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Workplace 2000: How Recent U.S. Supreme Court Decisions Affect Employment Law

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HOW THE UNITED STATES SUPREME COURT DOCKET AFFECTS EMPLOYMENT LAW

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PART I:
SUPREME COURT'S DECISIONS ON HARASSMENT, EMPLOYER LIABILITY AND PUNITIVE DAMAGES

I. INTRODUCTION

In 1998 and 1999, the Supreme Court issued employment law decisions critical to employers. These decisions have affected and will continue to affect preventive employment policies and practices for employers dedicated to minimizing or avoiding the risk of discrimination liability in the workplace. Not only has the Supreme Court set forth new standards, but the Equal Employment Opportunity Commission has also recently interpreted the Supreme Court's standards, issuing new guidance regarding an employer's liability for employment discrimination and harassment.

Therefore, it is imperative that employers reduce the uncertainty of liability for employment discrimination by adopting and implementing definitive policies and practices in order to prevent inappropriate workplace behavior.

II. THE SUPREME COURT'S RECENT CASES ON SEXUAL HARASSMENT

The courts have been split for over a decade regarding the applicable standards for employer liability in hostile environment cases. The Supreme Court finally addressed this issue in 1998 in two cases decided on the same day.[1]

1/ See Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998).

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The holdings of these two cases, coupled with those of two other cases decided earlier that year, substantially changed the landscape of sexual harassment law in the United States.[2] Almost one

2/ The two other sexual harassment cases decided in 1998 were Gebser v. Lago Vista Independent School District, 524 U.S. 274, 118 S. Ct. 1989 (1998); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998 (1998). In Gebser, a case decided only a few days before Faragher and Ellerth, the Supreme Court limited a school district's liability for the alleged sexual harassment of a student by a teacher. Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998). The plaintiff, a high school student, had engaged in a sexual relationship with one of her teachers. The relationship ended when a police officer discovered them having intercourse, and the district immediately terminated the teacher. The student had never reported the teacher's conduct while she maintained the sexual relationship with him, and there was no evidence that the district was aware of the relationship. The plaintiff subsequently sued the school district under Title IX of the 1972 Educational Amendments Act, which prohibits sex discrimination by educational institutions receiving federal financial assistance.

Although the Supreme Court in the Faragher and Ellerth cases increased the protection provided to employees against sexual harassment in the workplace, ironically, it narrowed the protection provided to students at school. The Court distinguished between Title IX's implied private cause of action and lack of legislative history and Title VII's express private cause of action. It held that a school district would not be liable under Title IX for a teacher's sexual harassment of a student where the district did not have actual notice of and did not display deliberate indifference towards the harassment. Id. at 2000.

Although the Court's result seems to conflict with Faragher and Ellerth, Justice Ginsberg, in her dissenting opinion joined by Justices Souter and Breyer, foreshadowed the subsequent holdings recognizing an effective anti-harassment policy as an affirmative defense. Id. at 2007. At the same time, however, these three justices, along with Justice Stevens in a separate dissenting opinion, criticized the Court's holding and argued that "[a]s a matter of policy, the Court ranks protection of the School district's purse above the protection of immature high school students... " Id.

The Oncale case involved the issue of same sex sexual harassment. 523 U.S. 75, 118 S. Ct. 998 (1998). A male employee brought a Title VII action against his former employer, a male supervisor, and two male co-workers, alleging that he had been sexually harassed. Specifically, the plaintiff alleged he had been sexually assaulted by his supervisor and co-workers and threatened with homosexual rape. Although the plaintiff had reported numerous incidents of harassment to supervisory personnel, no remedial action had been taken. The Supreme Court, in a unanimous opinion, held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. Id. at 1002.

> The Court allayed fears that liability for same sex harassment will transform Title VII into a "general civility code for the American workplace" by emphasizing that the crucial inquiry is still whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. (internal quotations omitted). Thus, the standard under which sexual harassment cases are evaluated remains unchanged, regardless of whether one alleges same-sex sexual harassment or opposite sex harassment. The Court, however, did caution that careful consideration of the social context in which particular behavior occurs is always required. For example: (footnote continued)
> a professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field -- even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.

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year after the Supreme Court issued its decisions in Ellerth and Faragher, the EEOC issued "Enforcement Guidance: Vicarious Employment Liability for Unlawful Harassment by Supervisors." This guidance interprets the Supreme Court's decisions one year earlier, emphasizing that employers should take "reasonable care" to prevent harassment.

A. Defining Employer Liability

In Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998), the Supreme Court sanctioned the imposition of automatic employer liability where a supervisor engages in sexual misconduct and directly misuses his or her authority to discharge, demote or cause the employee "tangible" job related consequences. In so doing, the Court held that when the offending conduct is by a supervisor, the employer's liability no longer turns on whether the alleged harassment is *quid pro quo* or hostile environment. The critical question is whether there was a tangible job detriment. If so, the employer is strictly liable. Where a supervisor's sexually harassing misconduct does not cause tangible job related harm to the employee, the employer can avoid liability or reduce damages if it proves, as an affirmative defense, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at __, 118 S. Ct. at 2293.[3]

B. Burlington Industries, Inc. v. Ellerth

In Ellerth, the plaintiff, a sales representative resigned after allegedly being subjected to repeated sexual advances by a mid-level manager. The manager made sexual

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Id. at 1003.

In advising courts to examine the context of any alleged inappropriate behavior, the Court reaffirmed that actionable hostile environment claims will exist only where the conduct is severe or pervasive.

3/ The distinction between eliminating liability or reducing damages, a question not answered by the Supreme Court, is a significant one from a practical standpoint. Once there is a finding of liability, no matter how small, the employer is liable for the plaintiff's attorneys' fees, which, in many cases, can be substantial.

