. “We need to get it done and get it done right,” Ishimaru said, adding that EEOC should not place “artificial time restraints” on its final product.

Federal Courts

Disabled Retirees Lack Standing to Sue Under Title I

Three General Motors Corp. retirees lack standing to sue under the Americans with Disabilities Act to challenge the reduction of their pension benefits when they started receiving Social Security disability insurance benefits, the U.S. Court of Appeals for the Sixth Circuit ruled Dec. 4 (*McKnight v. Gen. Motors Corp.*, 6th Cir., No. 07-1479, 12/4/08).

Affirming a lower court’s grant of summary judgment to GM, the appeals court addressed an issue that has split the federal appeals courts and held that disabled former employees are not covered by Title I of the ADA because they are not “qualified individuals” who “can perform” the essential functions of a job with or without reasonable accommodation.

Joining the Seventh and Ninth circuits in holding that disabled former employees lack standing to sue under ADA Title I, the Sixth Circuit found that the statutory language, which uses present-tense verbs, unambiguously excludes them and that the Employee Retirement Income Security Act instead addresses the provision of benefits to former employees who can no longer work.

In contrast, the Second and Third circuits have found that the statutory language is ambiguous and that “qualified individual” should be broadly construed in order to provide comprehensive protection from discrimination in the provision of benefits.

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Employee Alleging Perfume Sensitivity May Proceed

A Detroit city employee who claimed that she experienced extreme sensitivity to a co-worker's perfume and air fresheners may present her claims under the Americans with Disabilities Act to a jury, a federal district court ruled Nov. 25 (*McBride v. Detroit*, E.D. Mich., No. 07-12794, 11/25/08).

Denying the city's motion for summary judgment, Judge Lawrence P. Zatkoff of the U.S. District Court for the Eastern District of Michigan found that Susan McBride "has a negative reaction every time she is confronted with scents or other chemicals," and she "is sensitive to a wide variety of chemicals, not just perfumes and fragrances."

McBride "produced evidence that her breathing is significantly restricted as compared to the average person, such that there is a genuine issue of material fact whether she is a person with a disability under the Act," the court said.

The court also found a genuine factual issue with regard to whether the city provided McBride a reasonable accommodation. It noted that although the city argued that a scent-free workplace policy would be an undue hardship, McBride did not request such a policy.

According to the court, McBride proposed that the most egregious scents be curbed through a written policy and employee education, and she gave the city a copy of the Michigan Department of Information Technology's policy as an example. That policy allowed for mild scents in moderation, but not "strong or offensive scents that become detrimental to the work unit."

"[T]his type of policy does not require a completely scent-free environment nor does it address the public or those outside a department. Defendant has not offered evidence why such a policy would create an undue hardship," the court said, nor has it "offered any explanation why it could not simply have ordered Ms. Chaney to cease wearing offensive perfumes or oils, or why such a directive would constitute an unreasonable accommodation."

The court also noted a factual dispute over whether or not it was possible to move either McBride's or Chaney's work station and whether such possibilities were explored. And

while FMLA leave can constitute an accommodation—the city argued that it provided a reasonable accommodation by granting McBride such leave—"generally additional time off after the exhaustion of FMLA leave is required for the accommodation to be reasonable," the court said.

Finally, it found that several statements by city employees suggested that an interactive process did not occur. Among these were: "If she's allergic to perfumes and colognes then she has the problem not the employer"; "The problem is [Plaintiff] and her symptoms"; and "HR's position is to limit the contact between the employees."

City Had No Duty to Override CBA to Accommodate

The city of Madison, Wis., accommodated a bus driver's illnesses to the extent it reasonably could under a collective bargaining agreement, the U.S. Court of Appeals for the Seventh Circuit ruled Dec. 4, affirming summary judgment for the city on her claims that it violated her rights under the Americans with Disabilities Act and the Rehabilitation Act (*King v. Madison*, 7th Cir., No. 08-2052, 12/4/08).

"As far as this record shows, the city applied its disability layoff policies in a neutral, nondiscriminatory way and accommodated [plaintiff Gail] King as far as it could," Judge Diane P. Wood stated, pointing out that the city was not required to reassign a disabled employee to a position when such a transfer would violate legitimate, nondiscriminatory provisions of the city's collective bargaining agreement with International Brotherhood of Teamsters Local 695.

King became unable to work from the combined effects of a high-risk pregnancy, diabetes, and migraine headaches. She first took leave without pay for six months and later was transferred to layoff status for 18 months. Although her physician authorized her return after 14 months, he barred her from driving a bus.

But, under the collective bargaining agreement with Local 695, given her seniority and classification range, the only job King had a right to demand was that of bus driver. After two years of leave, the city terminated her, as it was entitled to do under the agreement.

King sued the city under the Americans with Disabilities Act and

the Rehabilitation Act claiming it unlawfully failed to accommodate her disability.

"Even if we assume that King is disabled for purposes of the ADA, she could not survive the city's motion for summary judgment because the city provided her with a reasonable accommodation," Wood said.

"King is correct to note that the ADA recognizes reassignment to a vacant position as a potentially reasonable accommodation if a disabled employee is unable to perform the essential functions of a job," Wood wrote. But employers are not required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, she stated.

The nondiscriminatory hiring and reassignment provisions of a collective bargaining agreement qualify as such a policy, the court held. The record showed that the city complied with the agreement by considering King for other vacancies. Based on the placement policies in the labor contract, "King had no right to bump another employee from the other available positions within her collective bargaining unit," it ruled.

King attempted to get positions outside of her unit, but the city found that she was not the most qualified candidate, Wood noted. "As far as this record shows, the city applied its disability layoff policies in a neutral, nondiscriminatory way and accommodated King as far as it could," she stated.

Bank Applicant Denied Job After Drug Test May Proceed

A prospective bank employee who was offered a senior vice president position only to have the job offer withdrawn after a pre-employment drug test indicated the presence of a legally prescribed drug may pursue a claim under the Americans with Disabilities Act, the U.S. District Court for the Northern District of Illinois ruled Nov. 18 (*Connolly v. First Personal Bank*, N.D. Ill., No. 07 C 5272, 11/18/08).

Denying the bank's motion to dismiss the ADA suit, the court said plaintiff R. Sue Connolly, who said she informed the bank hiring manager that she was taking phenobarbital before the drug test, adequately alleged that First Personal Bank (FPB) violated the ADA by using a drug screen that prohibited the use of

all legally prescribed medications as well as illicit drug use. Emphasizing that it was not considering the merits of Connolly's claim, the court ruled her complaint adequately sets out a potential violation of the ADA's provision on pre-employment tests, codified at 42 U.S.C. § 12112(d)(3)(C).

In seeking to dismiss Connolly's case, the bank had argued that the drug test administered to Connolly did not violate Section 12112 because the drug test was not a medical exam. Alternatively, the bank contended Connolly failed to state an ADA claim because her complaint did not allege that the job offer was withdrawn based on a disability or perceived disability.

Writing for the court, Judge James B. Zagel said that "for purposes of the ADA, tests to determine illicit drug use are clearly not medical examinations" within the meaning of the act. "A sensible reading of the statute instructs that an employer may only rely on a test for illicit drug use to make employment decisions based on that illicit drug use," Zagel wrote.

