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THIRD CIRCUIT PREDICTS DRAMATIC CHANGE IN PENNSYLVANIA PRODUCTS LIABILITY LAW

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In what could signal the most dramatic shift in Pennsylvania products liability law in decades, the Third Circuit has predicted that the Pennsylvania Supreme Court will change Pennsylvania law that has stood for more than 40 years. In *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009), the Third Circuit predicted that the Pennsylvania Supreme Court will adopt the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1 and 2, thereby allowing a child bystander to recover for injuries sustained by a riding lawnmower even though she was not the intended user of the product.

I. Section 402A and the Intended Use/ Intended User Doctrine

The RESTATEMENT (SECOND) OF TORTS, § 402A was adopted by the Pennsylvania Supreme Court more than 40 years ago in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Under Section 402A, a manufacturer or seller of a product "in a defective condition unreasonably dangerous to the user or consumer" is liable for physical injuries caused by the product even if it "has exercised all possible care in the preparation and sale of the product." Legal scholars have observed that the phrase "unreasonably dangerous" may suggest "an idea like ultrahazardous or abnormally dangerous, and thus gives rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous." John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 832 (1973).

In an attempt to address the possible confusion arising from the term "unreasonably dangerous," the Supreme Court felt compelled to caution that those words "have no independent significance and merely represent a label to be used where it is determined that the risk of loss should be placed upon the supplier." *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 556, 391 A.2d 1020, 1025 (1978). In *Azzarello*, the Court rejected the use of "unreasonably dangerous" in instructions given to the jury. Instead, the Court concluded that whether a product is "unreasonably dangerous" is a question for the judge based on social policy considerations. 480 Pa. at 558, 391 A.2d at 1020. Only after the judge has determined that a product is "unreasonably dangerous" is the case submitted to the jury, which

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…BUT THE PENNSYLVANIA SUPREME COURT DECLINES THE OPPORTUNITY TO DO SO – FOR NOW

By James W. Scott, Jr., Esquire, White and Williams LLP, Philadelphia, PA

In *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009), the Third Circuit predicted that, if given the opportunity, the Pennsylvania Supreme Court would change longstanding Pennsylvania products liability law by adopting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1 and 2, thereby replacing § 402A of the RESTATEMENT (SECOND) OF TORTS. In fact, the *Berrier* decision was issued while the Supreme Court was considering whether to do precisely that. In *Bugosh v. I.U. North America, Inc.*, 596 Pa. 265, 942 A.2d 897 (Pa. 2008), the Supreme Court granted allocatur to consider: "Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts."

Less than two months after *Berrier* was issued, however, the Supreme Court dismissed the appeal in *Bugosh* as improvidently granted. *Bugosh v. I.U. North America, Inc.*, 2009 WL 1668509 (Pa. Jun. 16, 2009). Justice Thomas G. Saylor issued a lengthy and passionate dissenting statement, in which he was joined by Chief Justice Ronald D. Castille. In his dissent, Justice Saylor reiterated his belief that Pennsylvania products liability law, based as it is on *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), is "severely deficient" and that "necessary adjustments are long overdue." 2009 WL 1668509, *1. Justice Saylor did not

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THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

By Jill Fisher, Esquire, Zarwin, Baum, DeVito, Kaplan, Schaer, Toddy, P.C., Philadelphia, PA and Janet Fiore, CEO, The Sierra Group, Inc., King of Prussia, PA

Introduction

Determining whether an individual is disabled under The Americans with Disabilities Act ("ADA") is, and has been since its enactment in 1990, a daunting task. Each situation must be decided on a case-by-case basis, analyzing each of the ADA's standards before coming to an ultimate conclusion.

By definition, an individual is disabled under the ADA if he or she has a physical or mental impairment that substantially limits one or more of the major life activities. Once that definitional threshold is established, a determination must be made whether that individual is a "qualified" disabled person under the ADA. An individual is "qualified" if, with or without reasonable accommodations, he or she can perform the essential functions of the position without posing a direct threat of substantial harm to the individual or to others.

The Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Pub.L. No. 110-325, which became effective on January 1, 2009, does not change the ADA's original definition of a disability. Rather, it expands the scope of the original law with a number of significant changes designed to loosen the Supreme Court's and the Equal Employment Opportunity Commission's narrow interpretation of the term "disability" and other provisions of the ADA.

This article is not intended to be a treatise on the ADA or legal advice on any particular situation. Rather, its purpose is to alert the reader to how the amendments alter the original disability discrimination statute. Ms. Fisher's comments spotlight the legal aspects of the ADA and the ADAAA, while Ms. Fiore's focus more on the practical aspects of complying with the ADA in the workplace.

