

LEGAL UPDATE

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BACKGROUND

- Americans with Disabilities Act
- Harassment
- Discrimination
- First Amendment
- Family Medical Leave Act

ADAAA – Definition of “Disability”

- ADAAA expands definition of “disability” to provide broad coverage
 - Under the ADAAA, the rules of construction note 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 the Act.”
 - An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
 - An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a “disability.”

ADAAA – Definition of “Disability”

- The ADAAA explicitly rejects the Supreme Court’s decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and clarifies that the primary object of attention in ADA cases is whether the entity has complied with its obligations and “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”
- The ADAAA instructs the EEOC to revise its definition of “substantially limits” to be consistent with the amendments.

ADAAA – Mitigating Factors

- Under the ADAAA, most mitigating factors are no longer to be considered when evaluating whether an employee is disabled
 - the ADAAA rejects the Supreme Court's decision in *Sutton v. United Airlines, Inc.* which had previously held that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures

ADAAA – Mitigating Factors

- provides that the determination of whether an impairment “substantially limits” a major life activity is made without regard to the ameliorative effects of mitigating measures such as:
 - medication
 - medical supplies, equipment or appliances
 - low vision devices (not including ordinary eyeglasses or contact lenses)
 - prosthetics
 - hearing aids and cochlear implants or other implantable hearing devices
 - mobility devices
 - oxygen therapy equipment and supplies
 - use of assistive technology
 - reasonable accommodations or auxiliary aids or services
 - learned behavioral or adaptive neurological modifications
- “ordinary eyeglasses or contact lenses” are the only exceptions.

ADAAA – Definition of “Major Life Activity”

- The ADAAA expands the definition of “major life activity” to include:
 - caring for oneself
 - performing manual tasks
 - seeing
 - hearing
 - eating
 - sleeping
 - walking
 - standing
 - lifting
 - bending
 - speaking
 - breathing
 - learning
 - reading
 - concentrating
 - thinking
 - communicating
 - working
 - 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 list is not exhaustive.

ADAAA – Expands “Regarded as” Claims

- Allows for ADA coverage where the employer discriminates against an individual “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”
- Excludes from the “regarded as” definition minor and transitory impairments with an actual or expected duration of six months or less
- The duty to accommodate does not apply to employees who meet the definition of disability merely because they are “regarded as” disabled

Additional ADAAA Provisions

- No reverse discrimination under the ADA
- Presumably, no retroactive effect

What Should Employers Do?

- Review and revise policies, procedures and handbooks
- Reasonable accommodation procedures
- Train supervisors, managers and human resource staff
- Meet with supervisors, managers and human resource staff

Additional Thoughts

- Be prepared for increase in disability claims and/or accommodation requests
- ADA lawsuits may become more difficult to win at summary judgment
- Case law regarding “reasonable accommodations” likely to increase
- Look for EEOC amendment of “substantially limits” definition
- Definition of “regarded as” subjects employers to greater liability

DISCRIMINATION / DISABILITY

- An employee that was called “rainman” because of his personality, and not as a result of his autism, did not subject the employer to a harassment case.
Mangano v. Berita, Inc.

DISCRIMINATION / DISABILITY

- Employee that was terminated because of refusal to attend an alcohol treatment plan was not considered as a disability under the Americans with Disabilities Act. *Kozisek v. County of Seward, Nebraska* (8th Cir. 2008) 539 F.3d 930.

DISCRIMINATION / DISABILITY

- An employee that suffers from a knee injury and rejected the employer's offer to transfer the employee to another comparable position, but had a diminished bonus plan, did not establish a claim under the ADA.
Bellino v. Peters (7th Cir. 2008) 530 F.3d 543

DISCRIMINATION / DISABILITY

- Court holds that an employee is afforded the opportunity to demonstrate that she was able to perform the essential job functions.

DISCRIMINATION / DISABILITY

- An employee could use a court's decision that he was disabled and "regarded as" disabled against the employer in a federal civil action.
Stone v. Department of Aviation (10th Cir. 2008) 2008 WL 2967704

Department of Fair Employment & Housing Internal Charges

- An employee's use of the employer's internal complaint procedures allows an employee more time to file a charge with the DFEH. *McDonald v. Antelope Community College District* (2008) 45 Cal.4th 88.

SEXUAL HARASSMENT

- A co-worker who knew of alleged harassment was not imputed to the employer in a Title VII harassment action where both employees possessed the same job position. *Shaloult v. Interstate Brands Corp.* (1st Cir. 2008) 540 F.3d 64

DISCRIMINATION / RACE

- City was not liable for race discrimination when it canceled an application process for a promotion that ultimately would have resulted in an unlawful disparate impact. *Oakley v. City of Memphis* (7th Cir. 2008) 2008 WL 4144820

AGE DISCRIMINATION

- An employee that was removed from her position while a younger employee was given a better position has a claim for age discrimination. *Filar v. Board of Education of the City of Chicago* (7th Cir. 2008) 526 F.3d 1054

DISCRIMINATION NATIONAL ORIGIN

- Plaintiff can not set forth a claim for “mixed motive” discrimination under Title VII if the employee does not meet the objective qualifications for the position. *Makky v. Chertoff* (3rd Cir. 2008) 541 F.3d 205

DISCRIMINATION NATIONAL ORIGIN

- Management's approval of a termination with no unlawful motive does not prevent the employer's liability for the adverse employment decision. *Mamou v. Trend West Resorts, Inc.* (2008) 165 Cal.App.4th 686

UNLAWFUL TERMINATION

- Supreme Court states that public entities are not liable for common law torts. *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876

SEX DISCRIMINATION

- A correctional facility's policy of mandating at least one officer of the same sex as the juvenile did not set forth a sex-based qualification as part of a bonafide occupational qualification. *Henry v. Milwaukee County* (7th Cir. 2008) 539 F.3d 573

FAMILY MEDICAL LEAVE ACT

- An employee's excessive number of sick days did not put the employer on notice that the employee qualified for a leave of absence under FMLA. *De La Rama v. Illinois Dept. of Human Services* (7th Cir. 2008) 541 F.3d 681

FAMILY MEDICAL LEAVE ACT

- An employee who could not plead that there was an employer policy that required the employee to submit a fitness-for-duty report could not bring a claim that she was terminated for her rights under the FMLA. *Tucker v. Middleburg-Legacy Place* (6th Cir. 2008) 539 F.3d 545

FAMILY MEDICAL LEAVE ACT/ CALIFORNIA FAMILY RIGHTS ACT

- An employee whose medical form establishes that employee was hospitalized for several days may be interpreted as a request for leave under the FMLA/CFRA. *Avila v. Continental Airlines* (2008) WL 3272183

WAGE & HOUR

- The California court holds that part-time adult education teachers are exempt from overtime and are therefore exempt from proportional pay requirements of the Education Code. *Kettenring v. Los Angeles Unified School District* (2008) 167 Cal.App.4th 507

FIRST AMENDMENT

- Students' first amendment rights to wear armbands to protest a school uniform policy. *Lowry v. Watson Chapel School District* (8th Cir. 2008) 540 F.3d 752

STUDENT HARASSMENT

- The court adopts the standard for student to student harassment.
Megan Donovan v. Poway Unified School District (2008) 167 Cal.App.4th 567

INDEPENDENT CONTRACTOR

- An at-will provision in a contract did not make an independent contractor into an employee. *Varisco v. Gateway Science & Engineering* (2008) WL 4193904

ARBITRATION

- Employer did not waive its rights to compel arbitration when the employee did not follow the procedures under the arbitration agreement. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114