

LAW OFFICES

ROLAND & SCHLEGEL

A LIMITED LIABILITY COMPANY
627 NORTH FOURTH STREET
P.O. BOX 902
READING, PA 19603-0902
(610) 372-5588
FAX (610) 372-5957
firm@rolandschlegel.com
www.rolandschlegel.com

OLEY OFFICE
308 MAIN STREET
OLEY, PA 19547
(610) 987-3277

FLEETWOOD OFFICE
12 WEST MAIN STREET
FLEETWOOD, PA 19522
(610)-944-6870

JOHN W. ROLAND
EDWIN L. STOCK
S. WHITNEY RAHMAN
ROBERT R. KREITZ
JOHN E. MUIR
DEBORAH A. SOTTOSANTI
ERIC E. WINTER
DANTE C. CUTRONA

OF COUNSEL TO THE FIRM
DAVID H. ROLAND
MARY M. BERTOLET
JERRY R. RICHWINE

RAYMOND C. SCHLEGEL (2004)
D. FREDERICK MUTH (2006)

September 26, 2008

****EMPLOYMENT LAW ALERT****

By: S. Whitney Rahman

Congress has passed a wide-reaching amendment to the Americans with Disabilities Act (“ADA”). This new law, the ADA Amendments Act of 2008, broadens the definition of “disabled” substantially, and will affect every employer covered by the ADA. It is expected that President Bush will sign the Bill into law this month.

The new law specifically overturns several key Supreme Court cases that had narrowly interpreted the term “disabled.” Congress has decided that the limitations placed on the definition of disabled in Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002) and in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and in Sutton’s companion cases were too narrow. The new law sweeps broadly, and specifically provides that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations.” Section 2(b)(5). Congress further stated that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Id. The bill further states that the definition of disability “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” Section 4(a) (amending Section 3(4) of the ADA).

The revised definition of disability continues to contain three prongs: actual disability, having a record of a disability, and being regarded as having a disability. Section 4(a). A disability is still defined as a physical or mental impairment that substantially limits on or more major life activities. Id. Major life activities, however, have been expanded to include “learning, reading, concentrating, thinking, communicating, and working.” Id. (amending Section 3(2) of the ADA). In addition, Congress has added “major bodily functions” to the list of major life activities. These include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” Id.

In addition, the “regarded as” prong has been amended extensively. The new provision states that “An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited

under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” Id. (amending Section 3(3) of the ADA). Previously, the courts had held that a person was perceived as disabled only if he or she was perceived as having an impairment that substantially limits a major life activity.

A contested issue under the ADA has been whether an individual who is perceived as disabled, but is not actually disabled, has a right to a reasonable accommodation. Although it is not entirely clear, it appears that the “perceived as” prong may now be interpreted not to require reasonable accommodations.

Importantly, the ADA Amendments Act requires that the determination of whether an individual is disabled be made without looking to the mitigating effects of such measures as medication or prostheses. Therefore, with the exception of glasses and contacts, to determine whether an individual is disabled, an employer must consider whether the person has or would have an impairment that substantially limits a major life activity if the employee did not take any prescribed medication, or use any other mitigating measure.

The Act, once signed by the President, will take effect on January 1, 2009.

BOTTOM LINE: This bill will change the way employers must determine whether an employee is disabled, and will broaden the number of employees who will be able to obtain a reasonable accommodation. It will be more important than ever for employers to:

- (1) Be sure job descriptions set forth the essential functions;
- (2) Engage in an interactive process with employees seeking an accommodation. Employers would be wise to err on the side of caution in granting reasonable accommodations even if it is not entirely clear that the individual is disabled; and
- (3) Educate supervisors and others who administer ADA policies.

If you have any questions about these new employer responsibilities, please call Whitney Rahman or John Roland.