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Supreme Court's Reversal in *Ricci v. Destefano*: No Effect on Judge Sonia Sotomayor's Confirmation, but Important New Guidance in Resolving Conflicting Theories/Claims of Discrimination

One month before the Senate confirmed Judge Sonia Sotomayor to become the first Hispanic U.S. Supreme Court Justice, the high Court reversed a Second Circuit Court of Appeals decision which Sotomayor had endorsed in 2008 as a member of the Second Circuit panel.

On June 29, 2009, the Supreme Court reversed a *per curiam* decision[1] of a Second Circuit three-judge panel, of which Sotomayor was a member, on a claim of reverse racial discrimination in *Ricci v. DeStefano*. The case involved a clash between the two primary theories of discrimination under TITLE VII—disparate treatment and disparate impact. "Disparate treatment" is, simply, intentional discrimination, *i.e.*, intentionally treating one employee differently from another similarly situated employee because of a prohibited factor, like race. "Disparate impact" is *unintentional* discrimination which results when some facially-neutral employment policy or work rule has a substantially disproportionate adverse impact on a protected group of employees and can't be justified by business necessity. The disparate impact theory of discrimination was originally created by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Duke, located in North Carolina, at one time had a workforce which was intentionally segregated by job classification; but it had ended the practice in the 1960s. Instead, the company adopted as a condition for job transfers a facially-neutral requirement for a high school diploma or minimum score on an IQ test. The Court held the employer's requirement—although facially neutral—unlawfully discriminated against black employees seeking a transfer, because the requirement disqualified a substantially disproportionate number of blacks, in comparison to whites,[2] and was not shown to be work related, *i.e.*, not justified by business necessity. The Court held the "absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Employment "practices that are fair in form, but discriminatory in operation," violate TITLE VII. Subsequently, Congress amended TITLE VII to formally, statutorily prohibit disparate impact discrimination.

In *Ricci*, the precise issue was: Is the fear of a disparate-impact lawsuit by one group of employees sufficient justification to allow an employer to engage in disparate treatment discrimination against another group of employees?

[1] A "per curiam" decision is a decision—usually short—issued in the name of, or attributed to, a court or a panel of a court as a whole, rather than to the authorship of a particular judge or justice of the court or panel.

[2] Statistically, in North Carolina in 1960, 34% of white males completed high school, whereas only 12% of black males did so.

Supreme Court's Reversal in *Ricci v. DeStefano*: No Effect on Judge Sonia Sotomayor's Confirmation, but Important New Guidance in Resolving Conflicting Theories/Claims of Discrimination, cont'd

In *Ricci* eighteen fire fighters—seventeen Caucasian and one Hispanic—sued the City of New Haven, Connecticut, under both Title VII and on constitutional grounds under the equal protection clause of the Fourteenth Amendment, alleging the city had denied them promotions based upon race. Each of these fire fighter had passed the test for promotion to lieutenant and captain. However, officials of the City of New Haven invalidated the test results, because a significantly higher percentage of black fire fighters than whites failed to pass the test and, of the black fire fighters who passed the exam, none had scored high enough to reasonably be considered for available officer positions. The city justified discarding the test results by arguing it feared being sued for disparate impact discrimination by black fire fighters who failed to pass the test, or those who passed but did not score high enough to be considered for promotion, or both.

In the district court, both the fire fighters and the city moved for summary judgment. Rejecting both the fire fighters' Title VII and constitutional claims, the district court denied the fire fighters' motion and granted summary judgment to the city. The district court held, as a matter of law, the city's "motivation to avoid making promotions based on a test with a racially disparate impact" did not "constitute discriminatory intent" against the plaintiffs; and "the result was the same for all because the test results were discarded and nobody was promoted."

Initially, a three-judge panel of the Second Circuit—including Sotomayor—issued a simple, unpublished, one-paragraph order affirming the district court. However, when the fire fighters petitioned for review of the decision by the entire court—all thirteen judges—the panel withdrew its original order and issued a nearly identical, one-paragraph, *per curiam* opinion which simply adopted the reasoning of the district court. By a 7-6 vote, the judges then denied *en banc* review.

