

Cultural Competence and the Americans with Disabilities Amendment Act of 2008

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I. 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. The other major component, 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*

II. COURT INTERPRETATION OF ADA EMPLOYMENT DISCRIMINATION CLAIMS

Federal Court Theme: "Are you really disabled?"

Disabled persons looked to the courts for protection from disability discrimination. Parties found, however, that the courts focused primarily on challenges to the existence of the disability and placed a heavy burden on plaintiffs to prove its existence.

The major cases regarding this theme are *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). *Sutton* 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* held that the term "substantially limits" must be strictly construed when determining the existence of a disability.

III. RESPONSE TO COURT INTERPRETATION OF THE ADA

Public response to courts & Congress

Numerous groups and spokespersons for disabled Americans spoke out regarding the impact of court rulings. Advocates for the disabled 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. In turn, Plaintiffs had a difficult time meeting these burdens in establishing their disabilities and were essentially barred from having their discrimination claims evaluated. Advocates emphasized that enforcement of the ADA should focus on its original intent and petitioned Congress for a change in the ADA.

Congressional Response to Courts/Public

Congress initially 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.

On September 25, 2008 the ADA Amendments Act of 2008 (ADAAA) was signed into law and took effect on January 1, 2009. It expressed a "new" Congressional purpose which was, in essence, to get back to the ADA's original intent.

IV. MAJOR COMPONENTS OF THE ADAAA

Summary of the ADAAA

The ADAAA primarily rejects the holdings of Toyota and Sutton by expanding the definition of what qualifies as a "disability," and directing that "disability" be interpreted broadly under the ADA; and by eliminating the mitigation defense, so that an employee's disability will be assessed without regard to any mitigating measures (e.g., medication, equipment, assistive technology). The amendments further 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.

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.

It also 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.”

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 also contains a “rules of construction” section which directs courts to interpret the definition of “disability” in favor of broad instead of narrow coverage.

Substantially Limits

In determining whether an impairment *substantially limits* a major life activity, the ADAAA provides that 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.
- 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 eyeglasses and contact lenses.

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 also clarifies that “*major life activities*” now includes “*the operation of major bodily functions*” such as normal cell growth, endocrine functions, neurological functions, digestive functions, respiratory functions and reproductive functions.

“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 to have an impairment that substantially limits a major life activity or where 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.

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 1) the employee does not have an impairment, but the employer mistakenly perceives the employee to have an impairment; or 2) the employee has an actual impairment, and the employer believes that the impairment limits a major life activity when it actually does not.

Further, 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.

Qualification Standards

The 1990 ADA prohibits covered 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.

V. IMPACT OF THE ADAAA

The basic concerns that employers have regarding the ADAAA’s impact are that:

- 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; and
- employer resistance to accommodations.

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 likely mean that more persons will be considered disabled persons under the law. As well, the broader of list of “major life activities” and more generous standard for “regarded as” will mean fewer decisions made from motions for summary judgment and, in turn, increased cases going to trial.

Also, the major issues will shift from whether plaintiff is disabled to issues of the interactive process, reasonable accommodations and undue hardship, and there will be increased demands on employers to provide reasonable accommodations.

Practical implications of the ADAAA

Given the considerations above, employers must, for the most part, take an employee's declaration that they are disabled at face value and employees with many common conditions, such as impaired vision or high blood pressure, can now be considered disabled, even if their conditions are controlled.

Further, 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. In essence, an employer can no longer avoid or shy away from accommodations out of fear or mere inconvenience.

VI. RESPONSE TO THE ADAAA IMPACT

There are several keys for employers in responding under ADAAA. They must understand the nature of disabilities under the law and their obligations. This involves increased awareness of disabilities – e.g., conditions that do not seem obvious or major but still affect one's ability to work; increased sensitivity to the expanded scope of disabilities; additional education of managers and supervisors on disability, reasonable accommodations, the interactive process and undue hardship; updated training of managers and supervisors on how to engage in the necessary conversations and actions; and understanding employer obligations.

VII. THE INTERACTIVE PROCESS

Often in the course of providing a reasonable accommodation, an employer will 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 can trigger a duty to initiate the interactive process even without an accommodation request.

The interactive process is a mutual problems-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 her job effectively.

VIII. 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 doing 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.

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 also not required to lower production standards, but they should consider whether it can help the employee meet those standards with a reasonable accommodation. Further, 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.

There are three categories for providing reasonable accommodations: 1) accommodations for job applicants; 2) accommodations for employees to perform job; and 3) accommodations for employee access to benefits and privileges.

Accommodations for Job applicants

The key consideration is to ensure that applicants with disabilities are able to participate in the hiring process. One example is making job announcements available to the blind (brail) or deaf (closed captioning).

Accommodations in performing job

It is essential to consider a reasonable accommodation based on the specific individual. Also, 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

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.

IX. UNDUE HARDSHIP

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 include:

- 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 he 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.

Considerations for determining undue hardship

Generalized conclusions will not suffice to support a claim of undue hardship. It must be based on individualized assessment of current circumstances. Congress also expects employers to consider all possible sources of assistance.

Examples of assistance:

- 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
- whether an alternative accommodation is affordable if the proposed one creates an undue hardship

Employers cannot claim an undue hardship based on employee or customer fears or prejudices. Employers also cannot claim an undue hardship based on a negative impact on employee morale (they can, however, consider whether the accommodation would be disruptive to other employees) and 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.

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 employers operations. Before deciding that an accommodation would create an undue hardship, the decision maker must have explored whether other effective accommodations can be provided which would *not* impose undue hardship.

Also, employers should avoid using money as a basis for claiming undue hardship, as it may open the door for inspection of its expenses and, in turn, require the employer to justify seemingly non-essential expenditures.