

WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK



ADA AMENDMENTS ACT GREATLY EXPANDS THE SCOPE OF THE ADA

David A. Kushner



On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008, which as its name suggests, implements drastic changes to the Americans with Disabilities Act ("ADA"). This law, which goes into effect January 1, 2009, is perhaps the most important piece of employment legislation of the last decade.

Historical Background

The ADA, which became law in 1990, prohibits employers from discriminating against employees on the basis of an actual or perceived disability, and creates an affirmative obligation for employers to provide reasonable accommodations to a disabled employee. While the ADA serves a laudatory purpose and has been highly successful in accomplishing many of its intended goals, it has also been a highly abused statute. Virtually every manager or HR professional has been confronted with an employee who, on the verge of termination, for the first time claims to be "disabled" and requests some accommodation.

Fortunately for employers, throughout the 1990s, the Supreme Court issued a number of opinions narrowly construing the ADA, which had the effect of limiting the opportunity for ADA abuse. For example, the Supreme Court ruled that "mitigating" measures could be taken into account when evaluating whether an employee was substantially limited in a major life activity so as to satisfy the definition of "disability" under the ADA. Thus, an employee with a hearing deficiency would not normally qualify for the ADA's protections if the employee had a hearing aid which improved the employee's hearing. In addition, courts issued a number of opinions limiting the number of activities which would be considered "major life activities."

The courts' narrow interpretation of the ADA allowed employers to win most ADA lawsuits by proving that the employees were not "disabled" under the meaning of the statute. While these legal developments were extremely helpful in limiting frivolous

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NO STATUTORY CAPS ON RACE-BASED RETALIATION CLAIMS UNDER § 1981

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In a decision having great significance for the employment law arena, in May 2008, in the case of *CBOCS West, Inc. v. Humphries*, the United States Supreme Court ruled that 42 U.S.C. § 1981, includes actions for race-based retaliation. Section 1981 was enacted by Congress in 1866 following the end of the Civil War. It gives "[a]ll persons. . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." It may be recalled that in 1989, the Supreme Court ruled in *Patterson v. McLean Credit Union* that employment conduct occurring after formation of the employment contract was excluded from the scope of § 1981. It therefore followed that claims of race discrimination subsequent to the start of employment were not covered by § 1981. In reaction, Congress enacted the Civil Rights Act of 1991 which was designed to supersede *Patterson* by explicitly defining § 1981's scope to include post-contract-formation conduct as codified in § 1981(b). However, the issue of retaliation under §1981 was not mentioned in *Patterson* and was not addressed by the 1991 statutory amendments.

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GUIDANCE ISSUED ON PERFORMANCE AND CONDUCT STANDARDS UNDER THE ADA

Thomas M. Lucas



On September 3, 2008, the Equal Employment Opportunity Commission issued long awaited guidance concerning employers' rights in applying performance and conduct standards to employees with disabilities under the Americans with Disabilities Act ("ADA"). The Commission addressed a myriad of troublesome issues employers face daily in balancing employees' and employers' rights and responsibilities under the ADA, including two especially recurrent issues. One is whether the ADA requires employers to exempt an employee with a disability from time and attendance requirements. The position of the Commission is that employers need not exempt an employee from time and attendance requirements, grant open ended schedules, or accept irregular, unreliable attendance. The Commission acknowledges that chronic, frequent, and unpredictable absences place a strain on the employers' operations, including:

- inability to ensure a sufficient number of employees to accomplish work;
- failing to meet work goals or service customers;
- shifting work to other employees, thus preventing them from doing their own work, while imposing significant additional burdens on those fellow employees; and
- incurring significant additional costs through overtime or use of temporary service employees.

The Commission noted that an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, and that the employer may justifiably demonstrate that any accommodation would impose an "undue hardship," rendering the employee unqualified for their position.

Another recurring issue is whether an employer may require an employee with a performance or conduct issue to provide medical information or to undergo a medical examination. The ADA permits an employer to request medical information or require a medical examination when the exam is job related and consistent with business necessity. That action would be justified when the employer has a reasonable belief based upon objective evidence that the employee is unable to perform the essential functions or poses a "direct threat" because of a medical condition. For example, where a sudden, marked change in performance or conduct occurs, or nonsensical or belligerent behavior suggests that a medical condition may be the cause, the employer may question the employee about whether the employee is ill, has seen a doctor, or whether there is a medical reason for the sudden and serious change in the employee's behavior or performance.