The court said "a problem arises" when "licit drug use" is revealed by an employer's testing of a prospective employee for "illicit drug use," and the employer takes action—such as rescinding a job offer—based on the legal drug use.

"Congress has a long history of enforcement against illicit drug use in this country, but I can't conclude that Congress intended to permit that enforcement mechanism to function in a way that circumvents the purpose of the ADA to prohibit discrimination against qualified individuals with disabilities," Zagel wrote. "In these circumstances, there is a minimal cost to determine whether the presence of Phenobarbital was legal. The [ADA] exemption for drug testing was not meant to provide a free peek into a prospective employee's medical history and the right to make employment decisions based on the unguided interpretation of that history alone."

Given Connolly's allegations that she was legally prescribed Phenobarbital as part of a cervical epidural shot, that she told the hiring manager in advance the drug might appear in her drug test, and that the bank thereafter rescinded the job offer without giving Connolly any further opportunity to explain the test results, the court said her complaint ad-

equately states a possible ADA violation.

Rejecting the bank's second argument, the court said Connolly does not have to allege that she was disabled or regarded as disabled by the bank in order to proceed with her ADA claim.

Although the Seventh Circuit has yet to rule directly on the issue, Zagel wrote that "the weight of authority supports the rule that a job applicant alleging an impermissible preemployment disability related inquiry does not have to suffer from a disability or be perceived as disabled in order to find protection under the statute."

Timely Filed Intake Forms Constitute EEOC Charge

The Americans with Disabilities Act claims of a well control specialist who submitted three questionnaires and an affidavit to the Equal Employment Opportunity Commission within 300 days of his termination are timely, the U.S. Court of Appeals for the Tenth Circuit ruled, reversing and remanding the district court's decision (*Carson v. Cudd Pressure Control Inc.*, 10th Cir., No. 07-6199, filed 11/19/08).

Cudd Pressure Control Inc. fired Christopher C. Carson after he began taking prescription medication that limited his ability to function. After receiving a right-to-sue letter from the EEOC, he filed a lawsuit alleging his termination violated the ADA.

"For Mr. Carson's ADA claims to be timely, he must have filed an administrative 'charge' within three hundred days after his November 30, 2004, discharge: that is, by September 26, 2005," the court said.

Although Carson's complaint stated his charge of discrimination was "issued" on February 3, 2006, Carson provided additional background documents indicating he had completed, signed, and delivered three EEOC questionnaires and an affidavit stating claims of discrimination on September 9, 2005 and clarified that the charge had been issued on February 3, 2006, not filed.

The district court dismissed the case, finding Carson's EEOC filing to be untimely. The appeals court reversed, noting that the district court had erred by "calculating from the date the EEOC issued its formal Charge of Discrimination, rather than the date Mr. Carson initiated the administrative process," it court said.

The court noted that after the district court's dismissal, the Supreme Court resolved two relevant issues in *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008): "what is a charge" in an employment-discrimination matter "[a]nd were [the plaintiff's EEOC intake documents] a charge?"

"On the first issue, the Court gave deference to the EEOC's statutory interpretation and determined that, to be considered a charge, a plaintiff's documents must provide 'the information required by the regulations, i.e., an allegation and the name of the charged party,' and also 'it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee,'" the court found.

The Supreme Court resolved the second issue in favor of the *Holowecki* plaintiff, the court said, finding his completed intake form and accompanying affidavit to be sufficient, amounting to "a request for the agency to act."

"It did not matter that the plaintiff subsequently filed a formal, but untimely, charge," the court added.

"In this case, Mr. Carson filled out forms similar to those discussed in *Holowecki*," the court said, "His EEOC submissions included his allegations of discrimination and the name of his employer. Additionally, his stated 'expectations' of 'back pay, front pay, reinstatement of stock incentives,' demonstrate an intent to seek EEOC assistance in enforcing his perceived rights."

"Under the *Holowecki* standard, Mr. Carson's intake forms constitute a charge," the court concluded.

"In light of the significance that the Supreme Court has accorded these documents, it is appropriate to consider them in our review of the district court's ruling," the court held.

Title III Remedial Order Violated Due Process

A remedial order requiring a movie theater company to modify complexes in violation of Title III of the Americans with Disabilities Act that were built before the government's interpretation of the applicable regulations could reasonably have been known, violates due process and was an abuse of discretion, the U.S. Court

of Appeals for the Ninth Circuit ruled, vacating and remanding the decision (*U.S. v. AMC Entm't Inc.*, 9th Cir., No. 06-55390, filed 12/5/08).

The Justice Department filed a lawsuit against AMC Entertainment, Inc. and American Multi-Cinema, Inc., seeking to enforce Title III of the ADA in 96 stadium-style AMC multiplexes across the nation.

Applying the Architectural and Transportation Barriers Board (Access Board) guidelines as adopted by the Attorney General as part of the "Standards for Accessible Design," 28 C.F.R. pt. 36, app. A, § 4.33.3, the district court ruled that AMC's existing facilities violated the line of sight requirement in § 4.33.3 and awarded summary judgment to the government. The district court also issued a remedial order with a series of injunctive orders specifying compliance for the 96 theatres in detail. AMC appealed.

DOJ first publicly advocated its interpretation of the lines of sight requirement in an amicus brief filed in *Lara v. Cinemark USA Inc.*, 1998 WL 1048497, at *2 (W.D. Tex. August 21, 1998), *rev'd*, 207 F.3d 783 (5th Cir. 2000). There, DOJ said § 4.33.3 requires that theaters provide wheelchair users comparable viewing angles to the screen.

This was the view later adopted by the Ninth Circuit in *Or. Paralyzed Veterans of Am. v. Regal Cinemas Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004), and also applied by the district court.

Although AMC did not appeal the district court's ruling on the merits under this standard, it objected to the district court's failure to exempt in its remedial order theaters built before the date AMC could have reasonably known of the comparable viewing angles requirement.

"AMC claims it was not told the rules of building stadium-seating theaters until, at the earliest, the government published its view of § 4.33.3 in its *Lara* amicus brief. We agree."

The appeals court noted a split in the circuits regarding the interpretation of "lines of sight." Some have applied the comparable viewing angles standard; others have held the term meant an unobstructed view, or merely dispersed seating options, it said.

"Examining the conflicting decisions reached by various courts . . . it is clear that the text of § 4.33.3 did

not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited'—let alone those of 'ordinary intelligence,'" the court said.

"Indeed, the government itself did not publicly endorse the viewing angle interpretation among these views until it filed a relatively obscure amicus brief in 1998 in the district court for the Western District of Texas," the court added.

"Retroactive application of the viewing angle interpretation is appropriate only as of the date on which AMC received constructive notice that the government viewed § 4.33.3 as incorporating a comparable viewing angles requirement and intended to enforce that requirement," it ruled.

A two-judge majority of the appeals court panel also ruled that the district court abused its discretion in issuing a nationwide injunction that included the Fifth Circuit, which applies a less stringent interpretation of the lines of sight requirement.

