



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

THE EEO Advocate

A Newsletter for Litigators

WINTER 2008

CONGRATULATIONS AFGE ON OUR OBAMA-BIDEN VICTORY!

ADA Amendments Act Takes Effect in New Year!

A more employee-friendly set of disabilities rights takes effect January 1, 2009.¹

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 ("Amendments"), revamping the Americans With Disabilities Act of 1990.

The ADA's definition for "disability" has remained unchanged since 1990, and the amendments do not change it: "a disabled person has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment." 42 U.S.C. § 12102.

What has changed over the past 18 years is not the actual ADA, but rather how judges interpret and apply that definition in specific cases. In the Amendments, Congress finds that judges have misinterpreted the law, "narrowed the broad scope of protection intended to be afforded by ADA, thus eliminating protection for many individuals whom Congress intended to protect."

This article identifies the key concerns behind the Amendments and how Congress addressed these concerns with the Amendments.

Concern 1: Definition of "Substantially Limits"

In response to the ADA of 1990, the Equal Employment Opportunity Commission ("EEOC") enacted regulations that defined "substantially limits" as "significantly restricts." 29 C.F.R. § 1630.2(j). The Supreme Court tolerated this definition in *Toyota Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

Reacting to EEOC and the Supreme Court, the Amendments find that the "significantly restricts" standard requires a greater degree of limitation than

Congress had intended. Thus, the Amendments direct EEOC to revise its definition "to be consistent with this Act, including the amendments made by the Act."

As the above language shows, Congress has not given EEOC a precise definition to put in-place of "significantly restricts" in its regulations. EEOC has yet to announce what revision it will make. However, the Amendments provide some guidance where they find that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and...the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

Some commentators predict that "substantially limits" will be replaced by "materially restricts," which would mean more than a nominal restriction, but less than a severe restriction of a major life activity. But it remains to be seen what new definition EEOC will supply in its regulations.

Concern 2: Relevance of Mitigating Measures

EEOC originally rejected employers' arguments that an employee with a disability who could self-mitigate his problem was not legally disabled. EEOC's position on this issue protected these employees from discrimination.

But that all changed in 1999 when the Supreme Court decided *Sutton v. United Airlines, Inc.* (1999). The airline rejected two sisters for pilots' positions because their uncorrected eyesight was 20/200, even though with corrective lenses their eyesight was normal. The Supreme Court held in favor of the airline, finding that the sisters were only "potentially" disabled and were not "regarded" as disabled. The effect of this

¹ Please take note: By becoming effective in the New Year, the Amendments do not apply retroactively; any action the agency took prior to the New Year will be analyzed without the benefit of the Amendments. Additionally, EEOC has not yet issued new regulations in response to the Amendments, as it will.

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ADA Amendments Act Takes Effect in New Year! *cont.*)

holding was that employers could have it both ways: (i) they were free to take action against an employee or applicant because of their supposed concerns about a mere potential disability, while at the same time (ii) they could claim that the employee or applicant was not disabled and thus could not be discriminated against. This put employees in a Catch-22 of being too disabled to perform the job, but not disabled enough to be protected under the ADA.

The Amendments largely fix this problem by stating that most ameliorative effects of mitigating measures “shall” not be considered. The Amendments provide a non-exhaustive list of measures that shall not be considered in evaluating the underlying disabilities:

- medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxiliary aids or services; or
- learned behavioral or adaptive neurological modifications.

The Amendments provide only one exception here: individuals who require “ordinary eyeglasses or contact lenses” cannot claim disability protection for their underlying ordinary vision problems.

Lastly, the Amendments still allow an employer to use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision, but the Amendments provide that an employer “shall” not do so unless it can satisfy the burden of proving the standard is job-related and consistent with business necessity. Had the ADA contained this requirement for employers when Sutton was decided, the courts might have found that the airline’s standards were not a true business necessity.

Concern 3: Definition of Major Life Activities

The ADA has always required the impairment must substantially limit one or more major life activities to rise to the level of disability. In *Toyota*, the Supreme Court interpreted this to mean that “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.”

The Amendments reject those standards and, in an effort to broaden the scope of what major life activities are covered, the Amendments provide a non-exhaustive list of major life activities:

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

As EEOC points out on its web page, it already recognized many of these as major life activities in guidance it has issued. However, the federal court system has been less predictable, and the codification of these items helps to solidify what is meant by a major life activity.

See also EEOC’s notice concerning the Amendments at: http://www.eeoc.gov/ada/amendments_notice.html

WHAT THIS MEANS?

AFGE supported enactment of the Amendments. Congress rejected the Court’s past narrow interpretation of ADA and enacted a broader-reaching version of the law by passing the Amendments. The Amendments change the focus of the analysis to whether discrimination occurred, rather than whether an individual has a qualified disability. People with diabetes, cancer and bi-polar disorder will be protected even when they are able to manage their chronic health conditions. However, the Amendment specifies that agencies are not required to actually accommodate employees who are only “regarded as” individuals with disabilities.