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CHANGES TO VISA WAIVER PROGRAM EFFECTIVE JANUARY 12, 2009

Luba I. Seliavski



The Electronic System for Travel Authorization (ESTA) is one of the newest programs created by the U.S. Department of Homeland Security (DHS) and Customs and Border Protection (CBP) with the intent to make the United States safer. ESTA is a Web-based travel authorization system designed for nationals of Visa Waiver Program countries who are allowed to enter the United States without a visa. Beginning January 12, 2009, all visitors, including transient visitors, entering the United States under the Visa Waiver Program will require a travel authorization obtained through ESTA prior to their travel to the United States. Until then, Visa Waiver visitors may obtain travel authorizations through ESTA on a voluntary basis. Visa Waiver Program travelers are encouraged to apply for ESTA while the program is still voluntary.

Visa Waiver Program travelers, including non-ticketed infants, or third parties acting on a traveler's behalf, can obtain their travel authorizations by completing an automated form on CBP's Web site: www.cbp.gov/esta. Once the information is entered into ESTA, it is automatically processed by the system to determine if the alien is eligible to travel to the United States under the Visa Waiver Program without a visa. The system provides the alien with an automated response, "Authorization Approved," "Authorization Pending," or "Authorization Denied." Prior to the alien's boarding an aircraft or a ship, a carrier will electronically verify with the CBP whether the alien has an approved travel authorization.

Travel authorization is valid for two years from the date of authorization, or until the alien's passport expires, whichever comes first. While DHS recommends that travel authorization applications be submitted at least 72 hours prior to travel, it is advisable to submit such applications prior to purchasing a nonrefundable ticket for travel to the United States.

The ESTA application process is relatively simple and requires entering the applicant's biographical information, such as the family name, first name, birth date, country of citizenship, country of residence, gender, and passport information, including the passport number, issuing country, and passport issuance and expiration dates. The application also requires responses to inadmissibility-related questions.

Upon completion of the application and before its submission, DHS recommends printing the application for the applicant's records. However, the applicant will not be required to present a copy of the application while traveling to the United States. Upon submission of the application, ESTA will provide the applicant with the application number, which has to be recorded for future ESTA access and reference. If the applicant's passport

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lawsuits under the ADA, employee-rights organizations have long complained that the original intent of the ADA has been eviscerated by the judiciary's conservative interpretations.

Against this backdrop, and with election season fast approaching, 240 members of the House of Representatives co-sponsored the so-called "ADA Restoration Act" in 2007. The stated purpose of this bill was to abolish the Supreme Court's narrow interpretation of the ADA. In early 2008, the bill was modified and renamed the "ADA Amendments Act of 2008." After receiving overwhelming support in the legislature, President Bush signed the bill into law on September 25, 2008, and the new provisions go into effect on January 1, 2009.

The ADA Amendments Act of 2008

The ADA Amendments Act constitutes a sea change in disability discrimination law. It greatly expands the number of employees who will qualify as "disabled," thereby eliminating employers' main defense in ADA lawsuits. Key provisions of the ADA Amendments Act include the following:

- **Definition of Disability Expanded:** The Act greatly expands the definition of "disability." While a disability will still be defined as a condition which "substantially limits" an employee in some "major life activity," both of these terms will now be defined expansively.
 - First, "substantially limits" will now be defined as "significantly restricts." The new law directs the EEOC to issue regulations defining this term, but it is clear that Congress intends this new definition to be much more inclusive than the current legal definition of "substantially limits."
 - Second, "major life activity," will now encompass a much greater list of activities. After the ADA Amendments Act, if an employee has a medical condition which significantly restricts him or her in the major life activities of reading, concentrating, thinking, or communicating, that employee will be protected by the ADA. Frighteningly for employers, a poor-performing employee may now be able to request an accommodation to help improve his or her deficiencies in thinking, concentrating, or communicating, if the employee can find a doctor who will say that such deficiencies are caused by a medical condition.
- **Consideration of Mitigating Measures Excluded:** Prior to passage of the Act, an employee who might have otherwise been considered disabled would not qualify for the ADA's protections if certain mitigating measures allowed the individual to perform all major life activities. The ADA Amendments Act prohibits consideration of mitigating measures in determining whether an individual qualifies for the ADA's protections. The only exception to this new standard would be normal eyeglasses. Thus, an individual

with diabetes who controls this condition with insulin will likely now be considered disabled under the Act.

- **Definition of "Regarded As" Expanded:** The ADA has always prohibited employers from discriminating against individuals who the employer "regards as" or perceives as being disabled, even if the individual is not actually disabled under the meaning of the ADA. However, courts have construed the "regarded as" provision only to offer protection when an employer wrongly believes that an employee is *substantially limited in a major life activity* (thereby satisfying the full definition of disabled). Thus, prior to the ADA Amendments Act, if the employer wrongly perceived an employee to have some ailment which did not substantially limit a major life activity, the employee was not protected.
 - However, under the new standard set forth in the ADA Amendments Act, an employee will be protected under the ADA if the employer perceives or regards the employee as having any physical or mental impairment *regardless of whether or not the impairment limits or is perceived to limit a major life activity.*
 - The good news is that the ADA Amendments Act makes clear that the "regarded as" prong does not protect employees who have merely transitory or minor impairments where the impairment is expected to last less than six months. The bad news is that any employee with a health condition that lasts more than six months is now potentially a member of a protected class.

