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Editor's Corner - David E. Long

***The advancement and diffusion of knowledge is the only guardian of true liberty.* - James Madison.**

***Liberty has never come from the government. Liberty has always come from the subjects of government. The history of liberty is the history of resistance. The history of liberty is a history of the limitation of governmental power, not the increase of it.* - Woodrow Wilson.**

***You can only protect your liberties in this world by protecting the other man's freedom. You can only be free if I am free.* - Clarence Darrow.**

On March 4, 1801, Thomas Jefferson opened the door of the boarding house he had resided in for the past few months. He was dressed quite plainly for the times. He probably attracted little attention, if any, as he began to walk toward the first appointment of the morning. He strolled to the Capitol Building, still a somewhat bare and unfinished edifice. He was joined by a few militia guards, congressmen and other persons. Arriving at the Capitol, he was met by a number of citizens that were numbered as close to a thousand. In the presence of his fellow citizens and presenting himself as entirely one of them, he was sworn as the third President of the United States. He mumbled through a speech he had prepared, at times his voice barely above a whisper. He acknowledged that he was unequal to the task before him, echoing perhaps the sentiment that all persons of wisdom have always known, stated eloquently by William Shakespeare: "the fool thinks he is wise; the wise man knows he is a fool." After his speech, he walked back to a tavern for a meal. It is rumored that it was crowded and no one would let him have their seat, so he stood in line like everyone else and waited for a table.

He had earlier, during the election campaign, referred to the personal brutality of the whole process. He spoke derisively of the newspapers of the time as "…teeming with every falsehood they can invent for defamation." He took some comfort that unlike elections in Europe, the elections of 1800 would "happily…deal in ink only" as opposed to European elections that dealt "in blood." He had then launched himself into the fray and ended up tying the election with Aaron Burr, both of which defeated the Federalist incumbent John

Adams. The election was decided by the House of Representatives, for the most part, no fans of Jefferson, who tried to block his election by throwing support to Aaron Burr. Since the House was filled with Federalists there was little support for Thomas Jefferson, the new head of the new Republican Party, not to be confused with the party of Lincoln. His eventual election was secured on the 36th ballot and not by an astounding majority at that. He was hated by most of Congress, feared as anarchist by others, and suspected to be a fan of the French Revolution and its bloody solution to the succession of government. Up to that point, only two other Presidents had served and both were Federalists who had very different beliefs than Jefferson's Republicans. The country was divided between elitists and non-elitists, those that believed in a settled meritocracy and those that were suspicious of it, those that were staunch social conservatives and those that favored a more liberal view of society. In short, Jefferson inherited a young country with divisive differences among and between its populace.

And yet, on that otherwise nondescript day the most amazing experiment in the history of freedom concluded successfully. It took place without war. It took place without generals, armies or the threat of armed conflict. It took place peacefully and without injury. It took place, shaking the political foundations of the world, its reverberations being felt even today.

For perhaps the first time in recorded history, one government "overthrew" another government without blood being spilled. Power changed hands merely by the consent of the people. The head of one government, President John Adams, quietly packed his bag and left the keys to the house for the new head of another government. Peaceful succession of an enlightened people took place, and the concept of a "loyal opposition" was born. No one ran into the forests, loaded their rifles and began another revolution. The losers went home with the promise of future elections to win, and the winners began governing with the knowledge that nothing lasts forever except by the will of the citizen. If July 4, 1776 counts as the birth of a nation, then March 4, 1801 was that nation affirming its first steps, its proclamation and proof to the rest of humanity that a government of the people by consent could indeed live and prosper. The rule of law and reason had arrived. The vote had replaced the gun.

Margaret Bayard Smith, a chronicler of the times and the new bride of the owner of the Washington Intelligencer, a newspaper supporting Jefferson, later wrote:

I have this morning witnessed one of the most interesting scenes a free people can ever witness. The change of administrations, which in every government and in every age have most generally been epochs of confusion, villainy and bloodshed, in this our happy country take place without any species of distraction, or disorder. This day one of the most amiable and worthy men [has] taken that seat to which he was called by the voice of his country.

