



The Effect of the ADA Amendment on the "Regarded As" Analysis by Allison Serafin

I. The Effect of the ADA Amendment.

The ADA Amendment which took effect January 1, 2009 substantially broadened the scope of ADA claims. (The Amendment was approved by President Bush on September 25, 2008. (Pub.L. No. 110-325, 122 Stat. 3553 (2008) and is effective January 1, 2009). The Amendment is an explicit rejection of prior Supreme Court decisions which narrowed the scope of the ADA. (See, ADA Amendments Act of 2008, H.R. Rep. 110-730(I), 110th Cong., 2nd Sess. 2008, 2008 WL 2502300 (June 23, 2008)). (See e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 2149-50 (1999), overturned due to legislative action in Pub. L. 110-325 (Jan. 1, 2009); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), overturned due to legislative action in Pub. L. 110-325 (Jan. 1, 2009)).

The Amendment changes the standard for establishing that whether a Plaintiff is "disabled" within the meaning of the ADA. The Amendment retains the original three prong definition of disability: (1) a physical or mental impairment that substantially limits one or more life activities; (2) a record of such impairment; or (3) being regarded as having such impairment, but adds provisions to clarify several elements of the definition.

The as yet unanswered question which will be addressed in this article is whether and to what extent this change will be applied retroactively.

II. The Change to the "Regarded As" Prong of a Disability Claim.

Previously, in order to prevail on a "regarded as" disabled claim a Plaintiff must show that (1) her employer mistakenly believed that she has a physical impairment that substantially limited one or more major life activities, or (2) her employer mistakenly believed that an actual, nonlimiting impairment substantially limited one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 2149-50 (1999). In both scenarios, an essential component of the Plaintiff's claim was to show that the defendant misperceived her condition as substantially limiting one or more of her major life activities. (See *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 471 n.

The Amendment states that an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that the employer discriminated against him because of an actual or perceived impairment, "whether or not the impairment limits or is perceived to limit a major life activity." (42 U.S.C. §12102 (3)(A)). (*Schmitz v. Louisiana*, 2009 WL 210497, 2 (M.D.La., January 27, 2009) (slip copy) citing Pub.L. No. 110-325, 122 Stat. 3553, 2008). Thus, the Charging Party has a much lower burden of establishing a "regarded as" claim under the Amendment.

As such, the Amendment effectively eliminated the previous standard which required the Plaintiff show the employer misperceived that the impairment substantially limited one or more major life activities.

III. Is the ADA Amendment applied retroactively to the "Regarded as" Analysis?

Consider an EEOC Charge that was filed by an employee on January 2, 2009, alleging she suffered an adverse employment action when she was demoted (in position and pay) on December 23, 2008, because her employer regarded her as disabled in violation of the ADA. Under this scenario, while the employment action complained of occurred before the effective date of the Amendment, the actual Charge is filed one day after the effective date of the Amendment.

Which standard applies in such a situation? (1) Does the Charging Party rely upon the lower burden as established via the Amendment; or (2) Is the Charging Party held to the standard prior to the Amendment which set forth a substantially higher burden?

Savvy Plaintiffs' attorneys began making the arguments that the Act as Amended applied to claims beginning on or after September 25, 2008, when the Amendment was approved by President Bush. Such arguments referenced the "knowledge" employers had regarding the changes in the ADA as of September 25, 2008, and also argued this "knowledge" thereby made the Amendment retroactive to all employment actions taken on or after September 25, 2008. Additionally, Plaintiff's attorneys argued that the Amendment is "silent" as to retroactivity and although silence generally requires such statutes be applied prospectively, the curative nature of the Amendment justifies an exception to this general rule.