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advances to her over a period of one year and told her that he could "make [her] life very hard or very easy at Burlington." Ellerth, 524 U.S. at __, 118 S. Ct. at 2262. Despite rebuffing his advances, she suffered no retaliation or adverse employment action. In fact, she was promoted. Furthermore, even though she was familiar with the company's anti-harassment policy, the plaintiff never reported the harassment to management until after she resigned.

Although the plaintiff allegedly suffered sexual harassment, the facts of her case made it difficult for her to frame a viable sexual harassment claim. She could not prove *quid pro quo* harassment because she never submitted to her supervisor's alleged advances, nor did she suffer a job detriment. Further, she could not establish a hostile environment claim because she could not prove her employer knew or should have known of the harassment.

The question presented to the Court was whether a claim of *quid pro quo* sexual harassment is viable when the alleged harasser makes unfulfilled threats and no tangible employment action is taken against the employee. The Court, however, reframed the plaintiff's claim as a hostile work environment claim because it involved only unfulfilled threats. Id. at 2265.[4] It held that employers will be vicariously liable for actionable hostile environments created by supervisors with immediate or successively higher authority over victimized employees.[5] See id. at 2270. When no tangible employment action is taken, the employer may raise an affirmative defense to liability or damages. Id. This affirmative defense is the same one set forth in Faragher, requiring the employer to prove, first, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and second, "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by

4/ In reframing the plaintiff's claim as a hostile environment claim, the Court removed plaintiffs' lawyers' incentive to frame claims as *quid pro quo* claims with the intention of holding employers to a vicarious liability standard. The Court explained that the labels *quid pro quo* and "hostile environment" are not controlling for purposes of employer liability. Rather, the inquiry relevant to employer liability is whether the supervisor took any tangible employment action against the employee. The Court explained, however, that the terms are relevant to the extent that "they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general." Id. at 2265.

5/ The Court's analysis in both Ellerth and Faragher applied only to sexual harassment perpetrated by a supervisor. Accordingly, the standards for judging harassment perpetrated by a co-employee (i.e. Was the harassment sufficiently severe or pervasive; did the employer know of the conduct and fail to reasonably respond; should the employer have known about the conduct?) remain unchanged.

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the employer or to avoid harm otherwise." Id. As in Faragher, the Court emphasized that no affirmative defense is available when the supervisor takes a tangible employment action against the employee. Id. Because no tangible employment action was taken against the plaintiff, the Court remanded the case to give Burlington the opportunity to prove the affirmative defense.

C. Faragher v. City of Boca Raton

The plaintiff, a female lifeguard, sued the City of Boca Raton on a hostile environment claim. She alleged that her supervisors created a sexually hostile work environment by repeatedly subjecting her and other female lifeguards to uninvited and offensive touching and lewd and offensive remarks. Although she told another supervisor about the offensive behavior, the supervisor did not report the alleged misconduct to his superiors.

Shortly before the plaintiff resigned, another female lifeguard wrote to the City's personnel director and complained about harassing conduct by the same supervisors. The City investigated the report and reprimanded the supervisors. Subsequently, even though the plaintiff had not complained to City officials, she filed suit claiming the city was liable for the harassment she allegedly had suffered.

The Supreme Court faced the issue of whether an employer could be liable for a first-line supervisor's sexually harassing behavior of which it was not officially aware and which does not result in a tangible adverse employment action.[6] Relying on traditional agency principles, the Court sought to resolve the conflict between an employee's right to be free of sexual harassment and the limits on employer liability for an "agent's" misconduct.

The Court held that while an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee, the employer is allowed an affirmative defense when no tangible employment action is taken. Faragher, 118 S. Ct. at 2292-93.[7] The Court cited discharge, demotion and undesirable reassignment as examples of a tangible employment action. Id. at 2293.

6/ In other words, the Court had to determine whether the City "should have known" about the conduct.

7/ Interestingly, Justice Scalia, as an appellate judge on the U. S. Court of Appeals for the District of Columbia Circuit, while dissenting in an en banc hearing for Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985),

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The Court found the City's sexual harassment policy had never been effectively disseminated among the beach employees and the internal complaint procedure did not provide a mechanism for bypassing the offending supervisors. On that basis, the Court remanded the case to the district court for reinstatement of the judgment in favor of the plaintiff.[8]

III. THE EEOC'S NEW ENFORCEMENT GUIDANCE REGARDING SEXUAL HARASSMENT LIABILITY

On June 18, 1999, nearly one year after the Supreme Court issued the Ellerth and Faragher decisions, the EEOC issued "Enforcement Guidance: Vicarious Employment Liability for Unlawful Harassment by Supervisors." The EEOC guidance interprets the Supreme Court's 1998 landmark decisions in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton. In those cases, the Supreme Court provided protection to employers who take "reasonable care" to prevent sexual harassment. The defense applies only in cases where the employee does not suffer a "tangible job detriment" (firing, failure to promote, decrease in pay, etc.) in connection with the
harassment and where the employee unreasonably failed to take advantage of any preventing or corrective opportunities provided by the employer. The EEOC, in its guidance, extended these decisions to harassment based on any criterion protected by anti-discrimination law.

The EEOC makes clear that "reasonable care" applies to efforts to prevent harassment, as well as the employer's response to harassment complaints. Reasonable efforts to prevent harassment include dissemination of an adequate, anti-harassment policy and complaint

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aff'd, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), rejected a standard of vicarious liability for a "supervisor's alleged sexual harassment when the employer was not even made aware of and given the chance to rectify the consequences of the harassment alleged." Id. at 38. In Faragher, Justice Scalia, in his dissenting opinion with Justice Thomas, once again expressed his disapproval of vicarious liability in the absence of adverse employment action. See Faragher, 118 S. Ct. at 2294 (citing his dissenting opinion in Ellerth, in which he argued that: "[e]mployers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the Plaintiff in question fulfilled her duty of reasonable care to avoid harm.... In practice, therefore, employer liability very well may be the rule." Ellerth, 118 S. Ct. at 2274).

8/ The district court awarded the plaintiff one dollar in nominal damages on her Title VII claim. Id. at 2281.

