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## 60-Second Memo

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### **Court of Appeals for the District of Columbia Holds that Sexual Relations is a Major Life Activity**

**By: Brian A. Price, Esq.**

Earlier this year, in [\*Adams v. Rice\*, 531 F.3d 938 \(C.A.D.C. 2008\)](#), the United States Court of Appeals for the District of Columbia held that engaging in sexual relations is a major life activity for purposes of determining whether a person is disabled. As a result, the Court concluded that a prospective employee could pursue her claim of disability discrimination -- on the theory that her ability to engage in sexual relations was substantially limited by the effects of her prior treatment for

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breast cancer. The Court reached this conclusion even though the prospective employee no longer suffered from cancer, and the prospective employer did not have any knowledge of the limitations on her ability to engage in sexual relations. The Court's decision expands the application of the ADA by increasing the number of conditions that may be considered disabilities.

### **The Definition of Disability**

The ADA defines a "disability" as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2). Courts often refer to the first portion of the definition as an actual disability, the second portion as a record of having a disability, and the last portion as being regarded as having a disability.

Under the ADA, "major life activities" are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). However, as illustrated by the Court's decision in *Adams*, this list of major life activities is not exhaustive.

### **The Court's Decision in *Adams***

In *Adams*, the prospective employee, Kathy Adams, passed the required entrance examinations and received the medical clearance to become a member of the United States Foreign Service. Subsequently, Ms. Adams was diagnosed with stage-one breast cancer. She elected to undergo a mastectomy and simultaneous reconstructive surgery, and her physician informed the State Department that her cancer was in complete remission with an excellent prognosis.

Nevertheless, the State Department revoked Ms. Adams' medical clearance, thereby disqualifying her from the Foreign Service. When the State Department revoked Ms. Adams' medical clearance, it expressed concern that many of its overseas posts lacked the follow up care for her breast cancer that it believed Ms. Adams needed.

The Court focused its decision on whether Ms. Adams satisfied the definition of "disability." First, the Court concluded that Ms. Adams did not have an actual disability because the only impairment she claimed, her breast cancer, had been eradicated at the time the State Department revoked her medical clearance. Second, the Court concluded that the

State Department did not regard Ms. Adams as being disabled in the major life activity of working because it only regarded her as being unable to perform the particular job for which she applied at the State Department.

Finally, the Court analyzed whether Ms. Adams had a record of having a disability. It was clear to the Court that Ms. Adams had a record of having a physical impairment, *to wit*, her breast cancer. To prevail on her claim, however, Adams also had to show that the breast cancer substantially limited one or more of Ms. Adams' major life activities (since it had been eradicated).

Ms. Adams claimed that she was completely unable to engage in sexual relations due to: (1) a deep seated fear that prospective suitors will reject her due to scarring from her mastectomy and breast reconstruction, her overall post-surgery appearance and her history of cancer; (2) her discomfort with how her body looks and loss of sensations due to her surgeries; and/or (3) loss of libido, which was a side effect of medications she continued to take because of the prior breast cancer.

The Court concluded that sexual relations "easily qualifies as a 'major' life activity" because, *inter alia*, it is a "basic physiological act practiced regularly by a vast portion of the population, a cornerstone of family and marital life...[and is] a conduit to emotional and spiritual fulfillment." *Adams*, 531 F.3d at 947. (Material in brackets added.) Furthermore, the Court concluded that it was irrelevant that the State Department did not have any knowledge of the limitations on Ms. Adams' ability to engage in sexual relations caused by the cancer.

The Court's former conclusion appears to be only the second decision from a federal appellate court recognizing that the ability to engage in sexual relations is a major life activity. *See also McAlindin v. County of San Diego*, 192 F.3d 1226 (9<sup>th</sup> Cir. 1999). (Prior decisions had recognized the related, but narrower, ability to reproduce as a major life activity.) In contrast, other federal appellate courts have held that in order for a person to have a record of having a disability, the employer must have knowledge of a record of both the impairment (such as cancer) and the resulting substantial limitation on a major life activity. *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2<sup>nd</sup> Cir. 1998), *cert. denied*, 536 U.S. 1018 (1999).

The *Adams* case was decided under the Rehabilitation Act, which applies to federal agencies and private employers that are government contractors. However, the *Adams* case is applicable

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to private employers because the ADA was based directly on the Rehabilitation Act, and the ADA and the Rehabilitation Act are interpreted in a nearly identical fashion.

**What Should Employers Do**

As a result of the Court's decision in *Adams*, employers should be prepared to defend against claims of disability discrimination brought by employees they know previously suffered from a condition that might qualify as a disability (such as cancer) even though they are not aware that the previous condition (or the treatment of it) is currently placing any limitations on the employee. In addition, in the event an employer becomes aware that an employee suffers from a condition that limits the employee's ability to engage in sexual relations, the employer should be prepared to defend against disability discrimination claims brought by the employee. When deciding to discipline or discharge such employees, an employer should work closely with their attorneys to build a defense against potential claims of disability discrimination.

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