FEDERAL DECISIONS AFTER THE AMERICANS WITH DISABILITIES ACT AMENDMENTS EVERYTHING OLD IS NEW AGAIN

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Three and a half years ago, Congress expanded the coverage of the Americans with Disabilities Act, which prohibits employers from discriminating against qualified individuals with disabilities and requires employers to make reasonable accommodation to the known disabilities of such individuals. The Americans with Disabilities Act Amendments Act ("ADAAA") became effective January 1, 2009.

Explaining its purpose in the amendments, Congress expressed its belief that in the years since adoption of the ADA, court interpretations deviated from the statute's intent to expand opportunities for the disabled. Far too much time and energy was devoted by the courts and litigants to arguing whether an individual was "disabled" rather than focusing on the employer's obligations, according to legislators.

Claims arising under the amended statute have now begun to make their way through the courts. And the lesson for employers from an examination of these recent decisions is in fact old news. While more employment plaintiffs are surviving summary judgment motions based on arguments that they are not "disabled," defendant employers continue to prevail when they can establish that their actions were motivated not by improper discrimination but by a legitimate nondiscriminatory reason such as poor performance.

The chinks in the armor of most ADA plaintiffs' cases are in two places: establishing all elements of the *prima facie* case and meeting the ultimate burden to prove discriminatory motive. The amendments to the ADA have the affect of making it easier for a plaintiff to establish a *prima facie* case, and thus have applied a patch to one of the traditional chinks, so to speak. But the balance of the McDonnell Douglas burden-shifting framework remains, and where the employer has strong evidence that a legitimate, non-discriminatory reason motivated any adverse employment action, the employer should still prevail. This second step in the McDonnell Douglas analysis is and always has been the element of the test which is more probative of discrimination *vel non*, and this element remains unchanged. With the amendments, as they are being applied by the courts, Congress appears to have succeeded in shifting the focus of the inquiry in disability discrimination cases to the employer's conduct rather than the nature of the employee's physical condition.

SPECIFIC STATUTORY CHANGES

To shift the focus from coverage to employer conduct, Congress made a number of changes to the statute, including the following major revisions, which have been applied by courts in recent months for plaintiff-friendly findings:

Mandate To Interpret Broadly The amended statute retains the same language defining who qualifies as an individual with a disability, but expressly changes the way such language should be interpreted. The revised Act requires that when interpreting its terms with respect to whether or not an individual suffers from a "disability" triggering coverage, "this Act shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the

terms of this Act." 42 U.S.C. § 12102(4)(A).

In *Lohf v. Great Plains Manufacturing, Inc.*, No. 10-1177-RDR, 2012 WL 2568170 (D. Kan., July 2, 2012), the district court refused to enter judgment for the employer on its argument that terminated employee Lohf was not "disabled" by his purported disability, a low back condition called spondylolisthesis. Great Plains asserted that Lohf did not suffer from any "disability" covered by the ADA because a 25 or 30-pound lifting restriction coupled with the need to alternate sitting and standing did not "substantially limit a major life activity." The court responded that while under the pre-amended ADA it may have agreed with the employer's argument, in the wake of the ADA amendments, Lohf had presented enough evidence to survive summary judgment on whether he was substantially limited in a major life activity. As the opinion stated "**[t]he court is mindful that under the ADAAA the inquiry into whether or not the limitation is substantial is not meant to be 'extensive' or demanding." Id. at *6.**

The court found that Lohf presented enough evidence to arguably make out a *prima facie* case of disability discrimination. But Lohf had been fired after shoving a coworker during an altercation in violation of the company's zero tolerance policy for violence. The company was able to show that managers interpreted the policy to prohibit any threatening or hostile physical contact with another worker and consistently fired employees for any such physical contact. Although the employee established a *prima facie* case and the employer presented a non-discriminatory reason for its action, the court found that Lohf had presented no real evidence to undermine the veracity of the employer's reason for his termination, that is, his violation of the zero tolerance policy. The plaintiff's case ultimately failed.

Expanded List of Major Life Activities In the pre-amended Act, the ADA contained a representative list of major life activities in which a plaintiff could be substantially impaired in order to qualify as having a disability under the Act, including caring for oneself, seeing, hearing, speaking, walking, breathing, performing manual tasks, and learning. The amended statute expanded the list of "major life activities" in which an individual could be limited to include new activities, such as: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. That list is augmented by the EEOC's final regulations to include the additional life activities of sitting, reaching and interacting with others. The new statute also states that major life activities include the operation of major bodily functions including the immune system, cell growth, digestive, neurological, respiratory and endocrine functions.

The addition of "lifting" as a major life activity caused a plaintiff to survive summary judgment only to lose his case on grounds that he was unable to perform an essential job function in *Thomas v. Werthan Packaging, Inc.*, No. 3:10-cv-0876, 2011 WL 4915776 (M.D. Tenn., Oct. 17, 2011). The employee, who operated various paper cutting and labeling machines for a manufacturer of large paper pet food bags, suffered lower back problems preventing him from lifting more than 20 pounds. Although the court recognized that a number of pre-ADAAA cases had held that a 20-pound lifting restriction did not substantially limit a major life activity, because the revised statute now explicitly defined "lifting" as a major life activity, material facts existed regarding whether the employee was "substantially limited," precluding summary judgment on that basis. The court did however enter judgment for the employer in light of the employer's evidence that the ability to lift more than 20 pounds was an essential function of the employee's job.

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Changed Definition of "Regarded As" Under the pre-amendment statute as interpreted by the courts, an individual could not meet the definition of being "regarded as" having a disability unless they could demonstrate that their employer perceived them as having a substantial limitation to a major life activity. Under the amended statute, an individual can show he or she was regarded as disabled if he or she was subject to an adverse action based on an impairment that merely is not transitory and minor.

A police cadet's claim that he was "regarded as" disabled by a police department that fired him as unfit for duty despite a return-to-work physician certification survived summary judgment where the employer argued the cadet's blood disorder was "transitory and minor." In *Lapier v. Prince George's County Maryland*, No. 10-cv-2851, 2012 WL 1552780 (D. Md., April 27, 2012), the court held that Lapier succeeded in establishing that his employer regarded him as disabled as the result of a blood disorder that periodically caused his oxygen levels to plummet, resulting in fainting. Citing the language of the revised statute and noting that plaintiffs need not show their employers perceived the impairment as substantially limiting, the court rejected the police department's claim that the plaintiff's blood complaint was transitory and minor. The evidence showed the plaintiff's blood condition in fact was chronic and impacted several bodily functions and life activities. The court refused to enter judgment for the department on plaintiff's "regarded as" claim.

CONCLUSION

The good news is that while each of the revisions to the statute make it easier for plaintiffs to establish a *prima facie* case, that doesn't necessarily translate into wins for the employee at the end of the day. In each of these illustrative decisions, interpreting three different aspects of the revised statute, the employee was able to survive a legal attack to his *prima facie* case. These plaintiffs survived a hurdle upon which plaintiffs historically have faltered. The tipping point in each of these cases however remained in the proof regarding whether discrimination motivated the termination. Put otherwise, the cases continue to turn on whether the employer's documentation and other proof demonstrate a decision based upon legitimate non-discriminatory considerations.

In that regard, what's old is new again.

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