Litigation

The Amendments to the Americans with Disabilities Act: Bad for Business, Boon for the Disabled?

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The ADA was designed with a noble mission in mind: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] In order to accomplish this mandate, the ADA prohibited discrimination against the disabled in job application procedures, hiring, and other conditions of employment.[2]

As part of the prohibition, employers were required to provide reasonable accommodations to the disabled by taking actions such as giving the disabled time off to seek treatment, making physical changes to the workplace like building a ramp, physically altering the workspace to accommodate the employee, or supplying materials in accessible formats such as Braille.[3] Disability was defined as "a physical or mental impairment that substantially limits a major life activity, a record of impairment, or being regarded as having an impairment."[4] The consequences for violating the act included significant damages such as back pay, compensatory damages for injuries such as emotional distress, front pay for anticipated future losses, and injunctive relief such as reinstatement into his or her former position.[5]

Reaction to the ADA

Not long after the ADA went into effect, courts began limiting its reach. The Supreme Court narrowed the scope of the act and the definition of "disability" in particular. The court emphasized that the standard for disability is a demanding one. In *Sutton v. United States*, the Supreme Court held that when inquiring about whether an impairment constitutes a major life activity, mitigating measures must be considered.[6] For example, bipolarism controlled by medication would not be considered a disability because mitigating measures are taken to control the condition. The Supreme Court similarly narrowed the scope of the ADA in *Toyota v. Williams*, where it held that in order to be considered "substantially limited" in the "major life activity" of performing manual tasks, the individual's limitations must prevent or severely restrict her from performing activities that are "central to most people's lives."[7]

In the early stages of ADA litigation, therefore, employers sought to significantly limit the scope of what could be considered a disability under the law, and they succeeded. Proving that one's disability was covered under the ADA became a central focus of litigation as federal courts continued to rein in the definition of disability. Impairments such as diabetes, epilepsy, muscular dystrophy, post-traumatic stress disorder, clinical depression, arthritis, and multiple sclerosis were all held to be disabilities not covered by the ADA.[8]

As employers succeeded in limiting the scope of the act, disability rights groups fought back, crying out that the original intent of the ADA had been abandoned. *Sutton* and *Toyota*, in particular, prompted groups such as the Epilepsy Foundation, the American Diabetes Association, and the National Multiple Sclerosis Society to lobby Congress to overturn those Supreme Court decisions.[9] The National Counsel on Disability also took action, launching an investigation into the outcome of Supreme Court decisions in ADA cases.[10]

A 2004 report on the NCD investigation was entitled "Righting the ADA," and it discussed ways in which the Supreme Court and lower federal courts had misconstrued the original intent of the ADA.[11] These efforts worked; the NCD report sparked congressional interest, leading to the introduction of the "ADA Restoration Act" in both houses of Congress in 2006 and 2007.[12] By enacting the ADAAA, Congress did exactly what the disability rights groups had asked them to do; they brought back the original intent of the ADA.[13]

The Birth of the ADAAA

The ADA Amendments Act (ADAAA) went into effect on January 1, 2009,[14] effectively overturning the *Sutton* and *Toyota* decisions.[15] Emphasis was placed on the act's broad coverage, while the demanding standard for "disability" was deemphasized. The ADAAA shifted the focus from whether the plaintiff's impairment constitutes a disability to whether the employer has discriminated.[16]

Under the ADAAA, employers are no longer permitted to inquire as to whether mitigating measures are being taken to control the disability.[17] As a result, the bipolar individual who takes medication to control her condition is considered disabled. The exception to this rule is the employee who uses eyeglasses or takes other action to mitigate impaired vision.[18]

The ADAAA also expands the definition of "disability" to include individuals with a perceived disability without considering whether it limits a major life activity.[19] The ADAAA softens the definition of "substantially limits" by stating that defining the term as "severely restricts" is too high a standard.[20] The ADAAA also eliminates the "central importance to daily life" requirement of "major life activity."[21]

The act states that a condition in remission still constitutes a disability if it would "substantially limit a major life activity" while the condition is in its active state.[22] Under the ADAAA, a condition only need substantially limit one major life activity in order for the condition to be considered a disability rather than requiring wholesale impairment of all activities that are central to a person's life as the ADA previously required.[23] The

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law also alters the definition of "major life activity" to include virtually all activities, including "performing manual tasks," "thinking," "lifting," "communicating," and "major bodily functions."[24] Activities not included under the revised definition of "major life activity" include sexual relations, driving, and using a computer. It is likely that these activities will continue to be litigated.

