EMPLOYMENT RELATIONS

Employment Update

FALL 2009

The EEOC Issues Its Long-Awaited Proposed ADAAA Regulations

As most employers are now aware, the Americans with Disabilities Amendment Act (ADAAA) became effective on January 1, 2009. The ADAAA expanded the scope of coverage of the Americans with Disabilities Act (ADA) and directed the Equal Employment Opportunity Commission (EEOC) to amend its regulations to comply with the amendments.

On September 23, 2009, the EEOC issued its Notice of Proposed Rulemaking (NPRM), setting forth its proposed regulations.

The public must submit comments on the NPRM by November 23, 2009. After the public comment period, the EEOC will issue its final regulations. It is likely that the EEOC will adopt the NPRM as final regulations with minimal change. Once adopted, the final regulations will be used by the EEOC to evaluate ADA claims involving allegedly discriminatory actions occurring as of the effective date of the ADAAA—January 1, 2009. As a result, employers should familiarize themselves with the NPRM and revise their practices and policies to comply with the proposed regulations.

Overview of the ADAAA

In passing the ADAAA, Congress' stated purpose was "to reinstate a broad scope of protection" under the ADA by expanding the interpretation of the definition of "disability." In short, Congress rejected narrow definitions of disability adopted by several courts, including the Supreme Court, and drastically expanded coverage.

While the technical definition of "disability" under the ADAAA remains the same, several terms used to evaluate whether an individual suffers from a "disability" have been revised. Specifically, disability is still defined as: 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) a record of such impairment; or 3) being regarded as having such impairment. However, the ADAAA considerably broadens the scope of "major life activity," "substantially limited" and "regarded as."

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Additionally, mitigating measures, such as medication or other devices used to control the effects of an impairment (other than ordinary glasses or contact lenses) must be disregarded in evaluating whether an individual's condition meets the definition of "disability." The definition of "major life activity" is expanded to include, among other things, a non-exhaustive list of major bodily functions.

The ADAAA also changed the definition of "regarded as" to no longer require a showing that the employer perceived an individual to be substantially limited in a major life activity. Instead, an applicant or employee is "regarded as" disabled if he or she is subjected to a discriminatory action under the ADA, based upon an impairment that is not transitory and minor. Examples of "discriminatory actions" include failure to hire, termination and demotion. Employers are not required to provide a reasonable accommodation to employees who have a "disability" by virtue of the "regarded as" portion of the definition.

The ADAAA did *not* change the definitions of "qualified," "direct threat," "reasonable accommodation" or "undue hardship." It also permits consideration of "mitigating measures" in considering reasonable accommodations or direct threat.

The Proposed Regulations

In keeping with Congress' intent to expand coverage, the NPRM state that the regulations are to be construed broadly and to the maximum extent permitted by the ADA.

The original version of the ADA required an "individualized assessment" of whether an impairment substantially limited one or more of the person's major life activities. The NPRM sets forth a non-exhaustive list of impairments that will consistently satisfy the definition of "disability" under the ADA. Those impairments include deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. According to the NPRM, the "individualized assessment" when these conditions are involved should be quick, easy and consistently result in the finding of a disability.

The NPRM also includes a list of impairments that may be substantially limiting for some individuals, but not others. This list includes asthma, back and leg impairments, and learning disabilities. With regard to this list of impairments, the NPRM states that the level of analysis of whether they substantially limit a major life activity still should not be extensive.

"Temporary, non-chronic impairments of short duration with little or no residual effect" are not disabilities. The NPRM provides examples of such impairments, which include the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.

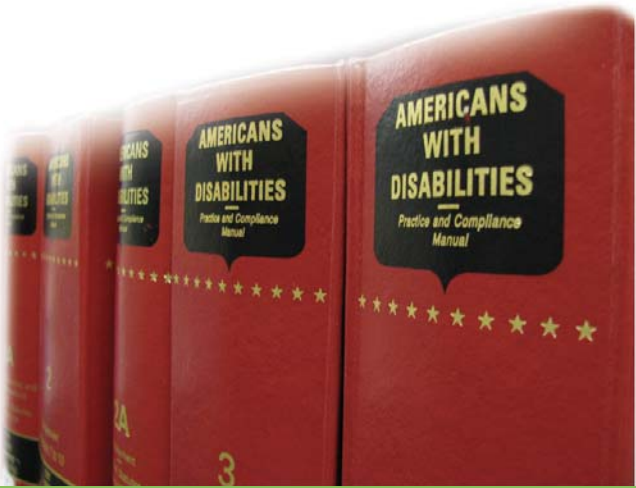
The ADAAA and the NPRM's provisions regarding "major life activities" also expand coverage under the Act. While several of the "major life activities" listed in the NPRM are included in the ADAAA's provisions, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, the EEOC added three: sitting, reaching and interacting with others.