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procedures, training employees if "feasible," training supervisors to report all harassment, and even screening applicants for supervisory jobs to ensure they do not have a "record of engaging in harassment." Reasonable responses to a harassment claim include an effective investigation process and taking immediate and appropriate corrective action when misconduct is found.

IV. INTERPRETATION OF ELLERTH AND FARAGHER BY THE COURTS: THE AFFIRMATIVE DEFENSE: PROMPT, EFFECTIVE REMEDIAL ACTION

An example of an employer's prompt remedial action shielding it from liability is found in the recently decided case of Caudillo v. Continental Bank, 1999 WL 542899 (7th Cir. 1999). Although the Court found that the behavior allegedly exhibited by the plaintiff's co-worker could have easily been construed to be severe and pervasive enough to be actionable in and of itself, it nonetheless held that the employer's reaction to her complaints protected the bank from liability.

The Court noted that the employer immediately responded to the plaintiff's complaints and that, even though its investigation did not yield any corroborating evidence of the plaintiff's claims, it still took steps to restrict contact between the plaintiff and the alleged harasser. The employer also promptly informed the alleged harasser that any further "questionable behavior" would result in employment consequences.

Caudillo represents an example of what an employer should do in response to a complaint of harassment. Another recently-decided case, Pacheco v. New Life Bakery, Inc., 1999 WL 54727 (9th Cir. 1999), is illustrative of what employers should not do. In Pacheco, the Court had noted that once the employer knows or should know of harassment, a remedial obligation "kicks in." However, in Pacheco, the Court held that the employer failed to take the appropriate remedial steps and therefore, was precluded from the benefit of the affirmative defenses stated in the Faragher and Ellerth decisions.

The employer in Pacheco did not have an anti-harassment policy. That in and of itself, however, did not bar the assertion of an the affirmative defense. The employer's actions

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after the allegations of harassment, however, did have that result. Of particular significance to the Court were the facts that: a) the investigation was performed by a relative of the harasser, b) the investigation did not include interviews of additional female employees, and c) the conclusion reached by the employer that no harassment occurred was unreasonable in light of specific evidence to the contrary.

According to the Supreme Court's Faragher and Ellerth decisions, the message to employers is that they must act reasonably when confronting sexual harassment issues in the workplace. The question of what constitutes "reasonable" behavior on the part of employers, however, will undoubtedly engender employment litigation for many years to come.

V. THE SUPREME COURT'S RECENT RULING ON PUNITIVE DAMAGES

On June 22, 1999 the Supreme Court addressed Title VII punitive damages, and the appropriate standard for employer liability.

A. Kolstad v. American Dental Association

In Kolstad v. American Dental Association, 119 S. Ct. 2118 (1999), Ms. Kolstad won a jury verdict for sex discrimination, claiming she was denied a promotion because of her sex. The Supreme Court was asked to clarify the standard under which employers can be held liable for punitive damages based on an employer's discriminatory decisions. As in the Faragher and Ellerth decisions last Term, the Supreme Court recognized in Kolstad that employers should be given credit for their efforts to prevent and remedy employment discrimination: "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII."

The Supreme Court's opinion was in agreement with arguments the Society for Human Resource Management made in a "friend of the court" brief filed in support of the American Dental Association. SHRM's counsel on the brief, employment law specialists Jackson Lewis Schnitzler & Krupman, argued, "[w]hen an employer demonstrates its reasonable

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and good faith commitment to preventing discrimination, and to remedying discrimination should it occur, the employer should not be held liable for punitive damages...." Consistent with SHRM's position, the Court noted that "giving punitive damages protection to employers who make good faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivating employers to detect and deter Title VII violations."

The Kolstad Court stated that punitive damages are awardable only where the employee can show that the employer acted with malice or with a reckless indifference to the employee's federally-protected rights. What constitutes such malice or a reckless indifference was left up to future courts to decide.

B. Post-Kolstad Punitive Damage Cases

In Blackmon v. Pinkerton Security & Investigative Services, 1999 WL 437218 (8th Cir. 1999), decided after Kolstad, the Court reinstated an award of $100,000 in punitive damages. Blackmon involved an employee who was subjected to "sexually explicit conversations" by her co- workers in her presence. Central to the Court's reinstatement of the punitive damages was the fact that the employer did not investigate the plaintiff's complaints and failed to institute any prompt remedial action. The Court noted that the award of punitive damages was appropriate even though the sexual harassment did not occur over an extended period of time. The Court stated that both the intensity of the harassment and the lack of employer response to the plaintiff's complaints supported an award of punitive damages because such could indicate either malice or a reckless indifference to her federally protected rights.

In Connolly v. Bidermann Industries, U.S.A., Inc., 1999 WL 504908 (S.D.N.Y. 1999), the ex-employee brought her claims under the ADA alleging that she was wrongfully terminated. A jury awarded the ex-employee $475,000 in compensatory damages and $350,000 in punitive damages. The employer argued that the punitive damage award should be set aside because a question existed as to whether it had "knowledge that it may be acting in violation of federal law." The Court dismissed this argument, holding that if a jury rejects the employer's stated reasons as pretext for discrimination, it can, nonetheless, award punitive damages. Thus, it

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appears that a future battleground in punitive damage litigation may be the employer's state of mind with respect to its decisions and whether enough credible evidence exists to support its position that its actions are not a pretext for discrimination.

VI. THE KEY TO AVOIDING LIABILITY: PREVENTIVE POLICIES AND TRAINING FOR MANAGERS AND SUPERVISORS

The Equal Employment Opportunity Commission, as well as the courts, have consistently counseled employers about the need to promulgate policies prohibiting harassment and providing effective complaint investigation procedures. The Supreme Court's decisions in Faragher and Ellerth, along with the recent EEOC guidelines regarding harassment liability elevate these basic precautions to a mandate, providing an affirmative defense for employers to avoid all liability where the harassing supervisor's misconduct causes no tangible job related harm to the employee and the employer proves both elements of the affirmative defense. The first element requires an employer to (1) prevent and (2) correct promptly any sexually harassing behavior. The second element requires the employer prove the employee (1) failed to take advantage of any preventive or corrective opportunities provided by the employer or (2) failed to avoid harm otherwise.

