

Employment Law Briefing



MARCH/APRIL 2009

2
ADA amendments
expand coverage
How your business may be affected

3
Criticized professor alleges
discrimination and retaliation

4
Does merely calling in
sick trigger FMLA protection?

6
Employers beware
Don't let emotions get the best of
you when making a firing decision

ADA amendments expand coverage

How your business may be affected

Congress enacted far-reaching amendments to the Americans with Disabilities Act (ADA), increasing protection for disabled persons. The amendments clarify the ADA's definition of "disability" in critical ways and reject several Supreme Court decisions and EEOC rules that had interpreted the ADA narrowly. As a result, millions of people not previously covered by the ADA will now qualify for its protections. The amendments took effect on Jan. 1, 2009.

Definition's application expanded

Unchanged is the definition of "disability" as "a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment." But the amendments change the application of that language.

One of the Supreme Court rulings rejected by Congress is *Toyota Motor Mfg. v. Williams*. There the Court held that, to be substantially limited in performing a major life activity under the ADA, a person "must have an impairment that prevents or severely restricts" performing "activities that are of central importance to most people's daily lives." The amendments state that this standard is "too high."

The amendments direct the EEOC to revise certain rules to be consistent with the goal of broadening "coverage" under the act "to the maximum extent permitted."

Similarly, the amendments find that current EEOC rules defining "substantially limits" as "significantly restricts" set too high a standard. The amendments direct the EEOC to revise its rules defining "substantially limits" to be consistent with the amendments' goal of broadening "coverage" of persons under the act "to the maximum extent permitted."



The amendments also expand the definition of "major life activities" by including two nonexhaustive lists.

The first includes many activities that the EEOC has recognized (such as walking) as well as activities that the EEOC hasn't specifically recognized (such as reading, bending and communicating).

The second includes major bodily functions (such as "functions of the immune system, normal cell growth, [and] digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").

More protection for persons "regarded as" disabled

Previously, persons claiming they were "regarded as" having disabilities had to prove that their employers mistakenly regarded them as having impairments that substantially limited a major life activity. Under the amendments, those bringing a claim under the "regarded as" theory will have to prove only that they were discriminated against because of an actual or perceived physical or mental impairment — regardless of whether the impairment actually limits or is perceived to limit a major life activity.

But the amendments don't require employers to reasonably accommodate persons who are regarded as disabled but who aren't actually disabled. Also, the amendments exclude "regarded as" claims for transitory or minor impairments, defined as those with an actual or expected duration of six months or less.

Mitigating measures no longer relevant

Another Supreme Court ruling that the amendments overturn is *Sutton v. United Air Lines Inc.* There the Court held that employers must take mitigating factors — such as prosthetics and medication — into account when determining whether a person is disabled.

Under the amendments, courts and employers may no longer consider mitigating measures (except for eyeglasses and contact lenses) in determining whether a person's impairment substantially limits a major life activity.

No reverse discrimination

The amendments bar claims for "reverse discrimination" under the ADA. Specifically, the amendments state that persons without disabilities may not claim they were discriminated against because they lack a disability or that they were treated less favorably or not given the same accommodations as disabled persons.

Amendments' full scope undetermined

Until the EEOC issues new rules as directed by the ADA amendments, their full scope is unknown. But clearly, workers will enjoy greater protections than in the past. Thus, employers must exercise greater care when making employment decisions for persons who may now be considered disabled under the law. ♦

Criticized professor alleges discrimination and retaliation

In *Sabinson v. Trustees of Dartmouth College*, the First Circuit had to decide whether a professor was discriminated against based on her age and whether she received undesirable teaching assignments in retaliation for having rejected a retirement-package offer. Did the offer constitute evidence of age discrimination?

Professor's "corrosive" effect on department

While a tenured professor was chair of the theater department, several colleagues and students complained about her behavior toward them. The faculty dean sent her a letter criticizing how she ran the department, asserting

that it was "demoralized" and that she had generated a "high level of acrimony" amongst the faculty.

When the professor's appointment as chair ended, she took a year's sabbatical. The new chair determined that the department needed to be placed in "receivership" because of various student and faculty complaints and the contentious atmosphere. When the professor returned, the new chair gave her undesirable teaching assignments and gave someone else the desirable assignment of directing the main-stage production.