As noted above, the ADAAA states that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine and reproductive functions. The NPRM adds to this list, hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary and cardiovascular functions.

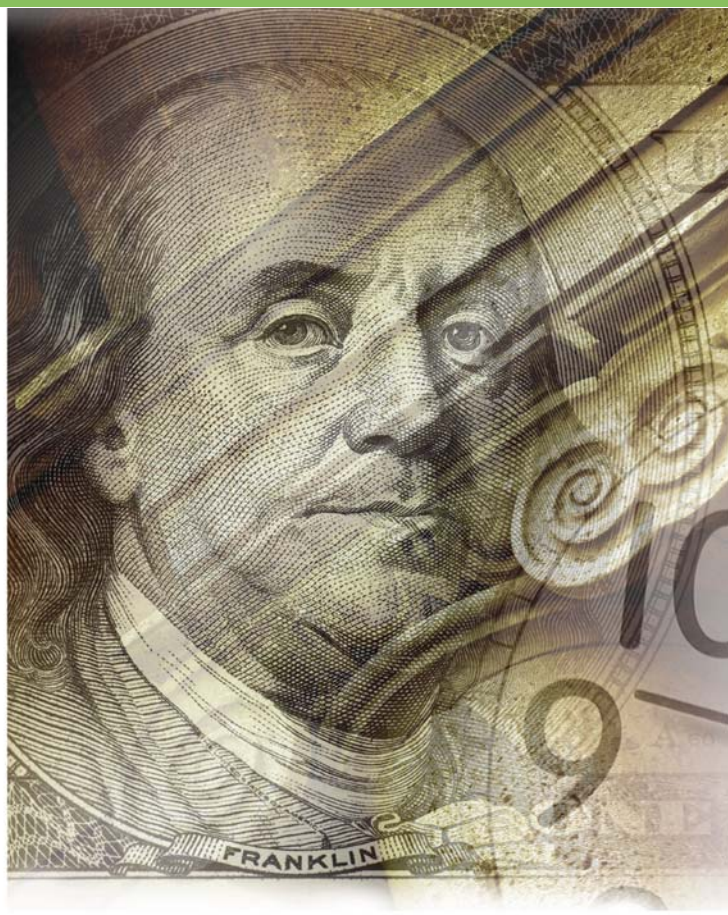
Finally, consistent with the ADAAA, the NPRM specifies that impairments that are episodic or in remission meet the definition of disability if it they would substantially limit a major life activity when active. The NPRM provides examples of such conditions to include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder and schizophrenia.

It is clear from the ADAAA and the NPRM that the obligations of employers, and exposure to liability under the ADA, have increased dramatically. Employers must remain vigilant by familiarizing themselves and their staff of their obligations under the ADAAA and make necessary changes to policies and procedures.

Melissa M. McGuire



When is the Boss *Personally* Liable for a Company's Failure to Pay Proper Wages?



The current economic downturn has required employers to make a broad array of cuts in the workplace, from reducing fringe benefits or employer-sponsored events to laying off employees. At a time when the need to reduce costs can be overwhelming, it is worth taking a moment to review why cutting costs by failing to comply with wage-hour and wage payment laws remains an ultimately costly proposition, with potential direct costs to the employer's decision-makers.

Both federal and Maryland law provide minimum wage and overtime requirements applicable to most employers. The federal requirements, contained in the Fair Labor Standards Act, provide that the "employer" who is subject to liability if required minimum wage or overtime payments are not made "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." This means that failure to pay the wages required by the FLSA can result in an award of damages not only against the employing company itself, but also against the employer's president, CEO, or other officers responsible for the payment of the employee's wages. Such liability has been imposed upon a company's president by the District of Maryland following the court's determination that the president "played a primary role in virtually every aspect of [the company's] operations, including virtually every aspect of personnel." *Chao v. Self Pride, Inc.*, 2005 U.S. Dist. LEXIS 11653 (D.Md. 2005).