Agency Activity

Access Board Seeks Comment

The Access Board Nov. 19 released a revised draft of its Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles. This second draft is being released because the format has been changed, provisions regarding over-the-road buses were added, and changes were made in response to previous comments. The revisions cover only buses, over-the-road buses, and vans, but the Board says revisions relating to other modes will be issued later. Comments must be received by Jan. 20, 2009.

The draft is available at <http://www.access-board.gov/vguidedraft2.htm>. For more information, contact Dennis Cannon, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW, suite 1000, Washington DC 20004-1111. Telephone number: 202-272-0015. Email: cannon@access-board.gov.

The Board's Advisory Committee on Emergency Transportable Housing Nov. 18 presented its report at a meeting of the Board. The report and

related information are available at <http://www.access-board.gov/eth/report.htm>.

Additionally, the Access Board Nov. 24 announced that David M. Capozzi has been named its new Executive Director. Capozzi has been serving as Acting Executive Director since Lawrence W. Roffee retired in August.

EEOC to Issue GINA NPRM

The Equal Employment Opportunity Commission aims to issue a notice of proposed rulemaking on the Genetic Information Nondiscrimination Act (GINA) in January 2009 as it faces a congressionally imposed deadline to issue final GINA rules by next May, EEOC said in its latest semiannual regulatory agenda, published in the Nov. 24 Federal Register (73 Fed. Reg. 71270).

GINA was signed into law May 21 (17 ADAM 48, 6/19/08). Under the law, employers, unions, and job placement agencies may not discriminate against job applicants, employees, apprentices, and trainees based on genetic information.

GINA's employment title takes effect 18 months after enactment (November 2009) and the act requires EEOC to issue regulations by one year after enactment (May 21, 2009). EEOC's most recent regulatory agenda states the commission's intention to issue a proposed rule in January, with a public comment period ending in March 2009, and a final rule by the deadline.

EEOC Clarifies Opinion Letter

A law enforcement agency can require police officers to report steroid use, but only may require certification or a medical exam for an officer reporting prescription steroid use if the agency has reason to believe the officer is unable to perform his or her duties or poses a direct threat, the Equal Employment Opportunity Commission said Sept. 10.

The opinion letter, obtained by BNA Oct. 26, clarifies a June 24 letter in which EEOC stated that a peace officer standards and training board could, without violating the Americans with Disabilities Act, require law enforcement agencies to test officers for illegal steroid use (17 ADAM 80, 9/18/08).

As in the June letter, EEOC noted that because the requester was not an employer, Title I of the ADA did not

apply directly. Rather, peace officer certification is governed by Title II, which is enforced by the Justice Department. “However, Title I is relevant to the extent that law enforcement agencies in your state will have to implement your procedures,” the commission said.

“Based on the information you have provided, . . . we believe that Title I of the ADA allows law enforcement agencies in your state to require peace officers to report their use of steroids,” EEOC said in the letter signed by Legal Counsel Reed L. Russell. “We also believe, however, that law enforcement agencies may not require officers who are lawfully using anabolic steroids to be examined by a Board-certified physician *unless* there is reason to believe that they are unable to do their jobs without posing a direct threat.”

While EEOC noted that the ADA prohibits employers from making inquiries that are likely to elicit information about a disability, employees in positions affecting public safety—including police officers—can be required to report prescription drug use if the employer can show that the inability or impaired ability to perform job-related tasks could result in a direct threat, even if there is no proof that a particular employee is experiencing performance problems.

Whether or not a licensing or certification board can deny, revoke, suspend, or cancel an officer’s certification if he or she fails to report steroid use within 72 hours of initial use or require medical clearance from a board-trained physician is governed by Title II, EEOC said. It noted that if such a policy is legal under Title II, employers under Title I may comply with these requirements by disclosing to the board the names of police officers who fail to report steroid use and those who have not obtained medical clearance.

EEOC stressed that employers can discipline officers who use steroids illegally because individuals currently using illegal drugs are not protected by the ADA. “However, if an agency learns through self-reporting that an officer is lawfully using anabolic steroids under a doctor’s prescription, it may require the officer to obtain certification of his ability to work and/or may require him to submit to a medical examination only if there is reason to believe that the officer is unable to perform his job duties or

would pose a direct threat because of such use.”

DOJ Submits Rules to OMB

The Justice Department Dec. 3 submitted its final rules updating its Title II and Title III Americans with Disabilities Act regulations to the Office of Management and Budget for review. DOJ issued an NPRM on the rules in June (17 ADAM 53, 6/19/08). Under the Americans with Disabilities Act, DOJ must adopt regulations that are consistent with the accessibility guidelines issued by the Access Board. The guidelines, commonly known as “ADAAG,” were last revised in July 2004. DOJ said the rule would adopt revised standards that are consistent with the 2004 guidelines, including all of the amendments to ADAAG since 1998. Information on the status of OMB’s review is available at www.reginfo.com.

Official Sees More ADA Cases

Cases alleging disability discrimination and age discrimination are two substantive areas in which the Equal Employment Opportunity Commission is likely to expand its future litigation efforts, EEOC General Counsel Ronald Cooper said Dec. 4.

Speaking at an employment law conference sponsored by the American Law Institute-American Bar Association in Washington, D.C., Cooper said the recent enactment of the ADA Amendments Act, which takes effect Jan. 1, probably will mean more EEOC suits filed under the Americans with Disabilities Act as well as a “different context” for such cases. He explained that as a result of the new law, more individuals will be covered and courts no longer will exclude plaintiffs who use “mitigating measures” or whose conditions might be episodic or in remission.

Cooper said fiscal 2008, which ended Sept. 30, was “a good one” for EEOC’s systemic program, in which the commission has renewed its emphasis on identifying, investigating, and litigating “big cases” that potentially affect employment practices at entire companies, professions, industries, or regions.

However, “[t]here has been a trade-off for this systemic focus,” Cooper said, acknowledging it means “we’re going to be shifting some resources away” from individual discrimination claims. He added, how-

ever, that individual cases will always be part of EEOC’s docket and that claims under some statutes, particularly the ADA and ADEA, inevitably focus on the individual.

Individual cases “will be essential to what we do,” Cooper said, remarking that it’s part of how EEOC helps to shape the law. “We expect to see the ADA part of our portfolio increase” as the ADA Amendments Act takes effect, he added. Cooper said perhaps with the ADA amendments, courts will “get down to the question of whether discrimination occurred” now that Congress has removed the “hurdles” to coverage erected by past Supreme Court opinions.

Settlements

EEOC Settles With Construction Company

The Equal Employment Opportunity Commission Oct. 24 reached a settlement agreement with a Marietta, Ga., construction company resolving allegations of violations of the Americans with Disabilities Act (*EEOC v. Blount Construction Co.*, N.D. Ga., No. 1:08-cv-00367-CAP-CCH, settled 10/24/08) (17 ADAM 25, 3/20/08).

Under the terms of the two-year consent decree, Blount Construction Co. will revise its equal employment policy to include disability as a protected criterion and implement a procedure for employees and applicants to request reasonable accommodations; comply with posting and reporting requirements; pay \$20,000 to charging party Virgilio Modica; and provide training to its managers and supervisory personnel.