The chair also created a committee to intensively review the department. Two years later, the committee produced a final report and a separate confidential cover letter that dealt exclusively with the professor. The letter noted the widespread criticism of her and stated that her effect on the department was "corrosive." The letter urged offering her a retirement package. If she rejected it, the letter recommended that she be "marginalized" in her course assignments.

Retirement offer, course assignments

When the chair offered the professor the buyout, she agreed to consider it after being told what courses she could teach. Two months later, the professor filed a



complaint with the EEOC. Eight days later, the chairman offered the professor four assignments for the upcoming year. Three months after that, the professor sued for age discrimination and retaliation. The trial court ruled for the college without a trial, and the professor appealed.

Discrimination?

The First Circuit found that offering a buyout to resolve an employment dispute doesn't constitute direct evidence of age discrimination even if the employee is elderly. Further, the court found that the review committee's finding that the professor's manner was damaging the department was consistent with other evidence and constituted a nondiscriminatory justification for its action.

The burden then shifted to the professor to show that the college's explanation was a pretext for discrimination (a motive alleged to cloak the real firing reason). The First Circuit explained that federal law doesn't generally protect against arbitrary or unfair treatment in private employment. Rather, it protects against actions motivated by listed prejudices such as race, age and gender.

The court found that, while discrimination is a form of unfairness, not all unfairness constitutes discrimination. Even if the professor produced evidence of pretext, the court explained, the problem was that her evidence didn't tend to establish a discriminatory purpose. Rather, it tended to establish that a pre-existing animus against her (unrelated to discrimination) was the reason for the

adverse action. So the court upheld the trial court's judgment on her discrimination claim.

Retaliation?

Taking up the professor's retaliation claim, the First Circuit found that the review committee's report recommendation (that the department use course assignments to marginalize her if she rejected a retirement package) occurred three days *before* the department met and decided to follow this course of action. Thus, although she received the unfavorable assignments eight days after filing her EEOC complaint, the assignment carried out a plan formulated well *before* she filed the complaint. Thus, her filing the EEOC complaint didn't even arguably cause giving her the less-desirable assignments.

The First Circuit found that filing a complaint can't be the basis for adverse employment action but it also can't immunize an employee from adverse action already planned and not dependent on the complaint. Absent a decision by the professor to retire, unwelcome assignments were inevitable regardless of the complaint. Thus, the court affirmed the judgment on the retaliation claim.

Careful wording essential

Although the employer was successful in this litigation, the committee report could have been better worded if an employment attorney had drafted it. For example, calling the offer a "severance package" instead of a "retirement package" could have avoided age-related connotations. ♦

Does merely calling in sick trigger FMLA protection?

The Seventh Circuit had to decide, in *de la Rama v. Illinois Department of Human Services*, whether an employee had sufficiently informed her employer of her serious medical condition so as to trigger her rights under the Family and Medical Leave Act (FMLA).

An extended absence

A registered nurse employed by a state hospital was entitled to 12 annual sick days, accruing at a rate of one day per month. Starting July 19, 2004, she began calling in sick every day and soon exhausted all of her accrued sick

days. She sporadically submitted doctors' notes saying she was ill, but not explaining the nature of her illness.

On July 27, the nurse turned in a doctor's note stating that she was under medical care and couldn't return to work until Aug. 10. On July 28, Human Resources told her that to request FMLA leave she had to submit a completed form. But she neither returned to work Aug. 10 nor submitted the FMLA form.

Still having not returned to work, on Aug. 20 the nurse submitted three more doctors' notes, one requesting

medical leave retroactive to July 16 until an unknown future date. None of the notes stated her condition or described its severity.

On Oct. 4, she submitted the completed FMLA form that explained that she suffered from fibromyalgia and a herniated disk. The hospital retroactively granted her leave to the date of her last accrued sick day, Sept. 2. However, it treated the work days the nurse missed in July and August — except for those covered by accrued sick time — as unauthorized absences.

The employee sporadically submitted doctors' notes saying she was ill, but not explaining the nature of her illness.

The nurse sued, alleging that counting that time as unauthorized absences constituted a refusal to allow her to take leave for a serious medical condition.

The trial court ruled for the hospital without a trial, and the nurse appealed.