Maryland imposes its own minimum wage and overtime requirements, and the Maryland Wage and Hour Law's definition of "employer" contains language identical to the FLSA with respect to persons acting in the interest of an employer in relation to an employee. This means that individuals involved in a company's decision-making need to be cognizant of the potential for *personal* liability in a state court action to recover wages withheld in violation of the Wage and Hour Law.

Of course, not all wage disputes involve minimum wage or overtime claims subject to the FLSA or the Maryland Wage and Hour Law. Such claims could include the alleged failure to pay bonuses or other amounts promised to the employee. The causes of action available to an employee claiming the denial of such wages include a claim under the Maryland Wage Payment and Collection Law and a claim for breach of contract. On this front, the news is better for individuals responsible for the payment of wages on behalf of an employer.

The Maryland Wage Payment and Collection Law's definition of "employer" is notable in that the language seen in the FLSA and Maryland Wage and Hour Law with respect to "persons acting…in the interest of an employer" is wholly absent. Instead, "employer" is defined simply as "any person who employs an individual in the State or a successor of the person." This distinction was at the heart of the court's decision in *Watkins v. C. Earl Brown, Inc.*, 173 F. Supp. 2d 409 (D.Md. 2001), in which the court found that the Maryland Wage Payment and Collection Law did not create personal liability for a general manager acting on behalf of his employer with respect to the payment of the plaintiff's wages.

While the *Watkins* decision provides some peace of mind for those tasked with managing wage payment decisions for their employers, the potential risks to the company for failure to comply with the Wage Payment and Collection Law, as well as the potential individual exposure attached to violations of the FLSA and Maryland Wage and Hour Law, dictate that managers act with caution in taking actions with respect to employee wages. Employers are encouraged to ensure that all managers involved in payroll decisions have appropriate

knowledge and training with respect to those requirements imposed by federal and state law, as well as to contact experienced legal counsel in the event that any uncertainties arise.

David M. Stevens

The District Court Dismisses ADA Claim

In a recent decision, the U.S. District Court dismissed the claim of a former Verizon employee who alleged that he was mistreated and constructively discharged on account of his weight.

The former employee, who worked most recently for Verizon as a service technician, was unable to claim ladders or work aloft due to his considerable weight, at times exceeding 400 pounds. Let's take a closer look at this case.

Background Facts

Andy Hill worked for Verizon Maryland, Inc., for 27 years, beginning as a customer service representative and in January 1979, as service technician. Hill held that position until his voluntary retirement in March 2006.

As a service technician, Hill was expected to climb poles and ladders and work aloft and was required to meet medical standards for the job. Verizon's safety policy limits the weight of employees who work aloft to 275 pounds, excluding tools and safety belts.

However, under the policy, every attempt will be made to accommodate employees who fall between 275 and 325 pounds via a heavy-duty ladder. Employees who exceed the 325-pound-limit are not permitted to perform aerial work.

Under Verizon's policy, overweight employees must make every effort to reduce their weight to less than 325 pounds. If the employee is unable to do so, the employee is considered unable to perform one or more of the essential functions of the job and may be transferred to another position or downgraded.

As a service technician, Hill was paid almost $1,100 per week. In March of 2000, Hill's weight was in excess of 325 pounds and until the end of 2002, he was unable to work aloft under Verizon's policies. During that period, Verizon accommodated Hill by letting him retain the title of service technician and continued to pay him the commensurate salary, although he performed limited field work, such as burying cable and installing telephone jacks. The balance of his time was spent performing office clerical work.

In January of 2003, Hill's weight dropped below 325 pounds and he was permitted to re-enter the field as a service technician, albeit with the use of a heavy-duty ladder. In March of 2004, Hill's weight had risen above the limit again. At 446 pounds, Hill was removed from the field and spent the majority of his time performing office clerical work. Still, Verizon considered him a service technician and continued to pay him accordingly.

On March 11, 2005, Hill was placed on a medically restricted plan because he could not perform his job safely. In October 2005, Hill was informed that effective the next pay cycle he would be paid at the rate of an office clerical assistant, resulting in approximately a $400 reduction in weekly pay.

After he initiated grievance procedures under a collective bargaining agreement, Hill's demotion was delayed until April 1, 2006. At the end of March 2006, just before the downgrade became effective, Hill voluntarily retired. Hill claimed that Verizon's reduction of his salary by approximately $19,000 per year constituted constructive termination of his employment.