EEOC Reaches Agreement With Fla. Tourist Attraction

The Equal Employment Opportunity Commission Oct. 30 reached a settlement agreement with a Fort Myers, Fla., business resolving allegations of Americans with Disabilities Act violations (*EEOC v. The Shell Factory L.C. d/b/a The Shell Factory and Nature Park*, M.D. Fla., No. 2:07-cv-00630-JES-SPC, settled 10/30/08). In the complaint, EEOC alleged The Shell Factory and Nature Park violated the ADA when it terminated Ara DerOvanesian’s employment, denied him employment opportunities, and failed to provide him a reasonable ac-

commodation because of his disability.

Under the terms of the three-year consent decree, defendant will pay DerOvanesian \$50,000; distribute its written policy prohibiting discrimination to all current and future employees and management staff; provide EEO and sensitivity training to all its employees, including all management personnel; and comply with posting and reporting requirements.

EEOC, Nonprofit Reach Settlement Agreement

The Equal Employment Opportunity Commission Nov. 13 reached a settlement agreement with a Newark, N.J., nonprofit organization resolving an Americans with Disabilities Act lawsuit (*EEOC v. The Urban League of Essex County*, D.N.J., No. 2:08-cv-04701-DRD-MAS, settled 11/13/08) (17 ADAM 92, 10/16/08).

Under the terms of the five-year consent decree, the Urban League of Essex County will pay Linda Robinson \$30,000; provide Robinson a reference letter; comply with posting and recordkeeping requirements; provide training to all employees on federal discrimination laws; and maintain an anti-discrimination policy and complaint procedure.

DOJ, Police Department Settle Over Interpreter Denial

The Justice Department Oct. 28 reached a settlement with an Illinois police department resolving a complaint alleging violations of Title II of the Americans with Disabilities Act. The investigation by DOJ was initiated by a complaint filed by a deaf detainee who alleged the Elk Grove Village PD failed to provide him a requested qualified sign language interpreter when he was arrested and held for several hours, handcuffed him behind his back so he could not communicate in ASL, and did not provide him with a TDD while he was in custody.

Under the terms of the three-year agreement, the department will ensure appropriate auxiliary aids and services are provided to arrestees and subjects; offer qualified sign language interpreters to those who prefer one; provide ADA training to all new employees; and pay the aggrieved detainee \$7,500. Other specifics of the agreement are available at http://www.ada.gov/elk_grove.htm.

DOJ, University Agree To Improve Accessibility

The Justice Department Dec. 9 announced it had reached a settlement agreement with a Pittsburgh, Pa., university resolving an investigation into allegations of violations of Title III of the Americans with Disabilities Act (*Settlement Agreement Between the United States of America and Chatham University*, D.J. No. 202-64-42, 12/9/08). The investigation was initiated by a complaint alleging Chatham University's facilities were inaccessible to persons with mobility impairments.

Under the terms of the five-year agreement, the university will take steps to make its buildings and facilities accessible, eliminate barriers in its exterior circulation plan, hold public events in accessible facilities, and install visual alarms in restrooms and general usage areas. Other specifics of the agreement are available at <http://www.ada.gov/chatham/chathamsa.htm>.

DOJ Reaches Settlement With Medical Care Provider

The Justice Department Dec. 8 announced it had reached an agreement with a Bridgeport, W. Va., medical care provider resolving an investigation under Title III of the Americans with Disabilities Act (*Settlement Agreement Between The United States of America and Medbrook Medical Associates Inc.*, D.J. No. 202-83-8, 12/8/08). The investigation was initiated by a complaint filed by a deaf man and his wife alleging Medbrook Medical Associates Inc. refused to provide a sign language interpreter when requested in violation of the ADA. Because of this failure, the deaf man's ill wife had to interpret for her husband, and thus was discriminated against because of her association with her deaf husband.

Under the terms of the three-year agreement, Medbrook will implement policies, practices, and procedures designed to ensure appropriate auxiliary aids and services are provided to patients and companions, enter into a contractual arrangement with qualified sign language interpreters or sign language interpreter agencies, and provide ADA training to members of its staff who have patient contact. Additionally, Medbrook will pay the complainants \$4,000 each and \$1,000 as a civil penalty to the United

States. Other specifics of the agreement are available at <http://www.ada.gov/medbrook.htm>.

D.C. Homeless Shelter To Address Violations

The Justice Department Dec. 12 announced it had reached a settlement agreement with the District of Columbia to improve accessibility in the city's homeless shelter program (*Settlement Agreement Between the United States of America and the District of Columbia Under the Americans with Disabilities Act*, D.J. No. 204-16-96, 12/12/08). DOJ initiated the review under Title II of the Americans with Disabilities Act after receiving many individual complaints alleging widespread violations in the program.

Under the terms of the agreement, the District will take steps to improve the accessibility of its homeless shelters, including hiring an ADA Coordinator, revising its ADA notice to ensure it provides sufficient notice of Title II rights, providing relevant training to shelter staff, developing a comprehensive physical access plan to ensure the shelters are readily accessible and usable by people with disabilities within two years, and ensuring the provision of auxiliary aids and services. Other specifics of the agreement are available at http://www.ada.gov/dc_shelter.htm.

Hospital Will Provide Auxiliary Aids Under DOJ Agreement

The Justice Department Sept. 18 reached a settlement agreement with a Concord, N.H., acute care hospital under the Americans with Disabilities Act (*Settlement Agreement Between the United States of America and Concord Hospital*, D.J. No. 202-47-46, 9/18/08). DOJ's investigation was initiated by complaints filed with the DOJ by several deaf individuals, two of whom are also visually impaired, alleging an inability to communicate adequately with Concord Hospital personnel.

Under the terms of the three-year agreement, the hospital will provide appropriate auxiliary aids and services, provide qualified interpreters under certain circumstances, and pay the complainants \$100,000 in total, in addition to other specified remedial action in the agreement, which is available at http://www.ada.gov/concord_hosp.htm.

In the States

Ex-Wal-Mart Employee With Cerebral Palsy May Proceed

A fitting room associate with cerebral palsy at a Wal-Mart store in Clackamas, Ore., who was fired for poor work performance may proceed with failure to accommodate and unlawful discharge claims under Oregon's disabilities discrimination law, the U.S. District Court for the District of Oregon ruled Nov. 14 (*Austin v. Wal-Mart Stores Inc.*, D. Or., No. 07-1306-HA, 11/14/08).

Partially denying summary judgment to Wal-Mart, the court found that a reasonable jury could conclude that the company failed to accommodate Heidi Austin's disability or engage in the interactive process for finding an accommodation, in violation of Oregon's Discrimination Against Disabled Persons in Employment Act (Or. Rev. Stat. § 659A.112). It cited evidence that a supervisor obstructed Austin's requests for reasonable accommodation for her cerebral palsy, which requires her to use a wheelchair.

Judge Ancer L. Haggerty also found that Austin could proceed with her discriminatory discharge claim because a reasonable jury could find that her termination was causally connected to her disability. She was fired after almost a year of employment when two Wal-Mart managers who visited the store reported that her fitting room was untidy and she looked unkempt.

However, he granted summary judgment on her hostile environment and retaliation claims. The conduct of a supervisor who allegedly yelled at Austin and "threw clothes back" at her because she was unhappy with her work was not sufficiently extreme or outrageous to constitute harassment.

