



CLIENT MEMORANDUM

President Bush Signs Law Broadening the Americans with Disabilities Act

September 30, 2008

On September 25, President Bush signed into law the ADA Amendments Act of 2008 (the "Act"), which amends the Americans with Disabilities Act (the "ADA") in several significant ways. *See* ADA Amendments Act of 2008, S. 3406, 110th Cong. (2008). The Act, which takes effect on January 1, 2009, stems largely from congressional disapproval of judicial interpretations that narrowed the scope of the ADA and excluded individuals from its protections because they were unable to meet the "demanding judicially imposed standard for qualifying as disabled." *Id.* at § 2(a)(4); ADA Amendments Act of 2008, H.R. 3195, 110th Cong. (2008) (report of Rep. John Conyers, Chairman, Jud. Comm.). By rejecting the requirements created by these decisions, the Act broadens the definition of "disability," prohibits consideration of almost all "mitigating measures" (*e.g.*, hearing aids, prostheses and medications) in determining whether an individual has a disability, and clarifies the provisions applying to individuals who are "regarded as" having impairments.

"DISABILITIES" UNDER THE ADA

Under the ADA, covered entities are required to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* at § 12111(8). The ADA contains a three-pronged definition of "disability," which includes "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* at § 12102(2).

AN IMPAIRMENT THAT "SUBSTANTIALLY LIMITS" A "MAJOR LIFE ACTIVITY"

Although it retains the ADA's definition of "disability," the Act clarifies the phrases "substantially limits" and "major life activities" and expresses Congress's disapproval of courts' narrow interpretation of this language. Representative John Conyers explained that courts had improperly narrowed the ADA by determining "either that the person is not impaired enough to substantially limit a major life activity, or that the impairment substantially limits something . . . that they do not consider a major life activity." H.R. 3195 (Conyers Report).

Specifically, in *Williams*, the Supreme Court considered the critical "substantially limits" phrase and concluded that it "need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled." *Toyota Motor Mfg., Kentucky, Inc. v Williams*, 534 U.S. 184, 197 (2002) (emphasis added). The Court held that to be substantially limited, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" and that "[t]he impairment's impact must also be permanent or long term." *Id.* at 198.

Congress disagreed, explaining that the *Williams* decision "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." S. 3406 at § 2(b)(5); see also *id.* at § 2(a)(8) (finding Equal Employment Opportunity Commission regulations that defined "substantially limits" to mean "significantly restricted" to be inconsistent with congressional intent). The solution, therefore, was for Congress to "retain the words 'substantially limits,' but clarify that it is not meant to be a demanding standard." S. 3406 (Statement of the Managers). The Act puts this less demanding standard into practice by providing that an impairment that is episodic or in remission may still qualify as a disability if it would substantially limit a major life activity when active. *Id.*

The Act also provides guidance and clarification on the subject of "major life activities." In many cases, courts had required individuals to show that an impairment

substantially limited more than one life activity. See *id.* (citing *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762 (10th Cir. 2006), which held that an individual with cerebral palsy who could not independently perform certain manual tasks was not substantially limited because of her ability to perform other manual tasks). To correct this, Congress determined that "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." S. 3406 at § 3(4)(c).

Finally, the Act gives concrete examples of what may qualify as "major life activities." For purposes of clarity, Congress included a non-exhaustive, illustrative list of "major life activities," such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." *Id.* at § 3(2)(A). Congress also defined "major life activity" to include the operation of a "major bodily function" such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* at § 3(2)(B).

"MITIGATING MEASURES"

The Act explicitly disavows the Supreme Court's *Sutton* decision, which held that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." *Sutton v. United Air Lines, Inc.*, 27 U.S. 471, 482-83 (1999). The Sutton Court concluded that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity." *Id.* at 482. Congress flatly rejected this holding; the Act states that the determination of whether an impairment substantially limits a major life activity is to be made "without regard to the ameliorative effects of mitigating measures" such as medication, medical supplies, equipment, appliances, prosthetics, and mobility devices.

S. 3406 at § 3(4)(E)(i). It does, however, provide an exception for the mitigating measures of ordinary eyeglasses or contact lenses, which may be considered in determining whether an impairment substantially limits a major life activity. *See id.* at § 3(4)(E)(ii)

"REGARDED AS" HAVING AN IMPAIRMENT

Under the ADA, the definition of "disability" includes being "regarded as" having an impairment. This "regarded as" prong reflects Congress's understanding that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments." S. 3406 (Statement of the Managers). Finding that courts had construed and applied this disability prong in an overly restrictive manner, Congress sought to make clear that the requirement for proving substantial limitation of a major life activity would not apply to the "regarded as" prong. *See id.* The Act provides that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*" S. 3406 at § 3(3)(A) (emphasis added).

To address concerns that this new language would cover individuals who are regarded as having "common ailments like the cold or flu," Congress provided an exception for impairments that are "transitory" (actual or expected duration of six months or less) and "minor." H.R. 3195 (Conyers Report); S. 3406 at § 3(3)(B). Although it broadened coverage of the "regarded as" prong in this respect, the Act confirmed that entities covered under the ADA are not required to provide reasonable accommodations to those employees whose impairments satisfy the definition of "disability" only through the "regarded as" prong. *See* S. 3406 at § 6(h).

CONCLUDING THOUGHTS

The Act has broadened substantially the coverage of the ADA, from the narrowing constructions imposed by the courts since its enactment in 1990. Many of the defenses used by employers in obtaining the dismissal of ADA proceedings are no longer available, which will result in more trials of disability cases in the federal courts. Although the ADA as amended by the Act is still not as broad in its coverage as are statutes prohibiting disability-based discrimination in employment in many states (*e.g.*, New York and California), Congress has now gone on record to affirm that the ADA is to be construed as a broad, remedial statute, overturning much of the caselaw in the area over the last 18 years.

For more information, please feel free to contact any of the following lawyers from the Firm's Labor and Employment Group:

J. Scott Dyer

212-455-3845

jdyer@stblaw.com

Fagie Hartman

212-455-2841

fhartman@stblaw.com

Julie Levy

212-455-2569

jlevy@stblaw.com

UNITED STATES

New York

425 Lexington Avenue
New York, NY 10017
212-455-2000

Washington, D.C.

601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
202-220-7700

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
310-407-7500

Palo Alto

2550 Hanover Street
Palo Alto, CA 94304
650-251-5000

EUROPE

London

Citypoint
One Ropemaker St.
London EC2Y 9HU England
+44-20-7275-6500

ASIA

Beijing

3119 China World Tower One
1 Jianguomenwai Avenue
Beijing 100004, China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road
Hong Kong
+852-2514-7600

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037, Japan
+81-3-5562-6200