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Sixth Circuit Maintains "Solely" Standard Under the ADA and

EEOC Releases Final Regulations for the ADAAA

The Americans With Disabilities Act ("ADA") prohibits discrimination "on the basis of" disability. The Sixth Circuit has held that in order to prove causation under the ADA that the employee must show that their disability was the **sole** reason for the adverse employment action taken by the employer. The majority of federal courts require that the employee merely show that the disability was a "motivating factor" or a "substantial cause" of the employer's adverse employment action. The Sixth Circuit, which governs employers in Ohio and Michigan, applies the more stringent standard requiring that the disability must be the **sole** reason for the adverse employment action.

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Staff Directory

President

Jack Hollister

President; ext. 204

jhollister@employersassociation.com

HR Research & Seminar Training

Cheryl Riggs

HR Member Services Manager; ext. 202

criggs@employersassociation.com

Judi Roe

HR Research & Training Assistant; ext. 203

jroe@employersassociation.com

CJ Gordon

HR Research Assistant; ext. 210

cgordon@employersassociation.com

Customized On-Site Training and Consulting

Dave Tippett, PHR

Director, On-site Training and Consulting; ext. 206

dtippett@employersassociation.com

Member Services

Barb Rains

Member Service Coordinator; ext. 205

brains@employersassociation.com

Justin Morelli

Membership Development Coordinator; ext. 209

jmorelli@employersassociation.com

Karen Wagenknecht

Administrative Clerk; ext. 200

karenw@employersassociation.com

EA Health Plus

Jennifer Kiernan

EA Health Plus Manager; ext. 212

jkiernan@employersassociation.com

Terry Vernier

Project Manager; ext. 213

tvernier@employersassociation.com

Kayla Jaimez

Wellness Assistant; ext. 211

kjaimez@employersassociation.com

Publications

Nichole Cousino

Print / Administrative Assistant; ext. 207

ncousino@employersassociation.com

Accounting

Vicki Bender

Accountant; ext. 201

vbender@employersassociation.com

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Attorney / Spengler Nathanson P.L.L.

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Human Resources Business Leader / SSOE, Inc.



5800 Monroe St., Bldg. F Sylvania OH, 43560 | 419-885-8505

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On March 17, 2011, in *Lewis v. Humboldt Acquisition Corp*, the Sixth Circuit upheld its prior decision to apply the “sole reason” standard. Currently, the U.S. Supreme Court has not decided between the split of courts which burden should be applied. However, only one other Circuit, the Tenth Circuit, has taken the same view as the Sixth Circuit. Therefore, Ms. Lewis may seek an *en banc* review of this decision which will require all of the Sixth Circuit judges to participate. If an *en banc* review is granted, the Sixth Circuit may overrule its prior decisions and decide to follow the majority of federal courts which have held that the employee merely show that the disability was the “motivating factor,” rather than the sole reason for the adverse employment action.

Final ADAAA Regs

At the end of March, the Equal Employment Opportunity Commission issued its long-awaited regulations under the ADA Amendments Act (“ADAAA”). These regulations will become effective on May 24, 2011. Much of the new regulations were as expected and consistent with the language of the ADAAA which became effective on January 1, 2009. For example, the statute is to be construed broadly and provide as much protection to employees as possible. As a result, since 2009, employers have focused more on accommodations rather than questioning whether an employee meets the definition of disabled. In addition, the EEOC confirmed that mitigating measures like medicine or prosthetic devices are to be ignored when analyzing whether an individual is disabled.

The big surprise in the final regulations was the EEOC’s decision to list conditions that, according to the EEOC, will “virtually always” be covered impairments. The list includes 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. Previously, the law had rejected the idea that any specific condition should be deemed a *per se* disability. This list effectively overturns the case-by-case approach previously utilized and now labels many employees disabled whether their condition substantially limits any major life activity or not.

Another surprise in the final regulations was an expansive approach to “substantially limits” as it relates to episodic impairments or conditions in remission. Therefore, any impairment, no matter how brief in duration, can be a covered disability if during its active stage it substantially limits a major life activity. In essence, an impairment only lasting two months such as a broken leg may now be deemed covered by the ADAAA. This specific regulation is likely to be challenged in court as contrary to the legislative intent.

The final regulations also further broaden the “regarded as disabled” analysis and indicate that it is applicable to any individual who is perceived to have an impairment even if that impairment is not an actual disability. The new regulations state that an employer “regards” someone as disabled by taking action based on any real or perceived impairment. However, the good news for employers is that there is no duty to provide a reasonable accommodation to those “regarded as” having a disability.

Moving forward, employers must continue to focus on the accommodation issue. Did the employee request an accommodation? Was an accommodation available? Did the employee decline the accommodation? Did the employee fail to meaningfully participate in the accommodation process? It is important that employers engage in this process and show that they went above and beyond what was expected of an employer.

(Renisa A. Dorner; Cooper & Walinski; 4/11)



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