The ADA Amendments: Expanding the Application of the ADA

On March 24, 2011, the Equal Employment Opportunity Commission ("EEOC") published its final regulations implementing the Americans with Disabilities Act Amendments Act (the "Amendments"). The Amendments significantly broaden the definition of disability, increasing both the number of individuals protected by the ADA and employers' exposure to claims of discrimination.

The Americans with Disabilities Act (the "ADA" or "Act") was enacted in 1990 and created an entirely new protected class of employees. The Act barred discrimination against individuals with disabilities, and, absent extreme hardship, required employers to make reasonable accommodations for disabled employees. Through cases such as, *Sutton v. United Airlines*, *Murphy v. United Parcel Service*, and *Toyota Mfg. Kentucky v. Williams*, the Supreme Court significantly narrowed the practical scope of the ADA by defining disability narrowly. Prior to the passage of the Amendments, determining if an individual had a disability under the ADA was an important threshold question that turned on whether that individual's impairment substantially limited a major life activity. Under this standard, an impairment had to significantly restrict or prevent an individual from performing a major life activity. Further, the impairment had to be permanent or long-term. Some studies estimate that employees lost about 95 percent of claims brought under the ADA because they failed to prove that they were disabled within the meaning of the Act. In response to these Supreme Court decisions, Congress passed the Amendments on September 25, 2008. The Amendments explicitly overturn the Court's decisions limiting the ability of an individual to establish a "disability" under the ADA and signal that the ADA's scope of coverage will now be much broader than it was in the past.

ADA Amendments Act

Under the Amendments, the definition of the term "disability" is unchanged. It remains "a physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; [or] being regarded as having such an impairment." However, the Amendments mandate a liberal interpretation of the definition, noting that courts should not spend a significant amount of time determining

Continued on page 5

Retail Q&A

Service Animals in Businesses

Q: I own a restaurant and do not allow people to bring animals in. One customer with no apparent disabilities has a "service dog." Am I required to allow a customer to bring the dog into the restaurant?

A: According to the U.S. Department of Justice: Under the Americans with Disabilities Act (ADA), privately-owned businesses that serve the public are prohibited from discriminating against individuals with disabilities. The ADA requires these businesses to allow people with disabilities to bring their service animals onto business premises in whatever areas customers are generally allowed. The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.

Service animals perform some of the functions and tasks that the individual with a disability cannot perform for him or herself. Guide dogs are one type of service animal, used by some individuals who are blind. This is the type of service animal with which most people are familiar. But there are service animals that assist persons with other kinds of disabilities in their day-to-day activities. Some examples include: alerting persons with hearing impairments to sounds, pulling wheelchairs or carrying and picking up things for persons with mobility impairments, and assisting persons with mobility impairments with balance.

The service animal must be permitted to accompany the individual with a disability to all areas of the facility where customers are normally allowed to go. An individual with a service animal may not be segregated from other customers. For more helpful information on service animals in places of business, visit the U.S. Department of Justice website at www.ada.gov/qasrvc.htm. ❑

Source: article taken from the January 2012 SDRA Retail Prophet

ADA Amendments

continued from page 4

if an individual is disabled. Instead, the definition should be interpreted broadly to the "maximum extent permitted by the terms of the ADA."

Expanding "Substantially limits"

Further supporting this broad interpretation, the Amendments provide nine (9) Rules of Construction (the "Rules") regarding the interpretation of the term "substantially limits." These Rules shift the focus of a court's analysis from a determination regarding disability to an assessment of reasonable accommodation. Specifically, the Rules lower the threshold for "substantially limits," stating that this determination does not require extensive analysis and noting that, moving forward, courts should apply a lower standard than was used prior to the Amendments. As such, an impairment is substantially limiting if it impairs an individual's ability to perform a single major life activity as compared to most people in the general population. Further to be substantially limiting, an impairment need not prevent or significantly or severely restrict an individual in performing these activities. In making this determination, the courts can consider the condition, manner, and duration of these impairments.

Under the Amendments, transitory and episodic impairments can be disabilities. For example, the EEOC's Interpretative Guidance indicates that "if an individual has a back impairment that results in a 20-pound lifting restriction lasting for several months, the individual is substantially limited in the major life activity of lifting" and, therefore, has a disability under the ADA. Also, while improvement measures cannot be considered when determining whether an individual is substantially limited, the Amendments note that worsening side effects of mitigating measures, such as the negative side effects of medication, may be taken into account when determining if a substantial limitation exists. For example, prior to the Amendments, an individual with well-controlled diabetes was not disabled under the ADA. However, the Amendments maintain that diabetes is a disability when, without considering improvement measures, the symptoms and/or effects of the diabetes substantially limit a major life activity when the impairment is active. In these instances, the employer must focus on providing reasonable accommodation. An employer can consider both the positive and negative side effects of such measures to determine what, if any, reasonable accommodation the employer must provide. If a diabetic controls his or her symptoms through insulin injections, an employee may be required to provide the employee with reasonable accommodations, such as breaks to take insulin and monitor blood sugar levels. Alternatively, a diabetic who controls his or her symptoms through mitigating measures with no negative effects, such as diet, exercise and oral medications, does not require a reasonable accommodation. Therefore, his or her employer has no obligation to provide one.

