Phillips Lytle LLP

The Working Paper

SEPTEMBER 2011

A LABOR & EMPLOYMENT REPORT FROM PHILLIPS LYTLE

EEOC Issues Final ADA Regulations

The Equal Employment Opportunity Commission (EEOC) recently issued final regulations implementing the ADA Amendments Act of 2008 (ADAAA). The regulations highlight the intent of the ADAAA to expand the Americans with Disabilities Act's (ADA) coverage by broadly interpreting what qualifies as a disability and limiting the defenses available to contest an ADA claim. The regulations explain that "[t]he primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA." As a result of these changes, it will be more difficult for employers to have ADA claims dismissed before trial. This article highlights the major changes of the ADAAA and the final regulations.

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MAJOR LIFE ACTIVITY DEFINITION EXPANDS

The ADAAA and regulations expand the definition of "major life activity" to include not only things such as seeing, hearing, talking, standing, eating, walking and breathing, but also concentrating, thinking, communicating and interacting with others. Also included are major bodily functions, such as functioning of the immune system and other bodily systems, normal cell growth, reproduction and the operation of a single organ. For example, an employee with diabetes will now be disabled if the disease substantially impairs his or her endocrine system, even if he or she is not substantially limited in any physical activity.

SUBSTANTIALLY LIMITED— WHAT IT NOW MEANS

The definition of what it means to be "substantially limited" in a major life activity also has been expanded. In determining whether an individual is "substantially limited," the individual is now to be compared against "most people in the general population" considering such things as: (1) the condition under which the person performs the major life activity; (2) the manner in which it is performed; (3) how long it takes to perform it; (4) the difficulty, effort or time required to perform it; (5) any pain experienced when performing it; and (6) any adverse effects of mitigating measures. The focus is now on whether a person is impaired in per-

forming a major life activity, not the result achieved. Thus, a person who is able to perform a function or task may still be disabled if he or she is nonetheless still impaired in being able to do so compared to most people in the general population.

MITIGATING MEASURES

Mitigating measures can no longer be considered when deciding if someone is disabled. Thus, an employee who is considered disabled without the use of mitigating measures remains disabled under the ADA even when using mitigating measures that ameliorate the effects of an impairment. For example, an employee whose ability to concentrate is impaired by ADHD but who can function normally when taking medication will still be considered disabled. In fact, the negative effects of mitigating measures may themselves cause an employee to be disabled. For example, if the employee's ADHD does not substantially limit a major life activity, but the medication causes him or her to be unable to communicate effectively, that side effect could substantially limit the employee in the major life activity of interacting with others. In that situation, the employee would be considered disabled under the ADA.

"PER SE" DISABILITIES

Perhaps the biggest difference between the proposed regulations and the final regulations is the absence of a list of certain impairments that would consistently qualify as disabilities under the ADA. Although not containing a list of "per se" disabilities, the final regulations do include a list of impairments which will usually be considered disabilities under the ADA when assessed on an individual basis, including deafness, blindness, intellectual disabilities and autism, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cancer, diabetes, HIV, multiple sclerosis, muscular dystrophy, cerebral palsy and epilepsy.

REGARDED-AS-DISABLED

Before the ADAAA, an employee had to prove that he or she was perceived as being substantially limited in a major life activity to make a regarded-as-disabled claim. Under the ADAAA and the final regulations, that requirement is removed and an employee now needs only to show that he or she was perceived as having an impairment and that the employer discriminated against the employee based on that perception.

DURATION OF ACTUAL DISABILITIES

The length of time an employee suffers an impairment is no longer relevant in determining whether the employee suffers from an actual disability. An employee may be considered disabled regardless of how long an impairment lasts as long as it substantially limits a major life activity. However, the duration of the impairment can be considered in determining if it substantially limits a major life activity.

These are just some of the many changes made by the ADAAA and the final regulations. When determining whether an employee is disabled under the ADA, employers will still have to conduct an individualized assessment, but the ADAAA and final regulations make it clear that the focus of the ADA is now on accommodating those with disabilities and not on determining whether a person is disabled. Employers should keep this new focus in mind when handling employee disability cases.