Several Courts have disagreed with this argument. (*Schmitz v. Louisiana*, 2009 WL 210497, *1, 3 (M.D.La., January 27, 2009) (slip copy)) (holding that the new ADAAA provisions related to the definition of disability create new legal consequences for events completed before its enactment, and broaden the scope of an employer's potential liability under the statute. With no clear evidence of retroactive intent, the fact that Congress passed the amendments to counteract Supreme Court decisions and restore the intended scope of the ADA is not sufficient to overcome the presumption against retroactive application). (See also *Rudolph v. U.S. Enrichment Corp., Inc.*, 2009 WL 111737 (W.D.Ky. Jan.15, 2009) (slip copy) (holding that the "regarded as" portion of the amendment could not be applied retroactively); *Neal v. Kraft Foods Global, Inc.* 2009 WL 799644, 10 (D.Or., March 23, 2009) (slip copy) (noting other courts have held that the ADA Amendments do not apply retroactively) (citing *Kiesewetter v. Caterpillar, Inc.*, 295 Fed. Appx. 850, 851 (7th Cir.2008); *Burkhart v. Intuit, Inc.*, 2009 WL 528603, at *11 n. 4 (D.Ariz. Mar. 2, 2009)(slip copy); *Moran v. Premier Educ. Group, LP*, 2009 WL 507505, at *7 (D.Conn. Feb. 13, 2009); *Rudolph v. U.S. Enrichment Corp., Inc.*, 2009 WL 111737, at *6 (W.D.Ky. Jan. 15, 2009); *Supinski v. United Parcel Serv., Inc.*, 2009 WL 113796, at *5 n. 6 (M.D.Pa. Jan. 16, 2009); *Walstrom v. City of Altoona*, 2008 WL 5411091, at *5 n. 3 (W.D.Pa. Dec. 29, 2008) (slip copy); *Hays v. Clark Products, Inc.*, 2008 WL 5384300, at *6 n. 3 (S.D.Ind. Dec. 18, 2008) (slip copy); *Levy ex rel. Levy v. Husted Chevrolet*, 2008 WL 5273927, at *3 n. 2 (E.D.N.Y. Dec. 17, 2008) (slip copy); *Knox v. City of Monroe*, 2008 WL 5157913, at *5 n. 10 (W.D.La. Dec. 9, 2008) (slip copy); *Gibbon v. City of New York*, at *5 n. 47 (S.D.N.Y. Nov. 25, 2008) (slip copy)).

The case law that addresses this issue to date focuses on the date of the alleged "adverse employment action" to determine the applicable standard. At this date, the EEOC has not issued guidelines addressing these specific issues. However, Sharon Rennert, senior attorney advisor with the Equal Employment Opportunity Commission, recently confirmed the position that the Amendments are not retroactive. (*Employees' Attorneys Argue ADA Amendments are Retroactive, but Courts are Ruling Differently*, 12, no. 3 *The Leave & Disability Coordination Handbook*, 7 (2009).)

In the above fact pattern, the adverse employment action occurred prior to the effective date of the Amendment. Therefore, the application of the "regarded as" analysis which was in place prior to the Amendment would appear to be most appropriate. Consider however a scenario where the same employee who alleged she was demoted on December 23, 2008, because her employer regarded her as disabled is later discharged by the same employer on January 15, 2009. Assume Charging Party immediately amends her Charge of Discrimination to include the January 15, 2009 adverse employment action. What effect does this have on the analysis of the Charging Party's claim?

It appears based on the case law to date, that the Courts will likely apply two separate standards to the analysis of the claims. The first adverse employment action (which occurred prior to the Amendment) follows the pre-Amendment analysis, while the second adverse employment action follows the post-Amendment analysis.

Thus, with respect to the demotion, the employee would be required to show that the employer "mistakenly believe[d] that an actual, nonlimiting impairment substantially limits one of more major life activities." (*Rhoads v. F.D.I.C.*, 257 F.3d 373, 390 (4th Cir. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1309 (2002) (quoting *Haulbrook v. Michelin North Am.*, 252 F.3d 696, 704 (4th Cir. 2001)); *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 471 n. 5 (4th Cir.2002), cert. denied, 123 S.Ct. 122 (Oct. 7, 2002) (an essential component of the Plaintiff's claim is to show that the Defendant misperceived her condition as substantially limiting one or more of her major life activities.) With respect to the termination however, the employee is entitled to the presumption that she meets the requirement of "being regarded as having such an impairment" if the individual establishes that the employer discriminated against her because of an actual or perceived impairment, "whether or not the impairment limits or is perceived to limit a major life activity." (*Schmitz v. Louisiana*, * 2 citing Pub.L. No. 110-325, 122 Stat. 3553, 2008).

IV. Conclusion

Until case law is firmly established at the Appellate Court level and/or EEOC guidelines are formally published, it would be prudent for employers to assess recent disability claims under both analyses – the analysis applied prior to the enactment of the Amendment as well as the analysis to be applied as of January 1, 2009.

Furthermore, if an employer has recently made decisions based on whether an employee meets the definition of "disabled," (such as in a case where there was a denial of a reasonable accommodation), these decisions should be revisited, particularly where the decisions turned on whether the employee was a qualified individual under the Act. Under the ADA Amendment, those individuals who previously did not meet the definition of disabled may now qualify – and may now be entitled to a reasonable accommodation where they previously were not.



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