The importance of March 4, 1801 cannot be over estimated. Had the Federalists formed an army or a military faction and refused to cede the reins of government, the world would be different as well as our nation, assuming we still had one. In sixty years America would become embroiled in a bloodbath with citizen against citizen to determine the outcome of not only the ideal that "all men are created equal' but whether we were a confederation of states or a nation first and foremost. Make no mistake, however, that March 4, 1801 set the foundation for the survival of a country and a philosophy that was able to transcend the human tragedy of the Civil War.

On November 4, 2008, we will again decide to change the government. No matter who wins the election, a new government will take its seat in a stable and peaceful succession. If we, at times, do not recognize the gift of which we are stewards, one merely has to turn on the television or to access the Internet to understand the importance inherent in the ability to create society by consent and reason. The gift of being able to change our world by an act of will, a vote, is nothing less than a miracle of the upmost importance. The right to vote, to choose by consent, is not only a possession: it is a duty owed to the world. It is a jewel to be cherished, polished and kept displayed vigilantly in a place of honor. It is a symbol, a golden band to affirm our marriage to a philosophy of justice and liberty that has enlightened History. It is a sacred trust, the chief sacrament on the altar of a constitutional democracy.

I heard one person say recently that she would not vote for McCain because he "was not conservative enough". I pointed out that sitting

home Election Day was actually casting a vote for Obama. Another person told me he would not vote for Obama because he supported Hillary and felt the election was stolen from her. I pointed out the same thing to him. Sitting home was casting a vote for McCain. Some people have told me that neither candidate can be believed, or that all of them spend more time eviscerating each other than actually explaining their proposed policies to the electorate. Others say that both parties purposely 'say nothing" because if the general electorate actually knew "the numbers", etc., they would not vote for either. "No one represents us," they say. "We might as well stay home." Admittedly, I have thought and said the same things myself.

Of course, staying home is our power of choice, if not our duty. It is also within our "power" to not work, not to mow our lawns, never buy groceries, abuse our neighbors at times, and sit and starve to death too. But...I digress. "Power" to do, or not do something, quite often does not imply the "right" to do so.

Freedom and democracy are only made secure by persistence and knowledge. If we do not persistently educate ourselves, we will never learn anything. Two of my professors in undergraduate school at the University of Tennessee, Dr. Tom Ungs and Dr. Joe Dodd, always emphasized the importance of skepticism. "Skepticism," they explained, "was not cynicism." It does not imply giving up. Skepticism implies listening to the opinion or scholarship of a person or group and then considering the other sides of the argument. Do not rely on a professor, politician, philosopher, pedantic, pope or pastor to tell you the "whole" truth. Do not concede readily to any "truth" without independent investigation. If all we do is regurgitate what we are told, we have learned nothing. Education of any kind involves activity on our part, or it is not education; it is simply repetition at best and brainwashing at worst.

Obama is intelligent and sincere. McCain is intelligent and sincere. You are intelligent and sincere. We can agree to disagree, but all of us need to be involved and part of the debate. All of us need to inform ourselves of the issues and not simply reinforce mentally what we already "think we know." In America, we deal in ideals, but we also deal with facts and deeply held beliefs. Let's question ourselves and determine (1) what do we, as a society, want; and very importantly, (2) what is the best way to get there? Knowing what you want is only part of the equation; determining the smartest way to do it is the second half of the key. No. 2 requires some effort on our parts. When we question what we are told, we are America at its best. The social experiment of a government run by the people, in the end, leaves us with no one to blame but ourselves if we fail a task due to our own neglect of participation, learning and consideration of all the important issues we face. We should at least put as much study into electing a president as we do into buying a car.

The importance of our social experiment is not necessarily who wins; the importance is that we all participate. Candidates and their campaigns will always make their case in a bright, shiny way. All will promise a "return to Eden." Their campaigns and their supporters in the press will always present a spin on facts "teeming with every falsehood they can invent for defamation." Or, at least they will really exaggerate the other side's weaknesses. No one said democracy was pretty all the time; however, I still prefer the dangers of democracy to the safety of the king.

