At the intersection of Age and Disability: The Impact of the ADAAA for the Municipal Practitioner

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Age and Disability

- Consider the role of age in the following hypothetical situations:
  - Older obese employee terminated
  - Older applicant experiencing osteoarthritis
  - Older applicant denied employment due to vision loss

Age and Disability

- The relationship between age and disability
  - Part I will consider:
    - An aging society and its impact on employers
    - The two major statutory remedies available
  - Part II will consider:
    - The impact of the ADAAA on common impairments associated with aging
  - Part III will consider
    - The increased significance of the ADA's requirement of reasonable accommodation

An older worker may be a person with a disability

- Age does not constitute a disability
- Universal impact of aging
  - Perceptive functioning
  - Cognitive functioning
  - Natural senescence and disease processes

PART I

Our aging society

- 2010: Baby boomers and retirement
  - Incentives to retire
  - Experience of the older worker
  - Balance and accommodation

Remedies available to the older, disabled plaintiff

- The amended Americans with Disabilities Act ("ADAAA")
  - Age plus disability
    - Kelly v. Drexel, 94 F. 3d 102 (3rd Cir. 1996)
- The Age Discrimination and Employment Act ("ADEA")
  - Disability plus age
    - Weishaupt v. American Med. Ass'n, 874 F. 2d 419 (7th Cir. 1989)
    - Sperling v. Hoffmann-LaRoche, 924 F. Supp. 1396 (D.N.J. 1996)

The ADAAA and the ADEA

- Shared legislative purpose of the ADA and ADEA
  - Individualized inquiry, not generalizations
  - Both prohibit disparate treatment and disparate impact
  - ADEA does not impose duty on employers to make reasonable accommodations

The ADAAA and the ADEA

- The ADAAA
  - Legislative history and purpose
    - Title I's definition of "discriminate"
  - Regulation of medical examinations/inquiries
    - Unlike ADEA regulates medical inquiries
    - Medical examinations in the pre-employment context
    - Medical examinations of employees

The ADAAA and the ADEA

- Who is covered by the ADAAA?
  - Qualified individual with disability and reasonable accommodation
  - Disability defined as:
    - Substantially limits
    - Record of
    - Regarded as

The ADAAA and ADEA

- The new and improved ADA
  - No more demanding standard
  - Rejects mitigating measures approach
  - Expands the list of major life activities
  - "Regarded as" prong
    - No accommodation required

The ADAAA and ADEA

- Unresolved issues
  - Short term impairments
  - Single job rule
  - No clarification of reasonable accommodation

The ADAAA and the ADEA

- The ADEA
  - Legislative history and purpose
  - Two theories of recovery
    - Disparate impact
    - Disparate treatment
  - Prima facie case
    - Over 40
    - Qualified and performing
    - Subject to negative employment action
    - Disadvantaged in favor of younger worker
  - Affirmative defenses
    - BFOQ
    - RFOA

The ADAAA and the ADEA

- Revival of the disparate impact defense
  - Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)
  - Smith v. City of Jackson, 544 U.S. 228 (2005)
- Significance of the RFOA defense
  - Meacham v. Knolls Atomic Power Laboratory, ___ U.S. ____, 128 S.Ct 2395 (2008)
- Beith v. Nitrogen Products, 7 F. 3d. 701 (8th Cir. 1993)
  - As a disparate impact case
  - As a RFOA case
  - As an ADA case

The ADAAA and the ADEA

- Why would a plaintiff choose the ADAAA instead of the ADEA?
  - No medical examinations/inquiries
  - Permissible inquiry
  - Exams for all entering employees
    - Need not be consistent with business necessity
    - See, e.g. Conroy v. New York State Department of Correctional Services, 333 F. 3d 88 (2d Cir. 2003)
  - Exams for current employee
    - May not inquire to disability unless inquiry job related

Part II

Substantially limits a major life activity

- Will a court's inquiry benefit older, disabled plaintiffs?
  - An individualized, fact specific inquiry
    - See, e.g. Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097
  - 29 C.F.R. Section 1632.2(j)
    - Courts should consider:
      - Nature and severity
      - Duration
      - Permanent or long term impact