Wal-Mart argued that it satisfied its duty to accommodate Austin by offering to transfer her to the "people greeter" position, but the court disagreed, saying the company "made minimal efforts to help" Austin perform her current job and should only have sought reassignment for her as a last resort. Austin had asked to use a shopping cart to free her hands while she answered the phone in the fitting room area and permission to

Legal Insight

Attorneys Advise on Litigating Under the Amendments

Although the ADA Amendments Act (P.L. 110-325) "left the actual language of the three-prong definition of disability fairly intact," the "real action is in how you interpret these three prongs," according to Jennifer Mathis, Deputy Legal Director at the Bazelon Center For Mental Health Law.

Speaking at an Oct. 30 teleconference sponsored by the National Employment Lawyers Association, Mathis noted interpretive guidance that was added to the Americans with Disabilities Act by the amendments. Rules of construction were added, and the Findings and Purposes sections lay out clearly that "substantially limits" had been interpreted as too high a standard, she said. The Equal Employment Opportunity Commission's interpretation of the term as "significantly restricts" caused problems, she remarked. The Findings and Purposes make clear, while keeping the same language, that the courts and EEOC got it wrong, she said.

Brian East, a senior attorney in the Legal Services Unit of Advocacy Inc., noted that disability is now going to be much easier to prove, and should no longer require intensive court focus.

East clarified, though, that although the goal is to simplify disability analysis, as a practical matter, plaintiffs still need to bring admissible evidence of an impairment. Disability should be easier to prove, and less of a focus by the courts, but plaintiffs' attorneys shouldn't "short-change" the evidence, he advised.

In the ADAAA, Congress insists the EEOC "fix" its interpretation of the ADA, he said, specifically granting EEOC rulemaking authority. Although the Supreme Court has resisted giving deference to EEOC's regulations, since EEOC is designated by law the authority to interpret the definition of disability, "the courts can't play that game anymore," he said.

Major Bodily Functions Included.

The list of major life activities consists of activities included in the regulations and adds a few found by the courts, Mathis said. The list is not exhaustive, but those listed have the force of statute, Mathis said.

The act adds a provision that major life activities include major bodily functions, which "gets at" conditions that don't always fit neatly into major life activities, she said. This inclusion of major bodily functions enables a plaintiff to demonstrate what is wrong with his or her body functioning instead of framing it as a major life activity, she said, which "allows a simple analysis for many conditions." This change may also relieve some of the tension between showing a disability and showing that the individual is qualified, she said.

In bringing ADA cases, East advised plaintiffs' attorneys to look at the big picture and envision this law as a "delicate new plant." It's important for plaintiffs' attorneys not to take "short cuts" in the first cases brought under the amended law, he said. He also encouraged the plaintiffs' bar to collaborate with each other, in order to bring "story" cases initially.

Warning attorneys to be careful in proceeding under the amendments, Mathis advised that the initial cases not skimp on the evidence or expert testimony. And, she added, "working" should not be used as the major life activity unless absolutely necessary.

"pre-hang" clothes on hangers and return to them as work permitted.

The court also rejected Wal-Mart's contention that Oregon law does not provide a separate cause of action for failure to engage in the interactive

process. Oregon Administrative Rule 839-006-0206(4), which took effect Feb. 1, 2007, "expressly clarified" that the statute requires an employer to engage in the interactive process.



BNA's

Americans with Disabilities Act

M A N U A L

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In this special supplement to the newsletter, legal experts in the academic field, in government, and in the private sector offer their viewpoints on the ramifications of the ADA Amendments Act and practical advice to employers on complying with the most significant changes to the law since its enactment.

The ADA Amendments Act of 2008

BY CHAI FELDBLUM*

By the time the Americans with Disabilities Act of 1990 turned 13 years old (bar mitzvah age, in Jewish terms), the Supreme Court had drastically narrowed the law. A series of Supreme Court cases established a new and demanding standard for proving “disability,” with the result that many individuals, with a range of conditions advocates had assumed would be covered as disabilities, were no longer protected by the law. The ADA Amendments Act of 2008 (ADAAA), which goes into effect on Jan. 1, 2009, restores protection for many individuals by rejecting the Supreme Court’s interpretation of the definition of disability in *Sutton v. United Airline*, 527 U.S. 41 (1999) (and its two companion cases) and in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 182 (2002). ADA Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, 3555 (2008) (amending Americans with Disabilities Act (ADA), § 3(4)(A), 42 U.S.C. § 12101 (1990)).

The ADAAA was the result of extensive negotiations between representatives of the disability and business communities between January 2008 and July 2008. Some of the negotiators in that process had been involved in negotiations on the original ADA and used their understanding of Congress’ original intent to inform their positions on the ADAAA.

Overview of the Definition of Disability.

Unlike an earlier bill, The ADA Restoration Act of 2007, H.R. 3195, 110th Cong. (2007), which deleted the phrase “substantially limits one or more major life activities” completely from the definition of disability, the ADAAA retains the original structure of the definition of disability. Under the ADAAA, as under the original ADA, the “term disability means, with respect to an in-

dividual - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3)).” ADAAA, § 3(1)(A).

To counter the perceived misinterpretations of this definition by both the Equal Employment Opportunity Commission (EEOC) and the Supreme Court, however, the ADAAA signaled Congress’ intent that the standard for “substantially limits” should be less strict than that established by either the EEOC or the courts. The ADAAA also established a new and broad statutory definition of “major life activities,” established a new and broad statutory definition of the third prong of the definition of disability, and included rules of construction related to mitigating measures and episodic impairments.

Substantially Limits a Major Life Activity.

The ADAAA retains the requirement, in prongs one and two of the definition of disability, that a physical or mental impairment must “substantially limit” a major life activity (or have a record of such limitation) to be considered a disability. After various unsuccessful efforts during the legislative process to come up with a new definition for the term “substantially limits,” Congress ultimately chose simply to communicate its position that the strict and demanding interpretation of the term that had been applied by the EEOC and the Supreme Court was wrong.

The ADAAA conveyed this position in two ways. First, the ADAAA includes a rule of construction stating that the definition of disability “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” ADAAA § 4(A). Second, the law includes an un-

usual statutory rule of construction that states that: “the term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.” ADAAA § 4(B).

The meaning of “substantially limits” thus lies within the findings and purposes of the new Act. The findings of the ADAAA first explicitly reject the statement in *Toyota v. Williams* “that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled.’ ” ADAAA § 2(a)(4). The findings further state that “the Supreme Court, in [*Williams*] interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress,” and that “the current Equal Employment Opportunity Commission ADA regulations defining the term ‘substantially limits’ as ‘significantly restricted’ are inconsistent with congressional intent, by expressing too high a standard.” ADAAA § 2(a)(7)-(8).

In the purposes section of the ADAAA, Congress repeats its intent to have the EEOC and the courts apply some lower standard for “substantially limits” than had previously been applied. In its fullest explication, Congress states this purpose as follows:

“[T]o convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for ‘substantially limits’, and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADAAA § 2(b)(5).

In another purpose provision, Congress states its expectation that “the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the amendments made by this Act.” ADAAA § 2(b)(6).