While Jefferson was still President, he was walking into the Cabinet meeting room with a foreign dignitary, Baron von Humbolt. The Baron picked up a newspaper in the room that contained vicious public and personal attacks on Jefferson. He questioned as to why the President would allow such an affront to his personal and public dignity. President Jefferson handed the Baron the paper. He told the Baron, "should you hear the reality of our liberty, the freedom of our press questioned, show this paper and tell where you found it." Well said, Mr. President. The freedom is more important than the man.

So, readers inform yourselves, get out there, scream, protest, roll in the muddy, wonderful tug of democratic choice. The winners get to buy the losers their favorite choice of beverage. Both will start as opponents but depart as one nation. The "best defense" to cynicism or despair is us remembering who we are and why we are, what it took to get there, and what it takes to stay there.

Vote.

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EMPLOYEE VOTING RIGHTS

We originally ran this article in an earlier edition. Given the upcoming election, we thought it was a good time to remind employers about their obligations to allow employees to take time off to vote. In short, Tennessee law:

- Allows paid time off for voting;
- Prevents employers from pressuring employees to vote for a certain candidate or to even vote at all; and
- Prohibits an employer from taking adverse employment action against an employee who is appointed to serve as a voting machine technician.

Tennessee Code Annotated § 2-1-106 provides that:

(a) Any person entitled to vote in an election held in this state may be absent from any service or employment on the day of the election for a reasonable period of time, not to exceed three (3) hours, necessary to vote during the time the polls are open in the county where the person is a resident.

(b) A voter who is absent from work to vote in compliance with this section may not be subjected to any penalty or reduction in pay for such absence.

(c) If the tour of duty of an employee begins three (3) or more hours after the opening of the polls or ends three (3) or more hours before the closing of the polls of the county where the employee is a resident, the employee may not take time off under this section.

(d) The employer may specify the hours during which the employee may be absent. Application for such absence shall be made to the employer before twelve o'clock (12:00) noon of the day before the election.

According to the statute, the employer may not be required to provide the full three hours to vote, but rather a "reasonable time not to exceed three hours." Generally, what is "reasonable" depends on the individual circumstances, including the residence of the employee and his polling location.

Most importantly, the employer cannot reduce pay or otherwise penalize an employee who has made the proper application for an absence to vote. The employee, however, is not eligible for paid leave if:

- The employee's work shift begins 3 or more hours after the polls open; **OR**
- The employee's work shift ends 3 or more hours before the polls close.

Poll schedules may differ depending on the county or the specific election. The county election commissions will have those details. According to the statute, the employer may not be required to provide the full three hours to vote, but rather a "reasonable time not to exceed three hours." Generally, what is "reasonable" depends on the individual circumstances, including the residence of the employee and his polling location. The employer can **specify** those hours during which the employee can be absent.

Additionally, Tennessee Code Annotated § 2-19-134 makes it illegal for an employer to coerce or discharge an employee in order to make an employee vote, or to vote for a particular candidate, party, or provision. A violation of this section is a class C misdemeanor.

Finally, Tennessee Code Annotated § 2-9-103 allows the county election commission to appoint voting machine technicians and their assistants. The technicians shall be excused without pay from such full-time employment for

the days required for the performance of their duties. No employer of a voting machine technician being excused from employment pursuant to the statute can require the technician to use vacation time or other leave time for the days the technician has been excused from employment to perform the technician's duties.

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TAKE NOTICE: SUPREME COURT RECOGNIZES RETALIATION CLAIMS UNDER SECTION 1981

In recent times, "Retaliation" has been become a hot topic in the world of employment law. For instance, the number of retaliation charges filed with the Equal Employment Opportunity Commission ("EEOC") has increased dramatically in the last two years and, as a category, rank second behind race in the number of charges filed with EEOC. The Supreme Court's 2006 decision in *White v. Burlington Northern* made it easier for employees to establish a claim of retaliation under Title VII of the Civil Rights Act of 1964 as it redefined what constitutes an "adverse employment action." This summer, the United States Supreme Court in *CBOCS West, Inc. v. Humphries*, considered the question of whether an African-American employee, who was allegedly discharged, among other things, for complaining about the discharge of a black co-worker, could assert a claim of retaliation under a post-Civil War civil rights law, 42 U.S.C. § 1981(a) ("Section 1981"). Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." Some courts had interpreted Section 1981 to permit retaliation claims while others found that such claims were not available. The Supreme Court resolved this question in *Humphries*.