Courts Review the ADAAA

Because the ADAAA did not go into effect until January 1, 2009, case law is still developing. To date, the majority of case law considers whether the act is retroactive. Most courts have held that the act is not retroactive.[25] This means that acts occurring before the passage of the ADAAA are evaluated under *Toyota* and *Sutton* and not under the new ADAAA regime.

The Fifth Circuit explained:

> The effective date of the ADAAA was January 1, 2009. This case was filed, tried, and decided before then. Therefore, in order for us to depart from the Supreme Court's settled interpretation, we would need to find that Congress intended the ADAAA to apply retroactively. We have already declined to do that.[26]

Other courts agree with this conclusion.[27]

In *Jenkins v. National Board of Medical Examiners*, the Sixth Circuit departed from other courts and held in an unpublished opinion that because the case involved prospective relief and was pending when the amendments became effective, the ADAAA and not the ADA must be applied.[28] The lynchpin to the decision was the fact that the plaintiff did not seek damages for the past but accommodation for the future. This case is an outlier in holding that the ADAAA is retroactive.

Cases engaging the substance of the ADAAA include *Horgan v. Simmons*, where the Northern District of Illinois held that under the ADAAA, HIV positive status is a disability because it impairs the immune system.[29] In *O'Neill v. Hernandez*, the Southern District of New York stated in a footnote that the court's conclusion, that the defendant was not discriminated against due to disabling depression, would be the same under both the ADA and ADAAA.[30]

The case delving most deeply into the substance of the ADAAA is *Menchaca v. Maricopa Community College*, where the court refused to dismiss the claim of a former college professor who had been diagnosed with post-traumatic stress disorder.[31] Menchaca suffered a traumatic brain injury from a car accident.[32] Her doctor recommended that she only teach a certain number of hours, only teach courses she had taught before, have reduced administrative responsibilities, and be provided with a job coach.[33]

The school accommodated nearly all of these requests.[34] Despite these accommodations, Menchaca's employment was terminated after complaints that she shouted at students in class, had a great deal of anxiety in meetings, and was found by a doctor to lack empathy.[35] She filed a complaint alleging that the school had failed to reasonably accommodate her.[36]

She was allowed to go to trial based on her inability to "interact with life."[37] She was unable to regulate her emotional responses in stressful situations, limiting her ability to care for herself and to interact with others.[38] This, the court held, was a disability under the ADAAA.[39]

The court referenced the following ADAAA language: "the definition of disability shall be construed in favor of broad coverage of individuals under the ADA."[40] The inability to "interact with life" was not considered a disability under the ADA, particularly because this inability was a condition composed of symptoms that were episodic in nature. Under the ADAAA, however, this inability does qualify as a disability. When the court stated that Menchaca had a disability, they referenced the fact that the ADAAA, unlike the ADA, affords protection to episodic conditions.[41]

Although a young statute, it is clear that the ADAAA shifts the focus away from whether a particular condition constitutes a disability. Under the ADA, whether a condition constituted a disability was the central question in litigation. Under the ADAAA, more often than not, a condition will be considered a disability, and consideration shifts to whether an accommodation was made and whether the accommodation adequately responded to the disability.

The ADAAA's Impact on Employers and Business

Employers will have to alter their behavior and conform their practices to meet the demands of the ADAAA. Because the definition of "disability" has been so widely expanded, employers will be obligated to provide accommodations to nearly every employee claiming a disability. The cost to employers of investigating whether a particular condition constitutes a disability is wasted because the definition is so broad; instead, employers should investigate at the start whether the employee was accommodated.

Because disabled employees can sue for being discriminated against due to their disability, and because the definition of "disability" is so encompassing, firing a disabled employee can lead to costly litigation. The ADAAA will inevitably increase litigation. Under the ADA, most lawsuits were dismissed at the summary judgment stage because the employee was unable to prove the existence of a disability.[42] Whether or not a disability exists will no longer be the focus of litigation. Employers will have to devote more resources to litigation since lawsuits will take longer to conclude and more employees will have a cause of action.

