EMPLOYMENT LAW REPORT

A New Day for the ADA: How the ADA Amendments Act Restores Accessibility To Justice

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INTRODUCTION[1]

Congress recently created a seismic shift for people seeking justice under the Americans with Disabilities Act ("ADA"). The ADA Amendments Act of 2008 ("ADAAA") took effect on January 1, 2009 to "restore the intent and protections of the Americans With Disabilities Act."[2] With the enactment of the ADAAA, people with disabilities should expect to have access to reasonable accommodations and to be protected from anti-disability bias in decision-making as they are brought under the umbrella of protection by the ADA. Toward that end, Congress expressly rejected narrow United States Supreme Court interpretations of the ADA and gave the United States Equal Employment Opportunity Commission ("EEOC") explicit authority to issue regulations that will ensure meaningful compliance with the ADAAA's broad remedial scheme.

As of this writing in May 2009, the EEOC has not promulgated regulations, and no published court decision has provided a definitive interpretation of the ADAAA's substantive provisions. Nonetheless, one may surmise the direction of enforcement efforts based on both pre- and post-amendment precedent and in light of the amended statutory language.

I. ANATOMY OF THE ADA BEFORE THE 2008 AMENDMENTS

President George H.W. Bush signed the ADA into law in 1990.[3] Congress modeled many aspects of the ADA after the Rehabilitation Act ("Rehab Act"), which Congress adopted in 1973 to bar disability discrimination in federal sector employment, funding, and contracting.[4] At the time of the ADA's enactment, the Rehab Act had been read to provide an expansive interpretation of what constituted a disability,[5] and those who advocated in favor of the ADA had good reason to believe that inserting the same language from the Rehab Act into the ADA would produce similar interpretations that would provide for broad coverage to those with disabilities[6]

Prior to the recent amendments, the statutory definition of "disability" under the ADA contained three prongs or bases for protection:

> The term "disability" means, with respect to an individual— (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.[7]

The ADA did not, however, define two major concepts: (1) "substantially limits," and (2) "major life activities." As a result, much of the pre-amendment litigation focused on whether a person met the definition of disability and, therefore, could assert a potentially viable claim under the ADA.

Left undefined, the meaning of these terms became the source of controversy and plaintiffs often had to litigate whether they were even covered by the ADA. Contrary to what many believed was the intent of Congress, the Supreme Court repeatedly rejected the broad definition of coverage under the Rehab Act in favor of a narrow view when applying the ADA. Landmark decisions in two cases in particular operated to exclude large segments of the population from protection.

In *Sutton v. United Airlines, Inc.*, the Supreme Court ruled that mitigating measures must be considered when determining whether a person has an impairment that substantially limits a "major life activity."[8] Mitigating measures could be, for example, medications, eyeglasses, and prosthetics. Further narrowing the scope of the ADA, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* subsequently held that the terms "substantially limited" and "major life activities" must be strictly construed when determining the existence of a qualifying disability.[9] The Supreme Court also ruled in *Toyota* that an individual must show that such a disability severely restricts that individual in "activities that are of central importance to daily life."[10]

II. NEW AMENDMENTS: AH, THE GOOD OLD DAYS

The ADAAA creates a major shift away from litigation over coverage issues and restores what may be thought of as the original intent of Congress when it first enacted the ADA. The ADAAA's text specifically confirms the legislative intent that the statute be broadly construed concerning the scope of protection.[11] To underscore that point of law and fact, the ADAAA explicitly repudiated the Supreme Court's rulings in *Sutton* and *Toyota*.[12]

Following are highlights of some of the major changes to the ADA. The ADAAA addresses the two major areas previously left undefined by explicitly covering the factors for determining if someone is "substantially limited" and by defining "major life activities." Congress delegated the defining of "substantially limited" to the EEOC through the agency's regulatory process and based on the significant guidance provided in the statute itself.[13] We commend to the reader the ADAAA's text for a fuller appreciation regarding the sweeping Congressional repudiation of the

course previously followed by courts when narrowly interpreting coverage issues.[14]

A. Mitigating Measures Generally Must Be Ignored In Determining Whether A Person Has A Disability

The ADAAA also rejects Supreme Court precedent on the extent to which courts (and employers) may consider mitigating measures in evaluating whether someone is impaired under the statute. In effectively reversing *Sutton*, the ADAAA bars consideration of mitigating measures when determining whether an individual's impairment triggers coverage.[15] The only exception to this bright-line rule is that ordinary eyeglasses and contact lenses may be considered.[16]