More recently, the Court's decision in Kolstad emphasizes again the importance of an employers' "good faith efforts to comply with Title VII." According to Kolstad, evidence of such efforts will help employers avoid liability for punitive damages for workplace discrimination. Now, more than ever, employers should implement policies to prevent inappropriate workplace behavior to avoid liability or to significantly reduce potential liability for the unlawful behavior of persons who work for them.

A. Two Critical Words: Prevention And Response

In the Faragher and Ellerth decisions, the EEOC guidance, and the Kolstad decision, two clear mandates to employers stand out: First, take immediate, bold and continuing steps to prevent harassment from occurring. Prevention is the only "no liability" option because

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any tangible adverse employment action flowing from the harassment results in automatic liability for the employer. Second, use "reasonable care" promptly to prevent and correct any sexually harassing behavior. If an employer does so and an employee unreasonably fails to take advantage of those preventive or corrective opportunities, an employer will not be liable for the harassment if there has been no tangible adverse employment action. In these cases, an employer's efforts at prevention and response are critical. Not only will these steps help prevent general liability for claims of harassment, but they also may provide a strong argument that the employer acted in "good faith", which is relevant in the punitive damages context.

B. Steps to Take Immediately

To enhance the ability to prevent harassment claims, to document those efforts and to maximize the likelihood of an effective response to a complaint, employers should consider implementing the following preventive workplace measures: [9]

1. Review Your Anti-Harassment and Anti-Retaliation Policy[10]

A strong anti-harassment policy -- written in plain language -- defining the types of conduct which potentially violate the policy and prohibiting harassment and retaliation for complaining of harassment is the linchpin in the prevention and defense of all harassment claims. In developing an effective policy, an employer should consider incorporating some or all of the following:

- offering examples of potentially violative conduct with statements that the examples are not intended to be all inclusive;

9/ Although the Supreme Court's decisions last year addressed supervisory sexual harassment, because the EEOC's recent guidance extended the impact of these decisions to harassment based on any criterion protected by anti-discrimination law, it is important for employers to adopt a general harassment policy, addressing not only sexual harassment but harassment based on all other legally protected categories as well.

10/ It is important to note that some states have statutorily mandated employment law training. For example, Connecticut requires all private and public employers with fifty or more employees to provide two hours of sexual harassment training and education to all supervisory employees. Other states that have adopted specific requirements regarding harassment training include Massachusetts, Illinois, Maine, Rhode Island, Tennessee, California, Utah and Vermont. The requirements are not necessarily limited to sexual harassment training and may encompass other forms of harassment as well.

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- providing employees with convenient and reliable mechanisms for reporting incidents of harassment and retaliation, and for participating in related investigations;

- posting the name, work location and telephone number of the employer representatives — both male and female — to whom employees may make complaints of harassment and retaliation;

- ensuring that at least one employer representative is at the employer's facility whenever it is in operation;

- encouraging employees to report incidents promptly either verbally or in writing;

- providing a timetable for reporting harassment, beginning and completing an investigation, and responding to the complainant;

- informing employees of the potential consequences of failing to take advantage of the employer's preventive or corrective opportunities;

- informing employees — supervisors and non-supervisors alike — of disciplinary action that may be taken if they are found to have violated the employer's policy.

2. Identify All Supervisors and Make Them Accountable for Compliance with the Employer's Anti-Harassment and Anti-Retaliation Policy

The Supreme Court held that employers are liable when a "supervisor" harasses an employee over whom the supervisor has immediate (or successively higher) authority. Take steps now so that you, rather than a jury, determine who is and who is not a "supervisor." Include "commitment to equal employment opportunity" as a qualification for every supervisory position.

3. Train All Supervisors on Harassment Prevention

To take advantage of the Supreme Court's affirmative defense, an employer must prove that it took "reasonable care" to prevent harassment and to correct promptly any harassing behavior. Providing effective harassment prevention training for all

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supervisors enhances an employer's ability to take advantage of this defense. But beyond this, effective training will increase the likelihood in the first place that a supervisor will not engage in harassing conduct and will respond appropriately to a complaint of harassment. All supervisors should be required to attend such training. To emphasize its importance, a senior manager should introduce the training.

4. Train Non-supervisory Employees on the Anti-Harassment Policy and the Procedures to Follow If They Experience Harassment

By educating non-supervisory employees, an employer breathes life into its harassment prevention policy. Such training enhances an employer's ability to establish that it took reasonable steps to prevent harassing behavior. It also can help establish that an aggrieved individual unreasonably failed to take advantage of the employer's preventive and corrective opportunities.

5. Obtain a Signed Receipt When Distributing the Anti-harassment Policy

Sometimes an employee does not remember or denies receiving a copy of an harassment prevention policy. When that happens, a jury determines whether the employer communicated the policy. To remove any doubt about dissemination of the policy, an employer should obtain and retain a signed receipt from every employee to whom the employer distributes an anti-harassment policy.

6. Redistribute Periodically (At Least Annually) the Anti-Harassment Policy and Obtain Updated Receipts

Remind employees periodically of the employer's policy prohibiting harassment by redistributing the policy and obtain a receipt each time. This will enhance the ability to prove an employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

7. Instruct Appropriate Managers on the Guidelines for Conducting Investigations of Harassment Complaints

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While it is unlikely that an employer can prevent all conduct which might give rise to a complaint of harassment, in some cases an employer may avoid liability if it promptly and effectively investigates the harassment complaint. Investigations into allegations of harassment are often difficult. Before any complaints are filed, give managers charged with this responsibility guidance on how to effectively conduct and document investigations. Make all managers responsible for notifying Human Resources or the General Counsel if any allegations are brought to their attention and state that possible discipline will occur for failure to do so.