By a 5-4 decision, the Supreme Court not only reversed the summary judgment in favor of the city but also ruled the fire fighters were entitled to summary judgment. The Court based its decision solely on Title VII and did not reach the fire fighters' constitutional claims.

First, the Court rejected the district court's contention the city's subjective good faith regarding the reasons for tossing out the test results did not constitute disparate treatment discrimination against the plaintiffs: "[H]owever well intentioned or benevolent it might have seemed—the city made its employment decision because of race . . . solely because the higher scoring candidates were white." Indeed, the district court itself had recognized, "too many whites and not enough minorities would be promoted" if the test results had been certified. Thus, the Court held, "[t]he question is not whether that conduct was discriminatory, but whether the city had a lawful justification for its race-based decision."

Second, the Court then wrestled with the proper standard to apply when Title VII's statutory prohibitions against disparate treatment and disparate impact discrimination conflict. The Court rejected the fire fighters' argument that disparate treatment discrimination could *never* be justified by avoidance of disparate impact liability—even if an employer knows its employment practice violates the disparate impact provision of the statute. Likewise, the Court rejected the city's opposite position, *i.e.*, an employer's good faith belief its actions are necessary to comply with Title VII's anti-disparate-impact provision should *always* be sufficient to justify disparate treatment discrimination. Instead—borrowing guidance from previous cases which, in a constitutional context, had determined when race-based remedies, *i.e.*, quotas, can be constitutionally used to remedy prior discrimination—the Court adopted the "strong basis in evidence" test as a matter of statutory construction for Title VII. That is, under Title VII, before an employer may intentionally engage in race-based decision-making with the aim of avoiding potential disparate impact liability, "the employer must have a strong basis in evidence to believe it will be subjected to disparate impact liability if it fails to take race-conscious, discriminatory actions."

Applying this standard to the fact of the case, the Court held as a matter of law the city did not have a strong basis in evidence for tossing out the test results.

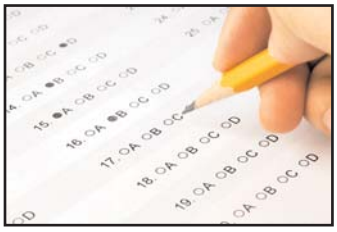
SUPREME COURT'S REVERSAL IN *RICCI V. DESTEFANO*: NO EFFECT ON JUDGE SONIA SOTOMAYOR'S CONFIRMATION, BUT IMPORTANT NEW GUIDANCE IN RESOLVING CONFLICTING THEORIES/CLAIMS OF DISCRIMINATION, CONT'D

First, there was "no genuine dispute that the examinations were job-related and consistent with business necessity." Before the tests were administered, the city had spent a substantial sum of money hiring an independent, professional testing firm to develop and administer the tests. The questions on the written exam were drawn from source materials approved by the fire department and available to test-takers.

Second, the city had ignored additional procedures for determining the validity of the test before rejecting the results. Specifically, the city's contract with the testing company contemplated having the company perform a post-examination "validity study" to verify the job-relatedness of the exam and the validity of the actual results. However, the city tossed out the results without requesting the validity study.

Finally, the city lacked a strong basis in evidence for believing there were equally effective, less discriminatory, alternatives to the test. The alternatives suggested by the city—weighting the test scores differently, *etc.*—would have violated another provision of TITLE VII which prohibits altering test scores based upon race.

The *Ricci* case illustrates the difficulty employers can face in trying to achieve a diversified workforce while avoiding discrimination lawsuits. However, the decision also underscores factors to keep in mind in attempting to minimize the risk of disparate impact liability:



- First, an employer must make sure its job requirements are, in fact, work related. If pen-and-pencil or other tests are administered, have they been properly developed or "validated?"