Substantially limits a major life activity

- Common impairments: arthritis, vision loss, and heart disease
  - Acceptance as limiting conditions
- A new future for two plaintiffs?
  - Dvorak v. Mostardi Platt Associates, 289 F. 3d 479 (7th Cir. 2002)
  - Wood v. Crow Redi-Mix, 339 F. 3d 682 (8th Cir. 2003)

Substantially limits a major life activity

- Arthritis, Osteoarthritis and Degenerative Joint Disease
  - Recognition as impairment
    - Kaplan v. City of North Las Vegas, 323 F. 3d 1226 (9th Cir. 2003)
  - Periodic or episodic flare-ups?
    - Moore v. J.B. Hunt Transport, Inc. 221 F. 3d 944 (7th Cir. 2000)
    - Barnes v. Northwest Iowa Health Center, 238 F. Supp. 2d 1053 (N.D. Iowa 2002)
  - Plaintiff can identify specific limitations
    - e.g., Kelly v. Drexel, 94 F. 3d 102 (3rd Cir. 1996); Selandia v. Regents of University of Cal., 2006 WL 463127 (E.D. Cal 2006); but c.f. Wheaton v. Ogden Newspapers, Inc., 66 F. Supp 2s (N.D. Iowa 1999)
  - Impairment affects ability to work
    - Phillip v. Ford Motor Company, 328 F. 3d 1020 (9th Cir. 2003)
    - Regarded as plaintiff
      - Kaplan v. City of North Las Vegas, 323 F. 3d 1226 (9th Cir. 2003).

Substantially limits a major life activity

- Vision Loss
  - Rejection of Albertson's v. Kirkinburg, 527 U.S. 555 (1999)
- Recognition of as impairment
  - Cutrera v. Board of Supervisors of LSU, 429 F. 3d 108 (5th Cir. 2005)
- Statutory night blindness
  - Capbianco v. City of New York, 422 F. 3d 47 (2nd Cir. 2005)
  - Wade v. General Motors Corp., 165 F. 3d 29 (6th Cir. 1998)(unpublished)

Substantially limits a major life activity

- Heart disease
  - Cases decided before Toyota Motor Manufacturing v. Williams 534 U.S. 471 (1999) may have predictive value
    - Jewell v. Reid's Confectionary Company, 172 F. Supp 212 (2001)
    - Weber v. Strippit, 186 F. 3d 901 (8th Cir. 1999)
- Bodily functions as a major life activity
  - Weissman v. Dawn Joy Fashions, Inc., 214 F. 3d 224 (2nd Cir 2000)
    - New York City Administrative Code Section 8-102 (16)(a)

Impact of the ADAAA

- Survive summary judgment
- Episodic or currently in remission
- New definition of substantially limit?
- Greater emphasis on reasonable accommodation

Part III

Reasonable accommodation

- Employee request for extended medical leave
  - Dark v. Curry County, 451 F. 3d 1078 (9th Cir. 2006)
- Duty to hire additional staff/reallocate essential functions
  - Epps v. City of Pine Lawn, 353 F.3d 588 (8th Cir. 2003)
- Provision of all day parking spot
  - Jones v. City of Monroe, 341 F. 3d 474 (6th Cir. 2003)
- Transfer denied because MLA not causally related to accommodation
  - Felix v. New York City Transit Authority, 324 F. 3d 102 (2nd Cir. 2003)
- Holding position open for one year
  - Harris v. Circuit Court, Clerk's Office, Metropolitan Nashville, 21 Fed. App. 431 (6th Cir. 2001)(unpublished)

Reasonable accommodation

- Importance of reasonable accommodation
  - Filar v. Board of Education of the City of Chicago, 526 F. 3d 1054 (7th Cir. 2008)
    - Plead both ADEA and ADA claims
    - ADA claim fails on reasonable accommodation

Reasonable accommodation

- Who has burden of establishing what is reasonable?
  - Vande Zande v. Wis. Dep't of Admin., 44 F. 3d 538
    - Adopting cost benefit approach
    - Burden of proving on employee
  - Borkowski v. Valley Cent. Sch. Dist., 63 F. 3d 131 (2d Cir 1995)
    - Shifting burden to employer
    - "More refined" cost benefit analysis