

Definition of Disability Pre- and Post- ADAAA (2008)

Week Four Power point

So why did Congress pass the ADAAA?

- When it enacted the ADA, Congress intended it to be broadly construed (as the Rehabilitation Act had been)
- But Supreme Court decisions interpreted the ADA narrowly, reducing the number of people who were protected from discrimination
- Trickle-down effect:
 - Lower courts went even further
 - ADA interpretations were applied to Rehab Act

The New Baseline

- These laws have undergone the greatest change in 20 years
- The ADA Amendments Act of 2008, effective in 2009, clarified by EEOC regulations effective in 2011, have greatly expanded who is protected by these laws
- In 2010, the U.S. Department of Justice (DOJ) published new regulations implementing Titles II and III of the ADA. Respectively, 28 C.F.R. Part 35 (Title II) and 28 C.F.R. Part 36 (Title III).

What changes did the ADAAA make to Federal disability law?

- Rejected the Supreme Court's interpretations of the definitions of "disability" and related terms
- Clarified a number of issues that had been the subject of debate
- Explicitly overruled U.S. Supreme Court cases that unduly restricted the definition of who is a person with a disability:
 - ❖ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) – definition "needs to be interpreted strictly to create a demanding standard," looking at activities of "central importance to daily life."
 - ❖ *Sutton Trilogy* – held mitigating measures should be taken into account when assessing "substantial limitation." *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
- Amendments will make it much easier for an individual to:
 - meet the definition of disability
 - be protected from discrimination
 - be entitled to reasonable accommodations

ADAAA Changes (continued)

- Broad interpretation of “disability”
- Expansive definition of “major life activity”
- Limited role of mitigating factors
- Lower standard for “regarded as” disabled

Core text of definition of “disability” is the same

- **DISABILITY.**—The term ‘disability’ means, with respect to an individual—
 - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment (as described in paragraph (3)).

Changes in *interpretation* of definition

- Congress explicitly directed that definition of “disability” is to be construed broadly
 - Statutory language: “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act”
 - Applies to all three categories of “disability”

Category One: Is the individual a person with an actual, current disability?

- Does the person have a *physical or mental impairment*?
- Does the impairment affect one or more of his/her *major life activities*?
- Is the effect a *substantial limitation*?

Changes to definition / interpretation of “**major life activities**”

- Previously, this term was defined only in case law
 - Regulations included some examples (29 CFR 37.4, definition of “major life activities”)
 - Courts and EEOC guidance documents recognized others
- Supreme Court had ruled that term should be interpreted narrowly

Changes to definition / interpretation of “major life activities” (cont’d)

- **ADAAA:**
 - Explicitly *rejected* Supreme Court’s ruling that activity must be “of central importance to daily life”
 - *Inserted* a definition of “major life activities” in the statute

Changes to definition / interpretation of “major life activities” (cont’d)

- New definition includes two non-exhaustive lists
 - List One: major life activities
 - List Two: **entirely new list** of “major bodily functions”

Expanded Definition of Major Life Activities

caring for oneself

standing

bending

seeing

learning

eating

speaking

sleeping

performing manual tasks

interacting with others

walking

lifting

reaching

hearing

concentrating

communicating

thinking

breathing

working

sitting

***This list is not exhaustive**

“New” Major Life Activities

In ADAAA (and previously not identified by EEOC):

reading
bending
communicating

In EEOC Regulations but not in text of ADAAA:

interacting with others
reaching
sitting

Neither list of major life activities in the ADAAA or regulations is exhaustive

Major Life Activities – Second List:

“Major Bodily Functions”

- **Major bodily functions** include, but are not limited to
 - normal cell growth
 - immune system functions
 - other types of functions (more on next slide):
 - digestive
 - bowel
 - bladder
 - neurological

*Non-exhaustive list

Major Life Activities – Second List: “Major Bodily Functions” (continued)

–Other types of functions

- brain
- respiratory
- circulatory
- endocrine
- reproductive

* Remember: non-exhaustive list

One “major life activity” is enough

- ADAAA clarifies that:
 - An individual’s impairment meets the definition of disability if it substantially limits him/her in just *one major life activity*
 - The individual is not excluded from coverage simply because s/he is *not* substantially limited in *other* major life activities
 - In other words, s/he *still* has a disability even if she is able to do many other things

Changes to interpretation of “substantially limits”

