

Cultural Competence and Disabilities and the Americans with Disabilities Act Amendments Act of 2008

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History of the Americans with Disabilities Act (ADA)

- Purpose of the ADA
 - Congress's purpose in enacting the ADA was primarily to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”
- ADA Overview
 - Enacted in 1990, Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.
 - The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.
 - The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.
 - (Title III applies to places of public accommodation – essentially imposes numerous duties on businesses and other places of public accommodations to ensure that access is available to disabled persons.)
 - Under the ADA, a “disability” is defined as:
 - a physical or mental impairment
 - that substantially limits
 - one or more major life activities

Court Interpretation of ADA Employment Discrimination Claims

- Federal Court Theme: “Are you really disabled?”
 - Disabled persons looked to court action for protection from disability discrimination.
 - Courts focused primarily on challenges to the existence of the disability.
 - Heavy burden put on plaintiffs to prove its existence.
 - Major cases in this theme:
 - *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) – held that mitigating measures that help an individual control or cope with impairments must be considered in determining whether an individual is disabled within the meaning of the ADA.
 - *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) - held that the term “substantially limits” must be strictly construed when determining the existence of a disability.

Responses to Courts' Interpretations

- Public Response to Courts & Congress
 - ▣ Numerous groups and spokespersons for disabled Americans spoke out regarding the impact of court rulings.
 - ▣ Advocates for the disability community argued that the standard created by the courts' decisions was so demanding that cases turned primarily on whether the plaintiff was actually disabled instead of on the merits of the disability discrimination claim.
 - ▣ Plaintiffs had a difficult time meeting the burden of proof in establishing their disabilities.
 - ▣ Thus, Plaintiffs seemed essentially barred from having their discrimination claims evaluated.
 - ▣ Advocates emphasized that interpretation of the ADA should focus on its original intent.
 - ▣ Petitioned Congress for a change in the ADA.

Responses to Courts' Interpretations (cont'd)

■ Congressional Response to Public & Courts

■ Road to Change

- Congress introduced the ADA Restoration Act in 2007, in both the House and Senate.
- It was rejected due to strong opposition from many sides, mainly because it excluded the requirement that a disability “substantially limit a major life activity.” The thinking was that this would deem virtually any condition a “disability.”
- After months of hearings and input from various advocacy groups, the business community and government officials, Congress reached a compromise bill.
- The new bill represented a compromise among advocates for the disability community, businesses and various organizations.

■ The ADA amendments

- On September 25, 2008 the ADA Amendments Act of 2008 (ADAAA) was signed into law and took effect on January 1, 2009.
- Expresses the “new” Congressional purpose: in essence, a return to the ADA’s original intent.

Major components of the ADAAA

■ Summary of the ADAAA

- Revises Title I of the ADA (and the corresponding provisions in the Rehabilitation Act) to reject the holdings of *Toyota* and *Sutton* to:
 - Expand the definition of what qualifies as a “disability,” and directing that “disability” be interpreted broadly under the ADA;
 - Eliminate the mitigation defense, so that an employee’s disability will be assessed without regard to any mitigating measures (e.g., medication, equipment, assistive technology);
 - Lessen the required showing for employees who claim to have been “regarded as” having a disability; and
 - Instruct that, in ADA suits, courts should focus the analysis on the alleged discrimination rather than on the plaintiff’s disability.

Major components of the ADAAA (cont'd)

■ Definition of “Disability”

- The ADA’s definition of “disability” is the same under the ADAAA, but the amendments change the meaning of related terminology.
 - It adds a definition for “major life activity” with a *non-exhaustive* list of examples, which includes various “major bodily functions.”
 - Previously there was no list or definition of what constituted a major life activity – this left much room for court interpretation.
 - Modifies the requirement that individuals claiming to have been “regarded as” disabled no longer have to prove that the employer regarded them as having been “substantially limited in a major life activity.”