"...employers may still rely on the undue hardship defense, and, thus, are not required to provide reasonable accommodation when doing so would cause the employer significant difficulty or expense. "

The Amendments also expand the non-exhaustive list of major life activities and major bodily functions that, if substantially impaired, constitute a disability. Now, major life activities include sitting, reaching, and interacting with others, and major bodily functions include special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal functions and the operation of an individual organ within a body system. Thus, an individual with hypertension is likely disabled under the ADA.

Finally, the Amendments include an illustrative, but non-exhaustive, list of impairments that routinely will meet the definition of disability. The regulations provide that "with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." Included in this list are autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder and schizophrenia. Unfortunately, the final version of the Amendments did not include a list of impairments that do not constitute a disability.

A Lower "Regarded as" Threshold

The Amendments also preserve an individual's right to bring a claim under the ADA if the individual experiences discrimination because the individual is "regarded as" having a disability. Similar to the Amendments' approach to the "substantially limited" standard, the new regulations reduce the threshold for asserting a claim of discrimination on the basis of a perceived disability. Under a "regarded as" analysis, the substantially limited standard is irrelevant. Instead, the individual must only demonstrate that an adverse action was taken based on an objective belief regarding an impairment or the individual's ability to perform his or her position. However, transitory and minor impairments are not disabilities under the "regarded as" analysis, and employers are not required to reasonably accommodate an individual because the individual is regarded as having a disability.

Continued on page 6

ADA Amendments

continued from page 5

…the More Things Stay the Same

Despite these myriad changes, several important features of the ADA are unchanged. Employers must still engage in an individual and interactive process to determine if an employee's request for a reasonable accommodation is feasible. Further, employers are entitled to medical documentation to support the need for reasonable accommodation. Finally, employers may still rely on the undue hardship defense, and, thus, are not required to provide reasonable accommodation when doing so would cause the employer significant difficulty or expense.

Moving Forward

In light of the changes brought about by the Amendments, employers should:

- establish concise procedures that minimize the risk of violating the ADA;
- engage in, and document, an interactive process to determine if there are any reasonable accommodations that will allow the employee to perform the essential functions of his or her job; and
- train human resource employees and management to identify and report potential ADA issues.

There is no doubt that ADA issues will continue to increase under the new paradigm ushered in by the Amendments. Thus, it is imperative that employers revisit their policies and practices to ensure that they are complying with the ADA. ❑

Source: Written by Williams Mullen attorneys William P. Barrett & Heath H. Galloway.

News from the North Carolina Department of Labor:

Safety: Who's Responsible?

Managers and supervisors are usually considered the ones responsible for safety. It is certainly a fact that without proper interest by them, the total safety program can't be effective. But every worker must realize that he or she, as much as anyone else, is responsible for not only themselves but for the safety of co-workers. No one enjoys losing a co-worker on the job or at home. In other words, every worker must be a partner in keeping others safe.

Examples of responsibilities of workers include:

- Using personal protective equipment and safety equipment as required.
- Following safety and health work procedures.
- Knowing and complying with all safety and health regulations.
- Reporting any injury or illness immediately to find root causes.
- Reporting unsafe acts and unsafe conditions to management.
- Participating in joint health and safety committees.

Examples of responsibilities of first-line supervisors include:

- Instructing workers to follow safe work practices at all times.
- Enforcing health and safety regulations within the workplace.
- Correcting unsafe conditions at worksites.
- Ensuring that only authorized and adequately trained workers operate equipment and that they operate it in the manner it was designed.
- Reporting and investigating all accidents/incidents in order to find root causes.
- Inspecting their own areas and taking remedial action to eliminate hazards.
- Ensuring equipment is properly maintained and promoting safety awareness in workers.

Many workers seem to think that the safety engineers or directors are responsible for accidents because they can engineer safety into all workplaces. Even though safety personnel frequently make inspections and counsel the workers, they can't be in all places at all times. Safety personnel cannot, therefore, be blamed or held solely responsible whenever an accident or mishap occurs. Bear in mind that we ourselves, as individuals, must constantly be alert to the hazards all around us. If we can't remove a hazard ourselves, we should call it to the attention of those who have the authority to do so or contact the N.C. Department of Labor for guidance before things go wrong.

The N.C. Department of Labor's professional staff will help employers identify safety and health hazards. The Labor Department offers a variety of free services to North Carolina employers, employees and the public. The Education, Training and Technical Assistance Bureau (ETTA) offers free training and outreach services for the public. The bureau responds to public requests for training, speeches, booths and standards interpretations. The bureau also provides a variety of OSH publications, including safety and health industry guides, quick cards, toolbox talks, fact sheets, and brochures.

The Consultative Services Bureau provides free confidential on-site consultation to small employers in developing a safety and health management program. The bureau assists in identifying hazards, making recommendations for reducing or eliminating hazards, and suggesting improvements to your safety and health program. Visit the website at www.nclabor.com or call 1-800-NC-LABOR (1-800-625-2267) before a fatality or catastrophe occurs at your workplace. ❑

Source: North Carolina Labor Ledger; written by Robert O'Neal, Safety Education Specialist