What are the major changes of the ADAAA?

Ms. Fisher: Specifically, the changes expand the definitions of the terms "major bodily function," "major life activity," and "substantially limits." Other changes involve the use of "mitigating measures" in determining whether an individual is disabled and the "regarded as" prong of the definition of a disabled person.

Major Bodily Functions

The ADA defines a physical impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of an individual's bodily systems or functions. The ADAAA expands the definition of a "major bodily function" to include the following: functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The addition of the functions of the "immune system" and "normal cell growth" indicates the intent to include as disabled those with HIV or cancer, without regard to manifestation of the disease.

Major Life Activities

Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity. The ADAAA makes it clear that "major life activities" (and other terms in the ADA) do not need to be interpreted strictly and the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

The ADAAA includes the following list of activities that constitute major life activities: caring for oneself, performing manual tasks, speaking, seeing, breathing, hearing, learning, reading, eating, sleeping, concentrating, walking, thinking, standing, lifting, bending, communicating, and working. If an individual with a physical or mental impairment cannot perform one of the above activities, he or she is automatically considered disabled. (Whether that individual will be considered a "qualified" disabled person under the ADA would be the final inquiry.)

Mitigating Measures

Prior to the ADAAA, the United States Supreme Court's 1999 decisions in *Sutton v. United Airlines, Inc*. and *Murphy v. United Parcel Service, Inc.* required employers to consider certain mitigating measures, such as medications, prostheses, and hearing aids, when determining if someone is disabled under the ADA. Now, employers are directed not to consider such mitigating measures. In addition to the above examples, the ADAAA includes the following examples of mitigating measures that should not be considered: medical supplies and equipment, low-vision devices (except ordinary eyeglasses and contact lenses), mobility devices, and oxygen therapy, equipment, and supplies. So, for example, under the ADAAA, an employee with diabetes (which affects the endocrine system) would be considered disabled without having to demonstrate that at any given moment in time, the disease was or wasn't controlled by medication (insulin).

Substantially Limits

Since the United States Supreme Court's decision in *Toyota Mfg. Ky., Inc. v. Williams* in 2002, the courts have interpreted the term "substantially limits" to mean limited "considerably" or "to a large degree." In addition, the EEOC regulations interpreted the term to mean "significantly restricted." The ADAAA, mandating that the term "substantially limits" be more broadly interpreted, has given the EEOC the duty of issuing new regulations which loosen the existing strict interpretations. However, until the EEOC issues its new regulations, employers should still look to the current regulations for guidance (and consult with an ADA professional or legal counsel).

Regarded As Disabled

The ADA prohibits discrimination against an individual who is "regarded as" having a disability. Prior to the ADAAA, an individual claiming that he or she was "regarded as" having a disability had to prove that the employer regarded him or her as being substantially limited in a major life activity. Under

the ADAAA, an individual is "regarded as" having a disability (whether or not the perceived impairment limits or is perceived to limit a major life activity) because of the discriminatory treatment he or she has suffered as a result of the misperception. In addition, minor and "transitory" impairments (lasting less than six months) are not to be considered disabilities under the "regarded as" prong. Finally, under the ADAAA, employers are not required to provide a reasonable accommodation for an individual who meets the "regarded as" prong of the definition of a disability.

Why should employers provide a reasonable accommodation?

Ms. Fisher: The ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. According to the EEOC, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. An accommodation will be considered "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the individual disabled employee. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary."

With the exception of clarifying that individuals "regarded as" being disabled are not entitled to accommodations, the ADAAA did not change the ADA's definition of a reasonable accommodation. What is clear is that with a broader definition of disability and relaxed standards under the ADAAA, employers will have to provide reasonable accommodations in many more instances than under the ADA. Employers, however, do not have to provide the specific accommodation requested by an employee if an alternative accommodation is reasonable.

There are three categories of "reasonable accommodations": (1) modifications or adjustments to the job application process; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed; and (3) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. Possible reasonable accommodations that an employer may have to provide include making existing facilities accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, changing tests, training materials, or policies, providing qualified readers or interpreters, and reassignment to a vacant position. On the other hand, employers do not have to remove essential functions of a job, create new jobs, or lower production standards to accommodate a disabled employee. Employers do not have to provide accommodations that pose an undue hardship (see below) or provide accommodations to employees who are not otherwise qualified for a position.