Readers of the new law (including agency regulators and courts) may well feel annoyed with Congress, and indeed, stymied by its refusal to provide further explication of the appropriate standard for “substantially limits.” But such annoyance would miss the mark. As Congress conveyed in the provision quoted above, a primary problem with the implementation of the ADA had been courts that were focusing primarily on how severe or not severe an impairment was, rather than on issues such as whether discrimination had occurred, whether reasonable accommodation was required, or whether a person was qualified for a job or eligible for a service. Congress was concerned that any effort to provide a more detailed definition of “substantially limits” (which was, indeed, attempted at various points during the legislative process) would simply reinforce the EEOC’s and the courts’ harmful tendency to over-focus on an impairment’s level of severity as the key aspect of any litigation.

Congress’ final approach was certainly not perfect. Nevertheless, it will work effectively enough in practice

if it is not overloaded with more detail by the agencies or the courts. The term “substantially limits” has a plain meaning. The key guidance from Congress is simply that the term does not connote a severe or significant impact and that the term must be construed in favor of broad coverage of individuals.

Major Life Activities and Mitigating Measures.

Congress made several more concrete changes in other parts of prongs one and two of the definition of disability.

The most important change is that “major life activities” are defined as including “major bodily functions.” Major bodily functions are defined as “including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” ADAAA, § 4(a), creating new § 3(2)(B) in the ADA.

Individuals with a range of serious medical conditions will presumably choose to establish coverage using the major bodily function approach. As a medical matter, an individual should be able to demonstrate relatively quickly whether his or her impairment substantially limits some major bodily function, either by causing that function to under-produce or overproduce. For example, any form of diabetes will substantially limit the endocrine function (it causes insulin to under-produce in the system) and any form of epilepsy will substantially limit the neurological function (when seizures occur, they cause misfiring of neurons in the neurological system).

In two rules of construction, the ADAAA clarifies that an impairment has to substantially limit only one major life activity (including only one major bodily function) to qualify as a disability, and that impairments that are episodic are considered in their active state when determining whether an impairment substantially limits a major life activity, including a major bodily function. ADAAA, § 4(a), creating new §§ 3(4)(C)-(D) in the ADA. The goal of these clarifications is to limit the various ways in which courts had concluded that impairments were not sufficiently severe to be considered “disabilities” and to make the assessment of “disability” a more streamlined function for the courts.

By establishing a substantial limitation on a major bodily function, people with serious medical conditions will establish coverage under the law without needing to describe the various daily activities they are unable to perform, with or without mitigating measures. Given that individuals must also demonstrate that they are qualified for a job or eligible for a service, it is helpful to establish coverage without discussing at length other limitations that the individual might experience.

For those who wish to establish coverage under the traditional list of “major life activities,” the ADAAA provides a statutory list of such activities that is non-exhaustive: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” ADAAA, § 3(2)(a), creating new § 3(2)(B) in the ADA.

For those who continue to use the traditional list of major life activities, the “mitigating measures fix” of the ADAAA will be particularly relevant. Reversing the

Sutton case, the ADAAA prohibits consideration of the ameliorative effects of mitigating measures, such as medication, devices, or learned behavioral modifications, in determining the substantial limitation on a major life activity. ADAAA § 4(a), creating new § 3(4)(E)(i) in the ADA. Ordinary eyeglasses and contact lenses are carved out as an exception to this rule (thus removing people with such lenses as automatically people with disabilities under the ADA), but an employer who has a qualification standard requiring individuals to have uncorrected vision must still justify that standard as “job-related for the position in question and consistent with business necessity.” ADAAA § 4(a), creating new § 3(4)(E)(ii) in the ADA; ADAAA, § 5(b), amending ADA, § 103.

Coverage Under the ‘Regarded As’ Prong.

When the ADA was enacted in 1990, advocates expected the third prong of the ADA—covering those who were “regarded as” having an impairment that substantially limited them in a major life activity—to play a major role in covering any individual who could prove that his or her impairment was the cause of a discriminatory action. This was because the Supreme Court had interpreted the third prong quite broadly in this manner in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

But the Supreme Court significantly narrowed the reach of the third prong in the *Sutton* case by importing EEOC regulations relating to working (which apply to prongs one and two of the definition) into the third prong. The ADAAA restores the *Arline* version of the third prong by stating that “an individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” ADAAA § 4(a), creating new § 3(3)(A) in the ADA.

In other words, the third prong of the definition of disability provides coverage based on a simple impairment (the impairment need not substantially limit any major life activity), but it is coverage that relies on proof of causation. Just as in cases alleging discrimination based on gender or race, a plaintiff must meet his or her prima facie case (including presenting evidence that raises the inference of discrimination) and must be able to rebut a defendant’s non-discriminatory reason for any adverse action.

Given the broad scope of the “regarded as” prong of the definition, Congress added two important statutory limitations. First, although the third prong generally covers all impairments, impairments that are both “transitory and minor” are excluded. ADAAA § 4(a), creating new § 3(3)(B) in the ADA. This ensures that individuals do not use impairments that are both minor and last for six months or less (the statutory definition for “transitory”) as bases for claims of discrimination. Second, covered entities are not required to provide reasonable accommodations in employment or modifications in public accommodation for individuals who are covered solely under the third prong. ADAAA § 6(h). This ensures that the affirmative accommodation and modifications requirements of the law attach only to individuals who can meet the stricter standard of having an impairment that substantially limits a major life activity.

Looking Backwards and Forwards in Disability Law.

The effort to bring about full anti-discrimination protection for people with disabilities is recorded in testimony, articles, congressional hearings, policy and advocacy documents, court cases, and the text of the law. For a comprehensive, online archive of the history and the law related to the ADA and the ADAAA, please visit www.archiveada.org.

The ADAAA seeks to meet the needs and interests of both the disability and business communities by providing people with disabilities the opportunity to contribute to a society free from discrimination. But the law will achieve that goal only if it is used carefully and appropriately. After the ADAAA becomes effective on January 1, 2009, the website www.archiveada.org will have a portal for covered entities to report incidents in which they feel the ADA has been inappropriately used. All the negotiators on the ADAAA will be very happy if that portal is rarely needed.

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Speakers Address Major ADA Changes, Advise Employers

Speaking at a Dec. 4 teleconference sponsored by the National Employment Law Institute, David K. Fram, NELI’s Director of ADA and EEO Services, addressed six major changes to the Americans with Disabilities Act of which employers need to be made aware as the act’s Jan. 1 effective date approaches. Fram was joined by a senior attorney with the Equal Employment Opportunity Commission and a representative of the business community.

First, the act “spells out in the statute for first time ever a nonexclusive list of major life activities,” he said.

The list includes several major life activities that have been controversial and upon which the courts have been conflicted.

Second, the act expands the concept of major life activities to include major bodily functions, he said.

Third, the act lowers the standard “substantially limits” to something less than the Supreme Court said in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), “but interestingly it doesn’t say what it does mean,” Fram said.

Fourth, the act explicitly reverses *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), he said, which required that mitigating measures be taken into account when determining whether a person is disabled. *Sutton* had kept “loads of people” from proceeding with their ADA claims, Fram said.

Fifth, the act “really really expands who is covered under the ‘regarded as’ category,” he said. No longer does an individual have to be regarded as substantially limited in order to be covered, he said. Except for those with conditions that are minor and transitory, “almost anyone bringing an ADA case will have a possible regarded as case.”