B. An Illustrative List Of "Major Life Activities" Confirms That Statutory Protection Must Be Applied Liberally Going Forward

Another major course correction by the ADAAA involves the definition of "major life activities." The amendments extend protection to many people who Congress had originally intended to cover but who have not been covered until now. The ADAAA defines "major life activities" as follows:

> (2) Major life activities.—
>
> (A) In general.—For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions.—For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[17]

This statutory list broadens the scope of conduct that may be considered "major life activities." More to the point, the list vastly exceeds the activities many courts had recognized over the years. Furthermore, the statutory compilation is

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an illustrative rather than an exhaustive list of what triggers ADAAA coverage.[18]

The textual inclusion of major bodily functions as "major life activities" is of particular importance because that allows whole classes of individuals to be considered to have impairments without the necessity of a case-by-case medical review. For example, people with HIV who are asymptomatic should be protected under the ADAAA because the function of the immune system is a major bodily function that is a "major life activity."

This aspect of the amendments also opens the door for more systemic challenges – either through class-action litigation or cases brought under a disparate-impact theory – to discriminatory practices based on a disability,.[19] Without the requirement of an individualized inquiry into whether a plaintiff has a disability in each case, collective action becomes much more feasible to address, for example, a company's leave policy.

C. "Substantially Limits" Includes Episodic Conditions And Conditions In Remission And Otherwise Must Be Broadly Construed

In reversing the rigid interpretation of "substantially limits" established by *Toyota*, the ADAAA specifically confirms that an impairment which is episodic or in remission is a disability "if it would substantially limit a major life activity ***when active.***"[20] Congress elaborated that one of the purposes of the ADAAA is as follows:

> [T]o convey Congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[21]

Accordingly, people with diseases like Multiple Sclerosis and Lupis will not lose protection under the ADAAA during the times that their medical conditions are not active.

D. "Regarded As" Claims No Longer Require Proof That An Employer Mistakenly Believed The Impairment "Substantially Limited" A "Major Life Activity"

A person who experienced job discrimination because they were regarded as having a disability was technically covered by the ADA. The analysis of "regarded as" claims before the passage of the ADAAA, however, had devolved to create a nearly impossible standard for plaintiffs. In many jurisdictions, a plaintiff had to show that an employer perceived the impairment "substantially limited" a "major life activity." This judicially created standard required extensive litigation around ***what the defendant subjectively believed*** was the impact of the impairment, moving away from what many believed was the original intent of the ADA – to prevent stereotyping and discrimination on the basis of the impairment itself.

Now the focus for "regarded as" claims has moved from an analysis of the employer's subjective perception about the impact of impairment to whether the employer took adverse action because of that impairment. Under the ADAAA, a plaintiff now states a "regarded as" claim by showing that the defendant took adverse action because it believed the plaintiff has an impairment (so long as the impairment is not minor and transitory). In other words, a plaintiff no longer must prove that the defendant perceived the plaintiff as having an impairment which "substantially limits" a "major life activity."[22] Importantly, the "regarded as" prong does not trigger a duty to accommodate.[23]

E. Implications Of The Statutory Changes For Litigation

A plaintiff lawyer now will likely pursue claims for failing to provide a reasonable accommodation under the first ("actually disabled") prong of the statutory definition

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of disability. Based on the textual changes and the explicit intent of Congress, the focus of litigation will probably revolve around the interactive process and whether a reasonable accommodation was available. The employer's defenses of undue hardship and direct threat will likely become more prominent in motion practice as defendants continue to seek dismissal of claims via summary judgment. In that regard, plaintiff counsel would be well advised to argue that reasonableness should be a question for the jury or finder of fact to decide.

Discrimination resulting in an adverse action, such as the failure to hire, termination and hostile environment, will likely be litigated under the third ("regarded-as disabled") prong of the definition of disability. The plaintiff will have to show that an impairment or perceived impairment motivated the decision or was the basis for the hostile environment. Again, the burden of demonstrating that the employer perceived the impairment to "substantially limit" a "major life activity" has been removed. This should re-focus the litigation on the question of causation – another question that should generally be resolved by a jury or fact finder rather than in connection with a dispositive motion.

