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Opportunities and Perils: The New ADA Regulations

On March 25, 2011, the Equal Employment Opportunity Commission promulgated final regulations implementing the ADA Amendments Act of 2008.[1] The thrust of the regulations is to "make it easier for people with disabilities to obtain protection" by expanding the definition of disability under the ADA.[2] The Amendments Act retained the ADA's basic definition of disability as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, but directed that these terms be given a broader reading, which the EEOC has effectuated through its new regulations.

Rules of Construction for the Meaning of "Substantially Limits"

The new regulations specifically adopt nine "rules of construction" regarding the meaning of the term "substantially limits" in the definition of disability. These are:

1. The term "substantially limits" shall be "construed broadly."
2. An impairment need not "prevent or significantly or severely restrict the individual from performing a major life activity" in order to be substantially limiting.
3. The focus in litigation should be on whether or not covered entities have complied with their obligations rather than whether or not an individual's impairment substantially limits a major life activity.
4. In making an assessment regarding whether or not an impairment "substantially limits" an individual's performance, the term "shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the [Amendments Act]."
5. "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis."
6. Excepting eyeglasses and contact lenses, "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."
7. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
8. "An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."
9. "The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting."

Whereas some of these rules of construction are vague or amorphous, others have serious and concrete implications. For example, in implementing the Amendments Act, the second rule of construction effectively overturns the U.S. Supreme Court's ruling in *Toyota Motor Mfg., Ky. v. Williams* that "an individual [to be protected under the ADA] must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[3] It is unclear how the courts will treat a regulation that states that an impairment that does not "significantly restrict" an individual from engaging in a major life activity can still "substantially limit" the individual's performance of the same major life activity. Only time and the accumulation of judicial decisions will demonstrate how this apparent contradiction will play out.

The sixth rule of construction, requiring that a disability be determined without reference to the effects of mitigating measures, dictates that individuals who begin taking medication for ailments, such as hypertension, before that condition ever affects them, will have a disability under the ADA. This is the case even though the individuals have never experienced any negative effects of the disability.[4] Furthermore, the EEOC has made clear that "[t]he determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures."[5] Thus, employees who have conditions whose effects could be obviated by medication but choose not to take this medication will still enjoy the protections provided by the ADA.

The seventh rule of construction, regarding episodic conditions or those in remission, creates a new regime, in which a condition, such as post-traumatic stress syndrome, can constitute a disability under the ADA even when the condition is in abeyance.[6]

Moreover, in the appendix to its new regulations, the EEOC explicitly states that its new regulations are meant to render obsolete cases such as *Todd v. Academy Corp.*, a 1999 Southern District of Texas case in which the court held that an individual was not disabled for purposes of the ADA because of the infrequent episodic nature of his alleged disability related to epilepsy, as a result of which "he [was] limited in … particular life functions a maximum of fifteen seconds per week and only eight times in … five months."[7] Accordingly, now employees who might suffer only very briefly and sporadically from certain medical conditions may still have the right to avail themselves of the ADA's protections.

Emphasis on the "Regarded as" Prong

Much ADA motion practice has centered on whether or not an individual has an "actual disability." The new EEOC regulations make it clear that, except for cases involving claims of reasonable accommodation, "the evaluation of [ADA] coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity."[8] Thus, the EEOC's new regulations will shift the focus of summary judgment motions away from explorations of medical diagnoses and the practical effects of diseases on individuals' ability to function. Instead, the new regulations will guide such motions toward the potentially more pliable topic of whether or not an individual with a certain condition is perceived as having a disability. This shift in focus may benefit plaintiffs, who may find it easier to demonstrate disputed material facts regarding how they were regarded than to show the same about the nature and extent of their physical or mental conditions.

The Inclusion of Major Bodily Functions as Major Life Activities

The ADA Amendments Act and the EEOC's new implementing regulations define "major life activities" to include "major bodily functions."[9] Practically speaking, according to the EEOC, an impairment of a specific organ, such as the kidney or liver, could constitute a substantially limited major life activity and therefore give rise to ADA protections.[10] Thus, individuals with diabetes would only have to show that the disease was substantially limiting the functioning of their pancreas or endocrine systems to show that they are disabled under the ADA. These individuals would not have to point to particular actions, such as lifting or performing manual tasks, which they were prohibited from doing as a result of their diabetes. This definition will simplify the proof that will have to be offered in order to demonstrate that a major life activity is substantially limited, and in so doing is likely to aid plaintiffs in constructing cases that can withstand summary judgment.

Conclusion

This discussion has only touched on some features of the new EEOC regulations implementing the ADA Amendments Act. Since the Amendments Act was not retroactive and did not take effect until Jan. 1, 2009, there is scant case law on its statutory provisions. And, given how new the EEOC's implementing regulations are, at the time this article was written, there were no reported legal decisions interpreting the regulations. Therefore, it remains to be seen how the courts will apply them.

Until the courts begin interpreting the EEOC's new regulations, it will not be clear what the contours of liability are under the revised definition of disability that has been set forth. What is clear is that, in any event, the ADA's coverage will be broader than it was previously. Thus, until the courts sort out the meaning of the new regulations, employers would be well advised to proceed cautiously when dealing with anyone who might be "regarded as" having a disability. Moreover, given the language of the Amendments Act and its accompanying regulations, employees undoubtedly have broader ADA protections than they did before, but they must wait to see just how far those protections will extend. Only the litigation process and the progression of reported case law made by different districts and circuits will provide both employers and employees with the road map they need to navigate their way through the workplace protections that Congress and the Equal Employment Opportunity Commission have created. **TFL**

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Endnotes

[1]76 Fed. Reg. 16,978 (March 25, 2011).
[2]*Id.* at 17,000.
[3]534 U.S. 184, 185 (2002).
[4]76 Fed. Reg. at 17,010 (March 25, 2011).
[5]*Id.*
[6]*Id.* at 17,011.
[7]57 F. Supp. 2d 448, 453 (S.D. Tex. 1999).
[8]76 Fed. Reg. at 17,000 (March 25, 2011).
[9]*Id.* at 17,007.
[10]*Id.*