The plaintiff, Hedrick G. Humphries, was a former assistant manager of a Cracker Barrel restaurant. He alleged that Cracker Barrel fired him due to his race and because he complained to managers that a fellow assistant manager had dismissed another black employee because of the employee's race. Humphries filed a charge with the Equal Employment Opportunity Commission (EEOC), and later filed a lawsuit under Title VII and Section 1981. All of his claims were dismissed by the District Court, but the Court of Appeals ruled that the plaintiff's Section 1981 retaliation claim was improperly dismissed. Cracker Barrel appealed to the United States Supreme Court. The Court, after considering the arguments, ruled that Section 1981 does encompass retaliation claims based on race even though the statute does not expressly provide that retaliation claims are covered under Section 1981. The Court relied on prior cases under similar civil rights statutes in making its decision.

The decision in *Humphries* is an important one, since it provides employees with another way to sue their employer for retaliation growing out of a complaint or opposition to the treatment of the employee or a co-worker on the basis of race. For example, an employee may fail to file a timely retaliation charge with the EEOC and still pursue a retaliation claim under Section 1981 where the basis for the retaliation is a prior complaint about race discrimination in the workplace, since no charge filing is required under Section 1981. In addition, a Section 1981 retaliation claim may be brought by an employee who works for an employer who is not covered under Title VII. The Court's decision in *Humphries* underscores the importance of handling with care employment decisions involving employees who have opposed alleged racially discriminatory practices in the workplace. Courts carefully scrutinize the circumstances surrounding the discharge or demotion of an employee who has engaged in protected activity, particularly where the adverse action occurs close in time to the internal or external complaint. Employers need to have a strong and well documented business reason for taking adverse action against such employees and ensure that they consistently apply and enforce workplace rules.

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CAN EMPLOYEES BE TERMINATED FOR DISCLOSING CONFIDENTIAL DOCUMENTS?

Retaliation claims have always been some of the most difficult employment claims for employers to handle, particularly where the employee making the claim remains actively employed. Retaliation claims are the fastest growing claims in the employment landscape today. Retaliation claims are easier for plaintiffs to establish than discrimination claims. This is partially because an employee who suffers an adverse act after complaining about discrimination is not required to establish that he or she was in fact discriminated against in order to win the retaliation claim. Federal law prohibits an employer from retaliating against an employee for opposing discriminatory practices or participating in a discrimination lawsuit/investigation. That being said, is an employee protected from termination for disclosing confidential documents in violation of company policy, if the disclosure came in the context of an employment discrimination lawsuit?

The United States Court of Appeals for the Sixth Circuit addressed this issue in Niswander v. The Cincinnati Insurance Company, No. 07-3738, 2008 U.S. App. LEXIS 13284 (6th Cir. June 24, 2008). In Niswander, a class action lawsuit was filed against Cincinnati Insurance Company alleging unlawful discrimination against women. Specifically, the lawsuit alleged that Cincinnati Insurance Company was paying female employees less than their male counterparts. Niswander opted into the class action lawsuit, but remained working for Cincinnati Insurance Company.

During the course of discovery, the attorneys for the plaintiffs' class asked Niswander to aid in responding to discovery requests by Cincinnati Insurance Company. Niswander provided her attorneys a wide range of documents, but admitted that several of the documents were not related to the unequal pay claim and would only be useful to "jog her memory." Specifically, Niswander provided claims-filed documents, some of which included confidential information about Cincinnati Insurance Company policyholders. Airing on the side of caution, the plaintiffs' lawyers produced the documents to Cincinnati Insurance Company's attorneys.

Cincinnati Insurance Company terminated Niswander's employment after learning of her disclosure of the documents. Cincinnati Insurance Company believed that the disclosure violated the company's privacy policy, code of conduct, and conflict of interest policy, all of which prohibited disclosure of the company's confidential information. Niswander then sued Cincinnati Insurance Company, alleging that they terminated her employment for having participated in the class action lawsuit.

