Direction on "Disabilities" & Damages for Discrimination: The Supreme Court's Decisions in Sutton & Kolstad

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Posted By: Daniel T. Dennehy

Practice Area: Labor and Employment

The U.S. Supreme Court previously offered little guidance as to what a disability was under the Americans with Disabilities Act ("ADA"). It was also unclear what steps an employer might take in order to avoid liability for damages under federal anti-discrimination laws. However, the Supreme Court has now made two milestone decisions addressing these issues. This article will briefly discuss the law before these decisions, how the Supreme Court's holdings change the law, and what steps employers should take in light of these decisions.

Definition of "Disability": *Sutton v. United Airlines, Inc.*

Employees are considered disabled under the ADA if they have a physical or mental impairment that substantially limits major life activities. Prior to the Supreme Court's decision in Sutton, there had been a great deal of controversy as to whether an employer could take into account "mitigating measures" when deciding whether an employee was disabled under the ADA. Mitigating measures include use of medicines such as insulin, and assistive or prosthetic devices such as glasses and prosthetic limbs.

The EEOC, in its "Interpretive Guidance," had taken the position that such "mitigating measures" could not be taken into account when determining whether an employee was actually disabled under the ADA. According to the EEOC, an employer had a duty to accommodate an employee with any condition that might be a disability if, hypothetically speaking, the employee chose not to use the mitigating measure. The EEOC claimed this was true even if the controlled condition did not substantially limit the employee in his or her daily life activities. Thus, for example, an employee with diabetes would be protected under the Act even if the employee experienced no debilitating effects from the diabetes because the employee controlled the diabetes with insulin. The U.S. Supreme Court rejected the EEOC's interpretation in the *Sutton v. United Airlines,* Inc. line of cases last week. The Supreme Court noted that the EEOC had no authority to interpret the term "disability," and the additional commentary in its guidance that is not in line with the statute is not binding on employers.

The *Sutton* cases were three separate decisions issued on the same day involving employees and applicants with physical conditions that could be controlled by "mitigating measures":

- *Sutton v. United Airlines, Inc.* involved twin sisters with 20/400 vision who applied for and were denied employment as commercial airline pilots. The vision of both sisters was corrected to 20/20 with corrective lenses.
- *Albertson, Inc. v. Kirkingburg* involved an employee who was fired for failing to meet the DOT's basic vision requirements for truck drivers because he was monocular, i.e., he was only able to see out of one eye. The employee had developed a subconscious mechanism, however, for coping with his vision impairment.
- *Murphy v. UPS, Inc.* dealt with an employee who was fired for failing to meet the DOT requirement that drivers have no current diagnosis of high blood pressure. The employee's high blood pressure did not affect his daily activities as he controlled it through medication.

The Court, in denying that any of these employees were disabled, held that, if an employee is taking measures to correct or mitigate a physical or mental impairment, the effects of those measures must be taken into account when judging whether that employee is substantially limited in major life activity and disabled under the Act.

Thus, an employer may take into consideration the fact that a diabetic employee uses insulin to control his or her diabetes. If, with the insulin, the employee is not substantially limited in daily life activities, then the employee is not entitled to a reasonable accommodation and the employee receives no protection under the ADA from termination or other adverse employment decisions. The Court warned that employees who, for example, use prosthetic limbs or take medicine for epilepsy may still be disabled. If, even with the use of the corrective device, the employee is still substantially limited in a major life activity, then the employee would receive protection under the ADA. The Court also warned that an employee using a corrective device to alleviate a disability could still be "perceived" as being disabled under the ADA and thus subject to its protections.

The Supreme Court's decisions in these three cases will have dramatic effects on an employer's evaluation of employees with physical and mental impairments, which is discussed later in this article.

Punitive Damages under Title VII and the ADA: *Kolstad v. American Dental Association*

The law of damages under federal anti-discrimination laws is a continuously developing area of law. Prior to 1991, employees who sued under Title VII and the ADA were only generally awarded back pay if they proved discrimination. Congress amended the law in 1991 to allow employees to claim compensatory and punitive damages in cases of intentional discrimination under Title VII.

Last year in *Faragher v. Boca Raton*, the Supreme Court held that an employer could avoid paying damages in harassment cases where it demonstrates that it used "reasonable care" to avoid the harassment and eliminate it when it occurs. This only applies where the employer has an anti-harassment procedure given to the employee and the employee fails to take advantage of that procedure.

Recently in *Kolstad v. American Dental Association*, the Supreme Court further clarified under what circumstances an employer would be liable for punitive and compensatory damages-generally the most costly portion of any damage award. First, the Court held that an employee cannot claim punitive damages unless the employee shows "malice" or "reckless indifference" on the part of the employer. This means that the conduct giving rise to the discrimination does not have to be "egregious" or "outrageous" to qualify for punitive damages.

This also means, however, that there will be cases of intentional discrimination where the employer will not be liable for punitive damages. For example, if the employer proves that it is unaware of the federal prohibition against discrimination or truly believes that its discrimination is lawful, then it would not be liable for punitive damages.

More important, the Supreme Court created a defense to punitive damages from acts of managerial employees in federal discrimination cases. It held that an employer may not be vicariously liable for punitive damages due to discriminatory employment decisions of managerial employees where these decisions are contrary to the employer's "good-faith" efforts to comply with Title VII.

Thus, where the employer has an anti-discrimination policy and attempts to stop the discrimination pursuant to that policy, it will be liable generally only for back pay, not punitive or compensatory damages. The Court's decision truly limits the potential liability of employers who are willing to implement and follow well-drafted anti-discrimination procedures.

Steps Employers Should Take In Light of These Decisions

Both the *Kolstad* case and *Sutton* line of cases require employers to take action in order to comply with the anti-discrimination laws and avoid liability. It is important that employers take the following steps in order to avoid discrimination in the workplace and to attempt to avoid liability under the anti-discrimination laws:

- When dealing with an employee with a physical or mental impairment, do not assume that the employee is disabled under the ADA. Occasionally, employers concede that employees are disabled and instead attempt to argue that the employees are not qualified individuals with disabilities or were in fact reasonably accommodated. It is important under *Sutton* (and in general) to perform a careful evaluation of whether an employee is actually disabled and whether any mitigating measures might be alleviating the alleged disability. Be careful to use the term "medical condition" and not "disability" in dealing with an employee.
- Accommodate and encourage use of mitigating measures. It is an employer's duty to accommodate individuals with disabilities, of course. But by encouraging use of mitigating measures and good health of employees in general, it decreases the chance that employees will be substantially limited in their daily activities and thus disabled under the ADA.
- Now more than ever it is crucial to have in place antidiscrimination policies for all types of discrimination: disability, gender, race, national origin, religion, and all other classes protected by law. This should include prohibitions on discrimination, reporting and investigation procedures, and disciplinary guidelines for those who have violated the policy.
- Managers and supervisors should be trained in anti-discrimination reporting and investigation procedures and all employees should be made aware of the procedures. Employees should receive a copy of the anti-discrimination policy with a signature line indicating receipt.
- When employers learn of allegations of discrimination, they must make a "good faith" effort to stop the discrimination. This means that, following the employer's anti-discrimination procedures, the employer should conduct an investigation and take whatever reasonable measures necessary to avoid future discrimination. (*The Labor and Employment Section of von Briesen & Roper, s.c. offers experienced training in investigation of discrimination complaints*.)

No policy or training can completely insulate an employer from liability for discrimination claims, though the above recommendations can certainly reduce the risk of such liability.

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