

**HIRE Institute**  
1320 Nineteenth Street, N.W., Suite 300  
Washington, DC 20036  
Tel: 202-296-4516  
Fax: 202-296-8205  
hireinst@aol.com

***“Employee Briefs”***  
**November 2008**

## **ADA Amendments Act**

The ADA Amendments Act was signed into law on September 25, 2008. This new Act provides that: (1) an impairment which substantially limits one major life activity need not limit other major life activities in order to be considered a disability; (2) an impairment that is episodic or in remission may qualify as a disability if it would substantially limit a major life activity when active; (3) prohibits consideration of the ameliorative effects of mitigating measures such as medication, medical supplies, low vision devices other than ordinary eyeglasses or contact lenses, prosthetic limb and devices, hearing aids, mobility devices, reasonable accommodations or learned behavioral or adoptive neurological modifications; (4) major life activities including, but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, neurological, brain, respiratory, circulatory endocrine and reproductive systems functions are covered under the Act; (5) a person can satisfy the “regarded as” disabled requirement of the ADA by demonstrating that “he or she has been subjected to an action prohibited by the ADA 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” if the “regarded as” requirement is of six months or less duration does not qualify for protection under the ADA; and (6) a non-disabled employee may not claim that an employer who accommodated a disabled employee engaged in disparate treatment. This new law reverses many earlier court decisions and will no doubt lead to more EEOC charges and litigation.

## **Supremes**

The upcoming term of the U. S. Supreme Court will consider a number of employment related cases. Some of the cases to be heard include the following issues: (1) whether an employee is protected from retaliation under Title VII for participating in an employer’s investigation; (2) whether an arbitration clause in a collective bargaining agreement waives the employee’s right to go to court for a statutory discrimination claim enforceable; (3) whether an employer violates Title VII by not fully restoring credit for pregnancy leaves before the passage of the Pregnancy act; and (4) whether the ADA requires an employer to reassign an employee to fill a vacant equivalent position for which he or she is qualified. These and other issues before the U. S. Supreme Court in the next term will be discussed in future issues of ***Employee Briefs***.

## **Age**

The First Circuit held in Torrech-Hernandez v General Electric Co that an employee failed to establish the second element of a prima facie case which requires proof that he was meeting or exceeding the employer’s legitimate job expectations. In this case, the employee demanded \$150,000 in severance pay and when he did not get it he sued. Because the employee could not prove a prima facie case, the employer’s motion for summary judgment was granted.

## Settlements

Sav-On Drug stores, formerly owned by Albertsons and the Lucky supermarket chain paid \$18.5 million to settle a class action lawsuit that alleged that the stores failed to pay 200,000 employees who quit or were fired their wages for the last day they worked. \$2.5 million of the \$18.5 million went to the attorneys who represented the plaintiffs.

The EEOC settled a case of sexual harassment against American Sales Corporation for \$375,000. The EEOC alleged that the executives of the company were guilty of inappropriate touching and sexual advances or implied requests for sexual favors as well as retaliation against the employees who complained.

## Cat's Paw

The U. S. Supreme Court approved the "cat's paw" theory, also referred to as the "subordinate bias" theory, which held that an adverse action by a high level company executive decision maker can be discriminatory if based on the recommendations of a biased manager or supervisor. In a case which considered the Supreme Court's "cat's paw" theory, the D. C. Circuit in Reeves v Sanderson Plumbing Products held that a hospital employer's independent investigation erased any taint of discrimination associated with the decision to terminate an employee for poor attendance. In this case, a suspended employee alleged that her suspension was based on information supplied by a supervisor against whom she had previously filed an internal complaint. Therefore, the false information was supplied by a biased supervisor and, applying the "cat's paw" theory, the decision to discipline was discriminatory. The trial court affirmed a jury verdict in favor of the plaintiff. The D. C. Circuit reversed and held that an independent review of the facts following the supervisor's recommendation to suspend did not result in discrimination even if the supervisor's recommendation was biased. This decision illustrates the importance of a review of all facts rather than blindly relying on a supervisor's recommendation.

## FMLA

The Seventh Circuit held in Delarama v Illinois Department of Human Services that an employer can require employees to provide information substantiating their eligibility to be covered by the benefits of the FMLA. In this case, an employee was not at work for one month and provided only vague notes from her doctor stating that she was "ill and under medical care." Two months after the employee returned to work, she submitted FMLA paperwork stating that she suffered from a herniated disk among other things and would have to miss work for the three months remaining in the calendar year. The employee sued contending that the refusal of the employer to grant her FMLA leave retroactively to her prior month of absence was a violation of the FMLA. The Seventh Circuit held that the employer did not violate the FMLA because simply "calling in sick or even providing a doctor's note does not convey the seriousness of the plaintiff's medical condition and does not give an employer sufficient notice of an employee's intent to take leave under the FMLA." The court added that the FMLA "does not require employers to play Sherlock Holmes scanning an employee's work history for clues as to the undisclosed true reasons for an employee's absence." The court added that if an employee displays a sudden dramatic change in work performance or physical appearance, that may be enough to put the employer on notice that the employee has an FMLA qualifying serious health condition.

The Seventh Circuit in Ridings v Riverside Medial Center affirmed summary judgment for the employer and held that the employer could terminate an employee who refused to work a full eight hours because the employee refused to comply with the employer's repeated requests to formally request FMLA leave by filling in the required FMLA forms.

## Religious Guidelines

Religious discrimination claims filed with the EEOC increased by 100% between 1992 and 2007 although they still comprise only 3.5% of all claims. After drafting religious guidelines for six years, the EEOC finally released a new 94 page compliance manual section on religious discrimination. Plaintiffs often file religious and national origin discrimination claims at the same time. There were 9,396 national origin claims filed with the EEOC in 2007. National origin claims comprised 11.4 % of all claims filed with the EEOC. Some of the issues that are emphasized in the compliance manual: (1) employers should promptly intervene when they become aware of conduct that is abusive or insulting even in the absence of a complaint by an employee; (2) supervisors and managers should be trained to recognize when an employee is seeking a religious accommodation and consider developing internal procedures for processing such requests; (3) prompt response to an employee's reasonable accommodation request. In the event an accommodation cannot be promptly administered, temporary accommodation should be considered and the employee should be kept apprised of the progress toward providing a permanent accommodation; (4) employers should not automatically reject an accommodation request because it will interfere with an existing seniority system or a union contract since they can seek a voluntary modification to the contract; (5) employers should work with employees seeking a change in their work schedules to accommodate their religious beliefs by providing a central file or bulletin board in order to help an employee find a co-worker who may agree to swap shifts; (6) employers should make efforts to accommodate an employee's need to wear garb because of religious beliefs and should train supervisors not to stereotype employees because of their clothing or practices; (7) employers should not pressure employees to attend social gatherings after the employee states that he cannot attend for religious reasons.

***“Employee Briefs”*** is provided free-of-charge to United Insurance Company Limited insureds and endorsing associations. Reproduction without expressed written permission of the HIRE Institute is strictly prohibited.

***“Employee Briefs”*** is written by Malcolm L. Pritzker, Esq., Attorney-at-Law, Washington, DC. Any questions concerning content should be addressed to the HIRE Institute, 1320 Nineteenth Street, N.W., Suite, 300, Washington, DC 20036, tel: 202-296-4516, fax: 202-296-8205, e-mail: [hireinst@aol.com](mailto:hireinst@aol.com).