

## **The Americans with Disabilities Act Amendments Act (ADAAA)**

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### I. Background and Overview

A. The Americans with Disabilities Act of 1990 (ADA) was intended to provide a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 USC § 12101(b).

B. The ADA definition of disability, a physical or mental impairment that substantially limits one or more major life activities, having a history of such impairment, or being regarded as having such impairment, was the definition that had been used in the anti-discrimination sections of the Rehabilitation Act of 1973. 42 USC § 12102, 29 USC § 705, § 791, § 793, § 794.

C. Contrary to almost everyone’s expectations, the application of this definition of disability created a veritable graveyard for ADA employment discrimination claims, with the majority being dismissed on summary judgment because the courts found that these plaintiffs were not substantially limited in any major life function and therefore not entitled to the protections of the ADA.

1. In 1999 The U. S. Supreme Court issued decisions in three ADA employment discrimination cases, often known as the Sutton trilogy, finding that the determination of “substantial limitation” should take into account the impact of “mitigating measures”, such as medication, corrective lenses, hearing aids, etc., in evaluating whether a plaintiff meets the definition of disability under the ADA. Sutton v. United Air Lines, 527 U.S.

471 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

2. In 2002 the Supreme Court held that the definition of disability “needs to be interpreted strictly to create a demanding standard for qualifying as a disability” and required that an individual demonstrate a substantial limitation in activities of “central importance to daily life.” Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

3. Since then, other federal district and appellate courts have found that plaintiffs with impairments such as muscular dystrophy, breast cancer, active seizure disorder, uncontrolled diabetes and deafness were not substantially limited in any major life activity and therefore not protected by the ADA. See Appendix to 29 CFR Part 1630.

D. This narrow interpretation of the definition of disability was undermining the purpose of the ADA to provide broad protection for individuals with disabilities, by making it extremely difficult for people with many types of physical and mental impairments to combat workplace discrimination. As a result, a successful effort was undertaken to amend the ADA in 2007-2008 to restore it as a comprehensive national mandate to eliminate disability based discrimination in the workplace and elsewhere.

## II. ADA Changes to the ADA

A. The statutory definition of disability remains **unchanged**. 42 USC § 12102.

B. The definition of major life activities are now included in the statute, 42 USC § 12102(2), (this definition had previously only been in the EEOC regulations), and they include, but are not limited to:

1. Caring for oneself
2. Performing manual tasks
3. Seeing
4. Hearing
5. Eating
6. Sleeping
7. Walking
8. Standing
9. Lifting
10. Bending
11. Speaking
12. Breathing
13. Learning
14. Reading
15. Concentrating
16. Thinking
17. Communicating, and
18. Working

C. In addition, and very significantly, major life activities now include major bodily functions, including, but not limited to the:

1. Immune system
2. Normal cell growth
3. Digestive system
4. Bowel and bladder function
5. Neurological system
6. Brain
7. Respiratory system
8. Circulatory system
9. Endocrine system, and
10. Reproductive system

D. To meet the requirement of being **regarded as** having a disability, an individual need only prove that he or she is perceived as having a mental or physical impairment, and is no longer required to prove that the impairment substantially limits a major life function. 42 USC § 12102 (3).

1. The impairment cannot be transitory (less than six months actual or expected duration) **and** minor to trigger coverage based upon “regarded as.” Id. There is otherwise no fixed durational requirement for coverage.

2. There is no entitlement to reasonable accommodation in the workplace for an individual only claiming to be regarded as disabled. 42 USC § 12201(h). There had been a split among the courts over this question.

E. Rules of construction

1. Definition of disability shall be construed in favor of broad coverage under the ADA. 42 USC § 12102(4).

2. The term “substantially limited “is to be construed broadly in favor of expansive coverage, and is not meant to be a demanding standard. 29 CFR § 1630.2 (j). It need not prevent or significantly restrict the individual from performing a major life activity. Id. This is a direct refutation of the Toyota Motor Manufacturing decision by the U.S. Supreme Court.

3. An impairment that is episodic or in remission is a covered disability if it would substantially limit a major life activity when active. 42 USC § 12102(4). (This had been a huge roadblock for claims by employees with mental illness, seizure disorders and other episodic impairments.)

4. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, including medication, prosthetics, assistive hearing devices, low vision devices (except ordinary eyeglasses) mobility devices, oxygen equipment, reasonable accommodations, assistive technology and learned behavioral or adaptive neurological modifications. 42 USC § 12102(4). This is a direct refutation of the findings in the Sutton trilogy of Supreme Court decisions.

a. Although the mitigating effects of ordinary eyeglasses may be considered, a covered entity may not use qualification standards based upon an individual’s uncorrected vision, unless it can demonstrate that it is job-related and consistent with business necessity, 42 USC § 12113.