Impact on Employers and Practical Advice

First and most obviously, employers can expect a rise in the volume and complexity of litigation under the ADA. Prior to the Act, employers usually prevailed in ADA lawsuits by proving that the plaintiff was not "disabled." This defense will now be exponentially more difficult to establish. Beginning in January, ADA litigation will likely now focus on (1) the employer's reasons for the discharge or other adverse employment action, (2) whether the employer satisfied its obligations to "reasonably accommodate" a disabled employee, or (3) whether the employee could perform the essential functions of the job with or without such accommodation.

In addition, employers can expect an increase in employee requests for reasonable accommodations, and a corresponding increase in the percentage of these requests which employers will need to grant.

It is crucial that employers, along with their employment counsel, review their current ADA policies and procedures to ensure that they are compliant with the ADA Amendments Act. In addition, the new law makes it increasingly important for all supervisors and managers to understand the ADA's protections, and to be competent to recognize and respond to an employee's request for an accommodation. We suggest that all employers schedule ADA training between now and January 1, 2009, when the Act takes effect. ■

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The employer may also be privileged to require the employee to:

- go to the Employee Assistance Program (EAP);
- produce fitness for duty medical documentation;
- undergo an appropriate medical examination.

The EEOC also noted that the employer might be justified in placing the employee on leave while awaiting medical documentation relating to whether the employee is able to continue performing the job.

Practice Pointer – both of these areas are typically factually and legally complex, and such actions should be carefully weighed before undertaken, especially in light of the more expansive causes of action and remedies available with the passage of the ADA Amendments Act of 2008. ■

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information changes after the travel authorization is obtained, the applicant must apply for a new travel authorization.

While CBP expects that the majority of applicants will receive their travel authorization immediately, some applicants might receive responses: "Authorization Pending;" or "Travel Not Authorized." "Authorization Pending" means that the application is under review because an immediate determination could not be made for the application. CBP represents that a determination will be available within 72 hours and advises the applicants with pending authorizations to return to CBP's Web site after 72 hours and check the status of their application. "Travel Not Authorized" means that the applicant is not authorized to travel to the United States under the Visa Waiver Program. However, the applicant may be able to obtain a visa from the Department of State for travel to the United States.

Currently, there is no fee to apply for a travel authorization via ESTA. However, CBP advises that there might be an application fee in the future.

Also, it is important to remember that ESTA authorization only establishes that an alien is eligible to travel to the United States without a visa; however, the authorization does not guarantee admission into the United States. A CBP officer at the port of entry will determine whether the alien is admissible into the United States. ■

NO STATUTORY CAPS ON RACE-BASED RETALIATION CLAIMS UNDER § 1981

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Mr. Humphries claimed that he had been fired by CBOCS West because he is black and in retaliation because he complained to managers that a black co-employee was also dismissed for race-based reasons. The District Court dismissed the Title VII claims for failure to timely pay filing fees and granted CBOCS summary judgment on the § 1981 claims. The Seventh Circuit affirmed on the direct discrimination claim, but remanded for a trial on Humphries' § 1981 retaliation claim. CBOCS appealed to the Supreme Court which held that § 1981 does encompass retaliation claims.

The particular significance of this decision is that § 1981 does not have the statutory caps on damages which are found under Title VII for both discrimination and retaliation claims. As we have emphasized in past editions of this newsletter published in Summer 2006 and Spring 2007, the retaliation claim may well be regarded as the biggest threat for employers. The factors involved focus upon an employee asserting legally protected rights and being subjected to retaliation for doing so. It must be recognized that it is very easy for a jury to be incensed over such an action by an employer. Employers generally do not enjoy much favor in the eyes of a jury which rarely includes management employees. The cry of the plaintiff's lawyer in the courtroom to "do justice for the employee who exercised legal rights and send a message" rings strongly in that rather sanctimonious setting. And now there is in general no limit on the damages which can be awarded.

The lesson: Employers must be extremely cautious when there is a situation which may give rise to a claim of retaliation. While appropriate disciplinary action must be taken when warranted, it becomes all the more important to have legitimate nondiscriminatory reasons which are clearly distinguishable from acting because the employee has aligned him or herself with exercising a protected right. ■

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