

CASE LAW UPDATE:

THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008: Congress Expands ADA Coverage and Opens the Flood Gates to ADA Litigants

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On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 (hereinafter the “ADAAA, or the “Amendments”). The ADAAA amends the Americans with Disabilities Act of 1990 (hereinafter the “ADA” or the “Act”) and specifically overturns several prominent pro-employer Supreme Court cases. The Amendments’ stated purpose is to “restore the intent and protections of the Americans with Disabilities Act of 1990.” In doing so, the Amendments broaden the scope of protection offered by the ADA and as such, presents a new and costly wrinkle to Employers’ ADA litigation.

The Findings:

Congress’s stated findings included:

- “the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”
- “the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA”
- “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities”;
- “in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.”

The Purpose:

As a result of these findings, Congress’s purpose of the Amendments was to:

1. Provide clear, strong, consistent, enforceable standards addressing discrimination by reinstated a broad scope of protection to be available under the ADA;

2. to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
3. to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
4. to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need 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';
5. to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
6. to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act.

The Amendments:

In order to fulfill this expressed purpose, Congress proposed, and President Bush recently approved several key amendments to the Act which direct courts to make a 180 degree turn in the current trend of interpretation of the Act. Over the past several years, the Supreme Court has repeatedly narrowed the definition of a disability. Starting January 1, 2009, ADA litigants, human resources managers, and in-house counsels throughout the country will be have a whole new set of rules to play by.

No Mitigating Measures:

The Amendments specifically overturn *Sutton*'s requirement that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In *Sutton*, two prospective airline pilots were denied positions as pilots due to their sub-par vision. The Supreme Court reasoned that because the plaintiffs' vision impairment could be fixed with contact lenses or eyeglasses, they were not disabled under the Act and therefore, summary judgment was granted. *Id.* While the result of this case would not be changed under the Amendments, *Sutton*'s progeny is hereby nullified.

The Amendments allow consideration of mitigating measures from contacts or eyeglasses, however, specifically exclude consideration of "medication, medical supplies, equipment or appliances,...prosthetics including limbs and devices, hearing aides and cochlear implants or other implantable hearing devices, mobility devices or oxygen therapy equipment and supplies." Thus, in future ADA litigation, it will not matter that an employee's diabetes is completely under control due to the employee's insulin, because whether the plaintiff's disability substantially limits a major life activity shall be made without consideration of the ameliorative effects of mitigating measures.

Regarded As Standard Expanded and Clarified:

Amongst Congress's goals is to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). Currently, an employee can qualify for protection under the ADA if he has "(A) a physical or mental impairment that substantially limits one or more of the major life activities ...; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment." *Greenberg v. BellSouth Telecommunications, Inc.*, 498 F.3d 1258, 1264 (11th Cir. 2007) (quoting 42 U.S.C. § 12102(2)). Thus, the third prong referred to by Congress is the "regarded as" prong. Under the current body of law interpreting the ADA, an employer must regard the employee as having "a physical or mental impairment that substantially limits one or more of the major life activities." See *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006); *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (discussing the ADA and the Rehabilitation Act and holding that "to set forth a *prima facie* case ... plaintiff must allege either that they are or are perceived to be handicapped *within the definitions of each of the acts*"). This body of law is no longer valid.

The Amendments specifically invalidate this line of reasoning and restate as law the reasoning expressed by the Supreme Court in *School Bd. of Nassau County, Fla. v. Arline*. In that case, the Supreme Court stated "Congress extended coverage, in 29 U.S.C. § 706(7)(B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment...Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 282-283 (1987). More specifically, the Amendments broaden the "regarded as" to include impairments "whether or not the impairment limits or is perceived to limit a major life activity." As such, perception becomes reality. If an employee suffers adverse employment action due to

an erroneous misconception or stereotype, the fact that the perceived impairment does not limit a major life activity will not bar the employee's discrimination case.