- Second, disparate impact analysis is not limited to testing. It applies to all employment practices or policies which, although neutral on their face, may have an adverse impact on a protected class of employees such as, for example, selection procedures for lay-offs.

- Third, employers should be constantly reviewing the potential adverse impact of employment selection procedures. For example, if a company engages in a reduction-in-force, after a tentative lay-off list is determined, the results should be examined to evaluate the percentage selection rate of the lay-off criteria on employees, evaluated by, *e.g.*, age, race, sex, *etc.* If substantially disproportionate impact is determined, the reasons for it need to be examined.

- Fourth, are there any alternative selection or test criteria or job requirements which would be equally effective in achieving the employer's legitimate objectives, but which would have a lesser adverse impact?

- Fifth, not all adverse impact constitutes unlawful disparate impact. Before any consideration of validation studies or equally effective, less discriminatory alternatives is necessary, the results of the selection criteria or testing has to yield *substantially disproportionate* adverse impact. The EEOC has long adopted "the 80%" rule as a rule of thumb. That is, compare the pass/selection rate for different groups. If the pass/selection rate of one group is 80% or more of the pass/selection rate for other groups, there is no substantially disproportionate adverse impact and no "validation" is necessary. For example, if 10 whites and 10 blacks take a test and all 10 whites and 8 blacks pass, the black pass rate, 80%, is at least 80% of the pass rate of whites, *i.e.*, 100%. Accordingly, no validation is required. However, if only 6 blacks and 10 whites pass, the black pass rate, 60%, is less than 80% of the white 100% pass rate and would be *prima facie* evidence of disparate impact.

- Finally, don't panic or act in haste if you detect a substantially disproportionate adverse impact from an employment policy, practice, procedure, or test. Disparate impact is not, necessarily, unlawful if the policy, practice, procedure or test can be justified by business necessity. Proper disparate impact evaluation requires a careful, cautious, deliberate analysis.

Rachael Chong Walters
John L. Ross

Texas Supreme Court Continues to Expand Enforceability of Covenants-Not-To-Compete

For a number of years in Texas, enforcing covenants not to compete against a former employee was very problematic, given the way the Texas Supreme Court and Texas courts of appeals had interpreted §15.50 of the Tex. Bus. & Comm. Code. That provision provides covenants not to compete are enforceable only if (1) "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made;" (2) reasonsble regarding limitations as to time, geographical area and scope of the activity to be restrained; and (3) impose no greater restraint than necessary to protect the goodwill or business interest of the employer. First, the courts had held an offer of employment-at-will did not create "an otherwise enforceable agreement" of which a covenant not to compete could be a part or to which it could be ancillary, because employment-at-will can be terminated at any time, thereby making the consideration given for the covenant "illusory." Second, the courts held for a covenant to be enforceable, the consideration, itself, given by the employer, *e.g.*, access to the employer's confidential information, trade secrets, specialized training, *etc.*, had to give rise to the need for the covenant. Things like mere money or a guaranteed period of employment or minimum period of notice before termination was not sufficient. Finally, because the "agreement" required by the statute had to be enforceable "*at the time the agreement is made*," some courts seemingly required the employer to literally provide the confidential information or other consideration at the very moment the employee signed the document.

Beginning in 2006, however, the Texas Supreme Court began to signal a greater willingness to enforce covenants not to compete. In *Alex Sheshunoff Management Services, L.P. v. Johnson*, the Texas Supreme Court held it was sufficient if the employer promised to provide the employee with confidential information and, in fact, did so during the course of the employee's employment. The Court held a non-illusory promise to provide confidential information constitutes an offer which, if the information is later in fact provided to and received by the employee, constitutes a unilateral contact formed at the time the information is provided.

Subsequent lower court cases expanded the thrust of *Shesunoff*. In February 2008, in *Teel v. Hospital Partners of America, Inc.*, a federal district court in south Texas held a statement in the employment agreement that the employee's employment "will involve access to and work

with" confidential information was sufficient to establish a promise to provide confidential information; and an enforceable agreement was formed when the employer, in fact, provided the employee with confidential information during the course of his employment.

