

ADA Amendments Act: What Managers Need to Know

Neha Hewitt
Attorney Advisor
Civil Rights Policy, Compliance and Counsel

Timeline

- 1973 – Rehabilitation Act of 1973 - Non-discrimination based on disability in Federal employment
- July 26, 1990 – President George H.W. Bush signs the Americans with Disabilities Act of 1990
- 1992 – Rehabilitation Act amended to make it co-equal with ADA in employment standards
- June 22, 1999 – S.Ct. issues Sutton trilogy
- January 8, 2002 – S.Ct. issues decision in Toyota
- September 25, 2008 – President George W. Bush signs the ADA Amendments Act of 2008
- January 1, 2009 – effective date of ADA Amendments Act

Congressional Findings

- When it passed the ADA, Congress intended the law to be construed broadly
- Physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society
- ADA definition of "disability" was based on Section 504 and construed broadly
- S.Ct. decisions in Sutton and Toyota are too narrow
- EEOC definition of "substantially limits" as "significantly restricted" is too narrow

Statutory Purpose

- To restore the ADA's broad protections
- To reject the S.Ct.'s view that "disability" should be determined by the effects of mitigating measures
- To reject the S.Ct.'s holding that ADA requires a "demanding standard" for coverage and requires that an impairment "severely restrict" a major life activity
- To instruct EEOC to revise its regulations defining "substantially limits"

What is Reasonable Accommodation?

- Any change in the work environment that enables an individual with a disability to enjoy equal employment opportunities
 - Modifications to the job application process
 - Modifications to the work environment
 - Modifications that allow the employee to enjoy equal benefits and privileges of employment
- Without creating an undue hardship on the Agency

INDIVIDUAL WITH A DISABILITY

- Individual who
 - (1) has a physical or mental impairment which substantially limits one or more of the individual's major life activities;
 - (2) has a record of such an impairment; or
 - (3) is regarded as having such an impairment

Note: All three definitions can constitute discrimination, but only (1) and (2) may require reasonable accommodation

Qualified Individual

- Definition of "Qualified Individual with a Disability"
 - (1) An individual who, with or without reasonable accommodation
 - (2) can perform the essential functions of the position in question
 - (3) without endangering the health and safety of the individual or others, and who
 - (4) meets the experience or education requirements of the position in question

NOTE: "qualified" refers to the ability to perform the job, not the disability

ESSENTIAL FUNCTIONS OF THE POSITION

- Individual with a Disability Must be Able to perform the “Essential Functions” of the Position to be Reasonably Accommodated
- Reasons why a job function is essential:
 - Position exists to perform that job function
 - Limited number of employees available to do job
 - Highly specialized job

ESSENTIAL FUNCTIONS OF THE POSITION

- Evidence of whether a function is essential:
 - Employer's judgment
 - Written job descriptions prior to advertising and interviewing
 - Amount of time spent doing the function
 - Consequences of not requiring the person to perform that function
 - Terms of a collective bargaining agreement
 - Past work experience of others in the job
 - Current work experience of others in similar jobs

DIRECT THREAT DEFENSE

- Individual with a Disability Must be able to perform the Essential Functions of the Position “without endangering the health and safety of the individual or others”
- Direct Threat Defense
 - Individualized Assessment Required
 - Agency bears burden of proof – must prove individual poses a direct threat to workplace safety that cannot be eliminated by a reasonable accommodation

ADAAA - Major Changes

- Spells out non-exclusive list of major life activities
- Incorporates major bodily functions as major life activities
- Lowers the standard for "substantially limits"
- Looks at people *prior* to the use of medication or prosthetics

ADAAA - Major Changes (continued)

- Expands who is covered under the "regarded as" category
- Limits protections under the "regarded as" category by not requiring reasonable accommodation

Major Life Activities

ADAAA provides a very broad, non-exclusive list of conditions that should always be considered major life activities:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Communicating
- Working
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking

Major Life Activity of "Working"

- 29 CFR 1630(j)(2): An individual is considered to be disabled in the major life activity of working if he/she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities"

Major Life Activity of "Working"

- Relevant Factors
 - Geographical Area
 - Jobs requiring similar skills from which excluded
 - Jobs not requiring similar skills from which excluded
- **The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.**

Major Life Activities (continued)

Also includes the operation of major bodily functions, including but not limited to:

- Functions of the immune system
- Normal cell growth
- Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Episodic or transitory conditions, or conditions in remission are included if they would substantially limit a major life activity when active

Major Life Activities (continued)

Does not discuss activities such as:

- Sexual relations
- Driving
- Using a computer

Likely that these activities will continue to be litigated.

