Feature Article

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Significant Changes in the Americans with Disabilities Act

In 2008, the U.S. House of Representatives approved a bill that greatly expands employee protections under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et. seq.* The ADA Amendments Act of 2008 (ADA Amendments Act), Pub. L. No. 110-325, 122 Stat. 3553, significantly changes the way the law treats the disabled. Effective January 1, 2009, the ADA Amendments Act increases the scope of employees who are protected by the ADA and places significant limits on the defenses previously available to employers.

In order to establish a prima facie case of disability discrimination under the ADA and ADA Amendments Act, a plaintiff must establish that: (1) he or she is an individual with a disability, and (2) he or she is "otherwise qualified" to perform the job requirements, with or without reasonable accommodation. In the past, the majority of cases dealt with the issue of whether an individual was disabled. Under the broadened scope of coverage of the ADA Amendments Act, the focus rarely will be on whether the individual has a disability. Instead, the focus will be on whether the individual is qualified for the job and whether there is a reasonable accommodation available.

A Need for Change

When the original ADA was enacted in 1990, the stated purpose of the ADA was to protect disabled Americans who were being unfairly discriminated against in the work place, based on unjustified prejudices, antiquated attitudes, or the failure to remove societal and institutional barriers concerning their abilities. 42 U.S.C. § 12101(a)(1)-(2). The ADA defined a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2)(C).

The original Act, however, did not define "substantially" or "major." Thereafter, the federal courts narrowed the scope of protection afforded by the ADA and limited protection for many individuals. The U.S. Supreme Court in *Sutton v. United Air Lines, Inc.*, 527, U.S. 471, 119 S. Ct. 2139 (1999), and its companion cases, held that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. A few years later, the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002), further narrowed the ADA by holding that the terms "substantially limits" and "major life activity" had to "be interpreted strictly to create a demanding standard for qualifying as disabled" and that to be substantially limited in performing a major life activity under the ADA, "an 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." *Id.* at 198. Based on these decisions, lower courts have found that people with a range of substantially limiting impairments were not people with disabilities.

Changes to the ADA

In direct response to these decisions and others, the ADA Amendments Act was written for the express purpose of restoring the intent and protections of the ADA by extending its protections to a broader class of individuals. 42 U.S.C. § 12101(b). The ADA Amendments Act not only provides instruction on how "disability" should be construed and proven, but also provides broad definitions for "substantially limits" and "major life activity."

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Changes in ADA *(Continued)*

1. Disability Must Be Broadly Construed

The primary change to the ADA is the expansion of the scope of coverage. The ADA Amendments Act states that "disability" is to be given a broad construction. Contrary to the way "disability" had been defined by the U.S. Supreme Court in *Sutton*, *Toyota Motors* and similar cases, the ADA Amendments Act expressly states that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." See 42 U.S.C. § 12102(a)(4)(A). The findings by Congress, as set forth in Section 2 of the ADA Amendments Act, indicate that the primary focus in cases brought under the ADA should be on whether the "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 . . . ." 42 U.S.C. § 12101(b)(5).

"Major life activity" has been broadly defined in two non-exhaustive lists to include almost every life activity.

"Substantially limits" must be broadly interpreted also. The ADA Amendments Act states that the *Toyota Motor* standard for strictly interpreting "substantially limits" has created an inappropriately high level of limitation necessary to obtain coverage under the ADA; and the ADA Amendments Act expressly rejects the standard. 42 U.S.C. § 12101(a)(4)-(7); 42 U.S.C. § 12101(b)(5)-(6). Instead, the term "substantially limits" is to be broadly interpreted to achieve the goals of the ADA. 42 U.S.C. § 12102(a)(4)(B). An impairment that is episodic or in remission is a disability if, when active, it would substantially limit a major life activity. 42 U.S.C. § 12102(a)(4)(D).

"Major life activity" has been broadly defined in two non-exhaustive lists to include almost every life activity. The first list includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(a)(2)(A). The second list includes major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and productive functions. 42 U.S.C. § 12102(a)(2)(B). Importantly, only one major life activity need be limited; an individual is entitled to protection under the ADA if he can do many things so long as the individual is substantially limited in performing one major life activity. 42 U.S.C. § 12102(a)(4)(C).

2. Mitigating Measures Cannot be Considered

Mitigating measures cannot be considered. Before the ADA Amendments Act, the U.S. Supreme Court, as well as lower courts, had held that mitigating factors, such as the use of medication, could be taken into consideration when determining whether the individual was disabled under the ADA. See *Sutton*, 119 S. Ct. at 2142. Under the ADA Amendments Act, a determination of whether an impairment "substantially limits" a major life activity must be made without consideration of any ameliorative effects of a mitigating measures. 42 U.S.C. § 12102(a)(4)(E).