#### F. Miscellaneous provisions

1. The ADAAA does not create a right to bring a reverse discrimination claim by an individual without a disability. Id.

2. It conforms the interpretation of the definition of disability in the anti-discrimination sections of the Rehabilitation Act to that of the ADAAA. This includes Section 501 for federal executive branch employees, Section 503 for employees of federal contractors and Section 504 for employees of entities receiving federal assistance.

3. Authorizes the EEOC, DOJ and the U.S. Department of Transportation to promulgate regulations implementing the changes in the ADAAA. 42 USC § 12201.

### III. Significant Additions and Clarifications in the New EEOC Regulations , Effective 5/24/11

A. Explicitly states that where a job applicant or employee does not require reasonable accommodation, the impairment of the individual can be evaluated solely under the “regarded as” prong of the definition of disability, and there is no need to determine if there is a substantial limitation of a major life activity. 29 CFR § 1630.2(g) and (I).

B. Pregnancy is not an impairment in and of itself, but a pregnancy could result in a pregnancy-related impairment which meets the definition of disability. Appendix to 29 CFR Part 1630.

C. In determining substantial limitation of a major life activity, the individual’s capacity should be compared to the ability of most people in the general population. This determination will generally not require scientific, medical or statistical analysis. Id.

1. For individuals with learning disabilities diagnosed on the basis of intra-individual difference in their abilities, such as actual versus expected achievement (for example, excelling in math and science, but barely passing in English and history), the relevant comparison is still to most people. However, the regulation explicitly rejects the

common previous assumption that excellent academic performance means an individual cannot be substantially limited in activities such as learning, reading or writing. Id.

D. Adds psychotherapy, behavioral therapy and physical therapy to the list of mitigating measures that cannot be considered in evaluating whether an impairment substantially limits a major life function, and re-emphasizes that the list is non-exhaustive. Id.

E. Deleterious side effects of ameliorative measures, such as medication, may be considered in determining substantial limitation, although it will rarely be necessary to do so. Id.

F. The EEOC has decided that the ADAAA does not apply prior to its effective date of January 1, 2009. See EEOC, "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008" at [www.eeoc.gov/laws/regulations/ada](http://www.eeoc.gov/laws/regulations/ada).

G. In a case where an individual claims he or she is regarded by an employer as having a mental or physical impairment, an employer cannot defeat such a claim by demonstrating it subjectively believed the impairment to be both transitory and minor. The employer must demonstrate that the impairment actually is, or would be, both transitory and minor. 29 CFR § 1630.15(f).

#### IV. Caselaw Under the ADAAA

A. Generally has been consistent with the intent of the ADAAA to provide broad and inclusive coverage.

1. Intensity of a plaintiff's broken femur sufficient to survive summary judgment. Patton v. eCardio Diagnostics, 2011 WL 2313211 (S.D. Tex. 2011).

2. Back pain, leg pain and physician's diagnosis of spinal stenosis/ lumbar radiculopathy sufficient to survive summary judgment. Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. 2011).

3. The ADAAA is intended to cover people with Attention Deficit Hyperactivity Disorder. Geoghan v. Long Island Railroad, 2009 WL 982451 (E.D.N.Y. 2009).

4. Under the ADAA, plaintiff claiming denial of reasonable accommodation must still allege specific major life activities that were substantially limited. Broderick v. Research Foundation of SUNY, 2010 WL 3173832 (E.D.N.Y. 2010).

B. Almost all courts have agreed with the EEOC that the ADAAA does not apply retroactively. In one exception, the Sixth Circuit found the ADAAA would apply retroactively to a claim where the plaintiff was seeking prospective injunctive relief. Jenkins v. Board of Medical Examiners, 2009 WL 331638 (6<sup>th</sup> Cir. 2009).

#### V. Some Litigation Practice Tips

A. Despite the changes made by the ADAAA, always consider your ancillary State law claims under the NYS Human Rights Law and City law claims under the NYC Human Rights Law if representing an employee. Both still provide more generous definitions of disability than the amended ADA, as well as no cap on the amount of compensatory damages which may be recovered. Also, in the past few years the NYS Division of Human Rights (NYS DHR) has become much more efficient in processing administrative complaints of employment discrimination and is not experiencing the unconscionable delays that occurred in years past. You can dual file your EEOC charge of discrimination with NYS DHR.

B. The burden of proving discrimination on the basis of disability remains unchanged, and is likely to be the new battleground when cases are litigated under the ADAAA. If representing an employee, do not get lulled into a false sense of security by the improved playing field. If representing an employer, your focus in discovery should probably shift to undermining the merits of the discrimination claim.

C. Be extremely careful in citing pre ADAAA caselaw!

D. Litigation of these cases is now far less likely to be resolved by dispositive motions. It will be expensive, time consuming and emotionally and physically exhausting for all parties. Use your position as attorney and counselor to be the voice of wisdom and reason, cool everyone's emotions and look to creative ways of resolving these cases fairly. If you treat your opposing counsel rudely and disrespectfully, resolution will be considerably more difficult. Opposing counsel can be your biggest ally in bringing the parties to the negotiating table.

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