Major Life Activities (continued)

Note: The U.S. House of Representatives Committee on Education and Labor Committee Report states their belief that other major life activities include:

- Interacting with others
- Writing
- Engaging in sexual activities
- Drinking, chewing, swallowing
- Reaching
- Applying fine motor coordination

Major Life Activities (continued)

The ADAAA specifically notes that an “impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”

Substantially Limiting

- ADAAA provides that the definition of disability "shall be construed broadly"
- Also states that the Act "rejects" the U.S. Supreme Court's Toyota v. Williams definition of "substantially limits" which has used a "demanding standard" that an impairment "prevent or severely restrict" a major life activity.

Substantially Limiting (continued)

- Requires EEOC to revise regulations defining "substantially limits" as meaning "significantly restricted." (no definition provided)
- HR Report notes that the individual should be compared to "most people," not simply someone with the same demographics at the employee (such as gender, age, education).

Substantially Limiting (continued)

- If an impairment *affects* – but does not *substantially limit* – a major life activity, a court is likely to dismiss the complaint.
- New standard will be somewhere between “affects” and “significantly restricts” once EEOC issues new regulations

Timeline of Substantially Limiting

In Toyota, the Supreme Court said that the impairment's impact must be "permanent or long-term". Conditions lasting up to several months without residual effects have been considered short-term.

Timeline of Substantially Limiting (continued)

ADAAA does not specify length of time

Now specifically includes episodic and transitory conditions and conditions in remission

Also states that an individual is not "regarded as" disabled if the condition is minor and lasts for less than six months

Considering Medication/Mitigating Effects

- ADAAA provides that an individual's condition should be analyzed without regard to the ameliorative effects of mitigating measures such as medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications among other things. (Rejects Sutton v. United Airlines)

Considering Medication/Mitigating Effects (continued)

- Returns position in courts to prior to Sutton and will result in many more individuals being covered under the first prong of the ADA.
- Will also have same effect on "Record Of" cases

Considering Medication/Mitigating Effects (continued)

Exception - ADAAA notes that individuals should be evaluated with their "ordinary eyeglasses or contact lenses," that "intended to fully correct visual acuity or eliminate refractive error."

"Regarded As" Cases (ADA)

ADA required individual to show that s/he was regarded as having a substantially limiting impairment.

"Regarded As" Cases (ADAAA)

States that an individual is "regarded as" disabled if s/he "has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

"Regarded As" Cases (ADAAA) (continued)

- Act excludes from definition "impairments that are transitory and minor"
- Defines "transitory" to mean an "actual or expected duration of 6 months or less."
- Act (and supporting language) takes position that the exception applies to conditions that are *both* transitory and minor.

"Regarded As" Cases (ADAAA) (continued)

Highly likely that most individuals claiming disability discrimination will include a "regarded as" claim, and that case law on this issue will grow.

"Regarded As" Cases (ADAAA) – Reasonable Accommodation

Employer is not required to provide a "reasonable accommodation" to an individual who is covered only under the "regarded as" category.

Other Provisions

- Employer must show that a qualification standard based on uncorrected vision is job-related and consistent with business necessity
- Same is true of all physical requirements for jobs

LESSONS LEARNED

- Reasonable Accommodation should be treated as a basic management issue, not as a civil rights matter
- Usually can be handled between employee and supervisor
- Often requires only adherence to good management practices
- Only becomes a civil rights matter if a reasonable accommodation has been denied improperly or if information is used inappropriately for other purposes
- ADR process can be an ideal solution

LESSONS LEARNED

- Avoid the Pitfalls
 - Failing to act promptly on requests
 - Failing to communicate with the employee
 - Asking for unnecessary medical information
 - Focusing on the disability rather than the functions of the job
 - Failing to take appropriate administrative action
 - Failing to document performance accurately
 - Failing to properly document any undue hardship burden
 - Violating confidentiality requirements
 - Failing to make interim accommodations

LESSONS LEARNED

■ **Successful Reasonable Accommodations**

- Respond quickly to requests and interact with the employee regularly
- Maintain confidentiality of the request and accommodation provided
- Focus on the essential functions of the job and the employees ability to perform with or without an accommodation
- Be specific when asking for medical documentation and focus questions on ability to perform the job, not the nature of the disability
- If there are performance or conduct problems, document them contemporaneously
- Be prepared to provide a detailed explanation of any denials
- Rely on your resources



Contact OGC



- Associate General Counsel for Civil Rights
 - Arlean Leland: 202-720-1760
- Assistant General Counsel, Civil Rights Litigation Division
 - Inga Bumbary-Langston: 202-720-3955
- Assistant General Counsel, Civil Rights Policy Division
 - Tami Trost: 202-690-3993 tami.trost@ogc.usda.gov
 - Neha Hewitt: 202-690-2174 neha.hewitt@ogc.usda.gov