WILLCOX SAVAGE

Employment Law Outlook

Spring 2011

EEOC ISSUES NEW ADAAA REGULATIONS

Bryan C.R. Skeen

In September 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA) in an effort to restore the Americans with Disabilities Act (ADA) to its originally intended scope which had been narrowed significantly by a series of Supreme Court decisions since the ADA's enactment in 1990. Although the ADAAA became effective January 1, 2009, the Equal Employment Opportunity Commission (EEOC) issued no regulations contemporaneous to the ADAAA, and the absence of judicial opinions or guidance on the new law left employers wondering what reality the new law would bring.

On March 25, 2011, the EEOC finally released the ADAAA regulations in final form. The new regulations, which became effective on May 24, 2011, re-emphasize that the ADAAA makes it substantially easier for employees

(CONTINUED ON PAGE 2)

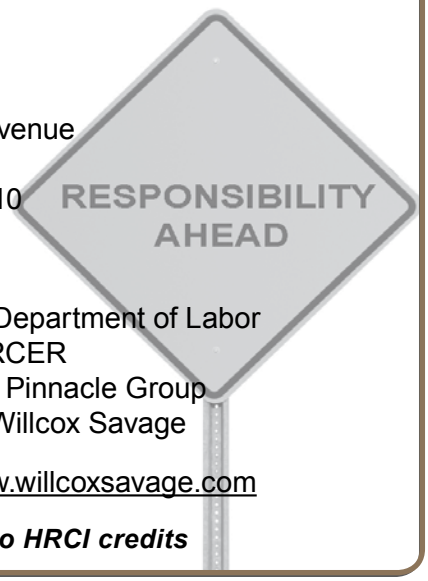
Join Our Upcoming Seminar!

Employers Beware!
Tend to Your 401(k) Plan ERISA Fiduciary Duties...Or Else!!

September 14, 2011
8:00am - 10:30am

Location:

Willcox Savage
440 Monticello Avenue
Suite 2200
Norfolk, VA 23510



Speakers:

Elizabeth Bond, Department of Labor
Julie Alford, MERCER
Bill Welsted, The Pinnacle Group
Cher Wynkoop, Willcox Savage

Register at: www.willcoxsavage.com

Submitted for two HRCI credits

In This Issue...

$4.3 MILLION LESSONS: COOPERATE IMMEDIATELY WITH ANY OCR INVESTIGATION UNDER HIPAA/HITECH

Samuel J. Webster

The Health Insurance Portability and Accountability Act (HIPAA) addresses, among other things the privacy requirements for patient medical records. The more recent Health Information Technology for Economic and Clinical Health Act (HITECH) deals with privacy and security concerns associated with the electronic transmission of health information. HIPAA/HITECH also allows patients unfettered access to their own medical records. 45 C.F.R. § 164.524.

In February of this year, the U.S. Department of Health and Human Services (HHS) sent a very large warning shot across health care providers' bows with a $4.3 million civil monetary penalty on a covered entity for violating HIPAA's Privacy Rules by not honoring patient requests for medical records.

In 2008, 41 CIGNET Health patients requested copies of their medical records to seek treatment from non-CIGNET doctors. CIGNET did not honor the requests and the individuals complained to HHS's Office of Civil Rights (OCR). OCR notified CIGNET that it was investigating those complaints and requesting a response. CIGNET failed to respond to the request, and over the course of more than two years failed to respond to follow-up phone and letter entreaties, to subpoenas, to show cause orders, including not appearing at court hearings. Facing default in Federal Court, on April 7, 2010, CIGNET delivered 59 boxes of original medical records, containing not only the medical records of the 41 individuals, but also medical records of approximately 4,500 other individuals, wholly in violation of HIPAA.

(CONTINUED ON PAGE 4)

EEOC ISSUES NEW ADAAA REGULATIONS

(CONTINUED FROM PAGE 1)

to qualify for protection under the ADA. Whereas pre-ADAAA litigation often turned on the issue of whether or not an employee was actually disabled, the new law shifts the focus to the employer's conduct.

Here is an overview of the most important aspects of the new regulations:

Three Prongs of Disability

The ADAAA and the new regulations set forth three prongs under which an individual may be covered by the ADA:

1. "Actual Disability": a physical or mental impairment that substantially limits one or more major life activities;

2. "Record of" Disability: a record of such an impairment; or

3. "Regarded as" Disabled: when an employer takes action prohibited by the ADA because of an actual or perceived impairment that is not transitory and minor.

