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EMPLOYMENT LAW

Employee Substance Abuse: A Disability Under New Version of the ADA?

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Special to the Legal

Equal Employment Opportunity Commission regulations, which took effect May 24, have been implemented at Congress' direction to make it easier for employees to prove they have a "disability" and are entitled to protection under the Americans with Disabilities Act (ADA), as amended, effective Jan. 1, 2009.

These EEOC regulations were published after careful consideration of more than 600 public comments and engaging in several town hall meetings in cities nationwide, including Philadelphia. The overall effect of these regulations and amendments is that more workers will be entitled to receive reasonable accommodations from their employers. In fact, the EEOC itself conservatively estimates that these amendments will result in an additional 2 million to 6.1 million people requesting workplace accommodations, costing the business community up to an additional \$183 million annually.

Congress took this decisive action after tragic cases like that of Mary Ann Pimental, a New Hampshire registered nurse diagnosed with stage III breast cancer, whose job was eliminated while she underwent a mastectomy, chemotherapy and radiation, but was held not to have a "disability" under the ADA. Ironically, Pimental died only four months after the court issued its decision in *Pimental v. Dartmouth-Hitchcock Clinic* deeming her to be insufficiently disabled. Decisions like this one spurred Republicans and Democrats alike into action to amend the ADA.

While the intent in widening the definition of "disability" was to broaden access to coverage for persons with health issues such as cancer, the ADA Amendments Act (ADAAA) may also have the unintended effect of making it easier for workers with a substance abuse problem to remain on the job. In fact, the question of whether an employee with a drug or alcohol addiction is considered "disabled" under the new version of the ADA remains an open matter for determination by our courts.

Under the present guidelines, this question will likely be determined on a case-by-case basis, with the law now favoring broad coverage. To date, there have been no reported cases involving substance abuse decided under the ADAAA in any jurisdiction. What is clear, however, is that the ADAAA specifically and intentionally upsets landmark Supreme Court decisions like *Sutton v. United Airlines Inc.*, *Toyota Motor Mfg. Kentucky Inc. v. Williams* and their progeny because Congress believed

that judges were interpreting the term "disability" far too narrowly.

Among the types of substance abuse cases that might be decided differently in the future is the recent Eastern District of Pennsylvania case of Deborah J. Larkin, decided on Feb. 23, 2011. In *Larkin v. Methacton School District*, the court dismissed the lawsuit brought by a high school teacher and recovering alcoholic, who sued for discrimination and retaliation in violation of the pre-amendment ADA.

After an incident in which Larkin — a physical education and health teacher — reported for work intoxicated and drank an entire bottle of cough syrup while on the job, she entered a treatment facility and was granted leave by her employer, under the Family and Medical Leave Act (FMLA), to seek treatment and attend AA meetings. Although temporarily suspended with pay, she was told that she would be allowed to return to work if she underwent counseling, scheduled an appointment with the school district to review a plan of action for the remainder of the school year, and agreed to submit the results of a blood-alcohol test.

Shortly after completing her stay at an inpatient treatment facility, Larkin, with the recommendation of her primary physician, requested and received an additional three months of leave time. She also sought a transfer to a new school — an elementary school — within the district as a "reasonable accommodation." According to Larkin, such a transfer was necessary to avoid the "people, places, and things" at her high school, which she deemed to be "triggers" to her drinking problem.

In response to this request for accommodation, Larkin was informed that she was entitled to apply for open teaching positions within the school district, but would not be permitted to bypass the normal application process. She was assured that her application would be given "all due consideration." Larkin then interviewed for two open teaching positions with elementary schools in the school district. Each time, she disclosed during her interview that she was a recovering alcoholic. Each time, she was passed over for the job, deemed not to be a good fit for the position. Larkin thereafter refused to return to her former job at the high school, despite the school district's offer to move her to a private office and work with her to find accommodations that would avoid the risk of relapse. Instead, Larkin filed suit.