Major components of the ADAAA (cont'd)

■ Broader Coverage

- The ADAAA instructs that “substantially limits” is to be interpreted consistently with the findings and purposes of the Act – which note that the courts’ previous standard was “too high.”
- The ADAAA contains a “rules of construction” section which directs courts to interpret the definition of “disability” in favor of broad instead of narrow coverage.

Major components of the ADAAA (cont'd)

■ Substantially Limits

- In determining whether an impairment *substantially limits* a major life activity, the following rules apply:
 - An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
 - An impairment that substantially limits one or more major life activities when active is still a disability if it is episodic or in remission.

Major components of the ADAAA (cont'd)

- Substantially limits (cont'd)
 - An impairment that substantially limits one or more major life activities but that can be controlled by “mitigating measures,” such as medication, medical supplies, prosthetics, hearing aids, mobility devices and assistive technology, is still a disability.
 - There is an exception for corrective lenses. Thus, individuals with poor vision should not be considered disabled if their vision is corrected by wearing eyeglasses or contact lenses.

Major components of the ADAAA (cont'd)

■ Major life activities

- The ADAAA identifies an illustrative list of “major life activities” that are of central importance to most people’s lives, such as:
 - caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.
 - Many of these activities were identified in case law interpreting the ADA, but were never identified in the ADA itself.
- The ADAAA clarifies that “major life activities” includes “*the operation of major bodily functions*” such as:
 - normal cell growth, endocrine functions, neurological functions, digestive functions, respiratory functions and reproductive functions.

Major components of the ADAAA (cont'd)

- “Regarded as” disabled
 - Under the 1990 ADA, an employee can be “regarded as” having a disability even though the employee does not have an impairment that substantially limits a major life activity.

 - Under prior case law, this occurs when:
 - the employee does not have an impairment, but the employer mistakenly perceives the employee as having an impairment that substantially limits a major life activity, or

 - the employee has an actual impairment, and the employer *believes* that the impairment substantially limits a major life activity when it is *actually* less than substantially limiting and/or does not actually limit a major life activity.

Major components of the ADAAA (cont'd)

- “Regarded as” disabled (cont'd)
 - The ADAAA clarifies that an employee may be subject to an adverse employment action, in violation of the ADA, based on an actual or perceived impairment, no matter how limiting, under a “regarded as” theory of disability.
 - Thus, an employee can be “regarded as” having a disability when:
 - the employee does not have an impairment, but the employer mistakenly perceives the employee to have an impairment, or
 - the employee has an actual impairment, and the employer believes that the impairment limits a major life activity when it actually does not.

Major components of the ADAAA (cont'd)

- “Regarded as” disabled (cont'd)
 - ▣ Thus, employers must be cautious in making random statements.
 - ▣ **Example: an employer says “I think you’re too emotionally unstable to be a law enforcement officer”**
 - This may now be enough to trigger protection under the ADA, without discussion of whether there is a perception of an actual *disability* because it shows the employer’s perception of a mental impairment.

Major components of the ADAAA (cont'd)

- The ADAAA clarifies that minor or transitory impairments with actual or expected durations of six months or less (e.g., the common cold or flu) cannot qualify an individual for a “regarded as” ADA claim.
- The ADAAA also clarifies that no reasonable accommodations and/or modifications to policies, practices or procedures need to be provided to persons “regarded as” disabled.

Major components of the ADAAA (cont'd)

■ Qualification Standards

- The 1990 ADA prohibits employers from using qualification standards, employment tests or other selection criteria unless the employer can demonstrate that the standards, tests or selection criteria are job-related and consistent with business necessity.
- The ADAAA clarifies that, with regard to standards, tests or selection criteria based on an individual's *uncorrected vision*, covered employers do not need to show that a reasonable accommodation is unavailable but still must show that the standards, tests or selection criteria are job-related and consistent with business necessity.