The ADAAA's wide definition of "disability" creates a regime that looks much less like at-will employment and much more like the system in foreign countries where employees are afforded a great deal of protections. In countries where more protections are afforded to employees, the trend is that employers are less willing to hire, and job growth is halted.[43] The ADAAA will mean increased costs to employers, and, like employers in these other countries, U.S. employers will hesitate to hire new employees when the employment will no longer be purely at-will.[44]

Small business will be disproportionately affected because larger firms have legal counsel and disability consultants in place to help them adapt to new laws. In order to accommodate one employee, small businesses must bring in outside experts such as

lawyers and ADA consultants to assist them in complying with the law. The law thus places small businesses at a competitive disadvantage to larger firms.

Larger business will still feel the impact of the ADAAA, however, and maintaining a consistent accommodation process is key. If, for example, an employee injured her knee and the business fulfilled her request for accommodation by giving her a new office on the first floor, the business ought to provide the same accommodation to any future employees with similar injuries. Providing lesser accommodations to similarly situated employees is a recipe for a lawsuit.

While the overall impact of the ADAAA on business is negative, there are some positive aspects to the new law. The ADAAA contains no provision for reverse discrimination claims, meaning that an employee without a disability may not sue under the theory that he received less favorable treatment than disabled employees because of his lack of a disability.[45] Also, employers are not required to provide reasonable accommodation to employees who are "regarded as" disabled; they are only required to avoid discriminating against those employees.[46] Multiple exclusions, such as exclusions for illegal drug use, sex-based conditions such as transvestitism, and psychological criminal conditions like kleptomania, remain under the law.[47]

The ADAAA's Impact on the Disabled

Another important consideration is the effect that the ADA has had on the disabled. Studies show that more disabled individuals were unemployed after the ADA was passed than before it.[48] Employers are far more likely to face liability for terminating someone than for failing to hire them, so employers simply decline to hire the disabled in the first place and thus avoid having to provide expensive accommodations.[49] The two most common ADA violations alleged with the EEOC are discharge, layoff, or suspension claims and failure to provide reasonable accommodation. Failure to hire is therefore not as much of a concern.

Julie Hofius, an attorney who uses a wheelchair, wrote an article entitled "How the ADA Handicaps Me," where she discussed her difficulty getting a job offer.[50] Hofius was thrilled that the ADA provided her with ramps and elevators to get around yet concluded, "The physical obstacles have been removed, but they have been replaced with a more daunting obstacle: the employer's fear of lawsuits."[51] Hofius says the reason for her troubles is that employers are legally prohibited from asking the disabled about their limitations, and so they just decline to hire people like her in order to prevent entanglement in the mess of accommodations.[52]

Solutions for Employers and Business

The most important step that employers can take to become compliant under the ADAAA is to recognize that nearly every condition now constitutes a disability. The definition of "disability" has been expanded threefold. The ADAAA softens the definition of "substantially limits," eliminates the "central importance to daily life" requirement of "major life activity," and alters the definition of "major life activity" to include everything from "major bodily functions" to "thinking." As we mentioned above, when an employee tells an employer about a disability and asks for an accommodation, the employer should not question whether the condition complained of is a disability but should immediately consider accommodations for the employee. This shift in thinking will help employers avoid litigation as much as possible and determine whether the individual can perform the essential functions of the job without accommodation.

Whereas before employers could deny accommodations to individuals taking medication to control their condition, employers will have to train managers to ignore mitigating measures and provide accommodations anyway. Prior to the passage of the ADAAA, the Supreme Court developed the "work with what you know" standard, allowing employers to focus on the current limitations of employees rather than speculating about future possibilities.[53] This standard was easy for employers to apply.[54] Now, employers must consider how the condition operates when mitigating measures are not being utilized. As a result, employers almost have to develop or pay for some base of medical knowledge.

Employers should understand the expanded definition of "major life activity." The Supreme Court had interpreted the term to mean activities that are of "central importance to most people's daily lives." That definition no longer stands. The ADAAA made clear that an impairment that substantially limits one major life activity need not limit any other major life activity in order for that impairment to be considered a disability.