- No new statutory definition, but . . .
 - EEOC must revise its regulatory definition to eliminate “significantly restricted”
 - Supreme Court interpretation was too narrow
 - required “a greater degree of limitation than was intended by Congress”
 - created an “inappropriately high level of limitation necessary” for a person to be protected

“Substantially limits” and “mitigating measures”

- Pre-ADAAA, the Supreme Court ruled “mitigating measures” had to be considered in determining substantial limitation
- “Mitigating measures” are:
 - In general: actions taken or procedures used to lessen something in force or intensity, or to make it less severe
 - In disability context: actions taken or procedures used to lessen the effect of a disability or impairment

Examples of Mitigating Measures

- Medication for conditions like epilepsy or depression
- Insulin to control diabetes
- Prosthetic devices
- Walkers, canes, and crutches
- Hearing aids

“Mitigating measures” (continued)

- ADAAA: Congress *explicitly rejects* Supreme Court’s holding that mitigating measures must be considered in determining substantial limitation
- Under ADAAA, consider how the impairment affects the person before, or without, the “mitigating measure”
 - Example: if a person has an amputated leg, you consider whether the amputation substantially limits him/her when s/he’s not wearing a prosthesis

“Mitigating measures”

(continued)

- ADAAA Rejects *Sutton* and defines mitigating measures by way of a **non-exhaustive list**:
 - ❖ Medication, medical supplies, equipment, or appliances, low-vision devices (**which do not include 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 and supplies;
 - “Ordinary eyeglasses or contact lenses” are defined as lenses that are intended to fully correct visual acuity or eliminate refractive error.
 - ❖ Use of assistive technology;
 - ❖ Reasonable accommodations or auxiliary aids or services; or
 - ❖ Learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E)(ii) and (iii).

“Mitigating measures” (continued)

- Sole exception: “shall” consider the effect of “ordinary eyeglasses and contact lenses”
 - Defined as “lenses that are intended to fully correct visual acuity or eliminate refractive error”
 - If the employee can’t see well without them but can see well with them, then his/her vision impairment is not “substantially limiting”
- These are distinguished from “low vision devices,” defined as “devices that magnify, enhance, or otherwise augment a visual image”

Note: Benefits of mitigating measures may be considered in showing ability to perform essential job functions.

Other issues that the ADAAA resolves:

- “Episodic” or cyclical impairments, or impairments that go into remission

Examples: depression, bipolar disorder, Post-Traumatic Stress Disorder, other psychiatric conditions, epilepsy, cancer

Are considered disabilities if they would substantially limit a major life activity *when active*

- Impairments that may have temporary symptoms but are not minor should still be covered (for example, broken dominant/writing hand)

Category Two: Is the individual a person with a record of a disability?

- Past history of a genuine disability
- Misclassified as having a disability
- The record or misclassification has to meet the three elements of an actual disability (impairment, major life activity, substantial limitation)
 - This last part has *not* changed

Special note: Category Two and reasonable accommodation

- The ADAAA:
 - States that people who fall under the *Category Three definition of disability* (are regarded as having a disability) are not entitled to reasonable accommodations
 - Signifies that **people in *both* of the other two categories *are* entitled to accommodations**

EEOC Authority & Rehab Act Conformity

Authority to Issue Regulations

- **ADAAA:** Clarifies that the authority to issue regulations implementing the Act's definition of disability is granted to the EEOC, DOJ, and DOT.
- This change responds to the Supreme Court's hesitation to accept EEOC regulations defining disability.

42 U.S.C. § 12205(a); *See, e.g., Toyota Motor, supra*, 534 U.S. at 194.

Rehabilitation Act Conformity

- **ADAAA:** ADA and Rehabilitation Act of 1973 shall use the **same** definition of disability.

29 U.S.C. § 705(9)(B) and (20)(B), as amended.

The New Standards in the ADAAA Also Apply to the Rehabilitation Act

Franchi v. New Hampton School,
656 F. Supp. 2d 252 (D.N.H. 2009)

- The ADAAA applies to Rehabilitation Act claims, and in the absence of contrary argument by the defendant, to the Fair Housing Act as well.

Looking Ahead: ADA Litigation Post –ADAAA

- As courts now recognize that most plaintiffs will more easily meet the definition of disability, the focus of the courts' inquiry in most ADA cases will likely be on whether covered entities have met their legal obligations under the ADA – as Congress intended.