Relying on the *Sutton* and *Toyota* decisions (which have now been superseded by the ADAAA), the court determined that Larkin's alcoholism did not constitute a "disability" within the meaning of the ADA. The court's ruling came only after it conducted

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an individualized analysis as to whether Larkin's alcoholism substantially limited any of her major life activities. Although some courts had found alcoholism to constitute a "disability" — without engaging in any such analysis — the 3rd U.S. Circuit Court of Appeals had not yet squarely addressed the issue of whether such a case-by-case analysis was required under the pre-Amendment ADA. The ADA amendments now clarify that an individualized analysis is generally

required (with the exception of a wide range of enumerated categories of impairments, such as deafness, blindness, cerebral palsy and cancer), but that a determination of whether coverage exists should not demand extensive individualized analysis.

The ADAAA and the EEOC's final regulations retain the same three-part definition of disability:

- A physical or mental impairment that substantially limits one or more major life activities;
- A record or past history of such an impairment; or
- Being regarded as having a disability.

However, there are major differences in how this definition should now be interpreted by our courts. The term "major life activities" now includes major bodily functions such as the operation of organs like the brain, liver, kidney and pancreas. No longer is the term "major" interpreted "strictly to create a demanding standard for disability." No longer does an employee need to prove that an impairment prevents, or severely or significantly restricts, performance of a major life activity in order to be considered disabled under the ADA. Whether something is a major life activity is not determined by whether it is of "central importance to daily life." An employee need only be substantially limited

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in one major life activity or one major bodily function in order to be considered disabled under the ADA. In addition, impairments — such as substance abuse — that are episodic or in remission can be considered disabilities if substantially limiting when active.

Moreover, although persons “regarded as” having a disability are not entitled to an accommodation, they cannot be demoted, terminated or disciplined because of an actual or perceived physical or mental impairment. A claim under the “regarded as” prong no longer requires that the employee prove that

an employer subjectively believed that the impairment substantially limited a major life activity. An employer can still challenge a “regarded as” claim by showing that there was no discrimination, that an adverse employment action was taken for lawful reasons, or by showing that the impairment at issue is, objectively speaking, both transitory and minor.

All of these changes beg the question of what an employer should do to assure compliance with these revised laws and defend against unwarranted claims of discrimination and retaliation — particularly when dealing with thorny issues such as employee substance abuse.

The following principles should remain applicable:

- An employee who is currently using illegal drugs or misusing prescription drugs is not covered by the ADA. However, a person with a past drug addiction is likely covered by the ADA.

- The standard is different when dealing with an employee with an alcohol problem. An employee with either a current or past alcohol addiction would now most likely be covered by the ADA.

- Types of accommodations that are generally considered appropriate are: granting leave to seek substance abuse treatment (also generally required under the FMLA); an altered work schedule to enable attendance at outpatient treatment or Narcotics Anonymous /Alcoholics Anonymous meetings; and a Return-to-Work Agreement, whereby an

employee would agree to successfully complete treatment, be subject to employer monitoring, and agree not to report to work under the influence in order to avoid termination. When in doubt as to whether an accommodation is appropriate, the Job Accommodation Network, a service of the U.S. Department of Labor, can be consulted.

- Types of accommodations that are generally considered inappropriate are: absences for incarceration, for alcohol or drug use, or as a result of a hangover; requests that would lower performance standards or remove an essential job function; and requests that would represent an undue hardship to the employer.

- When an accommodation is requested,

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an employer may still ask for documentation to substantiate a claim for a disability that is not obvious.

- Persons with disabling substance abuse problems remain subject to the same conduct rules as other employees. For instance, an employer is not required to excuse misconduct such as being under the influence on the job, unexcused absences, chronic tardiness or sleeping on the job.

If an employer has an established policy providing for discipline or termination for substance abuse, an employer can enforce it. Zero-tolerance rules are appropriate if uniformly enforced.

- If an accommodation is granted, the employee must still be able to perform the essential functions of the job and abide by the employer’s rules of conduct.

Until the smoke clears in the battles that are certain to arise over these new changes, it is recommended that employers institute and enforce uniform policies which prohibit the use of alcohol or illegal drugs at the workplace and require that employees

not be under the influence of alcohol or illegal drugs on the job.

According to the U.S. Department of Labor, a written drug-free workplace policy should include a statement as to the reason the employer is implementing a drug-free workplace policy (e.g., concern for the safety, health and well-being of its employees and patrons); a clear and concise description of prohibited behaviors (e.g., “the use, possession, transfer or sale of illegal drugs by employees is prohibited”); and the consequences for violating the policy (e.g. “discipline, up to and including termination”). •