An awareness that episodic conditions and conditions in remission are now protected is crucial. An employee who has had only one seizure yet has been diagnosed with epilepsy is disabled under the ADAAA.[55] The ADAAA does not define episodic or remission and does not give examples of conditions falling under these categories that would count as disabilities.[56]

Episodic Conditions

The ADAAA does not place a timeline on impairments, nor does it require an employee to experience more than one impairing episode to be considered disabled.[57] Employees should not deny a reasonable accommodation to an employee because he has experienced only one episode of an impairment. Employers ought to work with employees to address the impairment and assess its severity and frequency based on a physician's assessment as well as any other impairments the physician believes the employee might develop as a result of the recurring condition.[58]

After providing a reasonable accommodation, the employer should follow up to ensure that the reasonable accommodation meets the employee's needs and that the employee feels comfortable talking to the employer about future needed reasonable accommodations, and if a second episode occurs, the employer should confirm the employee's safety.[59] If the employee has had more than one episode, the employer should treat them the same as someone who has had only one, making sure to document each separate episode. The employer should try to tailor the reasonable accommodation to the individual employee by considering the information the employee has learned from his episodes, such as triggering factors and coping mechanisms.[60]

Conditions in Remission

The ADAAA states that conditions in remission constitute disabilities as well.[61] The two forms of remission are complete remission, which means "complete disappearance of the clinical and subjective characteristics of a chronic or malignant disease," and partial remission, which means that a disease is much improved but "residual traces of the disease are still present."[62] The ADAAA makes clear that conditions in partial remission are disabilities if they substantially limit a major life activity while active. Employers must also continue to accommodate conditions in complete remission because remission is different from a cure. Those who have had cancer, for instance, can experience symptoms of the disease prior to its return.

Possibly the most important action that employers can take is to require the employee to provide reasonable updates to the medical certification for his need of a continuing accommodation. Because episodic conditions and conditions in remission constitute disabilities, without requiring the medical certification of need, employees could continue to ask for accommodations indefinitely.[63]

Consistency is Critical

Consistent provision of reasonable accommodations throughout the organization is paramount. Large businesses will receive more accommodation requests, creating a greater potential for inconsistency. To combat inconsistency, larger businesses should create structures within their central human resources departments to track how each individual accommodation is handled. With each subsequent request for an accommodation, the business should refer back to how previous requests have been handled to avoid providing different levels of accommodation for the same disability.

Smaller businesses will likely not face the same problems as larger businesses. Smaller businesses have fewer employees, which means fewer requests for accommodations and a lower chance of inconsistent provision of accommodations. Moreover, businesses are not required to provide an accommodation if it would create an undue hardship. Still, small businesses face problems in ADAAA compliance about which larger businesses do not have to worry. Each small business owner must act as his own compliance officer, making judgments about accommodations on his own. Lacking a central human resources department and lacking in-house ADA consultants, small businesses must exercise caution when providing accommodations.

Conclusion

The ADAAA likely will increase compliance costs for business and encourage more litigation. However, by prioritizing the documentation of employee medical issues and the provision of reasonable accommodations, businesses will be able to manage the new law. The key for businesses concerned with successful navigation of the ADAAA is to change their own attitudes toward reasonable accommodation. Rather than debating whether to provide the accommodation and questioning whether the condition is a disability, employers should engage in the interactive process to ascertain whether there is a reasonable accommodation available that would enable the employee to perform his or her job. To avoid abuse, employers should require frequent updated documentation of employee medical issues.

Unfortunately, even by adopting the best attitudes, the ADAAA will prove burdensome for business by increasing costs and making businesses hesitant to hire new employees. This impact on business will result in harm to the disabled. While creating safe and comfortable work places for the disabled is an important objective, the ADAAA will likely make obtaining jobs more difficult. Concerned about litigation costs and aware that litigation rarely arises from the failure to hire, employers might hesitate to hire disabled individuals.

Endnotes

1 42 U.S.C.A § 12101(b)(1)(1990).

2 42 U.S.C.A § 12112(a) (1990).

3 42 U.S.C.A § 12111(9) (1990).

4 42 U.S.C.A § 12102(2) (1990).

5 42 U.S.C.A § 1981(a)(2) (1990).

6 Sutton v. United States, 527 U.S. 471, 482 (1999).

7 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002).

8 Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (diabetes); Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy); McClure v. General Motors Corp., 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003) (muscular dystrophy); Schriner v. Sysco Food Serv., No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005) (post traumatic stress disorder); McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (clinical depression); Sutton v. N.M. Dept. of Children, Youth and Families, 922 F. Supp. 516 (D.N.M. 1996) (arthritis); Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1085 (10th Cir. 1999) (multiple sclerosis).

