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THE ADA AMENDMENTS ACT

The Amendments to the Americans with Disabilities Act (the "ADA Amendments Act") has been signed by President Bush and will go into effect on January 1, 2009. The ADA Amendments Act significantly broadens the scope of the ADA by overturning a series of Supreme Court decisions. In order to understand the significance and effect of these amendments, one must understand the basic provisions of the ADA that were being amended and the Supreme Court decisions that Congress explicitly overturned. We begin with the statutory provisions.

1. The ADA

The ADA (key ADA phrases are underlined) makes it unlawful for an employer to discriminate against a "qualified" person with a disability because of that disability. A disabled individual is "qualified" if he can perform the "essential elements" of a job with "reasonable accommodation."

The term "disability" is defined as a "physical or mental impairment that substantially limits one or more . . . major life activities." The definition of disability also includes "being regarded as having such an impairment."

2. The Supreme Court Decisions

The Supreme Court decisions that have been overturned focus primarily on the issue of what it means to be "disabled." The first major case was *Sutton v. United Airlines, Inc.*, 527 U.S. 144 (1999). In that case, the Suttons were sisters who had been denied employment by United Airlines because they had severe myopia. With glasses, however, they had nearly normal vision. Disagreeing with eight of the nine federal circuit courts of appeals and with the EEOC, the Supreme Court held that the sisters were not "disabled" and, therefore, not protected by the ADA. Specifically, the Court ruled that mitigating factors – like eyeglasses – had to be considered in determining whether the sisters were "disabled," and since they had normal vision with glasses, they were not "persons with disabilities" under the ADA.

Similar reasoning was applied in subsequent cases, including *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) and *Albertson's, Inc. v. Kirkinburgh*, 527 U.S. 555 (1999). In the *UPS* case, the plaintiff had high blood pressure which, with medication, was relatively normal. The Court held that because the plaintiff functioned normally with medication, his high blood pressure did not "substantially limit" him in any "major life activity" and, for that reason, he was not "disabled" and protected by the ADA. In the *Kirkinburgh* case, the plaintiff had monocular vision, meaning that he saw with only one eye. However, the plaintiff had made physical accommodations with his functioning eye so that he could see in depth with that eye only. The Court held, first, that a person was not "substantially limited" in a "major life activity" – in this case, the activity of seeing – simply because he saw differently from other people; rather, to be "substantially limited," the plaintiff had to be "significantly restricted." Second, the Court held that the requirement that mitigation measures have to be considered in determining whether a person is disabled includes measures undertaken even unconsciously by a person's body systems. Put another way, the Court in essence held that a one-eyed man was not disabled because he could see reasonably well with his other eye.

These principles were further extended in *Toyota Motor Mfg v. Williams*, 534

U.S. 184 (2002). In that case, the plaintiff had carpal tunnel syndrome and tendonitis, which prevented her from doing some of the functions required by her job, specifically, working with her hands raised over her shoulders for several hours at a time. The court of appeals held that she was "substantially limited" in the "major life activity" of performing manual tasks.

The Supreme Court disagreed. It ruled that an individual with a physical impairment is not "substantially limited" in the life activity of performing manual tasks simply because her impairment prevented her from performing a particular job. Rather, to be covered by ADA (in other words, demonstrate that she was "substantially limited" in the major life activity of performing manual tasks), she must show that her impairment "prevents or severely restricts" her from doing activities that are "of essential importance to most people's daily lives." Since working with one's hands over their shoulders is not essential to most people's lives, the plaintiff was held not to be disabled, and, therefore, unprotected by the ADA.

Also overturned by the ADA Amendments Act is a series of cases which arose under the ADA provision which provides that an individual is "disabled" if he is "regarded as" having a disabling impairment. (This is referred to as the "regarded as" "prong" of the disability definition). This issue also arose in the *Sutton* case (the case discussed above in which the two sisters with impaired vision were seeking employment as airline pilots). The sisters also argued that they were disabled because United Airlines "regarded" them as being disabled. The Court held that an individual is "regarded as" being disabled only if the employer believes that she is incapable of performing "a broad range of jobs," not just the job for which she was applying.