Under prong three, the new regulations make it much easier for individuals to establish ADA coverage by shifting the focus away from employer's beliefs about the individual's perceived impairment. The concepts of "major life activities" and "substantially limits" are not relevant to a "regarded as" claim. Instead, the regulations limit the analysis to whether the employer treated the individual differently as a result of an assumed impairment.

"Substantially Limits"

The regulations state that "substantially limits" should be construed "broadly in favor of expansive coverage." To that end, a limitation no longer has to "significantly" or "severely" restrict a major life activity in order to be considered "substantially limiting." Instead, an impairment is a disability if an individual's ability to perform a major life activity is limited as compared to that of "most people in the general population." Further, the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, are not to be considered when determining if an impairment "substantially limits" an individual.

The "transitory and minor" exception that applies to the "regarded as" prong does not apply to an actual or "record of" disability. The regulations recognize that an impairment lasting fewer than six months can still be "substantially limiting."

"Major Life Activities"

The regulations provide an expanded, non-exhaustive list of "major life activities," including walking, sitting, standing, sleeping, concentrating, thinking, communicating, reaching, interacting with others, and working. Regarding the major life activity of working, the employee must establish a limitation in performing a "broad range of jobs in various classes," because the inability to perform "the unique aspects of a single specific job" is insufficient to establish a substantial limitation in the major life activity of working.

Additionally, the ADAAA expanded "major life activities" to include "the operation of major bodily functions," which included the immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The regulations add additional functions to include the special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems.

Episodic impairments (such as diabetes or asthma) or impairments in remission (such as cancer) are considered disabilities under the regulations if the impairments "would substantially limit a major life activity when active."

Impairments That Are "Virtually Always" Disabilities

The new regulations also provide a list of disabilities that will "virtually always be found" to be disabilities. The list includes use of a wheelchair, deafness, blindness, autism, partially or completely missing limbs, cancer, diabetes, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, post-traumatic stress disorder, obsessive compulsive disorder and epilepsy.

Given the increased coverage established by the ADAAA and the new regulations, employers should review their reasonable accommodation policies and procedures and train human resources personnel on the expanded range of circumstances and conditions that can trigger an employee's rights under the ADA. ■

CONTACTS

Labor & Employment Law

William M. Furr, Chair	wfurr@wilsav.com
Wm. E. Rachels, Jr.	wrachels@wilsav.com
Samuel J. Webster	swebster@wilsav.com
Susan R. Blackman	sblackman@wilsav.com
David A. Kushner	dkushner@wilsav.com
Luba I. Seliavski	lseliavski@wilsav.com
Bryan C.R. Skeen	bskeen@wilsav.com

Employee Benefits

James R. Warner, Jr.	jwarner@wilsav.com
Cher E. Wynkoop	cwynkoop@wilsav.com
David A. Snouffer	dsnouffer@wilsav.com
Corina San-Marina	csanmarina@wilsav.com

Workers' Compensation

Stephen R. Jackson	sjackson@wilsav.com

SUPREME COURT RECOGNIZES "CAT'S PAW" LIABILITY

David A. Kushner

On March 1, 2011, the United States Supreme Court unanimously ruled that employers may be subject to liability in employment discrimination cases even if the ultimate decision to take an adverse employment action was made by a manager who did not harbor a discriminatory bias.

In *Staub v. Proctor Hospital*, the Supreme Court adopted the so-called "Cat's Paw" theory of discrimination liability. Under the Cat's Paw theory, even where the ultimate decision-maker for an employment action harbors no discriminatory bias against the employee, the employer may nevertheless be liable for discrimination if the innocent decision-maker was significantly *influenced* by the actions or advice of another supervisor who did harbor a discriminatory bias.

Factual Background

Vincent Staub was employed by Proctor Hospital as an angiography technologist. Staub was also an Army Reservist who was required to report for military duty one weekend each month and two weeks during the summer. After his termination, Staub sued Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), alleging that the hospital's stated reason for his termination — leaving his post without notice to his supervisors — was simply pretext for discrimination based on his military status.

The Court held that, where a biased supervisor's action or advice is a substantial "cause" of the final decision, the employer will be liable for discrimination even if the ultimate decision-maker did not personally harbor any discriminatory bias.