8. Incorporate the Anti-Harassment Policy into New Employee Orientation

With each new hire, an employer has an opportunity to establish a record of taking reasonable care to prevent harassment. By distributing the policy and incorporating harassment prevention into new hire orientation, employers may reduce all types of harassment claims and strengthen their defenses if such claims are brought.

9. Document Efforts to Prevent and Correct Harassment and Any Employee's Failure to Take Advantage of the Opportunities Provided by the Employer

An employer can eliminate any dispute about its efforts to prevent and respond to harassment claims by documenting those efforts. A complete record of the preventive program, its publication to all employees, the training for managers and employees, all complaints received and investigated and any remedial action also will serve to document any failure by an employee to take advantage of the corrective opportunities provided by the employer.

10. Assert the New Affirmative Defense in Pending or Future Harassment Lawsuits

While the Supreme Court's decisions and the new EEOC Guidance provide employers with a defense for harassment claims, employers must affirmatively present and prove it. All pending sexual harassment litigation must be reviewed immediately to determine whether this affirmative defense has been presented and pursued. Amending court

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papers or requesting additional discovery may be appropriate. Also, consider raising this defense, not only in sexual harassment cases, but in other types of employment discrimination cases as well, especially those involving harassment.

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PART II:
THE SUPREME COURT'S RECENT ADA DECISIONS: TRENDS AND PROGNOSTICATIONS

I. INTRODUCTION

The U.S. Supreme Court's four recent decisions on the Americans with Disabilities Act will have a significant impact on the litigation of disability discrimination claims. Recently, the American Bar Association released the results of a survey showing that in 1998 employers won 94% of all reported ADA decisions. This win/loss ratio is likely to stretch even more in the employers' favor as a result of the Court's decisions narrowing the definition of "disability," while at the same time broadening the scope of who is "qualified," the two gateways through which a plaintiff must pass to reach the right to reasonable accommodation.

How expansively these concepts are defined under the ADA is particularly important in light of other recent judicial decisions and the Equal Employment Opportunity Commission's March 1, 1999 Enforcement Guidance on reasonable accommodation. For its part, the EEOC already has responded to the Supreme Court's decisions. In a July 27, 1999 memorandum to its field offices, the Commission accepted, as it must, the Supreme Court's holding that the use of mitigating measures, such as medication and eyeglasses, must be taken into account when assessing an individual's disability status. However, the Commission announced its intention to continue to interpret the definition of disability as broadly as it can by reading these decisions narrowly.

In addition to the EEOC's rapid response, the lower courts already have begun to apply the Supreme Court's decisions and narrow the definition of disability. Employers should be aware that these decisions provide a new basis to challenge the disability status of plaintiffs. However, notwithstanding these decisions, there will be individuals who remain protected by the ADA and who will be able to take advantage of an expanded interpretation of the duty to provide

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reasonable accommodation, including extended leave provisions, job restoration and non-competitive reassignment.

II. THE SUPREME COURT DECISIONS

A. Cleveland v. Policy Management Systems, Inc.

The media paid little attention to the Supreme Court's May 24, 1999 decision in Cleveland v. Policy Management Systems, Inc. There, the Court ruled 9-0 that an individual with a disability who applies for and receives Social Security disability benefits is not precluded, as a matter of law, from claiming to be a '"qualified individual with a disability" under the ADA, able to perform all essential job functions with or without a reasonable accommodation. The Court rejected the Fifth Circuit's holding that the plaintiff must surmount a rebuttable presumption that she was estopped from claiming to be "qualified" under the ADA because, to obtain disability benefits, she asserted she was unable to work.

The Court noted there is no inherent inconsistency between being qualified under the ADA and being a disability benefits recipient. For example, there might be a change in the plaintiff's medical condition, the plaintiff may be able to perform essential but not marginal functions, or the plaintiff may be qualified with a reasonable accommodation but not without one. Where a factual conflict does exist, however, the Court said the disabled plaintiff must offer a reasonable explanation why there is no inconsistency to preclude summary judgment for the employer.

B. Sutton v. United Air Lines, Inc.

In the case that received the most media coverage of the trio of cases decided by the Court on June 22, the twin Sutton sisters sought employment as global airline pilots for United Air Lines. They were denied employment, however, because they could not meet United's visual acuity requirement of 20/100 or better uncorrected vision. Without glasses or contact lenses both sisters could see only 20/200 in one eye and 20/400 in the other eye. However, with correction by glasses or contact lenses, both had visual acuity of 20/20 or better.

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Two questions were before the Court: one, were the EEOC and eight of the nine courts of appeals correct in holding that a person's disability status is determined without regard to mitigating measures, such as eyeglasses or contact lenses; and, two, did United regard the twin sisters as disabled in the major life activity of working?

The Court determined that mitigating measures should be considered in determining disability status because the ADA requires that a person claiming currently to have a disability must be assessed in the present and on an individual basis. To hold otherwise, said the Court, would result in all insulin-dependent diabetics being covered, even if their condition was controlled and produced no limitations because, absent insulin, they certainly would be disabled. The Court also indicated such an approach would preclude consideration of the side effects and negative consequences of some medication and other mitigating measures. Finally, the court reasoned that to ignore mitigating measures and include people who wear eyeglasses would expand the reach of the ADA to 160 million Americans, a figure far greater than the 43 million cited in the record of congressional findings on the legislation.

As to the sisters' argument the airline regarded them as disabled, the Court found they failed to state a claim because while the airline's vision standard prevented them from being global airline pilots, it did not preclude them from performing other pilot jobs. The Court noted that simply having a physical or mental qualification standard does not create a perception of disability. An employer is free to establish criteria which exclude individuals with some impairments if such impairments are not substantially limiting, i.e., ADA disabilities. Also, the Court noted what it means to be actually limited in the life activity of working: "To be substantially limited in the major life activity of working, ...one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs."