The ADA Amendments Act also includes a comprehensive list of mitigating measures that cannot be taken into account when considering whether someone is impaired, including medication, medical supplies, equipment, appliances, low vision devices (excluding ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment, use of assistive technology, reasonable accommodations or auxiliary aids or services and learned behavioral or adaptive neurological modifications. 42 U.S.C. § 12102(a)(4)(E)(i). The ADA Amendments Act states that mitigating measures do not include ordinary eyeglasses or contact lenses, which means that whether a person's vision is substantially limited may be assessed in light of the eyeglasses. 42 U.S.C. § 12102(a)(4)(E)(ii). Nevertheless, the employer cannot use qualification standards, employment tests or selection criteria based on an individual's uncorrected vision unless it is job-related and consistent with business necessity. 42 U.S.C. § 12113(c).

3. Being "Regarded As" Disabled is Simpler to Prove

Being "regarded as" disabled for individuals without a disability has changed. Before the ADA Amendments Act, in

order prove discrimination under the "regarded as" prong, the employee was required to show that the employer mistakenly believed the employee had a physical impairment that substantially limited one or more major life activities or that the employer mistakenly believed that an actual, non-limiting impairment substantially limited one or more major life activities. See *Sutton*, 119 S. Ct. at 2149-50. To prove "regarded as" under the ADA Amendments Act, the employee simply needs to prove an actual or perceived impairment. 42 U.S.C. § 12102(a)(3)(A). The employee does not need to prove that the impairment was limiting in any way. 42 U.S.C. § 12102(a)(3)(A).

The impairment, however, cannot be transitory or minor. 42 U.S.C. § 12102(a)(3)(B). A transitory impairment is defined as an impairment with an actual or expected duration of six months or less. 42 U.S.C. § 12102(a)(3)(B). In addition, being "regarded as" disabled will not support a claim for failure to accommodate. 42 U.S.C. § 12201(1)(h). It will only support a claim involving other conduct that violates the ADA.

The Employee Still Must Be Qualified for a Position

The ADA Amendments Act has not altered the requirement that an individual with a disability be qualified for a position in order to have protection under the ADA. Whether the employee is a qualified individual with a disability is a two-part test: (1) whether he or she satisfies the prerequisites for the position, and (2) whether he or she can perform the essential functions of the position. *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996). Under the ADA, Congress expressly defines a "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8). The Federal Regulations further state that a qualified individual with a disability means, "an individual with a disability who satisfies the requisite skill, experience, education and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). This definition has not changed with the ADA Amendments Act.

Essential functions are the fundamental job duties of the employment position; the term does not include marginal functions. 29 C.F.R. § 1630.2(n). A job function is considered essential if "the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2)(I).

Reasonable Accommodation Still Must Be Proven

The ADA Amendments Act did not change the law regarding reasonable accommodation. Nevertheless, now that the focus in most cases will no longer be on whether an employee has a disability, given the broadened provisions of the ADA Amendments Act, cases will be focusing more on whether the employer was aware of the disability and whether there was a reasonable accommodation.

Under the current Seventh Circuit case law and the ADA, an employee has the initial duty to inform his or her employer of a disability before ADA liability may be triggered for failure to provide a reasonable accommodation. *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996). The ADA requires reasonable accommodations only to "the known physical or mental limitations" of an employee. 42 U.S.C. § 12112(b)(5)(A). "Once an employer's responsibility to provide reasonable accommodation is triggered, the employer must engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir.1996).

A reasonable accommodation generally involves, "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position," 29 C.F.R. § 1630.2(o)(1)(ii), rather than rearrangements of the essential functions themselves. The "reasonable accommodation" element of the ADA imposes a duty upon an employer to engage in a flexible, interactive process with a disabled employee needing accommodation so that, together, they might identify the employee's precise limitations and discuss accommodations that might enable the employee to continue working. See 29 C.F.R. § 1630.2(o)(3).

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Changes in ADA *(Continued)*

Retroactivity

The ADA Amendments Act is silent with respect to whether it will be retroactive. Even though the ADA Amendments Act states that its effective date is January 1, 2009, it may be applied retroactively. Its preamble states that its purpose is "to restore the intent and protection of the Americans with Disabilities Act of 1990." In addition, the ADA Amendments Act states that its intent is to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage." 42 U.S.C. § 12101(a)(1). Most likely, courts will interpret the ADA Amendments Act as restoring its original purpose, rather than changing the law. Therefore, employers need to be aware that past conduct could be judged under the more liberal standards of the ADA Amendments Act.

The ADA has always contained a statement that finding a reasonable accommodation was an interactive process.

Moving Forward

What should employers do to assure that they are minimizing their risk of exposure under the ADA and the ADA Amendments Act? Employers need to address disabilities in a more interactive process, beginning with the way they view disabled employees and potential employees. Rather than focus on whether the individual has a disability under the ADA, the employer should focus on whether the individual is qualified for the position and whether the employer can reasonably accommodate the disability. The ADA has always contained a statement that finding a reasonable accommodation was an interactive process. Assuming a disabled individual is qualified for a position, the best way to begin the employment relationship is to ask the employee what type of accommodation he or she needs in order to perform the job, and then work together to formulate a reasonable accommodation. Doing so will not avoid all lawsuits, but it will go a long way toward reducing the number of claims as well as enhancing diversity of the workforce.