Finally, the act limits protections in regarded as cases by saying employers do not have to provide reasonable accommodations to covered employees, he said.

Major Life Activities Listed.

Originally, the ADA did not specifically list major life activities, Fram noted. The determination of whether an activity is a major life activity has been left to the EEOC and the courts, he said, who have done so broadly. Although there have been activities over which courts have disagreed, these cases tend to be few and far between, he said.

With the changes in the ADAAA, for the first time in the statute, “now we have this list of things that will always be major life activities,” Fram said.

Mike Peterson, Director of Labor and Employment Policy for the HR Policy Association and a member of the primary group of negotiators on the ADAAA representing all major employer associations, said that in writing the text of the act, the negotiators agreed early on regarding a number of major life activities because whether an activity is a “major life activity” has not been a source of major litigation in the courts.

In order to be included in the list, a major life activity had to have been recognized by the EEOC and at least two circuit courts, Peterson said. Even if circuit courts were divided, as long as these criteria were met, the negotiators agreed it was a major life activity, he said.

Sharon Rennert, Senior Policy Attorney in EEOC’s ADA Division, added that the statute itself in listing major life activities makes clear that these are examples but not an exhaustive list. Congress is clearly saying major life activities could be added, she said.

Peterson agreed, noting that the bill’s committee reports list others. Particularly, he said, the House Education and Labor Committee report lists interacting with others, engaging in sexual activities, drinking, chewing, reaching, and fine motor coordination as major life activities.

What has been “even more dramatic” is the expansion of what is a major life activity to include major bodily functions, Fram said. Fram mentioned *Furnish v. SVI Systems, Inc.*, 270 F.3d 445 (7th Cir. 2001), in which the Seventh Circuit held that “liver impairment” is not a major life activity. Under the amendments, liver function probably would be a major life activity because it’s a bodily function, Fram said. “I think the Amendments Act does really change a case like *Furnish*,” he said.

‘Substantially Limits’ Bar Lowered.

“Under the current law, courts have required a lot” in the determination of whether an impairment is substantially limiting, Fram said.

But with the act’s reversal of *Toyota* and its instruction to the EEOC to rewrite its regulations, the term will be open to court interpretation, Peterson said, adding that it will be “very interesting” to see what guidance the agency issue. Right now it’s in the courts’ hands, he remarked, opining “there will be litigation on this issue.”

In determining a substantial limitation in the major life activity of manual tasks, courts post-*Toyota* have often looked at what tasks the plaintiff can do, said Fram, in addition to those he or she cannot. After the Amendments Act, Fram said he thought employers would have an excellent argument that this part of *Toyota* is still good law. He said his position is that *Toyota* was reversed on the issue of severity, not as to what evidence is still relevant.

Peterson agreed, noting that the statements regarding *Toyota* in the act’s Findings and Purposes sections were deliberately made narrow, so as to clarify that the standards defining “substantially limits” had been rejected, not that *Toyota* had been overturned, he said.

Sutton Holding Overturned.

One of the major areas where the act changes the ADA is in the overturning of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), Fram said, which held that mitigating measures should be considered in the determination of whether a person was disabled.

The idea of reversing *Sutton* was not too controversial because it was very clear from the beginning the political will was there to reverse it, Peterson added. Many people thought it was decided “incorrectly and inappropriately,” he said.

Fram also pointed out that the Supreme Court in *Sutton* said it was not sure working was a major life activity. Now, working is listed in the statute as a major life activity. However, in his opinion, working will remain “a loser of major life activity” for most plaintiffs. Courts have not changed the requirement that plaintiff show an exclusion from a class or broad range of jobs and there is “no reason to think that’s changed.”

‘Regarded As’ Claims and Medical Information.

Under the change to the ‘regarded as’ prong, Fram said any impairment will be enough for coverage to apply unless it is minor and transitory. An impairment must be both transitory and minor to be excluded, Peterson said, adding that this change to the ADA was the subject of extensive negotiation. Referring to the legislative history, Peterson said things such as a cut finger, the cold, and the flu are transitory and minor, but with things such as broken bones, which are transitory but may not be minor, we start “getting into a grey area.” It’s definitely an area that’s open, he said. If there’s no guidance from the EEOC on this issue, courts will have an area of law to develop, he added.

“This use of the word ‘and’ is a very very important point for plaintiffs because that’s what keeps many impairments from being excluded,” Fram said.

Employers should make sure their decisionmakers stay as far out of an employee’s medical information as possible, Fram said. This way, the employer will have a

good argument they didn't take action because of the impairment, which could otherwise open the door to a 'regarded as' claim, he added.

Rennert advised employers to ultimately provide some sort of training on the changes to the ADA, but since there may not be enough time to provide it before the changes take effect, she advised that in the interim employers should send a memo or other alert to every manager or front-line supervisor who in any way could be dealing with medical information. All these people have to be on notice that come Jan. 1, the definition of disability under the ADA will be expanding, she said.

In particular, Rennert said post-offer medical exams may trigger 'regarded as' claims. Although that does not mean the employer has done anything wrong, an employer will need to be sure the rationale for its actions meets ADA requirements because they will not be able to argue there is no coverage—rather, there will be automatic coverage, she said.

Along the same lines, if a supervisor were to link disciplinary action to an employee's medical condition, that would trigger 'regarded as' coverage, Rennert said. Although that does not necessarily mean it is an ADA violation, the supervisor should be able to justify the reason for the disciplinary action, she said.

Although documentation is always important, it is even more important now, under the amendments, for employers to be a bit more vigilant in recording what they are doing and why, Rennert said. Where medical conditions come into play, employers should be documenting appropriately that they have assessed direct threat, she added, noting that there was nothing in the amendments addressing direct threat. This portion of the ADA remains the same, she said.

In response to a question about job applicants who volunteer medical information during an interview, Fram advised employers to tell their interviewers to stop the interview. If the interviewer asks follow-up questions, that is a basic violation of the ADA, he said. He added that the interviewer should not note any medical information in writing, otherwise the application is turned into a medical document.

In such situations, Rennert said employers should make clear it was the applicant who offered information about the medical impairment and that the interviewer immediately cut off the discussion. If an employer cannot avoid a 'regarded as' claim, the employer must show a legitimate nondiscriminatory reason for rejecting the applicant. "That's where I would really focus my documentation," she advised.

Spike in Reasonable Accommodation Requests.

Given that the definition of disability will expand, employers need to expect both an increase in requests for reasonable accommodations as well as an increased obligation to provide them, Rennert said. "I think this is one of the biggest areas that will be impacted by the Amendments Act."

Arguing that an employee is not covered will not be a valid reason for denial in as many cases as previously, she said. A prudent employer, if thinking of denying any requests on the grounds that the employee isn't covered, may want to reconsider, she advised. The employer's actions can demonstrate good faith and good will, even if the changes are not in effect yet, she said. And it's likely the person will be covered after the law does take effect, she added.

EEOC Regulations Pending.

A participant asked when the EEOC will publish its ADA regulations, to which Rennert responded, "I honestly don't know."