On October 26, 2006, Hill filed a charge with the EEOC based on Verizon's alleged failure to accommodate his disability. Thereafter, in November 2007, Hill filed a lawsuit alleging that Verizon failed to provide him with reasonable accommodations for his alleged disability, obesity, and, second, that Verizon's wrongful conduct resulted in his constructive discharge.

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Trial Court

Unfortunately for Hill, the District Court disagreed with both of those claims. With regard to the first count, failure to accommodate Hill's alleged disability, obesity, the District Court found that Hill's obesity was not a disability covered by the ADA. In reaching this conclusion, the District Court considered several other court decisions, which found that in order to be considered a disability under the ADA, the obesity must be a symptom of an underlying physiological condition. In this case, there was no evidence that Hill suffered from an underlying medical condition.

Moreover, even if the court recognized Hill's morbid obesity as a disability, it, nevertheless, found that his obesity did not substantially limit a major life activity. Under the ADA, a major life activity includes, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working."

According to the court, while Hill's obesity certainly interfered with his quality of life, it could not be considered substantially limiting, as required under the ADA. According to Hill, he was able to walk, dress, cook, do laundry, care for himself, drive, run errands, and work at a variety of jobs and capacities. While Hill's impairments are real, under the ADA they did not substantially limit a major life activity.

With regard to Hill's claim that Verizon considered him disabled on account of his weight, the court rejected that claim, as well. As the court noted, it is insufficient to merely show that the "employer was aware of the plaintiff's alleged impairment; rather, the plaintiff must demonstrate that, based on perceived impairment, the employer regarded the employee as disabled within the meaning of the ADA."

In this case, the court found that Verizon made numerous attempts to accommodate Hill's weight, but could not allow him to climb ladders or work overhead under Verizon's safety policies.

Concerning Hill's claim that Verizon's actions amounted to a constructive discharge, the District Court found no support in the facts or law to support such a position. According to the court, to prove constructive discharge, the employee must at the outset show that his employer deliberately made his working conditions intolerable in an effort to induce him to quit, and that the employer's actions were deliberate and that working conditions from an objective standpoint were intolerable.

Mere dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions, are not so intolerable as to compel a reasonable person to resign.

In this case, Verizon's actions against Hill did not approach the requisite level of deliberateness reflecting an attempt to induce resignation. Rather, Verizon allowed Hill to retain his technician status, even while he continuously failed to lose the weight necessary to perform the essential functions of his job. The decrease in Hill's compensation was the unfortunate result of business necessity and did not constitute a "career-ending action," as Hill claimed.

Indeed, Hill voluntarily resigned before the wage decrease even took effect, further undermining his argument that he was constructively discharged. As the court noted, the claim of "constructive discharge" is not meant to be a way to run around the ADA's main goal—to protect those truly disabled individuals who, because of stereotypes and prejudices concerning their general capabilities, are denied employment opportunities.

Bottom Line

As this case demonstrates, in evaluating an employee's claim of disability, whether real or perceived, it is important to focus on the particular medical condition at issue and to evaluate whether that condition constitutes a disability as defined under the ADA. Here, although Hill was admittedly suffering from "morbid obesity," upon closer examination, it became clear that while Hill's medical condition was very serious, it did not rise to the level of a disability covered by the ADA. Keep in mind that the ADA was recently amended and the EEOC has just issued proposed regulations interpreting the new requirements (see the article in this issue about the new law and regulations). Although it should be now easier to establish a claim, it is not likely that those recent changes would salvage Hill's claim.

In all-too-many circumstances in which an employee claims to be "disabled," the employer fails to carefully evaluate the claimed disability to see whether, in fact, it is considered a disability under the ADA. Of course, if it is, then the employer may be required to consider making appropriate, reasonable accommodations to allow the employee to continue working.

If it is not a legal disability, then the employer has much more flexibility in trying to resolve what in most cases is a very difficult situation. Here, Verizon engaged in a number of steps to try and continue Hill's employment, but, ultimately, for legitimate business reasons, could no longer continue to pay Hill's $1,100 per week salary as a service technician—a job he was no longer able to perform. (*Andy Hill v. Verizon Maryland, Inc.*, DCMD Civil Action No. RDB-07-3123, July 13, 2009.)

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