Disabilities advocates argued to Congress that this ruling established an almost impossible threshold of proof. Not only did it require that the plaintiff prove an employer's subjective state of mind; that burden was virtually insurmountable because employers had no reason even to think about whether a job applicant can perform a broad range of jobs. Their focus is on whether the plaintiff can perform the particular job that she is seeking. United personnel testified that the sisters were rejected because United believed that their vision deficiency precluded them from working as airline pilots. One might think intuitively that this testimony would definitively establish that United "regarded" the sisters as being disabled. Yet, ironically, this testimony actually won the case for United. Because United thought that the sisters' vision problem disqualified them only from working as airline pilots and not from a broad range of jobs, the sisters were not "regarded as" disabled under the Supreme Court's criteria.

3. The ADA Amendments

The thrust of the ADA Amendments Act is to expand the definition of "disability" by explicitly overruling the Supreme Court decisions which have been discussed above and the reasoning set out in those decisions. The ADA Amendments Act directly conveys Congressional intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Specific sections of the ADA Amendments Act provide that:

- The reasoning of the cases discussed above, which are explicitly cited in the text of the Act, is rejected.

- Whether an impairment "substantially limits" a major life activity is to be determined without reference to mitigating measures.

- The definition of "major life activities" is broadened to include not only specific activities such as eating, bending, speaking, concentrating, thinking and communicating; it also includes the "operation of a major bodily function" such as normal cell growth, digestive, neurological, reproductive and respiratory functions. Thus, "major life activities" are no longer limited to activities of "central importance to daily life." On the contrary, bodily functions such as "normal cell growth" or neurological or reproductive functions – are themselves "major life activities."

- The Supreme Court's definition of "substantially limits" – which requires that an impairment "prevent or severely restrict" a major life activity – is specifically found by Congress to have "created an inappropriately high level of limitation." EEOC is directed by the ADA Amendments Act to modify its regulations which define "substantially limits" as "significantly restricts." In other words, the combination of the expansion of the definitions of "major life activity" and "significantly restricts" means that an impairment to any basic bodily function will make a person "disabled" under ADA even if the impairment does not rise to the level of a "significant restriction."

- In order to prove that an employer "regarded" an individual as disabled, the disabled individual need not prove that the employer believed him incapable of performing a range of jobs; a person will be "regarded as" disabled if the employer believes that the person is not capable of performing the particular job for which they are applying or hold.

- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

4. What Has Changed

What has changed significantly as a result of the ADA Amendments Act is the definition of "disability." As previously mentioned, one explicit purpose of the ADA Amendments Act is to "convey Congressional intent" that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." As a result, the number of individuals who are "disabled" and entitled to protection under the Act will significantly expand. Conversely, the

number of cases in which employers contend that the plaintiff is not "disabled" is likely to decrease significantly. The primary focus of ADA litigation in the future will likely be on the ADA provisions that were not changed by the Amendments Act (discussed below).

5. What Hasn't Changed

Despite the changes in the scope of "disability," critical portions of the ADA have not been changed. Specifically, nothing in the ADA Amendments Act changes the underlying requirement that a disabled person is protected by the ADA only if "qualified" to perform the job.

In determining whether an individual is "qualified," EEOC and the courts will still have to deal with issues such as: What are the "essential elements" of a job? What is a "reasonable accommodation," *i.e.*, what accommodations can the employer be expected to offer to a disabled person to perform the "essential elements" of a job? When does an accommodation pose an "undue hardship" on the employer? When is a person "not qualified" because he or she poses a threat to others? And, apart from the issue of qualifications, determinations will still have to be made in virtually every case as to whether the disabled person was the victim of discrimination because of the disability.

