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CivilLITIGATION

Congress expands protection for the disabled

By **JENNIFER A. MEREAU**
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On Sept. 25, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"), which takes effect Jan. 1.

The amendments broaden the definition of disability, making it easier for employees to prove workplace discrimination. The Act overturns a line of U.S. Supreme Court decisions that narrowly construed the definition of disability under the ADA. According to the Act, those and other recent federal cases have "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," which resulted in decisions holding that people with a range of substantially limiting impairments are do not suffer disabilities. The Act emphasizes that the definition of "disability" should be interpreted broadly.

The Americans with Disabilities Act was enacted in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Over time, however, court decisions narrowed the definition of disability and the range of coverage so that individuals with serious impairments sometimes were left uncovered.

Lawmakers felt that such court decisions eliminated protections for many workers whom the law originally was intended to protect, such as those with epilepsy or cancer. The new law will allow people with such ailments to have their day in court, and make them more likely to receive accommodations from employers. Federal courts had determined that ailments that could be controlled by medication or treatment weren't covered under the ADA. Under the new law, whether an individual has a disability should not "demand extensive analysis".

The ADA Amendments Act specifically rejects the standard promulgated by the Supreme Court in *Sutton v. United Airlines Inc.*, 527 U.S. 471 (1999), which held that if a disability can be corrected or mitigated, employers can conclude an impairment does not amount to a "substantial limitation."

The Act also rejects the standards set forth by the Supreme Court in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184 (2002), which held that the terms "substantially

limited" and "major life activities" must be strictly construed when determining the existence of a qualifying disability, and that an individual must show such disability prevents or severely restricts activities that are of central importance to most people's lives. Under the amendments, the critical inquiry no longer will be whether an individual has a disability, but rather whether covered entities have complied with their obligations to disabled applicants and employees.

The Act instructs the Equal Employment Opportunity Commission to issue new regulations redefining the term "substantially limits" from its current definition to conform to the Act's broader view. The Act also states that a determination of whether an individual is substantially limited in a major life activity shall be made without regard to mitigating measures (e.g., prescription medication, hearing aids, artificial limbs), thereby explicitly rejecting the Supreme Court's decision in *Sutton*, which allowed consideration of mitigating measures when determining whether someone is disabled.

The Act further includes a non-exhaustive list of major life activities — including sleeping, reading, bending, learning, thinking and communicating — and lists "major bodily functions" as including functions of the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The Act clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Employers must now not only consider the current effects of an impairment, but also what the effects would be if the impairment were in an active state.

The Act expands the "regarded as" protection by prohibiting discrimination based on the employer's perception of a significant, non-transitory mental and physical impairment, regardless as to whether an individual can establish that the impairment limits or is perceived to limit a major life activity substantially. Such persons need only prove unlawful discrimination under the Act, so while discrimination against employees "regarded as" disabled is prohibited, employers are not required to provide reasonable accommodation to them, an issue over which the courts



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previously had been split.

New York State Human Rights Law still is as or more expansive than the ADA Amendments Act, therefore, New York employers may not be impacted significantly by the amendments; however, employers should review their job descriptions, policies, handbooks

and procedures for providing reasonable accommodations to ensure they are in compliance with the ADA Amendments Act and New York State Human Rights Law.

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