In April 2008, in *Shoreline Gas, Inc. v. McGaughey*, the Corpus Christi Court of Appeals went even further, holding as long as the employer, in fact, provides confidential information to the employee, an enforceable contact is formed which will support a covenant not to compete even if the agreement does not contain a promise to provide the information.

In April 2009, the Texas Supreme Court continued this trend in *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*. Brendan Fielding, was employed as a senior manager in the Tax Department of Mann Frankford, an accounting and consulting firm. Fielding signed a standard at-will employment agreement which contained the following "client purchase provision":

> If at any time within one (1) year after the termination or expiration hereof, Employee directly or indirectly performs accounting services for remuneration for any party who is a client of Employer during the term of this Agreement, Employee shall immediately purchase from Employer and Employer shall sell to employee that portion of Employer's business associated with each such client.

In addition to signing the agreement, Fielding promised he would "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by him while employed . . ." In January 2004, Fielding resigned from Mann Frankfort, opened an accounting firm, and successfully obtained a declaratory judgment holding the purchase provisions in his employment and limited partnership agreements were unenforceable. Mann Frankfort appealed the trial court's ruling; and the court of appeals held Mann Frankfort had failed to provide any consideration for the covenants, because the agreement made *no express promise* to give Fielding access to confidential information.

Texas Supreme Court Continues to Expand Enforceability of Covenants-Not-To-Compete, cont'd

The Texas Supreme Court reversed and rendered judgment for Mann Frankfort. Although the company made no express promise to provide Fielding with access to any confidential information, the Court held, when the nature of the work an employee is hired to perform necessarily requires confidential information in order to perform the job, the employer *impliedly* promises confidential information will be provided. Fielding's employment as a certified public accountant necessarily required Mann Frankfort to provide Fielding with confidential client, tax, and financial information in order to do his job. For example, in order for Fielding to, *e.g.*, complete client tax returns, he was given access to Mann Frankfort's confidential client database. Mann Frankfort's implied promise to provide confidential information, coupled with actually providing such information, was sufficient to create "an otherwise enforceable agreement."

Cases after *Mann Frankfort* have taken the same position. Recently, in *Gallagher Healthcare Insurance Services v. Vogelsang*, the Houston Court of Appeals, *citing Mann Frankfort*, enforced a covenant not to compete against an insurance broker, holding the company had impliedly promised to give the employee confidential information. Although the company had made no express promise to provide the employee access to any confidential information, the nature of the employee's job required the employer to provide confidential information in order to perform the job.

Although these cases signal an increased willingness of Texas courts to enforce covenants not to compete, careful drafting of employment agreements can help ensure enforceability. Additionally, regardless of whether the employer expressly or impliedly promises to provide the employee with confidential information, specialized training, trade secrets, or other proprietary information, for covenants not to compete to be enforceable the employer must, in fact, provide the employee with consideration of a nature which gives rise to the need for the covenant.

Derrick G. Parker

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AFTER *GROSS*: PROOF IN AGE DISCRIMINATION CASES

Based on distinctions in the language of TITLE VII and the AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA), a recent United States Supreme Court decision, *Gross v. FBL Financial Services, Inc.*, 557 U.S. __ (2009), appears to make it more difficult for employers to be successfully sued under federal law for age discrimination by requiring plaintiffs to bear the burden of proving age was the "but for" reason for an adverse employment action, as opposed to the lesser burden of proof applicable to TITLE VII claims.

Under federal law, discrimination on the basis of race, sex, national origin, color, religion, or disability is prohibited by TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII"). Age discrimination, however, is prohibited by an entirely separate statute, the ADEA. Nevertheless, historically, the allocation of the order and burden of proof under the two statutes had been interpreted to be the same.[1] The employee bore the initial burden of presenting evidence to establish a *prima facie* case of discrimination. If the employee did so, the burden shifted to the employer to *articulate*, *i.e.*, to present evidence of, non-discriminatory reasons for the employment action. If the employer did so, the burden shifted back to the employee to prove the employer's reason is not true but is, instead, a pretext for discrimination.[2] The burden of proving discrimination remained at all times on the plaintiff.