9 Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 Tex. J. C.L. & C.R. 187, 193 (2008).

10 *Id.* at 188, 194.

11 *Id.* at 194.

12 *Id.* at 197-198.

13 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101) (The ADAAA statute states that one of the purposes of the statute is to bring back the original intent of the ADA.).

14 Rohr v. Salt River Project Agric. Imp. & Power Dist, 555 F.3d 850, 853 (9th Cir. 2009).

15 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101).

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17 42 U.S.C.A § 12102(4)(E)(i) (2009); Gina M. Cook, *When the Duty to Provide a Reasonable Accommodation Seems Unreasonable: Accommodating and Managing Employees with Episodic Impairments or Impairments in Remission Under the ADA Amendments Act of 2008*, 32 N.C. Cent. L. Rev. 1, 14-15 (2009).

18 42 U.S.C.A. § 12102 (4)(E)(ii)(2009).

19 42 U.S.C.A. § 12102 (3)(A)(2009).

20 42 U.S.C.A. § 12102 (4)(B)(2009).

21 42 U.S.C.A. § 12102 (2)(2009).

22 42 U.S.C.A. § 12102 (4)(D)(2009).

23 42 U.S.C.A § 12102 (1)(A)(2009).

24 42 U.S.C.A. § 12102 (4)(A)(B)(2009).

25 *See* Carmona v. Sw. Airlines, 604 F.3d 848, 857 (5th Cir. 2010); Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 565 (6th Cir. 2009); EEOC v. Agro Distribution LLC 555 F.3d 462, 473 n.8 (5th Cir. 2009).

26 Carmona v. Sw. Airlines, 604 F.3d 848, 857 (5th Cir. 2010).

27 Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 565 (6th Cir. 2009); EEOC v. Agro Distribution LLC, 555 F.3d 462, 473 n.8 (5th Cir. 2009).

28 Jenkins v. Nat'l Bd. Of Med. Exam'rs, 2009 WL 331638, at *1 (6th Cir. Feb. 11, 2009).

29 Horgan v. Simmons, 2010 WL 1434317, at *5 (N.D. Ill. Apr 12, 2010).

30 O'Neill v. Hernandez, No. 08 Civ. 1689 (KMW), 2010 WL 1257512, at *16 n.6 (S.D.N.Y. Mar.25, 2010).

31 Menchaca v. Maricopa Cmty. Coll., 595 F. Supp. 2d 1063, 1077 (D. Ariz. 2009).

32 *Id.* at 1065.

33 *Id.*

34 *Id.*

35 *Id.* at 1066-1067.

36 *Id.* at 1067.

37 *Id.* at 1068-69.

38 *Id.*

39 *Id.*

40 *Id.* at 1068.

41 *Id.* at 1070.

42 *See* Smaw v. Commonwealth of Va. Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994); Andrews v. State of Ohio, 104 F.3d 803 (6th Cir. 1997); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U.L. Rev. Colloquy 217, 228-29 (2008).

43 Hugo Hopenhayn & Richard Rogerson, *Job Turnover and Policy Evaluation: A General Equilibrium Analysis*, *J. Pol. Econ.*, Vol. 101, No. 5, Oct. 1993, at 915-938; Adriana D. Kugler & Gilles Saint-Paul, Inst. for the Study of Labor, *Hiring and Firing Costs, Adverse Selection and Long-term Unemployment*, IZA Discussion Papers 134 (2000).

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51 *Id.*

52 *Id.*

53 *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).

54 *See, e.g.*, Zirpel v. Toshiba Am. Info. Sys., Inc., 111 F.3d 80, 81 (8th Cir. 1997) (finding that employee was not disabled because panic disorder did not usually limit her activities and did not substantially limit her ability to work).

55 *See* Cook, *supra* note 17.

56 *Contra* H.R. Rep. No. 110-730, pt. 2, at 19 (2008), *available at* http://www.law.georgetown.edu/archiveada/documents/HRRep110-730Part2.pdf (providing examples of episodic impairments or impairments in remission, i.e. epilepsy, multiple sclerosis, and cancer).

57 *See* Cook, *supra* note 17.

58 *Id.*

59 *Id.*

60 *Id.* at 22.

61 42 U.S.C.A. § 12102 (4)(D)(2009).

62 U.S. Equal Employment Opportunity Comm'n, EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), EEOC Notice No. 915.002 (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html #6.

63 *Id.*