At trial, Staub produced evidence that his two direct supervisors were biased against him based on his military service, and that the supervisors had made a number of derogatory comments about the burdens his military service placed on the department. The trial evidence also showed that Staub's supervisors had counseled him for problems with his work attitude, professionalism, and ability to work well with others. After one disciplinary incident, Staub's supervisors formally warned him that he was not permitted to leave his work area without providing notice to his supervisors.

Three months after this formal warning, Staub allegedly left his work area without notifying his supervisor. Staub's supervisor reported this infraction to the hospital's Vice-President of Human Resources. The Vice President reviewed Staub's personnel file, interviewed Staub, and consulted with his supervisors. After this investigation, she decided to terminate Staub.

In Staub's lawsuit, he admitted that the Vice President of Human Resources (the ultimate decision-maker) was not motivated by any discriminatory bias. However, he argued that the decision-maker was influenced by the two supervisors who did harbor a discriminatory bias against Staub.

The Supreme Court's Opinion

At trial, the jury found that the supervisors' discriminatory bias was a "motivating factor" in Staub's termination, and the jury awarded damages to Staub. However, the Seventh Circuit Court of Appeals (which had never accepted the Cat's Paw theory) overturned the jury verdict because there was no evidence that the ultimate decision-maker (the Vice President of Human Resources) considered Staub's military status in discharging him.

The Supreme Court unanimously reversed the Seventh Circuit's decision and officially adopted the Cat's Paw theory. The Court held that, where a biased supervisor's action or advice is a substantial "cause" of the final decision, the employer will be liable for discrimination even if the ultimate decision-maker did not personally harbor any discriminatory bias.

The hospital argued that the supervisors' actions could not be the "cause" of Staub's discharge because the Vice President of Human Resources had conducted an investigation prior to her independent decision to terminate Staub. The Court rejected this argument because the Human Resources investigation was not sufficiently independent. The Court explained that if an investigation simply "relies on facts provided by the biased supervisor," then the employer "will have effectively delegated the fact finding portion of the investigation to the biased supervisor."

The Court held, "if the supervisor performs an act motivated by antimilitary 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."

Practical Implications for Employers

While many courts had already accepted the "Cat's Paw" theory, there is no question that the *Staub* case will make it more difficult for employers to avoid trial by obtaining summary judgment. While *Staub* was a USERRA case, the Supreme Court's rationale will apply equally to cases brought under Title VII.

Notwithstanding the negative implications for employers, the Court's opinion in *Staub* does suggest that a sufficiently thorough and independent investigation by an employer's human resources department may insulate employers from liability. As the Supreme Court put it, "if the employer's investigation resulted in adverse action for reasons unrelated to the supervisor's original biased action, then the employer will not be liable."

(CONTINUED ON PAGE 4)

WILLCOX SAVAGE
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

Return Service Requested

$4.3 MILLION LESSONS: COOPERATE IMMEDIATELY WITH ANY OCR INVESTIGATION UNDER HIPAA/HITECH

(CONTINUED FROM PAGE 1)

In August 2010, OCR advised CIGNET that preliminary indications showed noncompliance and provided CIGNET yet again with an opportunity to submit written evidence of any mitigating factors or affirmative defenses. CIGNET did not respond. Accordingly, on October 20, 2010, OCR issued a notice of proposed determination to impose civil monetary penalties for failing to provide the patients access to their protected health information and failing to cooperate in OCR's investigation.

HIPAA imposes daily civil money penalties: access penalty of $100 per day; non-cooperation penalty of $50,000 per day. For CIGNET, the number of days ran from late 2008 through April 7, 2010, multiplied by 41 patients – a whopping $4,351,600 penalty. That civil monetary penalty became final on February 4, 2011. ■

SUPREME COURT RECOGNIZES "CAT'S PAW" LIABILITY

(CONTINUED FROM PAGE 3)

If a termination decision is going to be made by a human resources professional or other independent decision-maker above the level of the supervisor, this decision-maker should personally review relevant documents and should interview the employee, the referring supervisor, and other witnesses where appropriate. If the decision-maker is able to testify that he or she determined, "apart from the supervisor's recommendation," that the adverse action was justified, the employer should be able to avoid liability.

Moreover, after *Staub* it is even more important for employers to train supervisors to adopt appropriate documentation practices in order to avoid creating an appearance of discriminatory bias. ■