Employers with questions about these final ADAAA regulations may contact any Phillips Lytle labor and employment attorney. ■

E-Newsletter Sign-up

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DOL Publishes Smartphone Timekeeping Application

The U.S. Department of Labor (DOL) recently launched its first application for smartphones, a timesheet to help employees independently track the hours they work and determine the wages they are owed. Available in English and Spanish, the application can track regular work hours, break time and any overtime hours for one or more employees. The DOL statement accompanying publication of the application states that the application is "significant because, instead of relying on their employers' records, workers can now keep their own records." The DOL expects that such information recorded by employees will prove "invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." The DOL's launch of the application highlights its new emphasis on encouraging employees to file wage and hour complaints. Under the Fair Labor Standards Act (FLSA), it is the employer's obligation to maintain accurate time records. Where the employer fails to do so, the DOL and the courts will rely on a reasonable estimate of hours worked provided by the complaining employee. The DOL application will make it considerably easier for employees to substantiate claims of underpayment of wages. It is also a reminder to employers to maintain accurate time records because of the increased likelihood of employees complaining about underpayment of wages and recovering back wages, interest and penalties.

Employers with questions or concerns about any wage and hour issue can contact any Phillips Lytle labor and employment attorney. ■

Supreme Court Allows Third-Party Retaliation Claims

In *Thompson v. N. Am. Stainless, LP,* 562 U.S. ____, 131 S. Ct. 863 (2011), the Supreme Court extended the reach of the retaliation protections of Title VII of the Civil Rights Act of 1964 to third parties. The Court held that Title VII not only prohibits retaliation against an employee who makes a complaint of discrimination, but also third-party employees who have a close relationship to the employee making the complaint, such as relatives and fiancés. In *Thompson*, Eric L. Thompson was the fiancé of another employee, Miriam Regalado, who filed a charge of discrimination against the employer with the Equal Employment Opportunity Commission (EEOC). Three weeks after Regalado filed her complaint, the company fired Thompson. He alleged that his firing was in retaliation to Regalado's complaint.

The Supreme Court found that Thompson fell within the "zone of interests" that the retaliation provision of Title VII seeks to protect because the purpose of Title VII is to protect employees from their employers' unlawful actions, and Title VII makes it unlawful for an employer to take any action that might dissuade "a reasonable worker from making or supporting a charge of discrimination." The Court found that firing a person who has a close personal relationship with an employee who has filed a complaint of discrimination, such as Thompson, would deter a reasonable employee from pursuing his/her rights.

As a result of this decision, employers will have to exercise caution when disciplining or terminating an employee who has a close personal relationship with an employee who has made a discrimination complaint. How distant a relationship will qualify as being within the "zone of interests" protected by the retaliation provisions is unclear, but it is safe to assume that it will likely cover immediate family members and other close relatives and persons with whom the employee has a close personal relationship.

Those seeking further information about Title VII retaliation claims should contact their labor and employment attorney. ■

Supreme Court Upholds "Cat's Paw" Theory of Liability

On March 1, 2011, the Supreme Court held in *Staub v. Proctor Hosp.,* 562 U.S. ____, 131 S. Ct. 1186 (2011), a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), that employers can be held liable for discrimination by an employee who influenced, but did not make, an ultimate employment decision. The Court refused to adopt a rule that a decisionmaker's independent and unbiased investigation insulates the employer from liability for any discriminatory animus that may have motivated a lower level employee who influenced the ultimate adverse employment action.

In *Staub*, the employee, an Army reservist, alleged his supervisors were hostile to his military leave obligations and that the employer's decision to fire him was based on his supervisors' reports about his conduct. Staub conceded that the person who made the ultimate decision to fire him was not hostile to his military obligations, but that her decision was influenced by his supervisors who were hostile to them. In ruling in favor of *Staub,* the Court adopted a proximate cause standard and stated that "if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." Although the case was decided under USERRA, its holding has application to all federal and state anti-discrimination laws. As a result, employers will not be able to defend discrimination cases on the ground that the ultimate decisionmaker was not motivated by bias, if there is evidence that a biased supervisor somehow influenced the decision. ■

* "Cat's paw" is a figure of speech used to describe a person who is used by another to accomplish something.