The bill amends Section 705 of the Rehabilitation Act to conform to its provisions.

WHAT YOU SHOULD DO?

The Amendments require EEOC to revise its regulations on the ADA. Since the Amendments do not specify what level of limitation is necessary, courts may have substantial discretion to determine exactly what level of limitation short of “severe” is required.

AFGE advocates should aggressively work to

ensure the law is enforced so courts do not once again water-down the protections Congress has provided for disabled workers.

Gomez-Perez v. Potter: The Supreme Court Upholds Federal Worker's Right to a Reprisal Remedy Under The ADEA

In an important decision issued on May 27, 2008, the Supreme Court finally recognized the right of federal workers to sue when they suffer reprisal for pursuing an Age Discrimination in Employment Act claim. This decision gives federal ADEA plaintiffs the same rights that have been long-recognized in private sector ADEA and Title VII claims. *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (May 27, 2008)

EEOC has long recognized a cause of action for reprisal for filing age discrimination claims, but until the Supreme Court's May 27 decision, the Supreme Court was undecided on the issue. Prior to May 27, federal employees were able to successfully pursue such reprisal claims through the entire administrative process, but their claims faced an uncertain reception if they took them into the federal court process.

The background for the case is that in October 2002, Gomez-Perez worked for the USPS as a full-time distribution clerk in Dorado, Puerto Rico. She was 45 years old at the time. At her request, Gomez-Perez was transferred to a position in Moca, Puerto Rico so that she could be near her sick mother. The position was only part-time. The next month, November 2002, Gomez-Perez requested that she be transferred back to her previous position. The request was denied and Gomez-Perez was stuck in a part-time position. She filed a claim alleging Age Discrimination under the ADEA. Thereafter, Gomez-Perez was allegedly subjected to retaliation for her ADEA claim when she had her hours reduced, was baselessly accused of sexual harassment, and had her name written on anti-sexual discrimination posters. Gomez-Perez then filed another ADEA claim – for reprisal.

Upon its passage in 1967, the ADEA applied only to the states and the private sector. Seven years later, in 1974, Congress amended the law by adding provisions pertaining to federal employees. The original, private sector, provisions of the ADEA expressly provide workers with a cause of action for reprisal if an employer takes an adverse action against them because of the worker's ADEA claim. However, the 1974 amendment that

applies to federal workers did not expressly convey such a right. The question presented in *Gomez-Perez* was whether such a right could be implied in the 1974 amendment.

Justice Alito, writing for the majority, rejected the government's argument that Congress' omission in the 1974 amendment was deliberate.

The Court also noted that analogous provisions of federal anti-discrimination law, such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, have been expansively interpreted to provide a cause of action for reprisal.² They are remedial provisions that are aimed at prohibiting discrimination.

WHAT THIS MEANS?

The Court's decision in *Gomez-Perez* finally brings the federal sector portion of the ADEA into line with the general prohibition against reprisal in civil rights law. EEOC had continued to support the right of Federal workers to allege reprisal based on retaliation under its administrative process. Now, Federal workers are no longer limited to the administrative procedures; they can challenge such actions in court when seeking a remedy for retaliation.

WHAT YOU SHOULD DO?

AFGE advocates specializing in federal employment law have a new weapon against employment discrimination. An ADEA action may be a better choice for Federal workers after exhausting their administrative remedies or after the expiration of the allotted time to make their case more directly in court.

Discrimination Found – Double Trouble - Another Victory for AFGE !

Complainant, an Immigration Enforcement Agent with Department of Homeland Security Immigration and Customs Enforcement filed a discrimination complaint alleging gender discrimination when she was not selected for the positions of (1) Deportation Officer, GS-1801-9/12 and (2) Supervisory Immigration Enforcement Agent, GS-1801-11. Complainant alleged that her initial interview scores were higher than the males selected

² See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (holding that 42 U.S.C. § 1982 provides a cause of action for reprisal); see also *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005) (holding that Title IX of the Education Amendments of 1972 provides a cause of action for reprisal).

for the positions at issue and that her scores were later lowered to mask the discrimination that occurred.

After a hearing was held, the Administrative Judge concluded that the interview panel and rating process was a sham. She further concluded that the Agency's explanation as to why Complainant's scores were changed was not credible and that there were conflicting statements given as to when the scores were changed. The AJ awarded Complainant placement in either position retroactive to the date of selection. Complainant can choose in which position to be placed.

Complainant was also awarded back pay with interest, including increases in pay and any other employment benefits she would have received, \$15,000 in compensatory damages, and attorney fees and costs.

RELIGIOUS DISCRIMINATION GUIDANCE

On July 22, 2008, EEOC issued a new Compliance Manual on "Religious Discrimination." The manual provides guidance and instructions for investigating and analyzing charges alleging discrimination based on religion. – See <http://www.eeoc.gov/policy/docs/religion.html>

WHAT HAPPENS WHEN THE ADMINISTRATIVE JUDGE ORDERS A SETTLEMENT CONFERENCE?