Sufficiency of notice

To prevail on her FMLA-interference claim, the nurse had to show that:

1. She was eligible for FMLA protection,
2. Her employer was covered by the FMLA,
3. She was entitled to leave under the FMLA,
4. She had provided sufficient notice of her intent to take leave, and
5. Her employer had denied FMLA benefits that she was entitled to.

The Seventh Circuit agreed with the trial court's conclusion that the nurse had failed to provide sufficient notice of her intent to take leave.

The Seventh Circuit explained that, while an employee isn't required to refer to the FMLA to give notice of intent to take FMLA leave, "the notice must succeed in alerting the employer to the seriousness of the health condition." The court explained that "sick" doesn't imply "a serious health condition." Thus, calling in sick without providing

additional information doesn't constitute sufficient FMLA notice.

The court added that this is true even if the employee provides her employer with a doctor's note, if the note doesn't convey the seriousness of the medical condition.

Playing Sherlock Holmes

The Seventh Circuit found that, during the months that the nurse called in sick, she never indicated that she suffered from a condition that would require extended leave. The court explained that, while the FMLA's notice burden isn't onerous, it isn't illusory either.

The court found that the nurse had failed to provide documentation of her fibromyalgia for three months. Until that point, she had informed her employer only that she was sick. This was insufficient to suggest that she suffered from an FMLA-qualifying condition.

The nurse contended that, when she began calling in sick, her employer should have known that she was suffering from an FMLA-qualifying condition. But the Seventh Circuit held that this argument didn't wash. The FMLA doesn't require employers to play Sherlock Holmes, scanning an employee's work history for clues as to the true undisclosed reason for an employee's absence.



Scrutinize all requests

Here, because the employer initially had no basis to suspect that the employee had a serious medical condition, the employer was entitled to judgment in its favor. But employers subject to the FMLA must routinely scrutinize all requests for time off because of illness to ascertain whether they're covered under the FMLA. We can learn from this case that courts won't expect employers to take unreasonable steps in classifying the status of requests for leave. ♦

Employers beware

Don't let emotions get the best of you when making a firing decision

A federal trial court in New York held that an attorney who was fired from a law firm after she complained about sex discrimination could sue for retaliation. Let's see how the court came to this decision in *Collins v. Cohen Pontani Lieberman & Pavane*.

Firing follows e-mail exchange

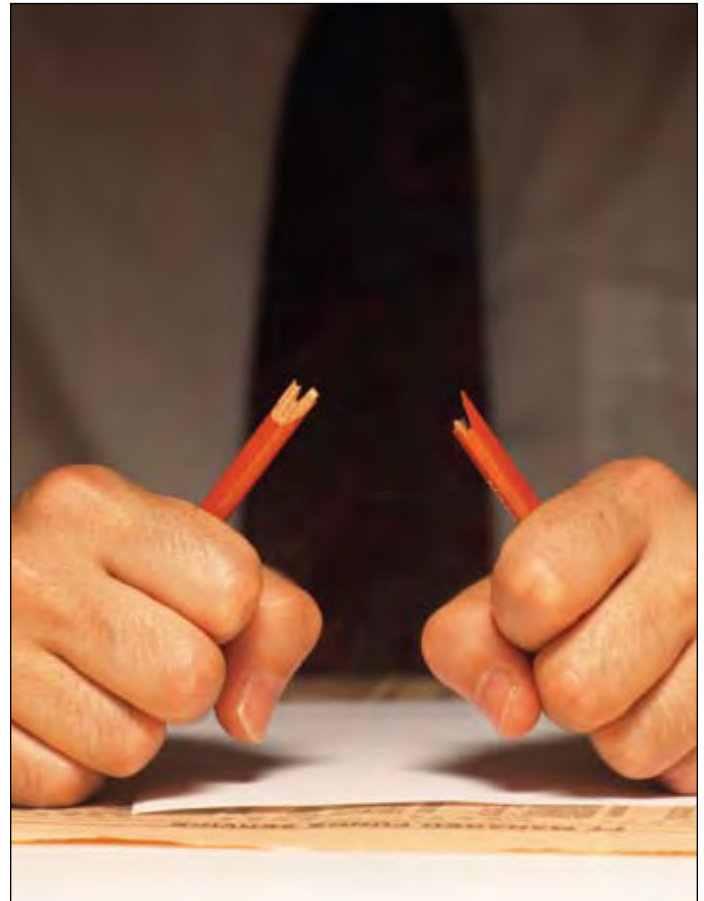
Two years after a litigation associate was hired, a partner in the firm told her that he “could not talk to her” and was “uncomfortable” with her. Three months later, the firm’s then-managing partner told the associate that she would never become a partner in the firm because she made the partners “uncomfortable,” and they prided themselves on being “collegial” and like a “family.”