Under Title VII of the Civil Rights Act of 1964, two kinds of conduct are identified as protected activity: (1) discrimination against an employee who has made a charge, testified, assisted, or participated in any manner in a Title VII proceeding or investigation ("participation"), and (2) discrimination against an employee who has opposed any practice that is unlawful under Title VII ("opposition"). The Sixth Circuit found that Niswander could not establish a valid claim under either theory.

The court rejected the notion that Niswander's disclosure of the confidential information was an active participation in the class action lawsuit. The court deemed it "fatal" to this claim that Niswander admitted that several of documents did not support a claim for gender-based pay discrimination. It would have been a different result, if Niswander had given documents that supported her claim of gender-based pay discrimination.

Niswander had also theorized that her disclosure of the documents should be treated as "opposition" to Cincinnati Insurance Company's alleged discrimination against her. The court rejected this argument on the basis that Title VII did not protect Niswander's disclosure of confidential documents. The court noted that an employee's opposition to activity is protected only if the employee's manner of opposition is reasonable. The Court then applied a six factor test to determine whether the employee had acted reasonably in producing the confidential documents to her attorneys. The six factors are:

1. How the documents were obtained;
2. To whom the documents were produced;

3. The content of the documents, in terms of both its confidentiality and the relevance to the claim of unlawful conduct;
4. Why the documents were produced;
5. The scope of the employer's privacy policy; and
6. The ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Applying these six factors, the court held that Niswander had not acted reasonably in giving all of her documents to her attorneys. The court observed that to find in Niswander's favor under these circumstances would turn Title VII's opposition clause into an invitation for dishonest behavior.

The Niswander case is a positive development for employers in the Sixth Circuit. The case essentially sets the foundation that an employee pursuing a discrimination claim does not have free reign to disregard company policies that forbid disclosure of confidential information. Employers should not use Niswander as a license to discipline employees who have opposed discrimination or participated in a discrimination investigation, simply because the employee has violated company policy. The application of the six factors is complex, and employers should certainly seek legal counsel for advice on applying the factors. A different set of circumstances could easily lead to a different result.

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EMPLOYMENT LAW AT THE "MICRO" LEVEL: GENETIC INFORMATION DISCRIMINATION ACT OF 2008

The Genetic Information Discrimination Act of 2008 was passed by Congress and approved by the White House because genetic testing will likely become more prevalent now that the human genome has been deciphered and because of other advances in genetics.

Recognizing that certain genetic conditions and disorders may be associated with particular racial, ethnic, and gender groups, Congress approved the legislation to protect individuals from employers and insurers who might use genetic information to discriminate based upon genetic predispositions. The Act bans discrimination in group premiums based upon genetic information; prohibits an insurer from requesting or requiring an individual to undergo genetic testing; allows an insurer to obtain only the "minimum amount of information necessary to" determine whether health insurance coverage is to be afforded for medical care that has been recommended by a health care professional such as undergoing genetic testing; authorizes an insurance carrier to request, but not require, the participant or beneficiary to undergo genetic testing subject to certain conditions; prohibits an insurer from using genetic information for underwriting purposes or using such information as a consideration for enrollment under a plan or for coverage considerations in connection with enrollment; extends such protection to the fetus carried by a pregnant woman and an embryo legally held by an individual or a family member; extends the Employment Retirement Income Security Act of 1974 for enforcement of the provisions; and gives the Secretary authority to impose and to waive certain penalties. The provisions of the Act apply to the Public Health Service Act and to the Social Security Act relating to Medigap.