While the Amendments are clearly pro-employee, Congress did provide some beneficial clarification for Employers. First, while there has been a split in federal courts on whether an employer is required to provide a reasonable accommodation to an employee who is "regarded as" disabled, Congress clarified that a reasonable accommodation is not necessary to these employees. Additionally, Congress excluded "transitory and minor" disabilities from the definition of disabled, as it pertains to "regarded as" employees. Transitory is defined as "an impairment with an actual or expected duration of 6 months or less." Note that this exclusion applies only to the "regarded as" prong of disability and the exclusion only applies to "transitory **and** minor" impairments. Thus, a major impairment which would only last 6 months would not qualify.

Major Life Activities and Functions Expanded

The Amendments broaden the activities covered as "major life activities." Prior to the act, major life activities included "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) (quoting 29 C.F.R. § 1630.2(i)). Under the Amendments, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." Additionally, the Amendments also include major bodily functions in the definition of major life activities. The Amendment states "major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive function." Thus, under the Amendments, a much broader class of impairments and health conditions will be covered. Employers and HR managers must be aware of these expansions.

Toyota v. Williams Specifically Rejected

Congress's expansion of "Major Life Activities" was largely a reaction to the Supreme Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*. In addition to the expanded definitions recited above, Congress specifically rejected the holding of *Williams* in the Amendments. In *Williams*, the Supreme Court was faced with the task of defining words in the Act, and the Rehabilitation Act, such as "major," "considerable" and "substantial." *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-198 (2002). The Court found "that these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act." *Id.* Therefore, the Court held that "to be substantially limited in performing manual tasks, 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. The impairment's impact must also be permanent or long term." *Id.*

The Amendments specifically reject this holding and states “[t]he term ‘substantially limits’ shall be interpreted with the findings and purposes of the ADA Amendments Act of 2008.” That is, with an eye towards providing a broader range of coverage to more employees. Additionally, Congress expresses its “expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term ‘substantially limits’ to be consistent with this Act, including the amendments made by this Act.” Thus, employers, like Congress, can expect the EEOC to revise its current definition for “substantially limits” so that it substantially increases the class of impairments which will be covered by the ADA.

Other Amendments

The Amendments make two additional changes which Employers should be aware of. First, in line with the purpose of the Amendments, the ADAAA amends the Act such that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Thus, employers must be aware that an employees’ impairment or diseases, although in remission may still qualify as a disability under the ADAAA. For example, an employee with intermittent major depression would have a disability under the ADAAA where they wouldn’t necessarily qualify for coverage under the ADA. *See Ogborn v. United Food and Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767 (7th Cir. 2002) (“The problem with Ogborn's claim, as the district court pointed out, is that he has not identified any evidence that his depression limited his ability to work for more than a short period of time. Major depression can constitute a disability under the ADA. But intermittent, episodic impairments such as broken limbs and appendicitis are not disabilities, nor are isolated bouts of depression.”) (Citations omitted).

Additionally, the ADAAA specifically states that there can be no claim for reverse discrimination under the ADA. The ADAAA states “[n]othing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”

The Result

On a day-to-day basis, the Amendments will require Employers to be aware of these changes and treat all employees accordingly. More globally, Congress has kicked the doors to the courthouse open. The Amendments will create coverage under the ADA to a much broader class of employees. The expansion of the definition of disability will require employers to be vigilant in their efforts to offer reasonable accommodations to employees, or face significant litigation. Employers and HR Managers must understand that many more employees are likely to be classified as “disabled” under the Amended act. Additionally, the expanded definition of disabled, coupled with Congress’s intent to provide a “broad scope of protection” will likely mean very few disability cases will be subject to summary judgment or motions to dismiss. This inherently will increase the volume of ADA cases filed in the future.

Employers are advised to immediately review the amendments with managers and human resources personnel. Handbooks and guidelines for dealing with the interactive process and

offering reasonable accommodations should be amended accordingly. Moreover, employers should err on the side of treating employees as disabled, as courts will be forced to do the same under the Amendments.

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