Three years later, the associate complained in an e-mail to the partners that “all the women litigators in this firm, regardless of their level of experience or talent, have been relegated to non-partnership-track support roles, thus limiting their career development as well as their ability to undertake substantive trial work.”

The following day, the partner who had complained that he couldn't talk to the associate e-mailed her his concern that she had bypassed the firm's procedure for docketing papers and had failed to obtain partner approval on various prebills.

The associate complained that “all the women litigators in this firm, regardless of their level of experience or talent, have been relegated to non-partnership-track support roles.”

The next day, the associate replied that she had “good reasons” for bypassing the office procedures because the firm's paralegals had failed to follow them. The associate sent two more e-mails that day, one to the partner who had complained and one to the paralegals (with copy to



him), complaining that the paralegals had failed to follow procedures with respect to her case.

Later that day, the firm fired the associate.

Retaliation alleged

The associate sued, alleging retaliation for complaining about workplace discrimination. The firm asked the court to rule for it without a trial, and the court denied the motion.

The court found that the associate could establish a prima facie retaliation case. First, the court explained that her e-mail complaining about the firm's treatment of women litigators was protected activity because it constituted a report and protest of workplace discrimination.

Various legitimate, nondiscriminatory reasons for firing don't equate to inconsistent reasons

The court that decided *Collins v. Cohen Pontani Lieberman & Pavane* cited its previous finding in *Aneja v. M.A. Angeliades* that a jury issue on the question of pretext may be created when an employer offers inconsistent and varying explanations for its decision to fire an employee. In *Aneja*, the New York City Transit Authority fired a project manager for the legitimate nondiscriminatory reasons that:

1. He lacked the skills to perform the work he was hired to do,
2. His supervisors complained about his poor performance, and
3. The transit authority lacked appropriate projects for him to perform.

The project manager argued that the employer's firing reasons were pretextual (an excuse to discriminate against him) because they were inconsistent.

The federal trial court explained that, although a jury issue on the question of pretext may be created when an employer offers inconsistent explanations for its firing decision, the various reasons the employer gave here *weren't* inconsistent. Rather, they reflected various complaints about his work and the assorted reasons why his services were no longer needed.

Accordingly, the court ruled for the employer without a trial.

Next, the court found that firing her two days after she complained about discrimination constituted strong circumstantial evidence of retaliation. Even more evidence was that the partner who had complained to her testified in his deposition that he thought her e-mail complaining about discrimination was "obnoxious," that it "angered" him, that it was "just a ranting of somebody who is looking to set you up for litigation," and that she was "trying to piss everybody off."

Inconsistent explanations

This shifted the burden to the firm to assert a legitimate nonretaliatory firing reason. The firm argued that it fired her in response to her e-mails explaining her "good reasons" for bypassing office procedures. The firm characterized these e-mails as insulting and unprofessional and stated they were the "final straw" in its firing decision.

This shifted the burden back to the associate to show that the firm's proffered explanation was a pretext — a motive alleged to cloak the real firing reason. Questioning the firm's nonretaliatory explanation for the firing, the court found that contemporaneous e-mails regarding her firing

sent by the firm's partners were inconsistent with their later deposition testimony.

In addition, both the partner who had complained that he couldn't talk to the associate and another partner testified that, until she sent her e-mail complaining about failure to follow office procedures, they hadn't wanted to fire her. But the court found e-mail evidence showing that both partners had already decided to fire her two hours *before* she sent her e-mail.

Finally, the court noted that a jury could find that the complaining partner's hostility at his deposition established the real firing reason.

The lesson

Even law firms can find themselves defending a discrimination lawsuit if they fail to follow appropriate procedures. Here, the partners apparently fired the plaintiff in an angry emotional reaction to her e-mail. Sometimes an underlying complaint lacks merit, but a valid claim of retaliation is then created by an emotional reaction to the complaint, as happened here. ♦