The Act also applies to employers – making it an unlawful practice for employers to refuse or fail to hire or to discharge any employee because of genetic information. The Act further makes it unlawful for any employer to limit, segregate, or classify employees in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee based upon genetic information. The Act limits the employer's right to acquire any genetic information. However, it is not considered to be an unlawful employment practice if the employer acquires information inadvertently, subject to the following exceptions:

1. Where health or genetic services are offered by the employer;

2. Where the employee provides prior, knowing, voluntary, and written authorization;
3. Where the employee or family member who is receiving genetic services and a licensed health care professional or a board certified genetic counselor involved in providing such service receives individually identifiable information concerning the results of such services, such information is to only be made available for the purposes of such services and is not to be disclosed to the employer in such a fashion as to disclose the identity of a specific employee;
4. Where an employer requests or requires family medical history from an employee to comply with the FMLA;
5. Where an employer purchases documents that are commercially and publicly available that include family medical history (such information may not include medical data bases or court records);
6. Where the information is to be used for genetic monitoring of the biological effects of toxic substances in the work place provided that the employer provides written notice of the genetic monitoring to the employee; the employee provides prior, knowing, voluntary, and written authorization; or the genetic monitoring is required by federal or state law and the employee is informed of individual monitoring results and the monitoring is in compliance with federal monitoring regulations and state monitoring regulations. The employer may not obtain specific information related to an individual, but may only obtain information in the aggregate.

An exception also applies to an employer who conducts DNA analysis for law enforcement purposes at a forensic laboratory or for purposes of human remains identification and requests or requires genetic information of an employer's employees but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

The ban on the use of this genetic information applies to employment agencies and labor organizations. No specific provision provides a cause of action for retaliation. It remains to be seen whether such a cause of action will be interpreted by the courts to exist as an enforcement mechanism of the Act.

(This is a synopsis of the Act and should not be relied upon as a full and complete summary.)

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CONGRESS MOVES TO EXPAND THE SCOPE OF THE AMERICANS WITH DISABILITIES ACT

Amendments to the Americans With Disabilities Act ("ADA") were approved by the House of Representatives in June 2008. Currently, the bill is on review in the Senate. The bill will be debated in the Senate, or another version might actually be the one that gets debated. The implication of the language of the bill, however, evidences Congress' intention to reverse, by legislation, the United States Supreme Court's holdings interpreting the ADA's definition of "disability." House Bill 3195 ("HB 3195") broadens the definitions of disability considerably. If passed through the Senate and signed by the President, it will change the way employers and their counsel need to look at the ADA and the way potential disability claims need to be assessed.

Named the "ADA Amendments Act of 2008" by Section 1 of HB 3195, Section 2 sets forth the intended purposes of the Bill. HB 3195 specifically cites as its purpose, in part, to reverse the Supreme Court's holdings in *Sutton v. United Airlines, Inc.*, 534 U.S. 471 (1999) ("Sutton") and *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 471 (2002) (" *Toyota*"). Briefly, *Sutton* held that a person was not "disabled" within the meaning of the ADA if "corrective measures" ameliorated the effects of the disability. In *Sutton*, the Court held that two employees could not claim that the airline discriminated against them on the basis of their eyesight when their eyeglasses, or other "corrective measures" gave them normal sight. In *Toyota*, the Court held that the plaintiff could not prove she was disabled because she could not prove her claimed disability (carpal tunnel syndrome) substantially limited a major life

activity. The Court narrowed the definition of disability under the ADA by requiring, among other things, that the claimant must show the claimed disability substantially limits a "major" life activity, not just activities at work. The claimant must show that daily life activities are inhibited and not simply provide a medical diagnosis, and the condition must be permanent.

HB 3195 makes it clear in Section 2 that it intends to reject *Sutton's* interpretation of the ADA that held whether an impairment substantially limits a major life activity is tied to the ameliorative effects of mitigating measures. HB 3195 seeks to reinstate the definition of disability in conjunction with the Rehabilitation Act of 1973 and the Supreme Court case of *Nassau County v. Arline,* 480 U.S. 273 (1987). It also clearly states that *Toyota* restricted the ADA too severely by its interpretation of "substantially" and "major." HB 3195 promises to provide a new definition of "substantially limits" showing that Congress feels that the Court misinterpreted what it meant to accomplish when it enacted the ADA.

In Section 3(1)(A)-(C) of HB 3195, "disability" means with respect to an individual:

— a physical or mental impairment that substantially limits one or more major life activities of such an individual;

— a record of such impairment; or,

— being regarded as having such an impairment (as described in paragraph (4).