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Since the Sutton sisters could be pilot instructors or regional pilots, they were not precluded from a class of jobs, but only a particular type of job. Accordingly, they were not regarded as disabled in working.

C. Murphy v. United Parcel Service, Inc.

In a companion case to Sutton, the plaintiff was hired as a truck mechanic even though his blood pressure, which was reasonably controlled with medication, exceeded the standard for Department of Transportation commercial driver certification as required by the employer. Despite his blood pressure being above normal with medication, the mechanic's doctor had concluded he could function normally. However, once the employer discovered the discrepancy, the mechanic's employment was terminated (this was not done until after two blood pressure readings exceeding the DOT requirement).

Using the same reasoning as the Sutton decision, the Court found the mechanic was not actually disabled because he could function normally with medication. Evaluating conditions in their uncorrected state "is an impermissible interpretation of the ADA," according to the Court referring to the EEOC's view that a determination of disability must be made on a case-by-case basis without regard to mitigating measures, such as assistive devices or medication. However, the Court did not rule on how much deference should be given to the EEOC's interpretation in its implementing regulations and instructive guidances.

The Court likewise determined the employer had not regarded the mechanic as disabled in the life activity of working. Rather, it said the company regarded him as unable to be a mechanic in jobs that require a commercial driver's license, but not in all mechanic jobs.

D. Albertson's, Inc. v. Kirkingburg

In the third of the trio of cases decided on June 22, the Supreme Court ruled a commercial truck driver with monocular vision did not have an ADA claim based on the employer's refusal to hire him. Even though the driver had obtained a special waiver of the vision standards required by the Department of Transportation for commercial truck drivers under an experimental

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government program, the Court held the employer had no obligation to accept that waiver and disavow its own minimum vision requirements.

The employer required interstate truck drivers to meet the DOT's minimum vision requirements for federal certification, however, the employee who had amblyopia or "lazy eye" had been issued a certification in error and had worked for the employer for two years. When he requested to return to work from leave after a nondriving accident two years later, the error was discovered. Consequently, he was refused certification. At that point, the employee applied for a waiver under a special DOT program instituted to bring its standards into compliance with the ADA. Although he obtained the waiver, the employer refused to accept it on safety grounds and terminated his employment.

A federal trial court granted summary judgment to the employer, finding the employee was not qualified to perform the essential functions of the job with or without accommodation, and the employer was not required to accept the waiver as a form of reasonable accommodation. Reversing that decision, the federal appeals court found the employer was not free to override the waiver and must accept the government's determination that those granted a waiver do not pose a threat to public safety.

The Supreme Court reversed the decision of the appeals court and found the driver did not have an ADA-covered disability. Monocular vision is not *per se* a disability under the ADA, the Court noted, because of the many possible variations in vision loss and the individual's ability to compensate for it. Although the Court did say that "people with monocular vision 'ordinarily' will meet the Act's definition of disability," the employer was not required to accept an individual whose vision is below the standard it has adopted as a legitimate job qualification simply because of an experimental government program. Further, mitigating measures that are taken into account in determining disability status may include the body's own ability to compensate for an impairment.

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III. IMPLICATIONS OF THE DECISIONS

A. Open Season on EEOC's ADA Regulations?

In light of these decisions, employers may be wondering what is the status of the EEOC's regulations interpreting the ADA. As the Supreme Court noted in the Sutton opinion, the ADA did not assign to any agency the responsibility to interpret the statute's definition of "disability." But the Court expressed no view regarding what deference, "if any" the court should give to the EEOC's regulations. The Court also openly questioned whether "working" should be a major life activity as the EEOC's regulations state, noting that doing so has the potential of making the definition of disability circular.

In Kirkingburg, the Court also questioned the EEOC's interpretation of "direct threat," noting that it would appear to impose on employers a heavier burden to justify safety qualifications as compared with other job-related qualification standards. Following the Court's decisions, the Fifth Circuit recently noted that the Court's language" now casts a shadow of doubt over the validity and authority of the EEOC's regulations." [EEOC v. RJ Gallagher Co., No. 98- 20351 (5th Cir., 7/15/99).

The EEOC appears to take the position that the Court's remarks about its regulatory authority are mere "dicta." The Commission points out the Court nonetheless frequently cited to its ADA regulations in interpreting the definition of disability.

While many management lawyers have cheered the prospect of now being able to attack the EEOC's regulatory interpretations with an apparent Supreme Court imprimatur, such an attack may not always be in the best interest of employers and certainly should be undertaken with care. The reported employer win rate of 94%, referenced above, demonstrates how well employers have fared under current case law, which frequently relies on the EEOC regulations. If, as the Fifth Circuit stated, the validity and authority of those regulations now are in doubt, employers may not benefit. What employers need most is greater certainty about the ADA. Attacks on the regulations are more likely to produce greater confusion than clarity. Moreover,

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to the extent such attacks prove successful, plaintiffs may be able to argue to their advantage that many employer victories have relied on EEOC interpretations of the ADA that are now invalid.

B. Scope of "Disability"

1. The Courts

The Supreme Court confirmed the common defense strategy of using activities the plaintiff can perform as a means of undermining a plaintiff's claim to be disabled in a major life activity. Many courts of appeals have endorsed this approach.[11] Now, the Supreme Court has done so explicitly in both Murphy and Sutton. The Court noted that UPS regarded Murphy only as unable to perform mechanic jobs which required a commercial driver's license per the DOT medical standards. In contrast, he was considered to be qualified to perform other mechanic's positions and was in fact working as a mechanic. The EEOC previously had taken the position that one need only look at what an employee could not do or was perceived as being unable to do because of a real or imagined impairment. Using the EEOC's analysis, Murphy arguably would have been regarded as disabled in working because he was screened out from performing any job requiring a commercial driver's license which might include a broad number and range of jobs. However, the Supreme Court's focus on the mechanic's position and what work Murphy is able to perform is very helpful to the defense.

