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The GSH 60-Second Memo

November 5, 2008

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The Tenth Circuit Court of Appeals Holds that Driving is Not a Major Life Activity Under the ADA

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The Tenth Circuit Court of Appeals (covering Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) recently held, as a matter of first impression, that driving is not a major life activity under the Americans with Disabilities Act ("ADA"). In [*Kellogg v. Energy Safety Services Inc.*, 2008 WL 4571962 \(October 15, 2008\)](#), a safety supervisor who had been diagnosed with epilepsy sued her former employer for disability discrimination under the ADA. Part of Ms. Kellogg's work responsibilities involved driving to oilfields to provide services to the company's clients. When working offsite, Ms. Kellogg would work 12-hour days in addition to commuting two hours each way to and from her assigned worksite.

After missing an entire day of work without realizing that she had done so, Ms. Kellogg was seen by her physician. She was advised by her physician that she could not return to work until receiving a release from him. After losing consciousness at home a second time, she was diagnosed with complex partial seizures, a form of epilepsy. Ms. Kellogg's doctor eventually released her back to work, but restricted her from driving until her next scheduled appointment with him.

When Ms. Kellogg requested that the employer's district manager allow her to work only in the shop, she was told that he would have to seek approval from the Company's corporate headquarters. Ms. Kellogg alleged that the district manager ultimately told her that the corporate office considered her a "liability," and that the company could not employ her in a "safety sensitive" position without a "full release" from her physician. The district manager allegedly also stated that Ms. Kellogg would be removed from the company's payroll if she failed to provide him with a "full release" from her physician. Ms. Kellogg never provided the Company with a release permitting her to drive.

The ADA prohibits employers from discriminating against any "qualified individual with a disability because of the disability." One of the elements required to establish a *prima facie* case of discrimination is proof that the ADA plaintiff is disabled as defined by the ADA. Currently, a "disability" is defined as: (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."

While the Tenth Circuit recognized the importance of driving in daily life, it considered driving a "means to an end." It stated that tasks such as walking, speaking, breathing, hearing, learning and working were profoundly more important than driving. It noted that the importance of driving to an individual living in a major metropolitan area with access to mass transit would be significantly less than it would to an individual in a rural area without access to mass transit. The court also noted the EEOC regulations require plaintiffs to establish that they are significantly restricted in their ability to perform a class of jobs or a broad range of jobs in various classes compared to the average person having comparable training. Although the inability to drive will sometimes enable a plaintiff to meet this

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standard or to be substantially limited in the activity of caring for one's self, the court stated that a plaintiff should not be permitted to bypass having to prove substantial limitations in these major life activities by simply providing evidence that she cannot drive. As such, the court held that driving is not in and of itself a major life activity under the ADA in its current form.

If the Kellogg case were to be decided applying the ADA as it will be amended effective in January 2009, chances are the Tenth Circuit would have arrived at a different conclusion. The EEOC's executive summary to the amendments state that the new definition of disability includes, "Chronic or episodic disorders that are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms may be disabilities." Epilepsy that prevents an employee from driving would likely fit into this definition.

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