Q: Do I have to participate in the settlement conference the Judge ordered when I know for a fact the Agency will not settle?

A: Yes, failure to adhere to a direct order from the Administrative Judge (AJ) may result in the dismissal of your case.

Q: Who will be at the settlement conference?

A: Usually a Settlement Judge (different from the AJ assigned to the case), Agency Attorney, Complainant, and Complainant's Representative are present.

Q: What will happen once I get there?

A: The procedures for settlement conference vary, but

usually they are conducted by another AJ from the Equal Employment Opportunity Commission. The AJ may separate you from the agency and listen individually to both parties' perception of what are the strengths and weaknesses of the case. The AJ will then give each party an idea of what he/she perceives to be the strengths and weaknesses of each side, and will inquire into what each party considers a reasonable settlement.

Q: How long will it take?

A: Be prepared to be there for a while. It is not uncommon for the Agency representative to lack sufficient settlement authority. In these situations, the settlement process may drag out by long periods of waiting for the person with the settlement authority to be contacted and to agree to the offers on the table.

Q: What happens if we do not settle?

A: If no settlement agreement is reached, the case continues where it left off prior to the settlement conference.

HUMAN RIGHTS TRAINING CONFERENCE -

Wisdom + Innovation = The Future of Labor

Mark your calendar for the AFGE's 2009 Human Right Training Conference on March 23 - 26, 2009, in Las Vegas, Nevada.

Registration ends February 2, 2009. You have two options to register for this remarkable conference; (1) fill out a registration online at <http://wfp.afge.org> or (2) mail in a paper registration. The preferred method of registration is online.

The tracks being offered are all designed to help our new and old activists be successful in the future of labor: EEO training; Stewards training; WFP Coordinator training; Financial Officers training; New Leaders training, Collective Bargaining, Conflict Resolution; Tackling Diversity; Recruit, Organize and Retain Volunteers; and Dealing with the Adult Learner.

The deadline for hotel reservations is Feb. 16, 2009. You can secure your reservation by calling the hotel at 1-866-227-5944. For other questions, call WFP at 202-639-6418.

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The Future of Labor

AFGE's 2009 Human Rights Training Conference

MARCH 23-26, 2009

**DON'T MISS OUT ON AFGE'S PREMIER TRAINING!!
REGISTER TODAY!!**



Wisdom + Innovation = The Future of Labor

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3570 Las Vegas Blvd South, Las Vegas, NV 89109
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This year's Human Rights Training Conference offers nine of our most popular tracks with three brand new tracks for the activists needing the tools to build a successful Local. Don't miss out on this opportunity to combine wisdom and innovation to strengthen the future of labor and AFGE!!

Registration ends February 2, 2009. Hotel reservations may be made directly with the hotel. You can register for the conference online at <http://wfp.afge.org>.



For questions regarding the HRT, please contact the Women's and Fair Practices Departments at 202-639-6418.



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New Family and Medical Leave Act (FMLA) Regulations: Overview

FMLA leave has become even harder to get, thanks to recent revisions to the Department of Labor (DOL)'s regulations. On November 17, 2008, DOL released the first revisions to its FMLA regulations since the FMLA took effect in 1993. The regulations affect Title I of the FLMA, which covers Postal Service employees, some civil employees of the Department of Defense and individuals employed on a temporary (one year or less) or intermittent appointment. The revisions take effect on January 16, 2009. Many of the revisions were strongly opposed by workers, advocates for women and families, and members of Congress.

At this time, the rule does not apply to Title II federal government workers because Office of Personnel Management (OPM) has not issued new regulations.

Below are some of the highlights of the new regulations:

- Employers will have more direct access to the health care providers and health information of workers and their family members – jeopardizing workers' medical privacy.
- Workers will have less time to give notice of their need for leave while employers get more time to let them know whether the request for leave has been approved – making it harder for workers to get FMLA leave.
- Workers will have more procedures for requesting FMLA leave – which again will make it easier for employers to delay or deny FMLA leave.
- It will be more difficult for workers to use their paid

leave (such as paid vacation) while on FMLA leave, making it impossible for some workers who have exhausted other forms of leave to take FMLA leave at all.

- A “serious health condition” is clarified to include an employee who takes leave involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, provided that the two visits occur within 30 days of the period of incapacity. Second, “periodic visits to a health care provider” for chronic serious health conditions is defined as at least two visits to a health care provider per year.
- Workers will have more fitness-for-duty requirements and more procedures for requesting FMLA leave – which again will make it easier for employers to delay or deny FMLA leave.
- The new rule consolidates notice requirements into one comprehensive section. Employers are required to provide employees with four different types of notices: general, eligibility, rights and responsibilities, and designation.
- The rule implements the statutory expansion of FMLA for military families, including family members caring for service members with a serious injury or illness incurred in the line of duty on active duty and for qualifying exigencies for families of National Guard and Reserve personnel on active duty (requirements of the 2008 National Defense Authorization Act).

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