III. APPLICATION OF THE ADAAA

To date, there have been virtually no published decisions indicating how courts will analyze the three prongs under the ADAAA: (1) actually-disabled claims, (2) record-of-disabled claims, and (3) regarded-as-disabled claims. In gauging the probable direction of the courts going forward, several issues become important. First, what kind of regulations will be promulgated under the ADAAA and when; second, to what extent will the ADAAA be used retrospectively; and third, how will the ADAAA interact with State anti-discrimination law.

A. The Nature And Weight Of Regulations Promulgated Pursuant To The ADAAA: Stay Tuned

The ADAAA expressly authorizes and directs the EEOC to promulgate revised regulations that define "substantially limits."[24] In that respect, the ADAAA specifically declares that the EEOC's existing regulations, which define "substantially limits" as "significantly restricted," create too high of a threshold.[25] Otherwise stated, Congress has directed the EEOC to issue regulations that ensure a much more liberal approach to enforcement of the ADAAA.[26]

That the ADAAA contains explicit Congressional authorization for the EEOC to promulgate regulations in furtherance of the amendments is critical. Traditionally, courts have felt relatively free to give little or no weight to EEOC regulations applicable to the ADA. As one Court of Appeals put it recently, "[t]he EEOC's interpretation is not necessarily entitled to any special deference by the courts, because Congress has not given that agency the authority to interpret the ADA."[27] Tellingly, the precedent on which the Court relied, *Toyota*, has been specifically rejected by Congress when enacting the amendments.[28] Accordingly, that same Court conceded as follows when discussing the ADAAA:

> [T]he EEOC's interpretation of what Congress meant by "major life activity" in the ADA is bolstered by the fact that when Congress amended the ADA last year, it added to the statute a definition that is quite similar to the EEOC's: "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking,

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> standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[29]

In short, the EEOC's regulations should carry great authoritative weight, and those regulations will likely be promulgated in the first part of 2010.[30]

B. The Retroactive Application Of The ADAAA: Permitted, Except When It Is Not

Given the emphatic way that Congress repudiated several Supreme Court decisions, some plaintiff attorneys have pushed for a retroactive application of the ADAAA. However, intent to overturn a judicial decision does not, by itself, establish intent that the legislation be applied retroactively.[31] Absent clear Congressional intent, a court will not apply a statute retrospectively if it will increase a party's liability for past conduct.[32] Indeed, some courts have already opined that the ADAAA should not be applied retroactively.[33]

Savvy plaintiff counsel have responded by reiterating that "[a] statute does not operate 'retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.'"[34] In that regard, the award of attorney's fees does not attach "new legal consequences to events completed before [the ADAAA's] enactment" because attorney's fees determinations are collateral to the main cause of action.[35]

Consequently, one of the first Courts of Appeals to address the retroactive application of the ADAAA vacated the district court's ruling against the plaintiff and remanded for reconsideration of the disability-discrimination claims under the ADAAA.[36] In that case, the plaintiff sought injunctive relief as opposed to monetary damages.[37]

A large amount of the initial litigation following passage of the ADAAA has occurred in the Federal District of Arizona. In a trio of cases, the Court first appeared to endorse the retroactive application of the ADAAA – even in cases involving claims for monetary damages; then a different judge explicitly held that the ADAAA cannot be retrospectively applied; and a third judge subsequently suggested that the ADAAA may be applied retroactively.

In the first and only published case, *Menchaca v. Maricopa Community College Dist.*, the Court ruled that the plaintiff's Post Traumatic Stress Disorder qualified as a disability because the condition restricted her ability to care for herself, work, and interact with others.[38] Although the predicate facts occurred before adoption of the ADAAA, the Court relied on the ADAAA in concluding that the plaintiff was "substantially limited" regarding a "major life activity."[39] In denying the defendant's motion for summary judgment, the Court cited the ADAAA's mandate that episodic conditions constitute disabilities.[40] In addition, the Court relied on the ADAAA's definition of "major life activities."[41]

Although the Court in *Menchaca* did not squarely address the question of retroactivity, the substantive analysis certainly supports the view that the ADAAA can be applied retrospectively. At a minimum, plaintiff counsel should be able to argue that the ADAAA provides