Likewise, the Court's assertion that the Sutton sisters could work as regional pilots or as pilot instructors to use their training and skills also supports this proposition. For this reason,

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[11]/ See, e.g., Jackson v. Analyst International Corp., 956 F. Supp. 1568 (D. An. 1997), aff'd, 134 F.3d 382 (10th Cir. 1998)(unpublished) (plaintiff who could not wear tie or dress shirt because of a broken tibia was not disabled because he was able to cook, shop, clean house, play racquetball and golf); Penny v. United Parcel Service, 128 F.3d. 408 (6th Cir. 1997) (only moderate difficulty or pain while walking would not rise to level of disability); Szalay v. Yellow Freight System, Inc., 998 F. Supp. 799 (N.D. Ohio 1996) aff'd 127 F.3d 1103 (6th Cir. 1997) (unpublished) (knee impairment not disabling because plaintiff could perform yard work, recreational activities, drive a car, truck and tractor trailer); Ventura v. City of Independence, 108 F.3d 1378 (6th Cir. 1997) (unpublished) cert. denied 118 S. Ct. 169 (1997) (asthma not substantially limiting because plaintiff could play baseball, football, play saxophone, run, sing and water ski); Olson v. General Electric Astrospace, 101 F.3d 947 (3rd Cir. 1996) (the facts which show that Plaintiff was qualified demonstrated he was not in fact disabled by mental impairments; plaintiff was able to work, attend school and engage in recreational activities); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 725-26 (5th Cir. 1995) (employee with only the use of one hand was not disabled because she was able to clean house, care for herself and engage in recreational activities).

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defense counsel may seek to elicit on cross-examination of plaintiffs' witnesses all of the different types of jobs the plaintiff could perform or offer such testimony directly.

The EEOC twists these decisions, interpreting them to imply that "pilot" and "mechanic" are a class of jobs. By doing so, the EEOC will attempt to argue that the definition of "class of jobs" is relatively narrow and thus interpret these decisions narrowly. On the other hand, employers should seek to argue these decisions stand for the broader proposition that employees able to perform gainful employment in other fields are not disabled in working.

A related implication of the Court's decisions involves the importance of offering the plaintiff an alternative position to defeat a claim he or she was "regarded as" disabled. Several courts of appeals have held an employer that offered alternative employment to a plaintiff or even merely attempted to find an alternative position could not have regarded the individual as disabled. [12] This assumes, however, that the offer is not a demonstration of an employer's

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[12]/ See generally, Burgard v. Super Value Holdings, Inc., 1997 U.S. App. LEXIS 12228 (10th Cir. 1997) (unpublished) (employer offer of non-union warehouse job employee was capable of performing demonstrated employer did not regard employee as disabled); Foreman v. Babcock & Wolcox Co.,supra, (supervisor who wanted employee to return to work demonstrated employee not regarded as disabled); Thompson v. Holy Family Hospital, 121 F. 3d 537 (9th cir. 1997) (nurse not regarded as substantially limited in working when offered her another job at hospital); Gaull v. AT&T, Inc., supra, (plaintiff called back from disability leave to work on special project not regarded as disabled); Penchishen v. Stroh Brewery Co., 932 F. Supp. 671 (E.D. Pa. 1996) aff'd 116 F.3d 469 (3d Cir. 1997), cert. denied 118 S. Ct. 178 (1997) (plaintiff not regarded by employer as substantially limited in walking when employer encouraged her to take position requiring walking); Motichek v. Buck Kreihs Co., 958 F. Supp. 266 (E.D. La. 1996) (since employer allowed plaintiff to return to work at his job, plaintiff was not regarded as disabled in working); Sherrod v. American Airlines, Inc., 132 F. 3d 1112 (5 Cir. 1998) (airline's effort to place employee with back impairment in various jobs demonstrates plaintiff not regarded as disabled); Howard v. Navistar Int'l Transp. Corp., 1997 U.S. App. LEXIS 2069 (7th Cir. 1997) (unpublished) (plaintiff not regarded as disabled where employer allowed plaintiff to work and make up lost overtime); Gordon v. E. L. Hamm & Associates, 101

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stereotypic assumptions about what a plaintiff with a particular medical condition is not able to do. Such a demonstration which would give rise to -- rather than prevent -- a "regarded as" claim of disability discrimination.[13]

Already, the Supreme Court's ADA decisions have resulted in judgments or dismissals of cases. For example, an individual with sleep apnea which was corrected by a positive air pressure device was found not to be disabled, relying upon Sutton and Murphy. (Taylor v. Blue Cross and Blue Shield of Texas, 1999 WL 451339 (N.D. Tex, 6/28/99). Likewise, the Eighth Circuit upheld the dismissal of a claim by a bus driver fired for falling asleep on the job. The driver could not demonstrate that the combination of medications she was taking were necessary medically and caused her to fall asleep with sufficient frequency to be disabling. (Hill v. Kansas City Area Transportation Authority, No. 98-2827 (8th Cir. 7/1/99). In addition, the Eight Circuit held that a police officer who had attempted suicide with his service revolver was not currently disabled because he recovered from his wound, and his depression had been successfully treated by a combination of medication and therapy. A concurring opinion in the case by Judge Kyle questioned the wisdom of reaching the issue of disability since the case had been briefed and argued before the Courts's June 22 decisions, and the appellant had not had an opportunity to respond to the Court's decisions. (Spades v. City of Walnut Ridge, 1999 WL 560627 (8th Cir., 7/15/99). The concurring opinion demonstrates how the lower Federal courts are quick to use these decisions to defeat ADA claims.

F.3d 907 (11th Cir. 1996) (employee not regarded as disabled when he is restored to substantially same position with minor changes to accommodate his absence for treatment); Gupton v. Commonwealth of Virginia, 14 F.3d 203 (4th Cir. 1994) cert. denied 115 S. Ct. 59 (1994) (employee did not show she was foreclosed generally from employment; employer had offered her a position in a nearby office).