Impact of the ADAAA

- Basic concerns regarding the ADAAA's impact:
 - significantly more disabled persons under the law
 - less employer victory prior to trial
 - increased litigation
 - greater focus on providing reasonable accommodations and challenging the undue hardship exception
 - higher demands on employers to accommodate disabilities
 - increased financial burdens on employers
 - employer resistance to accommodations

Impact of the ADAAA (cont'd)

- The general impact of the ADAAA
 - ▣ The exclusion of mitigating measures from the determination of a “disability” and the broader scope of “substantially limits” does mean that more persons will be considered disabled persons under the law.
 - ▣ The broader of list of “major life activities” and more generous standard for “regarded as” will mean less court decisions made from motions for summary judgment – and an increased number of cases going to trial.
 - ▣ Major issues will shift from whether plaintiff is disabled to issues regarding the interactive process, reasonable accommodations and undue hardship.
 - ▣ Increased demands on employers to provide reasonable accommodations.

Impact of the ADAAA (cont'd)

■ Practical implications of the ADAAA

- Employers must, for the most part, take their employees' declarations that they are disabled at face value, as employees with many common conditions, such as impaired vision or high blood pressure, can now be considered disabled, even if their conditions are controlled.
- As there will be an increase in the number of persons defined as disabled under the ADAAA, employers should be prepared for an increased number of requests for reasonable accommodations from employees.
- The ADAAA's intent of making protection under the ADA easier means an employer can no longer avoid or shy away from their duties out of fear or mere inconvenience.

Response to the ADAAA Impact

- Keys to Proper Employer Response
 - Understanding Disabilities
 - Increase awareness of disabilities – e.g., person whose conditions are not obvious but still affect their ability to work
 - Increase sensitivity to the expanded scope of disabilities
 - Additional education of managers and supervisors on disability, reasonable accommodation, the interactive process and undue hardship
 - Update training of managers and supervisors on how to engage in the necessary conversations and actions
 - Understanding employer obligations
 - Duty to engage in the interactive process
 - Duty to provide a reasonable accommodation
 - Positive perspective - no need to fear
 - Look at duties as a chance to create more level playing field for all workers and find creative solutions

The Interactive Process

- In the course of providing a reasonable accommodation an employer will often need to first engage in what is called the “interactive process.”
- The duty to engage in the interactive process generally begins when the employee makes the disability known to the employer and requests a reasonable accommodation.
 - This is not an exact process, however, as there are courts that have held that an employer’s awareness of the disability and need for the accommodation triggers a duty to initiate the interactive process even without an accommodation request.
- The interactive process is a mutual problem-solving process.
 - It requires the employer to engage in a dialogue with the employee claiming disability and requesting a reasonable accommodation.
 - The process allows the employer and employee to confirm that the employee has a disability and find a reasonable accommodation that will allow the employee to perform his/her essential job functions without unduly burdening the employer.
 - In sum, both parties have an obligation to work together in good faith to determine what assistance can reasonably be provided to allow the employee to perform the functions of the job effectively.

Reasonable Accommodations

■ Overview

- Title I of the ADA requires an employer to provide reasonable accommodations to a qualified individual with disabilities who is an employee or an applicant for employment unless to do so would cause an undue hardship to the employer.
- A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

Reasonable Accommodations (cont'd)

- What a reasonable accommodation is not:
 - ▣ An accommodation is not about lowering standards.
 - ▣ Employers are not required to eliminate an essential function of the job,
 - ▣ but an employer should consider reevaluating the job to determine whether all functions are *really* essential.
 - ▣ Employers are not required to lower production standards,
 - ▣ but an employer should consider whether it can help the employee meet those standards with a reasonable accommodation.
 - ▣ An employer need not provide the specific accommodation that the employee requested – rather, the accommodation need only be one that allows the person to perform the essential functions of the job.

Reasonable Accommodations (cont'd)

■ Employer Perspective

- Consider accommodations as opportunity to:
 - make the workplace safer;
 - ensure that employees have the tools to do their jobs effectively;
 - level the playing field for employees; and
 - increase productivity.
- Note that reasonable accommodations can be provided through creative and low/no-cost solutions.