Supreme Court Limits Class Actions

States May Not Prohibit Class Action Waivers in Arbitration Agreements

In *AT&T Mobility LLC v. Concepcion,* 563 U.S.____, 131 S. Ct. 1740 (2011), the Supreme Court held that the Federal Arbitration Act prohibits states from invalidating class action waivers in arbitration agreements based on unconscionability. *Concepcion* was a consumer contract case where the plaintiffs sued AT&T for charging $30.22 in sales tax for a "free" cell phone. The cell phone contract required any dispute to be arbitrated on an individual basis and prohibited a class action arbitration. The plaintiff sued in federal court and AT&T moved to compel arbitration. The trial court denied the motion holding that the ban on class arbitration was unconscionable under California law. The 9th Circuit Court of Appeals affirmed the trial court's decision, and *AT&T* appealed to the Supreme Court. In a 5-4 decision, the Supreme Court ruled that California's ban on class action waivers in arbitration agreements was at odds with the goal of the Federal Arbitration Act, which is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

The *Concepcion* decision is the most recent of several Supreme Court decisions issued in the last three years reinforcing the judicial preference for arbitration as a means to resolve disputes. It is also good news for employers. Although *Concepcion* was a consumer class action case, it will likely have an impact on employment arbitration agreements. It provides significant support for employers to require employees to sign arbitration agreements with class action waiver provisions. Such agreements are a particularly useful tool for managing the risk of wage and hour class actions.

Supreme Court Rejects Wal-Mart Sex Discrimination Class Action

In *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. ____ (2011), the Supreme Court rejected class action certification in a sex discrimination case involving 1.5 million current and former female employees, the largest employment class action ever certified. The plaintiffs in *Wal-Mart* alleged that Wal-Mart allows local managers to use broad discretion in making pay and promotion decisions and that the managers, who are predominately men, use their own subjective criteria in making those decisions, which disproportionately favors men and results in females receiving lower raises and fewer promotions. In reversing the District Court's grant of class action status, the Supreme Court, in a decision written by Justice Scalia, stated that the case could not proceed as a class action because there was no evidence that there was a common reason for the plaintiffs' alleged injuries, one of the requirements for a class action. Justice Scalia stated that there was no evidence that Wal-Mart used a uniform procedure to evaluate applicants and employees and that the allegation that the common policy was Wal-Mart allowing local managers to exercise independent discretion was the opposite of a uniform policy because the plaintiffs had not identified any common pattern in which local managers used their discretion. Justice Scalia summarized the Court's reasoning by stating: "Without some glue holding the alleged reasons for all of those decisions together, it will be impossible to say that the examination of all the class members' claims for relief will produce a common answer to the crucial question *"why was I disfavored?"*

The impact of the *Wal-Mart* decision on employment cases is that there will likely be a decrease in the number of certified large class actions because of the difficulty in identifying the "glue" that holds together the alleged reasons for all of the challenged employment decisions. However, the *Wal-Mart* decision does not mean that the exercise of local manager discretion can never be the basis for a discrimination class action, just that such a claim is not sufficient to hold together a nationwide class action. In fact, Justice Scalia stated that the Supreme Court has previously recognized that "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory . . . ." The result may be an increase in class actions on the local and regional level rather than nationwide.

For more information pertaining to either of these class action cases, contact any Phillips Lytle labor and employment attorney. ■

Our Labor & Employment attorneys handle the full scope of labor relations, discrimination, and employment matters on behalf of management in the private and public sectors for employers of all sizes, from FORTUNE 500 companies to small businesses and not-for-profit organizations. We work with our clients to develop preventive strategies to reduce their risk of litigation, and represent them vigorously when confrontation occurs either at the negotiation table or in court.

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