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interpretive guidance retroactively when no precedent on point exists concerning the disability claims in a particular case.[42]

Two months after *Menchaca* was decided, a different judge from the same federal district issued an unpublished decision, *Burkhart v. Intuit, Inc.*, that declared, "the ADAAA is not retroactively applicable and does not govern this matter."[43] The judge in *Burkhart* did not address the prior published decision from the same jurisdiction, and she specifically relied on *Toyota* and *Sutton* in concluding that the plaintiff did not have a disability.[44]

One month after *Burkhart* was decided, yet another judge in the Federal District of Arizona essentially endorsed the approach in *Menchaca* and the view that the ADAAA could be applied retrospectively. In *Yount v. Regent Univ.*, the judge reiterated that, "'because the ADAAA shed light on Congress' original intent when it enacted the ADA,' this Circuit recognizes that the ADAAA may be relevant to the scope of the terms within the ADA."[45] In short, the ADAAA – at the very least – provides interpretive guidance retroactively.

The judicial battle in the Federal District of Arizona portends ongoing ambiguity and further litigation about the reach of the ADAAA. On balance, plaintiff lawyers in cases seeking monetary damages will be on more solid ground arguing that the ADAAA informs the construction of the ADA retroactively rather than revising the ADA outright.[46]

C. The Significance Of (Forum) Shopping: Pursuing Disability Claims Under The Minnesota Human Rights Act Versus Under The ADAAA

The Minnesota Human Rights Act ("MHRA") provided protection from discrimination to people with disabilities before the ADA existed. The Minnesota Legislature based the MHRA's original statutory language on Section 504 of the Rehab Act. Therefore, Minnesota courts looked to regulations promulgated under the Rehab Act and federal case law interpreting the Rehab Act to construe the MHRA.[47]

In 1989, prior to the original enactment of the ADA, the Minnesota Legislature amended the MHRA to lower the threshold for what was considered a disability.[48] Pursuant to Minn. Stat. § 363A.03, Subd. 12, "[a] disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Notably, the Minnesota Legislature change "substantially" to "materially" in revising the legal mandates under the MHRA.[49] Since that amendment, Minnesota courts have expressly recognized that the standard under the MHRA is less stringent than the standard under federal law.[50]

Not having its own statutory definition of "major life activities," Minnesota courts have relied on federal regulations as "helpful" in defining what activities constitute "major life activities."[51] Minnesota courts have also ruled that changes in federal regulations under the ADA have an impact on interpreting the MHRA.[52]

Thus, Minnesota courts will likely rely on the ADAAA and related regulations in applying the MHRA. The question is how the ADAAA statutory and regulatory changes will affect coverage issues and how Minnesota courts will decide what "materially limits" a "major life activity" in the future.

At present, Minnesota courts have not defined "materially limits" but instead describe it referentially as being "less stringent" than the federal standard.[53] We expect "materially limits" under the MHRA will continue to be interpreted as less stringent than "substantially limits" under the ADAAA. Indeed, the Minnesota Legislature inserted "materially limits" in the MHRA to lower the threshold below the threshold imposed by the Rehab Act which, in turn, was lower than the threshold created by courts under the ADA.[54]

In sum, the MHRA should continue to provide broader access to coverage for people with disabilities. The choice of law question for plaintiff attorneys will probably shift away from whether a client will be covered by the ADAAA or MHRA, as coverage issues become less of a concern, and move toward forum-selection and damages considerations when suing out cases. For example, the ADAAA may provide greater access to punitive damages than the MHRA, which caps such damages at $25,000.[55]

CONCLUSION

The ADAAA should shift the focus of courts and employers alike from an individualized and intensive medical-records analysis of whether a person has a

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disability and back to an interactive process that lowers barriers to equal employment opportunities for people with disabilities. As a result, the crux of future disability litigation will probably concern (1) whether a defendant acted reasonably in response to a request for accommodation or (2) whether a defendant violated the law because it took adverse action against a plaintiff because of the plaintiff's disability – acting on stereotypes, biases, and myths.

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[2] ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3406, 122 Stat. 3553 (2008), codified in 42 U.S.C. 12101, et seq.

[3] 42 U.S.C. §§ 12101, et seq.

[4] 29 U.S.C. §§ 701 et seq.

