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Recent
Developments

U.S. Supreme Court Issues Four Employment Decisions and EEOC Issues New Interpretive Guidance Regarding Sexual Harassment (June 23, 1999)

On June 22, 1999, the U.S. Supreme Court issued four decisions in employment cases. Three of the decisions dealt with the Americans with Disabilities Act (ADA), and one addressed employer liability for punitive damages in employment discrimination cases under federal law. Additionally, on June 21, 1999, the EEOC issued a new policy guidance statement regarding employers' liability for sexual harassment by supervisors in light of the U.S. Supreme Court's troika of decisions on this issue last fall.

Summary

In brief, the Supreme Court's decisions contained the following new rulings or clarifications:

- An individual is not disabled under the ADA if his or her physical or mental impairment is corrected or correctable.
- An individual is not disabled merely because he or she is unable to perform a particular job.
- Creating a physical criteria requirement for a position and enforcing that requirement, does not violate the ADA unless the criteria is based on myth or stereotype.
- An individual's impairment must be "substantial" in order to constitute a disability.
- Employers should adopt anti-discrimination policies and educate their personnel on those policies in order to avoid potential punitive damage liability.

An individual is not disabled under the ADA if his or her physical or mental impairment is corrected or correctable; an individual is not disabled under the ADA unless he or she is unable to perform a broad range of jobs; "regarded as" disability status only applies to situations where an employer mistakenly believes an individual has a substantially limiting impairment. [Sutton v. United Air Lines](#) was the Supreme Court's lead case. The root of the case was United Air Lines' policy requiring that pilots have at least 20/100 uncorrected vision. As a result, it refused to hire two sisters as pilots because their uncorrected vision was only 20/200, even though their vision with eyeglasses was normal. The sisters sued claiming they were disabled, or were regarded as having a disability, due to their eyesight. The central issue was whether the availability of corrective measures (i.e., eyeglasses) should be considered in determining whether the sisters were disabled under the ADA.

In a lengthy opinion, the Supreme Court ruled that a person is **only** disabled under the ADA if, after corrective measures are used (eyeglasses, medication, prosthetics, etc.), the individual still has an impairment that "substantially limits a major life activity." Because the plaintiffs had normal vision with eyeglasses, the Court held they were not disabled under the ADA.

Next, the Court concluded that if "working" was the "major life activity" affected by plaintiffs' lack of vision, it was only a disability under the ADA if it precluded them from a broad range of jobs. Because the plaintiffs were only precluded from being global commercial pilots, and not from being regional

pilots or flight instructors, they were not disabled under the ADA.

Finally, the Court ruled that being "regarded as" disabled by an employer does entitle an individual to ADA protection, but only if the employer mistakenly believes the individual is substantially limited in a major life activity. Importantly, the court ruled that the mere fact that an employer creates physical criteria for a job does not violate the ADA, unless the criteria is based on myth or stereotype. Therefore, United Air Lines was allowed to require 20/100 uncorrected vision or better because it made the disqualified individuals "less ideally suited for the job."

The Supreme Court addressed many of these same issues in *Murphy v. UPS, Inc.* The employee in *Murphy* was disqualified from a mechanic position at UPS that involved driving commercial vehicles because he could not obtain the required Department of Transportation health certificate due to his high blood pressure. Again, the Supreme Court concluded that the determination of whether an individual is disabled must be made with reference to the mitigating measures that are available (i.e., medication). The Court also noted that, like the *Sutton* plaintiffs, the employee had only shown that he was disqualified from holding one particular mechanic position, not all mechanic jobs. Therefore, the Court held that he was not disabled.

What this Means: These were important decisions for employers. Employers can now consider individuals' actual abilities, rather than theoretical disabilities. Any available medication or corrective device should be considered in determining whether an individual is disabled. Employers may also use rational physical criteria in their employment decisions, so long as those criteria are not based on a stereotype. However, when incorporating physical criteria, employers should still exercise caution to avoid disparately impacting a particular gender. Finally, an employer does not need to accommodate an applicant or employee merely because the individual is unable to perform a specific position. If the "major life activity" affected by the disability is "working," the limitation must affect an entire class of jobs or a broad range of jobs.

An individual is not disabled under the ADA unless his or her physical or mental impairment results in a "significant restriction" on his or her ability to perform a major life activity. In [Albertsons, Inc. v. Kirkingburg](#), the employer had refused to employ a truck driver who could not meet the Department of Transportation's vision requirements because he only had acceptable vision in one eye. The Ninth Circuit Court of Appeals had held that the employer's conduct violated the ADA because Albertsons could have participated in an "experimental program" to waive this vision requirement. The Supreme Court began by stating that the Ninth Circuit court "was too quick to find a disability" and held that in each case, the individual must show that his or her impairment is substantial. The Supreme Court also concluded that employers are not required to justify a decision to comply with a governmental safety regulation. The mere fact that there was an experimental program that might have constituted an accommodation did not require Albertsons to participate in the program.

This decision appears to bring a more reasonable and practical approach to ADA compliance that stands in contrast to the rather onerous suggestions stated by the EEOC in its [interpretive guidance](#) on reasonable accommodation issued on March 3, 1999.

What this Means: Employers should not assume that an individual has a disability just because an individual has a condition that sounds bad. There should be an assessment of the effect that the condition actually has on the individual. Employers should also feel a greater sense of freedom to comply with any safety regulation that is required by state or federal law, even if that means individuals are excluded.

An employer is not vicariously liable for punitive damages if it made "good -faith efforts to comply" with the law. In [Kolstad v. American Dental Assoc.](#), the Supreme Court considered employer liability for punitive damages based on the discriminatory conduct of its managers. The Court expressly noted that not all discriminatory conduct warrants punitive damages and held that an employer should not be liable for punitive damages if it engaged in good faith efforts to comply with the law. The Court encouraged employers "to adopt anti-discrimination policies and educate their personnel [on the prohibitions against unlawful discrimination]." This is consistent with the Court's ruling in the three sexual harassment cases decided last term, which were also designed to encourage preventative and remedial measures by employers.

What this Means: Maintaining an anti-discrimination policy and conducting regular training on personnel issues now has an added benefit. Additionally, this case encourages employers to conduct thorough and impartial investigations into any complaints of discrimination to demonstrate the employer's good faith efforts. These were always good ideas, but now have new legal significance.

New EEOC Interpretive Guidance. On Monday, the EEOC released a "comprehensive policy guidance explaining the circumstances under which employers can be held liable for unlawful harassment by supervisors." It can be found at <http://www.eeoc.gov/docs/harassment.html>. The guidance, which analyzes the recent Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, addresses the steps employers should take to prevent and correct harassment. For example, the guidance gives examples of measures to stop harassment and to correct the effects of the harassment. It provides the EEOC's suggestions on conducting an investigation, making credibility determinations, and reaching a determination. It also explains the nature of employees' obligations to bring complaints of harassment to their employers' attention. The EEOC also released a [guidance](#) summary geared specifically to small employers.

If you would like any further information about these developments, please feel free to call or e-mail Mike Sullivan (msullivan@paulplevin.com, (619) 744-3655) or any of our other attorneys at (619) 237-5200. Please note that this update is also attached as a Word document for easy printing and linking.

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