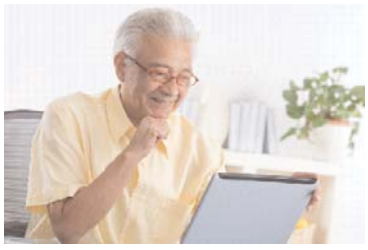
That allocation of the order and burden of proof under TITLE VII began to change, however, in 1989. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), a plurality of the Supreme Court held if a TITLE VII plaintiff presented *direct evidence* of discrimination—such as admissions by a manager or in an email indicating the company considered race in an employment decision—then the *burden of proof* shifted to the employer to prove as an affirmative defense it would have taken the same action despite consideration of the prohibited factor. Following *Price Waterhouse*, in 1991 Congress formally amended TITLE VII by providing an employee can prevail in a discrimination case if he proves one of the prohibited factors was *a motivating factor* and, if so, imposing liability on the employer unless the employer proves it would have made the same decision in any event.

Finally, in *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Supreme Court held the 1991 amendments to TITLE VII no longer required "direct evidence" in order to shift the burden of proof to the employer. Under *Desert Palace*, if a TITLE VII plaintiff demonstrates—either by direct or circumstantial evidence—"mixed motives," *i.e.*, a prohibited factor was *one* of the reasons for an adverse employment action, the burden of proof shifts to the employer to prove it would have made the same decision.

In a 5-4 opinion written by Justice Thomas, however, the Court in *Gross* held the allocation of the order and burden of proof made applicable to TITLE VII by the 1991 amendments to TITLE VII and *Desert Palace* do not apply to age discrimination claims under the ADEA. The Court in *Gross* distinguished ADEA claims from TITLE VII claims because Congress had not made amendments to the ADEA similar to those made to TITLE VII. Thus, the Court reasoned, the ADEA was not subject to the same burden-shifting standards as TITLE VII claims; but, instead, age discrimination plaintiffs have to show that "but for" their age, the adverse action would not have occurred.

PLAINTIFF'S AGE DISCRIMINATION CLAIM

The plaintiff in *Gross* was a 54-year-old male who sued his employer, FBL Financial Services (FBL), alleging FBL demoted him in violation of the ADEA. In 2003, FBL reassigned Gross to another position and transferred many of his job responsibilities to a newly-created position that was given to a female employee in her early forties. Both Gross and the female employee received the same compensation in their new positions. He argued the reassignment was a demotion because FBL reallocated some of his former job responsibilities to the forty–something female employee. He alleged the reassignment violated the ADEA. FBL argued the reassignment was part of a corporate restructuring and the new position was better suited to Gross' skills.



[1] *See, e.g., Bienkowski v. American Airlines, Inc.*, 851 F.2nd 1503, 1505-06 (5th Cir. 1988).

[2] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

After *Gross*: Proof in Age Discrimination Cases, cont'd

The Court Decisions

At the trial court level, the district court instructed the jury to enter a verdict for Gross, if he proved he was demoted and his age was a motivating factor in the demotion decision. The court also told the jury age was a motivating factor if it played a part in the demotion. It also instructed the jury, however, to return a verdict for FBL, if it proved it would have demoted Gross regardless of age.

The Eighth Circuit Court of Appeals reversed and remanded for a new trial, holding the jury had been incorrectly instructed under the standard established in *Price Waterhouse* for Title VII cases. That is, under *Price Waterhouse*—decided before the 1991 amendments to Title VII—before the burden of proof in a discrimination case shifts to the employer, the employee must present *direct evidence* of discrimination. In the Court's view, Gross had not done so; and, accordingly, the district court should not have given "mixed motives" instructions.

