

EEOC to Employers: Don't Focus On Whether An Employee Is Disabled

On March 25, 2011, the U.S. Equal Employment Opportunity Commission (EEOC) published its much-awaited final regulations and interpretive guidance on the Americans with Disabilities Amendments Act, which became effective January 1, 2009 (the "Amendments Act"). <http://www.mosessinger.com/articles/files/ADAAMendmentsAct2008.pdf>. The Amendments Act does not apply retroactively.

Prior to the Amendments Act, employers had some clear guidance to help determine whether an impairment was a disability, which generally excluded temporary disabilities or disabilities that could be successfully treated with medications, such as diabetes. That relatively clear guidance is gone. Now, employers must be extremely cautious when dealing with employees who claim to be disabled. Congress and the EEOC have sent a clear message that employers should focus on how to accommodate an employee, not on whether the employee is disabled. As explained in the Amendments Act, the question of whether an individual is disabled "should not demand extensive analysis."

The Amendments Act did not change the definition of "disability," which is still defined as: (1) an impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment. An individual may establish coverage under any one or more of these three prongs. While the basic definition of disability was not changed, the application and interpretation of many of the statutory terms have been fundamentally altered by the Amendments Act and the regulations.

Major Life Activity

To have an "actual" disability or a "record of" a disability, an individual must be substantially limited in performing a "major life activity" as compared to "most people in the general population." The interpretation of "major" has been considerably weakened. The regulations clarify that "major life activity" does not mean of "central importance to daily life" and should not be interpreted "to create a demanding standard for disability."

The Amendments Act added a non-exhaustive list of major life activities, including:

[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

The regulations expand this list to include sitting, reaching and interacting with others.

In addition, the Amendments Act added “operation of a major bodily function” to the list of major life activities, which it defined as including:

[i]mmune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

The regulations add the following functions to this list: special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal. The EEOC further clarified that the operation of a major bodily function includes the operation of an individual organ within a body system, such as operation of the kidney, liver, pancreas or other organs.

Substantially Limited – Nine Rules of Construction

The EEOC was further tasked with promulgating regulations interpreting the term “substantially limited.” Prior to the Amendments Act, the EEOC defined the term to mean “significantly restricts.” The newly defined term is so vastly different that the EEOC considered abandoning the term altogether and replacing it with something that more accurately reflected the more expansive definition. Instead, the new regulations create nine “rules of construction” to help determine if an individual is “substantially limited” in performing a major life activity:

- Expansive Definition. The term “substantially limits” is not meant to be a demanding standard and shall be construed broadly in favor of expansive coverage;
- No Severe Restriction Required. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
- Shift in Primary Purpose. The primary purpose now is whether employers have complied with their obligations (i.e., duty to accommodate etc.). Extensive analysis is not needed to determine whether an impairment substantially limits a major life activity;
- Individualized Assessment Required. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
- No Scientific or Medical Proof Required. Scientific, medical or statistical analysis not required to show an employee is substantially limited in performing a major life activity, but is permissible when appropriate.
- Ameliorative Effects Not Considered. Except for eyeglasses or contact lenses, mitigating measures (i.e., medications, equipment, prosthetics, hearing devices, physical/behavioral therapy) may not be considered when determining whether an impairment substantially limits a major life activity.
- Episodic/In Remission Conditions Now Disabilities. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- Limitation Only Need Affect One MLA. An impairment need only substantially limit one major life activity to be considered substantially limiting.
- Transitory Exception Is Limited to Regarded As Prong. Impairments that last less than six months can still be substantially limiting when determining whether an impairment is an “actual” or “record of” disability.

In addition to the above rules of construction, the following factors may be considered (but are not required) when determining whether a major life activity is substantially limiting: the condition under whether the employee performs the major life activity; the manner in which the employee performs the major life activity and/or the duration of time it takes the employee to perform the major life activity compared to most people in the general population. Such considerations may include difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; the way an impairment affects the operation of a major bodily function; negative side effects of medications; and/or burdens associated with following a particular treatment regimen.

It should be clear from the foregoing that it will now be difficult to be confident that any physical or mental condition is outside the definition of "disability."

Impairments that Will "Virtually Always" Be Disabilities

As a result of the changes to the definitions of "major life activities" and "substantially limits," the EEOC forewarns that certain impairments "will virtually always be disabilities:"

deafness; blindness; intellectual disabilities; partially or completely missing limbs; impairments that require the use of a wheelchair; autism; cancer; cerebral palsy; diabetes; epilepsy; Human Immunodeficiency Virus (HIV) infection; multiple sclerosis; muscular dystrophy; and major depressive disorders (including bipolar, post-traumatic stress, obsessive compulsive and schizophrenia).

Regarded As

The definition of disability under the "regarded as" prong is still defined as an individual regarded as disabled because of an actual or perceived impairment that is not transitory and minor. Transitory is defined as a disability that lasts fewer than six months.

What has changed, as to "regarded as" disabilities, is that an employee no longer has to show that an employer believed the individual's impairment under this prong "substantially limited" performance of a major life activity. Employees now only have to show that they were treated adversely because of an actual or perceived impairment and do not have to establish the severity of the impairment.

While an employer is obligated to engage in the interactive process for individuals who are actually or have a record of a disability, under the Amendments Act an employer is not required to provide a reasonable accommodation to an employee under the "regarded as" prong.

Employee Must Still Be Qualified

Other definitions, however, such as "qualified," "direct threat," "reasonable accommodation" and "undue hardship" were not changed by the Act or the regulations.

An individual still must be qualified to perform the essential functions of the position, with or without a reasonable accommodation. Thus, employees or applicants must still satisfy the requisite skill, experience, education and other job-related requirements of the position. Here, updated job descriptions can assist employers in their analysis provided, as before, that they include only bona fide job requirements.

The Amendments Act and regulations apply to all private and state and local government employers with 15 or more employees, employment agencies and labor organizations (unions).

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