THE EMPLOYEE FREE CHOICE ACT ("EFCA")

The Employee Free Choice Act ('EFCA") passed the House and is currently pending in the Senate. Since President-elect Obama is a strong supporter of EFCA, it is widely assumed that EFCA – as written or with some modifications – will be signed into law in 2009. That law is intended to – and likely will – facilitate a new era of union organizing. Here are some of the highlights:

1. Recognition Based on Card Checks

Unions organize by obtaining signed authorization cards (cards designating the union as their bargaining representative) from employees. Under present law, employers have a right – recognized by the Supreme Court in 1974 – to decline to recognize a union claim for recognition based on signed authorization cards and to insist instead that the union establish its majority status in an election conducted by the NLRB. Under EFCA, unions would attain recognition from the NLRB – and the employer would be required to recognize and bargain with the union – if the union demonstrates its majority status based on authorization cards. In effect, EFCA would substitute card checks for the secret ballot election now required. Since the employer often learns about a union organizing campaign after it is well under way – and often after the union has attained a card majority – the practical effects of card check recognition are to deny employees a secret ballot election and, simultaneously, prevent the employer from having any meaningful opportunity to express its views about unionization before the union obtains the cards that entitle it to recognition.

This is a radical change in existing law. It is widely recognized – by the Supreme Court among others – that authorization cards are not a reliable measure of employee sentiment. For this reason, many unions don't even seek an NLRB election unless they have 60 or more percent of authorization cards. Unions recognize that without a large majority based on authorization cards, they have little chance of winning a secret ballot election.

The obligation of an employer to recognize a union based on authorization cards also has the effect of denying the employer the opportunity that an election campaign now provides to express its views on the pros and cons of unionization before the union is recognized. Without the opportunity to campaign and reverse a card majority by secret ballot election, employers will need to devise new strategies focusing not on how to win an NLRB election but on how to persuade employees that signing an authorization card is not in their best interest.

2. Interest Arbitration for Initial Contracts

Even when a union wins a representation election, it often finds itself unable to obtain a first contract. This failure stems from multiple reasons, including the limited economic power and public support that unions presently enjoy. EFCA would change all of that by requiring "interest arbitration" for initial contracts. In other words, if the parties can't reach agreement for a first contract, the arbitrator will set the terms of the contract for them.

This is almost as radical as the provision which eliminates NLRB elections for initial recognition. An underlying principle of American labor law is that the NLRB regulates only the process of collective bargaining; the results – meaning the terms of the contract – are reached through collective bargaining by the parties and without governmental interference. Under the EFCA bill, a first contract will be imposed by the arbitrator if the parties can't agree.

Under existing law, "interest arbitration" is not illegal and it does occur, albeit rarely. For example, if the company has a long-term contract with a customer and cannot tolerate labor disruptions during the term of that contract, it may choose to sign a long-term labor contract for the same duration as its commercial contract in return for periodic contract reopeners subject to interest arbitration (and no strikes if the parties can't agree). Except in this kind of unusual situation, employers are usually unwilling to allow a third party to set the wage levels for their employees and determine issues such as whether the employer will have a pension plan or what kind of health insurance it will provide. The core concern is that if the

company cedes contract-making authority to a third party, it will lose control over the costs of its business.

Under present law, neither the company nor the union can be compelled to engage in interest arbitration. Either side can refuse to negotiate over a proposal for interest arbitration and can lawfully insist that the terms of a contract be determined by collective bargaining.

For first contracts, EFCA changes all of this.

Interest arbitration will not only guarantee a first contract that the union might otherwise be unable to attain; it will change the nature of the bargaining. If either party believes that it will fare better with the arbitrator, it will not likely bargain to reach agreement but rather to position itself for interest arbitration. Moreover, unions today are often willing to reduce their demands in first contract negotiations simply to get a first contract and a foothold which establishes the union for the future. If interest arbitration is available, the union will often have no incentive to reduce its demands and first contracts will likely be more costly than they now are. Since first contracts usually form the baseline from which subsequent contracts are negotiated, inflated costs of first contracts usually inflate the costs of future contracts as well and effectively raise labor costs on a long-term basis.

We are following EFCA closely and plan to hold seminars for clients once the specifics of this legislation are clarified. Once they are, we plan to closely work with companies to develop for the company the employee relations programs, communications processes and training that the company will need in this new labor relations environment in order to minimize the possibility of a union recognition that might not have occurred if the employees understood the full consequences of unionization and the effect of signing authorization cards.

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