The Supreme Court decided both the district court *and* the court of appeals were wrong. Rather, under the ADEA's own specific language—different from Title VII—a "mixed motives" instruction is *never* proper *even if the plaintiff presents direct evidence of age discrimination*. The Court referenced the language in the ADEA, which provides, in part (emphasis added), "it shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* the individual's age." 29 U.S.C. §623 (a)(1). The Court concluded the text of ADEA does not allow a plaintiff to bring a "mixed-motive" claim under the ADEA, *period* (*citing Hazen Paper Co. v. Biggins*, 507 U.S. 604, "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act").

This is critical, because it suggests even if the plaintiff produces some evidence age may have been *a* factor but cannot show age was *the* reason for the employment action, the employer will prevail and, perhaps, prevail on a summary judgment motion. However, the majority opinion in *Gross* commented, "[t]here is no heightened evidentiary requirement for ADEA plaintiffs to satisfy their burden of persuasion that age was the 'but-for' cause of their employer's adverse action . . . and we will imply none." This comment will likely lead to much discussion and legal argument regarding the evidence needed to satisfy the burden of proof under *Gross*. Nonetheless, it is clear ADEA plaintiffs will need to present clear evidence of age discrimination in order to prevail.

The Effect of *Gross*: More Age Discrimination Claims Likely in State Court under State Law

Unlike federal law, there is only one primary employment discrimination statute in Texas. The same section of the Tex. Labor Code which prohibits discrimination on the basis of race, color, sex, religion, disability, and national origin also prohibits age discrimination; and Tex. Labor Code §21.125 parallels the 1991 amendments to Title VII. That section allows plaintiffs to prevail merely by proving age was a "motivating factor" in an adverse personnel action and, in such "mixed motives" cases, shifts to the employer the burden of demonstrating it would have taken the same action in the absence of the impermissible motivating factor.

For this reason—and because more employers are subject to age discrimination claims under the Texas statute than under the ADEA[3]—plaintiffs' lawyers will be more likely to file suit in state court under the Texas statute, rather than under the ADEA.

Federal Legislative Reaction

Some members of Congress have already indicated they are unhappy with the *Gross* decision and will seek congressional action to overturn it. Rep. George Miller (D-California), Chairman of the House Education and Labor Committee, has publicly stated he wants a hearing on the decision and warned of Congressional action. As of the date this article was being written, Congress had not set a hearing on the matter.

[3]Under the ADEA, a company must have at least 20 employees to be subject to the ADEA. Under the Tex. Labor Code, an employer need only have 15 employees to be subject to the statute.

After *Gross*: Proof in Age Discrimination Cases, cont'd

Also, it is uncertain what the EEOC may do. The EEOC held a public hearing on July 15, 2009, on "Age Discrimination in Employment." Some panelists at the hearing urged the EEOC to consider new regulations clarifying how the ADEA should be enforced after *Gross*. Given the recent increase in age discrimination claims between 2007 and 2008, an approximately 30% increase from approximately 19,100 claims to 24,500, you can expect increased pressure from plaintiffs' attorneys and advocacy groups on the Congress and EEOC to attempt to reverse the decision.

Albert Betts, Jr.

Texas Legislature Amends Labor Code Provisions on Disability Laws

In September 2008, Congress amended the Americans with Disabilities Act of 1990 (ADA) to expand protections and clarify the meaning of "disability" and reverse Supreme Court decisions and Equal Employment Opportunity Commission (EEOC) regulations. The amendments became effective January 1, 2009.

The ADA Amendments

The scope and effect of the ADA amendments were discussed in some detail in an issue of the *Labor & Eployment News* earlier this year: http://www.thompsoncoe.com/portalresource/lookup/wosid/intelliun-104-3004/media.pdf.

