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## PROPOSED EEOC REGULATIONS IMPLEMENTING THE ADA AMENDMENTS

The Equal Employment Opportunity Commission (EEOC) published draft regulations implementing the ADA Amendments of 2008. These regulations can be found at the EEOC webpage or at the Federal Register, Vol. 74, No. 183.

Significant provisions are:

Major Life Activities - The new regulations include among "major life activities" examples such as caring for oneself, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. The regulations significantly expand the examples of major life activities. This will make it easier to find that individuals with certain types of impairments have a disability.

Substantial Impairment - The new rules say that an impairment does not have to prevent or significantly or severely restrict an individual from performing a major life activity to be considered substantially limiting. The rules call for a common-sense assessment comparing an individual's ability to perform a specific major life activity with that of most people in the general population. The important question will be how to determine how most people in the general population are able to perform a specific major life activity.

Mitigating Measures - Another area of change is that the success of mitigating measures such as medication, medical equipment and devices, and behavioral modification does not eliminate the disability for purposes of coverage under the Act. The determination of disability must focus on whether the individual will be substantially limited in performing a major life activity without the mitigating measure. The only exception appears to be ordinary eyeglasses or contact lenses that fully correct visual acuity.

Episodic Conditions - Under the regulations even an impairment that is episodic or in remission meets the definition of a disability if it would substantially limit a major life activity when active. Examples given in the regulation include epilepsy, hypertension, and major depression.

Employers covered by the ADA should review the proposed regulations. Employers should be prepared for more employees qualifying for ADA coverage. Employers will also have to accommodate more employees. The focus under these regulations is now on whether or not an employer's accommodation is reasonable under the circumstances.

## FEMALE SUPERVISOR'S SEXUAL HARASSMENT OF MALE EMPLOYEE STATES CAUSE OF ACTION

In Turner v. The Saloon, Ltd., No. 07-2449, February 8, 2010, Seventh Circuit, the plaintiff male employee alleged that his female supervisor sexually harassed him by subjecting him to a series of offensive touchings and comments of a sexual nature. The District Court granted summary judgment to the employer because only one alleged incident occurred within the applicable three hundred day time limit charging period. The Circuit Court of Appeals reversed and held that the District Court should have considered all incidents of harassment alleging hostile environment because the one incident did occur within the applicable limitations period. In addition, the Circuit Court of Appeals held that the allegations, which included the female supervisor's grabbing of the plaintiff employee's penis through his pants, were sufficiently severe to survive summary judgment.

## GENDER STEREOTYPING MAY EQUAL A SEXUAL ORIENTATION CLAIM OF DISCRIMINATION

Presently, no Federal employment law includes protection for sexual orientation discrimination. However, the prohibition against gender stereotyping under Title VII may offer a claim for sexual orientation. The Illinois Human Rights Act does prohibit discrimination based on sexual orientation. 775 ILCS 5/1-102A. In Prowel v. Wise Business Forms, No. 07-3997, the plaintiff, a self-described effeminate gay man, argued that his layoff did not stem from deteriorating business circumstances but was a bias based on gender stereotyping.

Gender stereotyping was recognized as a viable cause of action in the U.S. Supreme Court case of Price Waterhouse v. Hopkins in which the Court held that Title VII prohibits discrimination against women for failing to conform to a traditionally feminine demeanor and appearance. 490 US 228, 109 S.Ct. 1775 (1989)

In the Prowel case, the facts were that some of the plaintiff's co-workers reacted negatively to his demeanor and appearance in the following ways: a female co-worker frequently called him "Princess;" co-workers made comments calling him "Rosebud" and asked if they had seen "Rosebud sitting there with his legs crossed and filing his nails." Co-workers also stated "Look at the way he walks."

The District Court found that the name calling and gossip were so closely intertwined with the plaintiff's co-workers' attitude about his sexual orientation that the District Court granted the employer's motion for summary judgment. The District Court held that the plaintiff's suit was merely a claim for sexual orientation discrimination, not a gender stereotyping claim.

The Circuit Court of Appeals reversed summary judgment and held that when the facts were considered in the light most favorable to the plaintiff, they constituted sufficient evidence of gender stereotyping harassment because the plaintiff did not conform to the employer's vision of how a man should look, speak and act. The Court held that the employer could not persuasively argue that because the plaintiff was homosexual, he is precluded from bringing a gender stereotyping claim. The Court held that as long as the employee, regardless of his or her sexual orientation, marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred because "of sex," the case is not appropriate for summary judgment.

Comment: Thus, while employees may not be able to file Federal sexual orientation claims, if an employee can show that the hostile environment they experienced was based on gender stereotyping, the employees may be able to state a claim under Title VII.

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