

By Mark Noonan

The amended Americans with Disabilities Act, called the ADA Amendments Act of 2008 (ADAAA), took effect January 1, 2009, and overturned several landmark Supreme Court decisions that narrowly interpreted the definition of disability. The ADAAA expands the number of people who are covered under the definition of disability, and impacts employees and employers in every state except California, which follows a state law that has a broader definition of disability.

Individuals were usually covered under the Americans with Disabilities Act (ADA) only if their medical condition is visually apparent or if it is debilitating and not controllable with medication. Under ADAAA, in most cases, individuals who have any type of physical or mental health condition controllable with medication will now be covered and qualify for workplace accommodations. As a result, employers will experience a drastic change in the way they can defend ADA lawsuits. Under the ADA, it was up to the employee to prove a disability; more than 90 percent of employers prevailed in all ADA lawsuits. With the amendments, the employer will now have to prove that they did not discriminate against the employee because of a disability and that a reasonable accommodation was offered.

The following recent rulings are significant because they establish that last year's expansion of the ADA and the recently released U.S. Equal Employment Opportunity Commission (EEOC) guidelines are not to be taken lightly by an employer. So far, court reactions have been firmly against employers who prohibit employees with disabilities from being employed and, as such, more employees will benefit from the additional ADA protection. ADA cases will be more similar to other discrimination cases (age, race, and gender) and employers will be less likely to prevail.

## **Physical Capacity Test**

This fall a decision was rendered in the U.S. Court of Appeals 9th Circuit regarding an employee who sued her employer over being required to submit a physical capacity evaluation (PCE) before returning to work. (After the PCE, which disqualified her from returning to the job, the employee, Kris Indergard, was terminated due to a collective bargaining agreement that allowed the employer to terminate employees on medical leave for more than two years). The trial court ruled in favor of the employer, Georgia-Pacific Corp. The employee argued that the PCE was a medical examination and termination from her employment as a result of the exam was discriminatory. Georgia-Pacific argued that the PCE should be exempt from ADA rules since it was "job-related and consistent with business necessity." The appeals court stated that the PCE was far more than a return to work exam, more a disability-determination exam (not acceptable under ADA), and sent the ADA lawsuit back to the lower court for reconsideration.

Kris Indergard vs. Georgia-Pacific Corp. represents the first time a federal appeals court has used guidelines from the EEOC to determine when a physical capacity evaluation or functional capacity evaluation becomes a medical exam. Under the ADA, employers may not require employees to take medical exams unless they can prove the exam is job-related and consistent with business necessity. The lower court must now make the determination as to whether the test was specific to the job and acceptable under the ADA.

## **EEOC Reaches \$6.2 Million Disability Settlement with Sears**

On September 29, 2009, the EEOC reached a \$6.2 million disability settlement with Sears, Roebuck, & Co. The class action lawsuit, filed in November 2004, is the largest ADA settlement in a single lawsuit in the history of the EEOC. The suit alleged that Sears had an inflexible workers' compensation leave exhaustion policy, and terminated employees instead of providing reasonable return to work accommodations for their disabilities.

The case, EEOC v. Sears Roebuck & Co., came from a discrimination complaint filed with the EEOC by a Sears technician, John Bava, who was injured on the job, received workers' compensation benefits, and repeatedly attempted to return to work, but was then fired by Sears when his leave expired. During the pre-trial, according to the EEOC supervisory trial attorney, it was discovered that hundreds of other Sears employees who had taken workers' compensation leave were also terminated without reasonable return to work accommodations, and without consideration of whether a brief extension of their leave would make a return to work possible.

The suit was settled by a three-year consent decree and, besides providing monetary relief, it also includes that Sears complete the following: amend its workers' compensation leave policy, provide written reports to the EEOC detailing its workers' compensation practices and compliance with the ADA, train its employees regarding the ADA, and post a notice of the decree at all Sears locations. Final determination of the individual distribution of the \$6.2 million will be decided in February 2010.

