

A SHIFT IN FOCUS - *The Amended ADA*

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By *Chris Hogan*

The ADA Amendments Act of 2008, that became effective January 2009, directed the courts and the Equal Employment Opportunity Commission to “restore the intent and protections” of the Americans with Disabilities Act of 1990, primarily with reference to what constituted a legally-protected disability. To this end, the ADAAA instructed the courts and the EEOC to construe the definition of “disability” under the ADA “in favor of broad coverage” and admonished that “the determination of whether an individual has a disability should not demand extensive analysis.” On March 25, 2011, the EEOC issued final regulations implementing the ADAAA, effective on May 24, 2011. Most significantly, the regulations set forth “rules of construction” with respect to the definition of “disability” designed to compel an expansive interpretation of the term.

In the wake of the ADAAA and the regulations implementing it, the primary focus of ADA compliance efforts and litigation has shifted away from the question of whether an applicant or employee is disabled (once a key threshold issue) to questions of qualification and accommodation – issues that were not addressed by the ADAAA. What follows is a brief summary of several key issues that now receive far more attention.

Who’s Qualified?

A covered disability, standing alone, is insufficient to trigger the ADA’s protections. The ADA prohibits covered employers from discriminating “against a qualified individual with a disability because of the disability of such individual.” The ADA defines a “qualified individual with

a disability” as one who can perform the essential functions or duties of a job, with or without reasonable accommodation, and without posing a direct threat to herself or others. Being qualified generally entails meeting both the paper qualifications for the job (*e.g.*, education, employment experience, skills or licenses) and being able to perform the essential functions of the job with or without reasonable accommodation. However, an applicant or employee who poses a direct threat to herself or others in performing the job in question, which cannot be mitigated through the provision of a reasonable accommodation, will not be deemed qualified. Finally, in addition to job-specific qualifications, certain abilities can be essential functions of broad classes of jobs, such as regular attendance or the ability to work with others. With so many more impairments likely to qualify as covered disabilities, the issue of whether an applicant or employee is a “qualified individual with a disability” has taken on a new prominence in ADA compliance and litigation. Fundamental to this inquiry is the determination of what job functions are essential.

Essential Job Functions

As noted above, to be a qualified individual with a disability and, hence, protected by the ADA, an applicant or employee must be able to perform the essential functions of the job in question, with or without reasonable accommodation. The determination of what job functions are essential can be one of the more difficult inquiries under the ADA, as there can be a significant incongruity between perception and reality. In determining whether a function is essential to the job, the ADA directs that “consideration shall

be given to the employer’s judgment as to what functions of a job are essential,” as well as consideration of any written descriptions of the job. However, since there is often significant slippage between the stated functions of a job and its actual performance, the courts and the EEOC tend to privilege the actual functioning of the job over the employer’s judgment and job description. Job functions that are tied closely to the position’s *raison d’être* that are clearly communicated in advance to and actually performed by the employee are the most likely to be found essential.

The Interactive Process

With questions of qualification and accommodation tending to predominate in post-ADAAA compliance and litigation, the dialogue between the employer and the covered individual seeking accommodation has never been more important. Because the ADA defines discrimination to include, among other things, not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, a breakdown in communication can result in litigation, with the party responsible for an unjustified communication breakdown often on the losing end.

The ADA provides that reasonable accommodation includes, “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices” and the like. In cases where the disability or the potential reasonable accommodation is not obvious, the EEOC envisions that the parties will engage in an “informal, interactive process.” An effective interactive process will zero in on the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. Generally speaking, the employee has the initial burden of establishing a covered disability and proposing an accommodation. The employer then is generally obligated to respond in some fashion. Prior to the ADAAA, much of the interactive process was devoted to determining whether an individual, in fact, had a covered disability. Now, the bulk of the dialogue is often focused on determining the precise limitations imposed by the covered disability, the range of potential reasonable accommodations, and whether the provision of the accommodation would impose undue hardship on the employer.

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Undue Hardship

Though an employer may lawfully reject certain proposed accommodations as unreasonable – for example, accommodations that are impossible under the circumstances – the ADA provides that a failure to provide reasonable accommodation to a qualified disabled applicant or employee is not a form of disability discrimination where the employer can “demonstrate that the accommodation would impose an undue hardship.” The undue hardship analysis is an individualized assessment of the expense and difficulty to the employer of providing the proposed accommodation. Obviously larger employers often have a much more difficult time establishing undue hardship than do smaller employers. Ultimately, accommodation requests founded on undue hardship are relatively rare. Nevertheless, the question is more often raised in compliance and litigation in the wake of the ADAAA.

Cases arising under ADAAA are only now beginning to work their way through the courts of appeals. While there are still many unknowns, it seems certain that far more attention will be paid questions of qualification and accommodation than to any other element of the ADA.



chogan@nplmlaw.com

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*Chris Hogan,
 Newhouse Prophater
 Letcher & Moots*