

An Initial Look at the Challenges of the New ADA

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ABSTRACT

Congress recently enacted legislation designed to change the interpretation to be used in determining whether a claimant is disabled under the Americans with Disabilities Act. In passing the ADA Amendments of 2008, Congress expressed its concern that worthy claimants were being denied disability protections due to the restrictive analysis used by the courts. Congress also directed that the Equal Employment Opportunity Commission would revise its regulations to be more consistent with the amendments. This paper examines the new standard for determining disability under the new ADA in light of the proposed regulations published in the Federal Register by the Equal Employment Opportunity Commission.

INTRODUCTION

Get Ready! The Equal Employment Opportunity Commission (EEOC) has proposed rather sweeping changes to the Americans With Disabilities Act (ADA) in order to implement the ADA Amendments Act of 2008 (ADAAA). Through the amendments, Congress sought to counter the restrictive approach the Supreme Court took in discussing the definition of disability in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. (ADA Amendments Act, 2008)

In *Toyota*, the Court reviewed the situation of an employee working on an automobile assembly line who claimed her requests for modified duty jobs due to her carpal tunnel syndrome and related impairments had been denied. The lower appellate court had determined that the impairments substantially limited the employee in performing major life activities and was therefore entitled to ADA protection. The Supreme Court took a much more demanding approach, holding that just having an impairment wasn't quite enough to warrant protection. The Court determined that the individual must have an impairment "that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." (*Toyota*, 2002) Many other courts followed suit.

In the ADA amendments, Congress expressly rejected the restrictive approach the courts have been using in determining whether claimants are disabled for purposes of the ADA. In addition, Congress provided the EEOC with the mandate to reinforce the intent of Congress that disabled employees would be afforded the broadest protection allowable under the statute. (ADA Amendments Act, 2008)

THE NEW ADA

In the ADA Amendments Act of 2008, signed into law by President George W. Bush in September 2008, Congress specifically rejected the *Toyota* decision and adopted rather broad standards to be used when determining whether an individual is considered disabled. The statutory mandate is rather

unmistakable in that the language of the Act provides a “broad scope of protection” for employees. It also conveys Congress’ intent and expectation that courts analyzing ADA cases provide coverage for plaintiffs to the maximum extent permitted by the statute.

What does this mean for business? This action by Congress immediately reverses the course taken during a decade of conservative federal court decisions interpreting the ADA. In the future, employees will be more prosperous in demonstrating that a condition meets the definition of disability and thus justify protection. Therefore, under the amendments, more claims premised upon the ADA will survive early dismissal by the courts and proceed to trial. The ultimate outcome may be the surfacing of a multitude of latent claims or novel conditions that meet the less restrictive requirements for disability. Nevertheless, the impending issues presented by the amendments require that employers take notice since employees who might have a disability are more likely to be held protected under the Act.

Definition of Disability

The ADA expressly prohibits employers from discriminating against qualified individuals with a disability. Therefore, what constitutes a disability is a very important determinant for ADA protection. The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities” of an individual. (Americans with Disabilities Act, 1990) The new rules expand upon the key definitions found in the ADA for delineating what is considered a disability.

The ADAAA retains the basic definition of disability but seeks to change the way it should be interpreted by the courts in ADA cases. One such expansion involves the interpretation of “substantially limits” a major life activity. Consistent with the Act, the proposed EEOC regulations reinforce the statutory language in that a limitation need not significantly or severely restrict a major life activity to meet the standard. (EEOC Proposed Regulations, 2009) The directive seeks to dilute the degree of limitation and intensity of focus applied by the Supreme Court in *Toyota*.

Major Life Activities

The second half of the definition of disability involves what exactly constitutes a “major life activity.” Until now, the ADA was silent on what constituted a major life activity, the area of life that needed to be adversely affected to claim a disability. This was a primary focus in denying the employee protection in the *Toyota* case. Although the EEOC had proposed recommended activities to be included under the definition, the courts had routinely rejected the agency’s broad interpretation of the statute. In fact, in the case of *Sutton v. United Air Lines, Inc.*, the Supreme Court questioned why the EEOC had even issued regulations providing guidance regarding the proper interpretation of the term disability since no agency had been given such authority under the ADA. (*Sutton*, 1999) Congress addressed the issue in a very clear manner in the ADA by including a thorough, but not exhaustive, list of major life activities.

The new ADA actually divides major life activities into two categories. The first list is rather comprehensive, comprising activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. (EEOC Proposed Regulations, 2009, p.48440) Some of these activities had actually been recommended previously by the EEOC through regulations and guidance, and others were added by Congress in the amendments. The second category of major life activities expressly includes the operation of any major bodily function, including functions of the immune system, cell growth, digestive functions, reproductive functions, and

neurological and brain functions. (EEOC Proposed Regulations, 2009, p.48440) The bottom line for employers to observe regarding the amendments and subsequent EEOC regulations is that just about anything can now conceivably constitute a major life activity.