The commissioners are well aware how important it is to have something in place by Jan. 1, she said, so they have ordered the staff to work long hours in getting something out. But once the commissioners vote on the regulations (see related story, main issue), they will still have to be circulated to other agencies, the Office of Management and Budget has to review them, and any changes have to be negotiated, she said. EEOC has no control over how much time other federal agencies and OMB take in the rulemaking process, she said. "We have expedited things incredibly," she said, but because of those other factors, "I truly don't know."

Courts More Likely to Rule on Merits Under ADA Amendments

The recently enacted ADA Amendments Act (P.L. 110-325) likely will shift the focus of litigation and court decisions from coverage issues under the Americans with Disabilities Act to dealing with the merits of disability discrimination claims, Equal Employment Opportunity Commission Associate Legal Counsel Peggy Mastroianni said Dec. 4.

Speaking at an American Law Institute-American Bar Association conference in Washington, D.C., Mastroianni declined to say when EEOC will issue regulations under the new law, which takes effect on Jan. 1, 2009. She observed that EEOC has a public meeting scheduled for Dec. 11, which would give commissioners an opportunity to vote on a proposal before the effective date. Such a proposal then would still have to be cleared by the White House Office of Management and Budget before publication in the *Federal Register* for public comment.

The ADA Amendments Act, which Congress passed by large majorities and President Bush signed on Sept. 25, was "very much a compromise bill," Mastroianni said. The bill that Congress approved was the product of months-long negotiations between disability rights and employers' groups after the ADA Restoration Act (H.R. 3195/S. 1881), introduced in 2007, had failed to gain much traction, she said.

Requires Broad Construction of Disability.

Although the new law retains the ADA's original definition of disability, including the requirement that plaintiffs prove a "substantial limitation" on a "major life activity," it also requires broad construction of the term disability and overturns four U.S. Supreme Court opinions that proponents believed had misconstrued congressional intent by unduly narrowing the act's coverage.

Frank Morris, a management lawyer with Epstein, Becker & Green in Washington, said that under the new law, the assumption is that in most cases, courts now “will pass over the question of disability” and proceed to issues of discrimination, reasonable accommodation, and the like. The law provides that the definition of disability found in Section 504 of the Rehabilitation Act and decisions construing that law should be “the touchstone” for courts construing the ADA, Morris said.

Court decisions denying ADA coverage that relied on the Supreme Court’s decisions in *Sutton v. United Airlines Inc.*, 527 U.S. 471, 9 AD Cases 673 (1999) and *Toyota Motor Mfg. of Ky. Inc. v. Williams*, 534 U.S. 184, 12 AD Cases 993 (2002), are “largely no longer relevant,” as Congress specifically disavowed those Supreme Court rulings, Morris said. Congress also indicated that an EEOC regulation defining “substantially limits” as “significantly restricts” is incorrect and directed the commission to revise its ADA rules, Morris said.

Mitigating Measures and Major Activities.

The ADA Amendments Act specifically overturns *Sutton* by stating that courts generally should not consider “mitigating measures,” such as medication, assistive devices, or learned behavior, in determining whether an individual has a disability covered by the act. It also states that impairments that are “episodic”—such as epilepsy—or in “remission”—such as cancer—may be considered disabilities under the act.

Observing that the law makes the use of “ordinary” eyeglasses and contact lenses an exception to the no mitigating measures rule, Morris said it is “not entirely clear” whether someone will be covered by the ADA if corrective lenses do not completely correct that person’s vision. He predicted litigation on whether “minor variations from 20/20 vision” entitle an individual to protection under the ADA. Morris recommended that if it’s a close case, the “most prudent course” for employers would be to grant reasonable accommodation.

“That is a little bit of a problem around the margins as to how that would apply,” Morris said regarding the mitigating measures exception for corrective lenses.

The new law includes an illustrative, but not exhaustive, list of major life activities that includes reading, concentrating, thinking, and communicating, Morris noted. Observing that almost every job requires at least one of those activities, Morris questioned whether this could spawn new ADA claims by workers in office cubicles, for example, who claim they cannot work in an atmosphere of noise and movement from an open office floor plan.

When an audience member asked if given the new list of “major activities,” anyone with a diagnosable psychological condition would be covered if easily distracted at work, Mastroianni said such an individual still must show a “substantial limitation” on concentrating or thinking, for example. An individual who shows a psychological condition merely “affects” such activities would not be covered, although the law does require a broad construction, Mastroianni said.

Mastroianni said that while the original ADA, signed in 1990, focused primarily on physical impairments, the major life activities list in the new law reflects attention to psychological impairments as well. She said “concentrating” as a major life activity relates directly to conditions that might afflict combat veterans returning

to the workplace, such as post-traumatic stress disorder and certain brain injuries.

Mastroianni predicted the new statutory list of major life activities, which includes working, will mean less frequent reliance by plaintiffs on “working” as the activity in which they are substantially limited. The courts generally have not looked favorably on ADA claims based on alleged limitations on working, Mastroianni said. “Now, if a plaintiff’s attorney goes to ‘working’ as the major life activity without considering the others, it’s almost malpractice,” she said.

Changes to ‘Regarded As’ Rules.

The new law provides plaintiffs with a broader definition of “regarded as” disabled, no longer requiring proof that an employer considered the plaintiff unable to work in a class of jobs or broad range of jobs. That provision also is helpful to employers in that it excludes from “regarded as” claims impairments that are transitory (lasting six months or less) or minor, Morris said. He questioned whether the six-month term used to define “transitory” impairments is confined to “regarded as” claims or could also be applied to cases in which plaintiffs allege an actual disability.

Morris said the act also makes clear that employers need not provide reasonable accommodation for plaintiffs who assert “regarded as” claims, resolving an issue that had divided the federal courts. Mastroianni said the notion of reasonable accommodation for those “regarded as” disabled is another example where court interpretation of the ADA became “skewed” because plaintiffs unable to win rulings based on actual disability pursued “regarded as” claims as a fallback position. “Now, there is a much cleaner analysis” available under the new law, she said.

Potential Retroactivity Issue.

Regarding the Jan. 1 effective date, Morris said that in his opinion, the act is not retroactive, that is, it does not apply to workplace conduct that occurs before Jan. 1. He added, however, that some “interesting situations” might arise. For example, an employee who was deemed not disabled under previous court interpretations of the ADA and therefore not entitled to reasonable accommodation could renew his or her claim after the new law takes effect, Morris said. Employers in some cases might have to “take a new look” at their earlier determinations that particular employees were not covered by the ADA, he suggested.

As for whether employers should “proactively” engage in such reviews of employees’ disability status, Morris said perhaps so, particularly if they do business within the Second Circuit, where the appeals court ruled in *Brady v. Wal-Mart*, 531 F.3d 127, 20 AD Cases 1281, that accommodation is required if an employer “knew or reasonably should have known” an employee is disabled.

Mastroianni said EEOC does not agree with the Second Circuit’s analysis in *Brady*, as the commission takes the position that an employee generally must request accommodation to trigger the employer’s obligation to engage in the ADA “interactive process.” She added that although EEOC has not yet taken a position on the retroactivity issue, the commission’s Office of Legal Counsel, where Mastroianni works, has opined that the ADA Amendments Act is not retroactive.