[5] See generally School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

[6] See generally Chai R. Feldblum, et al., "The ADA Amendent Acts of 2008," 13 Tex. J. C.L. & C.R. 187 (2008).

[7] 42 U.S.C. § 12102 (2009) (emphasis added).

[8] 527 U.S. 471, 482-84 (1999).

[9] 534 U.S. 184, 197 (2002).

[10] Id.

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3406, 122 Stat. 3553 (2008), codified in 42 U.S.C. § 12101, note.

[12] Id.

[13] Id.; see also 42 U.S.C. § 12102, Subd. 4 (2009).

[14] Id.

[15] 42 U.S.C. § 12102, Subd. 4(E)(i)(2009).

[16] 42 U.S.C. § 12102, Subd. 4(E)(i)(I) (2009).

[17] 42 U.S.C. § 12102, Subd. 2 (2009).

[18] 42 U.S.C. § 12102, Subd. 2(A) (2009).

[19] For an illustration of the challenges that plaintiffs faced in pursuing class-action litigation before passage of the ADAAA, see generally EEOC v. Northwest Airlines, Inc., 216 F.Supp.2d 935 (D. Minn. 2002).

[20] 42 U.S.C. § 12102, Subd. 4(D) (2009) (emphasis added).

[21] ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3406, 122 Stat. 3553 (2008), codified in 42 U.S.C. § 12101, note at (b)(5).

[22] 42 U.S.C. § 12102, Subd. 3(A) (2009).

[23] 42 U.S.C. § 12201(h) (2009).

[24] ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3406, 122 Stat. 3553 (2008), codified in 42 U.S.C. § 12101, note.

[25] Id.

[26] Id.

[27] Winsley v. Cook County, 563 F.3d 598, 603, n.2 (7th Cir. 2009).

[28] Id.

[29] Id. (quoting 42 U.S.C. § 12102(2)(A)).

[30] See generally Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984) (ruling that courts must defer to agency regulations when the discretion has been delegated to that agency).

[31] Rivers v. Roadway Express, Inc., 511 U.S. 298, 304-05 (1994).

[32] Landgraf v. USI Film Prods., 511 U.S. 244, 263-64 (1994).

[33] EEOC v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009); Rudolph v. United States Enrichment Corp., 2009 WL 111737 (W.D.Ky. January 15, 2009).

[34] Landgraf, 511 U.S. at 247.

[35] Landgraf, 511 U.S. at 269-70, 277.

[36] Jenkins v. Nat. Bd. of Med. Examiners, 2009 WL 331638, *3-*4 (6th Cir. 2009).

[37] Id.

[38] 595 F.Supp.2d 1063, 1069 (D. Ariz 2009).

[39] Menchaca, 595 F.Supp.2d at 1068-69.

[40] Menchaca, 595 F.Supp.2d at 1070.

[41] Id.

[42] Menchaca, 595 F.Supp.2d at 1068 (quoting the ADAAA) ("[T]he primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and ... the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis[.]" Congress has made clear that "[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA].").

[43] 2009 WL 528603, n.4 (D. Ariz. 2009).

[44] 2009 WL 528603, *13.

[45] 2009 WL 995596, n.3 (D. Ariz. 2009) (quoting Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850 (9th Cir. 2009)).

[46] See, e.g., Rohr v. Salt River Project Agric. Improvement & Power Dist. , 555 F.3d 850, 862 (9th Cir. 2009) ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.").

[47] State by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn. 1988); see also generally Fahey v. Avnet, Inc., 525 N.W.2d 568 (Minn. Ct. App. 1995).

[48] See, e.g., Sigurdson v. Carl Bolander & Sons, Co., 532 N.W.2d 225, 228, n.3 (Minn. 1995).

[49] Id.

[50] Id.

[51] See generally State by Beaulieu v. Clausen, 491 N.W.2d 662 (Minn. Ct. App. 1992).

[52] See generally Gee v. MN State Colleges and Univ., 700 N.W.2d 548 (Minn. Ct. App. 2005).

[53] See, e.g., Hoover v. Norwest Private Mort. Banking, 632 N.W.2d 534, 543, n.5 (Minn. 2001); Sigurdson, 532 N.W.2d. at 228, n.3.

[54] Sigurdson, 532 N.W.2d. at 228, n.3.

[55] Minn. Stat. § 363A.29, Subd. 4(a).

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