Some of the more substantial changes to the ADA resulting from the amendments are the following:

- consideration of mitigating measures (other than ordinary eyeglasses or contact lenses) is no longer allowed in determining whether an impairment is "substantially limiting";

- the definition of "disability" is to be construed broadly by the courts;
- expansion of the definition of "major life activities" to include some activities which had not been previously recognized by the EEOC;
- the EEOC is directed to revise its regulations regarding the definition of the term "substantially limits";
- the burden of proving a "regarded as" claim has been substantially lessened by requiring a claimant to merely show the employer perceived the individual as having a mental or physical impairment; and
- granting the EEOC, U.S Attorney General, and Secretary of Transportation authority to issue regulations interpreting the definition of disability under the ADA.

Texas Disability Discrimination Law Changes

During the recently-concluded legislative session, the Legislature amended the Tex. Labor Code to be consistent with the federal ADA amendments. The state amendments incorporate into the Tex. Labor Code the federal changes in definitions of "major life activity," "impairment," and "business necessity" and in the standards by which to evaluate the way impairments affect major life activities.

Major Life Activity

The legislation defines "major life activity" by providing an exhaustive list which includes, among other activities, the following:

- caring for oneself;
- activities such as seeing, hearing, eating, walking, bending, and standing; and
- operation of major bodily functions.

Regarded as Having an Impairment

The legislation defines "regarded as having an impairment" as being perceived to have a physical or mental impairment; but, like the federal amendments, it would not include an impairment which would be considered minor or would last six months or less.

Texas Legislature Amends Labor Code Provisions on Disability Laws, cont'd

Prohibitions against Disability Discrimination Are to Be Construed Broadly

The prohibitions against employment discrimination in the law are to be construed broadly to provide maximum protection of those with disabilities. For purposes of the state statute, disability also includes impairments limiting major life activities which are episodic or in remission. Like the federal amendments, mitigating measures which cannot be considered in determining whether an "impairment" is "substantially limiting" are:

- medication,
- prosthetic limbs and devices,
- hearing aids,
- mobility devices, and
- devices that magnify, enhance, or otherwise augment a visual image, other than eyeglasses and contact lenses.

Employer Provisions

The legislation prohibits the use of a qualification standard, employment test, or other selection criterion based on an applicant's uncorrected vision, unless those standards, tests, or criteria were considered a business necessity and related to the job.

In one change which differs from the federal amendments, the legislation extends the good faith and reasonable accommodation exception, based on business hardship, if the disability is based solely on being regarded as having an impairment which substantially limits at least one major life activity. This provision differs from the ADA amendments, which protect an individual who is regarded as disabled, if the person can show he was subjected to prohibited action under the ADA, regardless of whether the impairment limits a major life activity.

Other Changes

The legislation provides the changes to the law do not affect eligibility standards for benefits under state or federal disability benefit programs. Additionally, the law cannot be the basis for a "reverse discrimination" claim by someone without a disability.

When Does HB 978 Take Effect?

The amendments apply only to any acts which occur on or after the bill's effective date, September 1, 2009. Otherwise, state law claims would be reviewed under prior Texas law. For claims based on acts occurring between January 1, 2009, (when the ADA amendments took effect) and September 1, 2009, (when the state amendments took effect), differing federal and state standards would be in effect.

What Does this Mean for Employers in Texas?

For employers, it means reviewing disability accommodation policies to ensure compliance with the new, broader federal and amended state laws. Mitigating measures can no longer be considered a factor in determining whether an employee is disabled. In addition, the expanded definition of "major life activity" means some conditions which previously would not have been considered ADA-eligible will now have to be reassessed. Employers will have to carefully evaluate accommodation requests.

Employers should have begun updating policies and training management late last year in preparation for the January 1, 2009, effective date of the federal ADA amendments. Employers should consult with legal counsel and human resource professionals to determine how to deal with ADA claims brought between January 1, 2009, and September 1, 2009, which are subject to differing standards under the state and federal laws. Given the federal law's January 1, 2009, effective date, all disability claims should have been treated in accordance with the federal amendments even before the state laws were amended. Even if you reviewed these claims in accordance with the state law, you may still have not acted in compliance with the federal amendments, particularly regarding mitigating measures or broader requirements for substantially limiting conditions or major life activities.

Albert Betts, Jr.

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