13/ See, e.g. Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 1998 WL 237006 (4th Cir. 1998) (evidence supported the jury verdict that Wal-Mart perceived the plaintiff to be substantially limited in his ability to perform a class of supervisory jobs where manager offered another employee his job because he no longer had "the mental capacity to supervise and run the night maintenance crew.").

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Not all of the implications for the ADA's definition of "disability" are necessarily positive for employers. By mandating an assessment of a plaintiff's individual abilities and limitations, the Supreme Court's rulings may undercut the development of several pro-employer presumptions regarding disability status by some courts. For example, several federal appeals courts have concurred that an individual unable to lift 25 pounds or more did not have a disability.[14] The federal district court in northern California recently questioned whether the 25-pound lifting rule is still valid after the Supreme Court's decision in Kirkingburg, which appears to mandate individual assessment of a disabled plaintiff in all cases rather than the adoption of a general rule of law. Powderly v. Mt. Diablo Health System, 1999 WL 447598 (N.D. Cal., 6/24/99).

2. The EEOC

In its July 27, 1999 instructions to its field offices, the EEOC indicated it would continue to interpret the definition of disability broadly, relying on the Supreme Court's 1998 decision in Bragdon v. Abbott, 524 US 624 (1998). The EEOC also noted that the Court's June 22 decisions emphasized that the definition of disability must be determined on a case-by-case basis and that the use of mitigating measures does not necessarily result in an individual not being "disabled" under the ADA. Rather, the EEOC has instructed its investigators to determine whether an individual actually was using mitigating measures at the time of the alleged discrimination and, if so, what impact the mitigating measures had on the individual's ability to perform major life activities, e.g., were the measures successful and did those measures cause adverse side effects.

More significantly, the EEOC will attempt to evade the strictures of the Court's decisions through the use of the second prong of the definition of "disability" which provides ADA coverage for persons with a "record of"a disability from which they have recovered in

[14]/ See, e.g., Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir.1997)(25 pound lifting restriction not disabling); Williams v. Channel Master Sys., Inc., 101 F.3d 346, 349 (4th Cir.1996) (holding that a 25-pound lifting restriction does not meet the ADA definition of "substantially limiting" as a matter of law); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir.1996) (same).

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whole or in part. According to the EEOC's field guidance, an investigator should inquire into a complainant's medical history. Such inquiry may reveal a "record" such as a hospitalization from the time when the complainant's impairment was not yet successfully treated by mitigating measures such as medication or a prosthetic device. The EEOC will attempt to establish that the complainant has a "record of" an impairment which clearly was disabling prior to successful treatment. Because such an individual arguably has a "record of" a disability, even if not currently actually disabled because of successful mitigating measures, the agency hopes to establish disability status in the past. By this method, the agency is seeking to achieve a similar result as if the mitigating measure is ignored by looking to the past before such a measure was in place. The EEOC contends in its guidance that such a "record" will establish disability status regardless of whether the individual currently is disabled, taking into account present mitigating measures. The agency still will have to prove by competent evidence that relevant decision makers had knowledge of this "record" to claim any adverse employment action was caused by this history of disability.

To counter this strategy, employers should carefully weigh the pros and cons of conducting a comprehensive post-offer medical history.. Such an examination of the past may result in an employer acquiring or creating a "record of" a past disabling condition. The EEOC will attempt to argue that the acquisition of such medical history information will be imputed to employers even if it is held in confidence by an employer's medical department. However, if the ADA's confidentiality strictures are adhered to and the medical information is kept in separate locked medical files, an employer should be able to defeat this strategy by adducing testimony from the decisionmakers involved in a challenged employment decision that they had no access to or knowledge of the complaint's medical history. Smaller employers, however, may have more difficulty and plaintiffs may be able to get some cases to a jury based upon a disputed fact as to whether a supervisor knew of the record.

C. More Latitude for Qualification Standards

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The Supreme Court's ADA decisions also appear likely to provide employers with greater latitude to establish qualification standards that permit the rejection of applicants with certain impairments, at least where those impairments are not disabilities under the ADA. Perhaps most significant is the Court's questioning of the EEOC's interpretation of "direct threat" in the Kirkingburg case. The EEOC and many courts take the position that all safety-related qualification standards must satisfy the stringent "direct threat" standard rather than the more employer-friendly test of "job-relatedness and consistent with business necessity." In Kirkingburg, the Supreme Court suggested it is a questionable policy to require employers to bear a higher burden of proof when protecting lives than when promoting business efficiency. The Court's dicta likely will lead employers to defend safety-based qualification standards under the business necessity test and to challenge the EEOC's interpretation of "direct threat."

With regard to the Court's decision that disability benefit recipients are not barred from ADA claims, it seems unlikely that it will result in many more victories for plaintiffs. Only a few circuits had previously adopted a presumption against a disability beneficiary being a "qualified individual with a disability" under the ADA. However, by raising the bar on proving disability, fewer individuals may be "qualified" under the Act, since a plaintiff claiming to be disabled in spite of mitigating measures likely will need to emphasize his or her limitations even with those measures. By being forced to enhance what he or she cannot do, the individual may be unwittingly demonstrating that he or she is not qualified, even if disabled.

IV. CONCLUSION

Based on the cases issued since these Supreme Court rulings, it appears the Court's decisions likely will result in employers winning an even higher percentage of ADA cases. To prevent that result, the EEOC has instructed its field offices to adopt an extremely narrow reading of the decisions and to focus on case-by-case determinations in seeking to find a disability (even when taking into account mitigating measures or the disabling impact of impairments prior to the implementation of mitigating measures).

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Employers should remember, however, that persons with serious medical limitations still are protected by the ADA and may be entitled to extensive accommodation. As a result, employers should not rush to change policies and practices which have been effective in managing issues of disability and enabling disabled individuals to enter and succeed in the workplace.

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