Ms. Fiore: First, the term "reasonable accommodation" is a legal command, one that by its nature does not conjure up a smile on the faces of Human Resources personnel or business managers. I prefer to use the term "work around." I define "work around" as a way for an individual employee's talents and contributions to be maximized in a cost-effective way. From a practical standpoint, given the ADAAA's broadened definition of a disability, new opportunities will emerge for businesses to offer a variety of "work arounds" for a wider range of physical and/or mental limitations of employees, including limitations of an aging workforce and the dramatic rise in students (who graduate to the workforce) diagnosed with learning disabilities.

An effective "work around" is always beneficial to an employer because it serves as a tool to allow an employee to succeed at his or her job. For example, an employee with Muscular Dystrophy was having difficulty maintaining production results in her work as an insurance claims examiner. The addition of an external macro keypad ($100.00) and a foot controlled mouse ($300.00) allowed her to maintain production, thereby keeping her ten years of expertise within the company's workforce. Despite what some employers might think, learning how to implement a "work around" can be surprisingly easy in most cases. Often, however, employers must reach beyond their own knowledge and beliefs to do so.

In the above example, the employer did not know *how* to accommodate the worker's disability-related limits. Therefore, it called upon the state vocational rehabilitation program for assistance. The state program paid for an evaluation by a private disability/accommodation consultant. The recommendations led to the cost effective solutions that saved the employee's job. The same employer went on to purchase more macro-keypads for many employees, using them as efficiency tools to improve accuracy, reduce training time, and lower repetitive motion.

In my experience, it is not uncommon for the employer and employee to be unsure of *how* to find and implement an appropriate accommodation. In those instances, consulting an accommodation expert is necessary to help the employer determine what an effective accommodation might be given the particular circumstances and whether that accommodation would be reasonable under those circumstances. The expert also can help ensure that the work to be performed by the employee with a disability can be achieved on a level that meets or exceeds company performance standards. Another way the expert can help the employer is instructing the employer on how to explain to other employees (who will invariably ask) why a particular individual is permitted an accommodation.

Providing a workplace inclusive of individuals with disabilities can add value to the efficiency of the employer's operations and can be unexpectedly rewarding.

Why is the interactive process so important?

Ms. Fisher: The ADA and the courts mandate that employers and employees engage in an interactive process when an employer knows of an employee's disability and an employee requests a reasonable accommodation. (The majority of courts have held participation in the interactive process to be mandatory, although there are some minority opinions to the contrary.)

The EEOC has defined the interactive process as "an informal, interactive process [to] identify the precise limitations resulting from the disability and potential reasonable accommoda-

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tions that could overcome those limitations." The goals of the interactive process are best achieved when both parties are flexible. There are four steps involved in the interactive process: (1) analyzing the particular job involved and determining its purpose and essential functions; (2) consulting with the disabled individual to ascertain the job-related limitations imposed by the disability and how the limitations can be overcome with a reasonable accommodation; (3) identifying potential accommodations and assessing the effectiveness of each; and (4) considering the preference of the disabled individual and selecting and implementing the accommodation.

The responsibility to enter into the interactive process is shared because each party has information the other does not have and may not easily obtain. When missing information is of the type that can be provided by only one of the parties, failure to provide the information may result in a breakdown of the interactive process and the party withholding the information may be found to have obstructed the process. To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate that: (1) the employer knew of the disability; (2) the employee requested an accommodation; (3) the employer did not make a good faith effort to accommodate the employee; and (4) but for the employer's lack of good faith, the employee could have been reasonably accommodated.

It is clear that employers should engage in the interactive process, in good faith, to minimize their risk of legal liability for failing to do so.

Ms. Fiore: People, including those who have a covered disability, have individual likes, strengths, and learning styles. Understanding these differences, and finding a "work around" that is mutually agreeable to the employee and the employer, incentivizes all parties to "make it work." Although the legal mandate requires interaction between the employee and employer, in my experience, it is rare for these parties to have the required breadth of experience in the area of accommodation. Thus, utilizing the services of an accommodation expert to clearly understand the required business outcome will ensure that the work can be performed to a level that meets or exceeds company performance standards.

It is also critical to gain the "buy in" of the individual with the disability because he or she must learn to use the "work around" to perform the specific job duties. In my opinion, an employee who requests, then fails to utilize an appropriate accommodation, becomes an employee who is choosing not to perform his or her job according to company standards. This obstacle can be minimized by including the person with the disability and his or her supervisor in the discussion and selection of the accommodations. Finding a mutually convenient time to implement and train the employee on how to maximize new accommodations is also vital to the success of the solution. The interactive process can sometimes be time-consuming and frustrating. However, to gain a long-term benefit from the right accommodation, in the short run, an employer may need to tolerate a certain amount of lost productivity during the exploration, training and implementation process.

What might be considered an undue hardship under the ADAAA?