Reasonable Accommodations (cont'd)

- Three categories for “reasonable accommodation”
 - ▣ accommodations for job applicants
 - ▣ accommodations for employees to perform job
 - ▣ accommodations for employee access to benefits and privileges

Reasonable Accommodations (cont'd)

■ Accommodations for Job applicants

- Key consideration is to ensure that applicants with disabilities are able to participate in the hiring process.
 - e.g., making job announcements available to the blind (Braille) or deaf (closed captioning)

■ Accommodations in performing job

- It is essential to consider a reasonable accommodation based on the specific individual.
 - Often employers will try to treat everyone equally by creating one-size-fits-all solutions, or believe that if they make an accommodation for one person they must do for everyone.

Reasonable Accommodations (cont'd)

- Accommodations in performing job (cont'd)
 - ▣ When an employee is requesting an accommodation, the employee does not have to use the term “ADA” or actually say “reasonable accommodation.” The employee need only give sufficient information to make it clear to the employer that some adjustment is needed at work because of a medical condition.
 - ▣ The request for an accommodation does not have to be in writing.
 - ▣ An employer can ask for documentation regarding the disability unless the disability is obvious or the employee has already provided with sufficient information to demonstrate the disability and the need for an accommodation.

Reasonable Accommodations (cont'd)

- Accommodations in performing job
 - ▣ Research has shown that the typical cost of an accommodation is \$500, but about half do not have a cost attached. Examples include:
 - ▣ providing an employee who normally stands with a chair
 - ▣ eliminating non-essential functions
 - ▣ assigning a small percentage of the job to another employee
 - ▣ altering when or how a marginal function of the job is performed

Reasonable Accommodations (cont'd)

- Accommodations related to benefits and privileges of employment
 - ▣ The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the benefits and privileges of employment.
 - ▣ Benefits and privileges include, but are not limited to employer sponsored:
 - ▣ training;
 - ▣ services (e.g., credit unions, cafeterias, gymnasiums, transportation, etc.);
 - ▣ social functions; and
 - ▣ communications.

Undue Hardship Issues

■ Overview:

- An employer is not required to provide a reasonable accommodation that would create an undue hardship to the employer.
- “Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.

■ Factors for determining undue hardship

- The nature and net cost of the accommodation;
- The financial resources of the facility, the number of employees there, the effect on the expenses and resources or other impact on the facility’s operation;
- Overall financial resources of the entity and size of the business with respect to the number of employees; the number, type and location of its facilities; and
- Type of operations of the entity, including the composition, structure and functions of the workforce

Undue Hardship Issues (cont'd)

- Considerations for determining undue hardship
 - ▣ Generalized conclusions will not suffice to support a claim of undue hardship.
 - ▣ The claim must be based on individualized assessment of current circumstances
 - ▣ Congress expects employers to consider all possible sources of assistance such as,
 - ▣ government assistance to pay for all or a portion of the accommodation (e.g., a state rehabilitation agency);
 - ▣ tax break eligibility;
 - ▣ assistance from the accommodated employee; or
 - ▣ whether an alternative accommodation is affordable if the proposed one creates an undue hardship.

Undue Hardship Issues (cont'd)

- Considerations for determining undue hardship
 - ▣ Employers cannot claim an undue hardship based on employee or customer fears or prejudices.
 - ▣ Employers cannot claim an undue hardship based on negative impact on employee morale (but it can consider whether the accommodation would be disruptive to other employees).
 - ▣ Employers cannot determine the cost of an accommodation based on a comparison to the employee's salary – the cost depends on the *employer's* resources.

Undue Hardship Issues (cont'd)

■ Summary

- A determination of undue hardship means that the employer finds that a specific accommodation would result in significant difficulty or expense, or would fundamentally alter the nature of employer's operations.
- Before deciding that an accommodation would create an undue hardship, the decision maker must explore whether it can provide another effective accommodation which would *not* impose an undue hardship.
- Employers should avoid using money as a the basis for an undue hardship, as it may open the door for inspection of its expenses and, in turn, require the employer to justify seemingly non-essential expenses.

Thank You!