Paragraph 4, referred to in sec. 3(1)(C), states that the "regarded as" prong of the ADA "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

Even more interesting is the way HB 3195, Sec. 3(2) defines the phrase "substantially limits." The term is defined to mean "materially restricts." It is not defined further, but HB 3195, Sec. 3(5) ("Rules of Construction Regarding the Definition of Disability") reads more like a Worker's Compensation Act than the ADA employers are accustomed to reading. Sec. 3(5) makes it clear that "materially restricts" is meant to be broad, or at least far broader than *Toyota* ever imagined. Sec. 3(5) states that:

— in order to achieve the "remedial" intent of the ADA, the "...definition of 'disability' in paragraph (1) shall be construed broadly."

— an impairment that substantially limits ("materially restricts") one major life activity is enough to qualify as a disability.

— "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

— determinations of whether the impairment substantially limits ("materially restricts") a major life activity will be determined without regard to the ameliorative effects of "mitigating measures" (A non-exclusive list of those types of devices and accommodations are provided, but "ordinary eyeglasses or contact lenses" are made exceptions if they are intended to fully correct visual acuity/eliminate refractive error.)

There are other sections of HB 3195 dealing with additional definitions as well as amending Section 102 (42 U.S.C sec. 12112) of the ADA. The EEOC is given authority to write and implement regulations in interpretation of HB 3195. Section 5(a)(1) deals with Section 102 of the ADA which prohibits a covered entity" from discriminating "against a qualified individual because of the disability of such individual" in terms of employment and all other aspects associated with employment. Section 5(a)(1) of HB 3195 strikes the above quoted language to now prohibit a covered entity from discriminating "against a qualified individual on the basis of disability." It is not certain what this language is intended to mean, but it certainly broadens the potential targets of discrimination. Is it intended to broaden the protection to individuals who are discriminated against because of an association with a disabled person such as a child? At present, there is no answer, but taking out the requirement that the discrimination against a qualified individual occur as a result of that individual's own disability may be an intentional broadening of the potential scope of what constitutes discrimination.

For example, the ADA at 42 U.S.C. sec. 12112(b)(4) prohibits an employer from discriminating against an employee that lives with or has a relationship with a disabled

person. There are three types of recognized discriminatory conduct in regard to 12112(b)(4). The first is discriminating against an employee because the association with a disabled person costs the employer more in benefits; the second discrimination is against persons associated with disabled individuals with HIV or AIDS. The third recognized associative discrimination is adversely affecting the employee because the employer believes that the employee may be distracted or inattentive at work due the association with a disabled person. The first two are more easily identifiable than the third and more easily proven. The third recognized component is treated fairly narrowly, with case law and the Code of Federal Regulations, making it clear that employers do not have to provide flexible work schedules or attendance, and the employer can refuse to hire the employee if the association prevents the employee from performing the essential functions of the job. See, CFR sec. 1630.8 (1991). Courts have upheld employee terminations when, upon request of the employee for more time off to take care of a disabled child, the employer looked at the past record of absences and determined it could not keep the employee on the job. The Sixth Circuit upheld a trial court's grant of summary judgment, holding that the ADA did not protect a truck driver who refused to work an extra shift because of a need to stay with a disabled child. *Tyndall v. National Education Centers Incorporated of California*, 31 F. 3d 209 (4th Circuit 1994); *Overley v. Covenant Transport, Inc.*, 2006 WL 1133292 (6th Cir., Tenn. 2006). Might the new suggested language signal a Congressional intent to broaden the parameters of what constitutes discrimination by association? It is too early to tell, but certainly the overall intent, or effect of, HB 3195 is to increase the numbers of those protected by the ADA.

The most obvious effect of HB 3195 is the fact that, if passed and made into law as written, more persons are likely to be considered disabled. Moreover, like all enabling acts, it will be in place quite a while before the agency has time to promulgate any guidance or other regulations to alert employers as to how to approach various situations. That effect will be felt most likely in the courts with increased filing of ADA lawsuits. Again, one will have to wait to see if HB 3195 is the version that is enacted into law, or another version makes it through the Senate. A good guess is that the bill is likely to be held up in the Senate pending the November 2008 elections.

(The above article is a synopsis of HB 3195 and should not be relied upon as a full summary of it.)

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