

# Rothman Gordon Employment Law Alert

## ADA Amendments Act of 2008

By Alan C. Blanco, Esquire

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008, the "ADA Amendments Act." (In this short article the original Americans with Disabilities Act is referred to as the "ADA"). The ADA Amendments Act becomes effective at the start of the New Year, January 1, 2009. This article covers its major highlights and provides the historical background for its passage.

The original ADA, passed in 1990, was intended to protect qualified individuals with disabilities from job discrimination and to require their employers to provide reasonable accommodation to make it possible for persons with disabilities to perform the essential functions of jobs they held or desired. The ADA's definition of "disability" has 3 prongs. A person is disabled if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of having such an impairment; or (3) is regarded as having such an impairment.

In the years following the ADA's passage, court decisions drastically narrowed the protections initially thought to have been afforded by the ADA, principally by narrowing the definition of disability. Litigation results bore out the ADA's diminishing scope of protection; for example, in 2004, plaintiff employees lost 97% of the ADA employment discrimination claims that went to trial. In large measure, the narrowing of the ADA's remedial scope traces to four decisions by the United States Supreme Court, three from 1999, and one from 2002. The major purpose of the ADA Amendments Act is reversal of these four Supreme Court decisions. One of the Findings and Purposes of the ADA Amendments Act reads that "as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."

In 1999, the United States Supreme Court decided three cases which have come to be known as the *Sutton Trilogy*. Prior to the *Sutton Trilogy*, an overwhelming majority of courts and the EEOC had approached the question whether an individual was disabled by considering the individual's condition without regard to mitigating measures such as medication, prosthetic devices, etc. Take an insulin-dependent diabetic, for example. Pre-*Sutton*, courts and the EEOC would determine whether that person was significantly impaired in major life activities by asking hypothetically what the individual's degree of impairment would be if the person did not take the required insulin. In *Sutton* and the two companion cases decided at the same time, the Supreme Court changed this approach and held that a person's degree of impairment in one or more major life activities required assessing the effects of the impairment taking into account the positive and negative effects of mitigating measures such as medical treatments or prosthetic or adaptive devices.

The *Sutton Trilogy* was hugely controversial at the time, greatly benefiting employers to the detriment of employees trying to stay in the workforce despite significant health problems. It had the overnight effect of cutting back the ADA's protections for large groups of people thought to have been protected by the ADA.

ROTHMAN  
GORDON  
Just Right

Rothman Gordon P.C.  
Attorneys At Law  
310 Grant Street  
Third Floor, Grant Building  
Pittsburgh, PA 15219  
phone 412.338.110  
fax 412.281.7304  
www.rothmangordon.com

The ADA Amendments Act reverses the *Sutton Trilogy*. It states: "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as: (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications." In short, with the exception of ordinary eyeglasses or contact lenses, courts are directed to ignore the beneficial effects of mitigating measures in determining an individual's disabled status.

The other major Supreme Court decision intended to be reversed by the ADA Amendments Act is the 2002 Supreme Court case *Toyota Motor Manufacturing Company of Kentucky v. Williams*. The *Toyota* decision involved whether the employee who brought the case was significantly impaired in the major life activity of performing manual tasks. In that case, the Supreme Court required the degree of a person's limitation "to be interpreted strictly to create a demanding standard for qualifying as disabled." The *Toyota* court also stated, "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to people's daily lives." After *Toyota*, lower courts applied that demanding standard to other major life activities as well. This led to lower court decisions with shocking results including cases around the country where individuals who had made great personal strides to overcome the effects of severe conditions like mental retardation, muscular dystrophy, and cancer had sometimes been held to be without ADA protection because some courts had found they were not disabled.

The ADA Amendments Act reverses the *Toyota* holding. It states, "To achieve the remedial purposes of this Act, the definition of 'disability' ... shall be construed broadly." The term "substantially limits" is defined as "materially restricts." The ADA Amendments Act also makes it clear that episodic diseases or diseases in remission do not lose their capacity to result in disability status: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." The ADA Amendments Act expands the illustrative lists of major life activities. Under the revised statute, the term "major life activities" is defined to "include, [but not be limited to], caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working" and additionally to include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The ADA Amendments Act charges the EEOC, the Attorney General, and the Department of Transportation to issue regulations further defining disability and related concepts.

The last major change made by the ADA Amendments Act has to do with new principles for applying the "regarded as" prong of the definition of disability. The ADA had included, within its definition of disability, the idea that a person regarded as disabled was protected from discrimination. Courts had applied that standard to require that a person demonstrate that he or she was regarded by an employer as significantly impaired in a major life activity, feeding back into the restrictive standard established by the *Sutton Trilogy* and *Toyota*.

Under the ADA Amendments Act, 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 a prohibited action (such as being fired, denied a job, etc.) "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." The exception is that the foregoing standard "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." In addition, the ADA Amendments Act resolves a conflict among courts concerning whether employers had to reasonably accommodate employees who were regarded as disabled. In keeping with the employee's lessened burden for showing that she or he is regarded as disabled, under the statutory revisions, employers have no duty to reasonably accommodate employees who fall solely under the "regarded as" prong of the definition of disability.

In summary, the ADA Amendments Act makes significant changes in the way courts have been interpreting the ADA for the last several years. Employees will have significantly more protection under the statutory revisions. Employers will have to exercise much greater care in addressing employment issues involving employees with health related impairments.

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