Ms. Fisher: Under the ADA (unchanged by the ADAAA) "undue hardship" means significant difficulty or expense. Focus is on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.

Courts, and the EEOC, consider the following factors in determining whether an accommodation poses an undue hardship on an employer: (1) the nature and cost of the accommodation; (2) the overall financial resources of the employer; (3) the type of operation of the employer, including the functions of the workforce; and (4) the impact of the accommodation on the operation of the facility.

An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause an undue hardship. If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation. An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability or the fear that the accommodation might have a negative impact on the morale of other employees.

Ms. Fiore: Rationally, when an accommodation does not allow a worker to meet the performance standards of his or her employment, maintaining that employee on the payroll would be a practical hardship. Additionally, when the raw cost of the assistive device and/or training, or the actual roll-out time is extensive, the accommodation may be seen to cause a financial hardship for the business.

Unfortunately, there is little case history to guide us in determining how the courts might define what exact cost or amount of lost time actually constitutes an undue hardship for a particular company. However, there are many sources of assistance that provide accommodation-related services and assistive devices, at little or no cost to an employer. Such resources are available through various state and federal vocational rehabilitation programs. To locate public resources, visit the United States Department of Labor's Office of Disability Employment Policy (ODEP) at *www.dol.gov/odep*, or contact an experienced disability and employment consultant in your region. The EEOC offers many free publications to help employers understand their obligations under the ADA.

In addition, employers are often eligible for certain tax credits, deductions or training grants when they hire or retain an employee with a disability. A helpful guide to resources and incentives can be found at *www.employmentincentives.org*. Such incentives can be stacked thereby eliminating most, if not all, direct costs. To the extent that a portion of the cost of an accommodation causes undue hardship, the employer can tap into a wide array of public programs to help find the best accommodation, and to offset the cost.

What does the legal landscape look like under the ADAAA?

Ms. Fisher: There is no doubt that the legal landscape of "the disabled" will be significantly enlarged by the ADAAA. Increased litigation by employees is likely given that the expanded definition of a disability will cover more people. In addition, the issue of whether an employee has a disability will take a back seat to the question of whether discrimination occurred.

While no court has yet ruled under the ADAAA, the Ninth Circuit recently (February, 2009) decided an ADA case pro-employee when it easily could have favored the employer. In *Rohr v. Salt River Project Agric. Improvement & Power District,* the court decided that a plaintiff with insulin-dependent type 2 diabetes who was medically restricted from traveling overnight for a project provided enough evidence that he was a qualified individual with a disability under the ADA and could proceed with his case, even thought the employer argued that the ability to travel was an essential job function.

Although the decision was rendered under the ADA, the court nevertheless discussed, and apparently embraced, the ADAAA in its opinion. The court concluded in that case that: (1) eating is a major life activity (and under the ADAAA that fact is made perfectly clear; perhaps not under the ADA); (2) the plaintiff met the ADA's higher definitional standard of what "substantially limits" means, i.e., "significantly restricted" (and therefore the plaintiff could surely meet a lower standard under the ADAAA, yet to be defined by the EEOC); and (3) the determination of whether an impairment substantially limits a major life activity must be made without regard to mitigating measures (therefore, in spite of the plaintiff's regular use of insulin, he was substantially limited in eating because he still had to strictly control his diet and without insulin, his blood sugar would rise to dangerous levels).

The *Rohr* case is a clear signal that courts will be evaluating disability cases with wider eyes.[1]

What can employers do proactively to ensure they are in compliance?

Ms. Fisher: Until the EEOC issues its regulations, employers may be stymied about what to do. Here are some practical, and preventative, measures employers can initiate now: (1) review and update all of your job descriptions, job qualification criteria, and hiring and other accommodation procedures; (2) train managers to focus on performance and conduct instead of perceived physical or mental limitations; and (3) consistently and appropriately document and support all employment decisions.

Hopefully, the ADAAA, which was enacted because of the displeasure of legislators over the manner in which the ADA has been narrowly interpreted by the courts, will restore the original intent and objectives of the ADA, to wit: the elimination of discrimination against individuals with disabilities.

ENDNOTE

[1]Since the enactment of the ADAAA, several courts have held that because Congress did not indicate that the ADAAA may be applied retrospectively, its terms do not control cases filed prior to its effective date. *See* e.g., *Rohr v. Salt River Project Agricultural Improvement & Power District* and *Yount v. Regent University, Inc.,* Nonetheless, as the *Yount* court opined, "because the ADAAA sheds light on Congress' original intent when it enacted the ADA," the ADAAA may be relevant to the scope of terms within the ADA. Thus, although the ADAAA will not be applied retroactively, courts still may be informed by the new provisions.