## **Seasonal Affective Disorder**

On October 6, 2009, the U.S. Court of Appeals 7th Circuit ruled that a teacher may sue her employer for not accommodating her disability – seasonal affective disorder. In Renae Ekstrand vs. School District of Somerset, Ekstrand stated that the school did not accommodate her disability and wrongly discharged her under the ADA.

During the 2005 – 2006 school year, Ekstrand requested to teach a different grade but her new classroom had no exterior windows. She told the school district about her disorder, and the school made some improvements to the classroom but did not move her to another classroom although others were available. Due to her seasonal affective disorder, she experienced anxiety, fatigue, tearfulness, and other symptoms, and as it worsened, she was placed on medication and doctors advised her to take a leave of absence.

A federal judge in Madison, Wisconsin, ruled in favor of the school district stating that it "engaged in an interactive process" with Ekstrand and attempted to reduce her stress. An appeals court in Chicago, however, cited evidence from Ekstrand's doctors that stated she was disabled from seasonal affective disorder. Her psychologist also advised that her return to work depended on Ekstrand being provided natural light. The appeals court ruled that the school district was "obligated to provide Ekstrand's specifically requested, medically necessary accommodation unless it 'would impose an undue hardship' on the school district" and found that her employer failed to accommodate her under the ADA. The appeals court also noted that natural light is not widely known as therapy for seasonal affective disorder but, since this may be the first time an appeals court has ruled on natural light as an accommodation, employers should now be aware of light therapy as one of the many changing aspects of ADA and return to work accommodations.

## **ADAAA Guidelines Released**

The ADA Amendments Act (ADAAA) invalidated certain EEOC regulations and several Supreme Court decisions interpreting the ADA. In response, on September 22, 2009, the EEOC released an advanced copy of the proposed regulations and interpretive guidance. There is a 60-day period where the EEOC will accept comments from the public concerning the proposed changes to the ADA regulations and the EEOC's interpretative guidance. After that time period, the EEOC will issue final regulations along with an effective date on when they will be implemented.

The EEOC enforces federal laws prohibiting discrimination in employment. In 2008, the EEOC received 19,453 charges of disability discrimination and resolved 15,708 of the cases, resulting in the recovery of \$57.2 million in monetary benefits for parties involved. For more information on the EEOC guidelines released, visit [www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html).

## **The Recession and Claim Severity**

With the increase in job losses rising to 10.0 percent in November, 2009, as noted by the Department of Labor, concerns about the recession and its affect on workers' compensation claims continues to rise as well. Although the National Council on Compensation Insurance (NCCI) reported that the rate of workplace injuries and illnesses declines during recessions, a study conducted in 1992 by the Workers Compensation Research Institute (WCRI) discovered that recessions do impact workers' compensation claims severity. WCRI found that the longer the duration of the claim, the larger and more frequent the lump sum settlements.

As the recession continues, and workers continue to fear losing their jobs, many workers may be compelled to continue working and not report an illness or injury. As a result, they may begin to wear down, creating a greater likelihood for a claim in the process. In addition, individual retirement portfolio losses throughout the recession may delay retirement for older employees. This, too, could increase claim severity and frequency.

## **Presenteeism Vs. Absenteeism**

Employees who work when they are not healthy, frequently termed "presenteeism," have been found to be worse for employers than if they experienced a high rate of absenteeism. A medical market research company, Kalorama Information, recently reported that it costs employers \$160 billion annually when their employees work while being sick – double the cost of the 425 million sick days taken in 2008. The high cost of presenteeism stems from the negative downward spiral sick employees can have on the workplace. Sick employees can spread illnesses to other employees, multiplying the loss of productivity, and workplace injuries can also increase due to sick employees not being able to mentally and physically work at their best and safest performance levels.

Employers should take caution to replacing sick days with such incentives as paid time off (PTO) days. Due to PTO, sick employees may be tempted to work through illnesses and save the days for vacations or personal time off. Companies who are going through mass layoffs should also be aware of the affects of presenteeism; employees afraid of being losing their job may feel it necessary to work while being ill instead of taking a sick day.

## For More Information

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