PUBLICATION

The ADA at Nineteen: Footloose and Fancy Free

October 22, 2009

Since its passage in 1990, no other federal employment law has engendered more celebration or controversy than the Americans With Disabilities Act. Like the unruly teenager it is, you can't turn your back on the ADA for a moment without the Act reasserting itself. This past month was no exception.

Sears Settles Largest ADA Settlement in EEOC History

On September 29, the U.S. District Court for the Northern District of Illinois approved a $6.2 million settlement of a class action in *EEOC v. Sears Roebuck & Co.* – the largest ADA settlement in EEOC history. The Commission had alleged that Sears violated the ADA between 2001 and 2008 through an "inflexible" policy of terminating injured employees who exhausted their workers' compensation leave rather than seeking to offer them reasonable accommodation and return them to work.

The parties' consent decree requires Sears to post notices in all its stores informing employees about the settlement and including contact information for the EEOC's Chicago District office. Sears denied any ADA violations and agreed to settle "because the factually intense nature of the case would take quite some time and considerable expense to be resolved through the court system." Given this development, employers are encouraged to review their disability policies to ensure that they include consideration of reasonable accommodations needed by employees returning from workers' compensation and other forms of medical leave.

Physical Capacity Exam May Be "Medical" Exam Prohibited by ADA

On September, 28, the Ninth Circuit Court of Appeals reversed summary judgment in *Indergard v. Georgia-Pacific Corp.*, where a paper mill fired a worker after she failed a "physical capacity evaluation" (PCE) while attempting to return to work from knee surgery. Even though no blood was drawn, no urine samples were collected, no lab work was performed, and no doctor or nurse ever examined, diagnosed, or treated Indergard, a divided appellate court held that the PCE constituted an unlawful "medical" examination under the ADA.

Employee medical examinations are prohibited by the ADA unless the employer can show that the exam is both job-related and consistent with business necessity. The *Indergard* majority held that the PCE was a medical exam because it included components that were not relevant to the job at issue, as well as information on Indergard's blood pressure and other medical data. This case is bound to foster even more uncertainty for employers attempting to navigate the ADA, particularly considering that the EEOC has said that "physical agility tests" are not medical exams. Accordingly, employers would be well advised to limit their return-to-work testing only to those physical assessments directly related to the employee's job.

EEOC Proposed Regulations and Interpretive Guidance

Also last month, the EEOC issued proposed regulations and interpretive guidance for public comment. The Commission intends to significantly broaden the definition of "major life activities" to include those that "most people in the general population can perform with little or no difficulty."

The EEOC likewise discusses, but fails to illuminate, coming changes to the definition of what it means to possess a "substantial limitation." For example, while the Commission notes that an individual may be "substantially limited" in a major life activity even if he or she is not prevented (or even severely restricted) from performing the activity, it goes on to urge that an ailment must be more than a temporary, non-chronic impairment of a short duration with little or no residual effects. This definition aptly points out what a substantially limiting impairment is not, rather than what it is. The EEOC also provides rules of construction to evaluate whether an impairment substantially limits a major life activity, which include but are not limited to:

- The term "substantially limits" should be broadly construed and should not require extensive analysis;
- Major life activities do not have to be those that are of central importance to daily life;
- An impairment may substantially limit a major life activity even if it lasts fewer than six months. (Unhelpfully, the EEOC does not say how many months are too few for an impairment to be considered substantially limiting.);
- Analysis should not focus on what an individual is able to do in spite of the impairment, but rather how a major life activity is substantially limited. The positive effects of mitigating measures (e.g., medication, medical supplies, assistive technology) may not be considered in determining whether a substantial limitation exists, but negative effects may be considered; and
- An episodic impairment, or one in remission, is a disability if it would substantially limit a major life activity when active. Examples include multiple sclerosis, asthma, cancer, hypertension, seizure disorders, and psychiatric impairments such as depression.

The EEOC has compiled a non-exhaustive list of impairments that it believes will consistently meet the definition of "disability," including deafness, blindness, intellectual disability, wholly or partially missing limbs, mobility impairments requiring a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bi-polar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Regarding perceived disability, an employee may now establish coverage if he or she can show that the employment action occurred because of a perceived physical or mental impairment, regardless of whether the employer believed that the perceived impairment substantially limited a major life activity. However, a "perceived as" claim still cannot be established if the impairment lasts fewer than six months and is minor.

Last, employers will soon be obliged to accommodate individuals with both actual disabilities and those with records of disabilities. Employers still are not required to accommodate "perceived" disabilities. Positive and negative side effects of mitigating measures may be considered when evaluating whether an individual needs an accommodation and/or is a direct threat.

While these regulations may change before they are issued in final form, employers should review their current non-discrimination and reasonable accommodations policies and train supervisors to appropriately handle future requests for accommodation.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

Baker Donelson gives you what boutique labor and employment firms can't: a set of attorneys who are not only dedicated to the practice of labor and employment issues, but who can reach into an integrated and experienced team of professionals to assist you in every other aspect of your legal business needs. We set

ourselves apart by valuing your entire company. And when it comes to your company's most valuable asset - your employees - we're committed to counseling with and advocating for you every step of the way.