THE COURTS AND MITIGATING MEASURES

In the past, courts considered the ameliorative effects of mitigating measures in making determinations as to whether employees were protected under the ADA. The *Sutton* court decided that corrective measures should play a role in the determination of disability and found that individuals with conditions that could be controlled with assistance would not be protected by the ADA. (*Sutton*, 1999) In *Sutton*, regular eyeglasses served as a mitigating measure to correct the plaintiffs' vision and deny ADA protection. Other courts followed this lead in denying ADA protection. One claimant was denied ADA protection because his diabetes could be controlled through medication and diet. (*Orr*, 2002) Another employee's claim was rejected because he had so successfully adapted to muscular dystrophy that he therefore did not have a disability. (*McClure*, 2003) Numerous other courts have applied the *Sutton* analysis in determining that if conditions could be controlled, or the intensity or frequency of the condition could be reduced (perhaps by medication, exercise, or diet) claimants would not be considered disabled under the ADA. The ADAAA and proposed EEOC regulations direct that employers and courts must now ignore the effects of such mitigating measures being used by the individual in question in determining whether an impairment substantially limits a major life activity. The regulations provide an extensive list of mitigating measures, including medication, medical supplies, prosthetics, hearing aids, and mobility devices that cannot be used in determining whether an employee is disabled. The regulations specifically warn that employers should not revert to the reasoning about mitigating measures used in court cases preceding the amendments because they are contrary to the law as amended. (EEOC Regulations, 2009, p. 48440) However, in a minor victory for employers, the ADAAA specifically holds that employers and courts may consider the ameliorative effect of "ordinary glasses or contact lenses" when examining an individual under the new ADA.

The ADAAA and proposed EEOC regulations may have the effect of forcing employers to make speculative assumptions about what "may be" instead of "what is" a mitigating measure. When engaging in the interactive process and communicating with employees and their health care providers, employers will need to specify that the examination being conducted should be without regard to mitigating measures.

MISTAKEN ASSUMPTIONS

What about the situation where an employer mistakenly believes that an employee is disabled? In addition to impairments that substantially limit a major life activity, the ADA has always offered protection for employees wrongfully perceived as being disabled. However, the previous standard was difficult for ADA claimants to satisfy since they would need to demonstrate that the employer regarded them as substantially limited in a major life activity. Under the new ADA, a plaintiff "regarded as" having a disability need only demonstrate that the employer perceived the individual as having a mental or physical impairment. The good news for employers is that the "regarded as" prong will not be applicable to impairments that are transitory (lasting six months or less) or considered minor. However, on the other hand, impairments that are "episodic or in remission" can still be considered to be disabling

if they substantially limit a major life activity when the condition is active. (EEOC Proposed Regulations, 2009)

EEOC MANDATE

The new ADA provided an express mandate to the EEOC to issue binding regulations and other interpretive guidance to further clarify the statute. This is the catalyst behind the proposed EEOC regulations and is significant in light of the Supreme Court's questioning of the EEOC's authority regarding technical interpretations under the ADA. Congress clearly eliminated any concern in that area through the express language of the ADAAA. In fact, under the amendments, Congress expected that the EEOC would provide a regulatory definition of "substantially limits" that would relax the current high standard used by the courts and therefore better reflect the intent of Congress. (ADA Amendments Act, 2008)

CONCLUSION AND FUTURE RESEARCH

The bottom line for employers is welcome to the new ADA! When it comes to litigation under the ADA, employers should now have the same expectation as they do for other types of discrimination claims (gender, race, religion, age, etc.). It will be much less difficult for plaintiffs to prove that they have a right to bring such claims. Although employers will still have the right to defend a discrimination claim by showing that a legitimate nondiscriminatory reason existed to justify the adverse employment action, they can no longer count on being able to defeat such a claim before getting to that point.

The proposed regulations make it absolutely clear that the EEOC fully intends to carry out its Congressional mandate to broaden the protections afforded by the ADA. When it comes to day-to-day human resource management, employers need to be prepared to adapt interactive process policies and to offer accommodations to a wider cross-section of their workforce. Prudent employers will err on the side of caution when considering whether an employee has a disability and proceed cautiously when reacting to requests for accommodation.

Future research by the authors in this area will take two primary directions. First, the authors will examine subsequent application of the ADA by the courts in light of the amendments and EEOC regulations. Simultaneously, the authors intend to study how the EEOC regulations will impact the decisions made by executives and managers when disability claims surface.

REFERENCES

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- Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101) (enacted July 26, 1990).
- McClure v. General Motors Corp.*, 75 Fed.Appx. 983 (5th Cir. 2003).
- Orr v. Wal Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).
- Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431 (2009) (to be codified at 29 C.F.R. pt.1630) (proposed September 23, 2009).
- Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
- Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 134 (2002).