

# The new Americans with Disabilities Act

The new year has ushered in a stunning sea change in federal disability law. Signed in to law in late September 2008 and made effective Jan. 1, 2009, the ADA Amendments Act of 2008 (ADAAA) is a congressional clarion call directing the courts and the Equal Employment Opportunity Commission (EEOC) to “restore the intent and protections” of the Americans with Disabilities Act of 1990 (ADA), particularly with reference to who falls within the ADA’s protective ambit. The ADAAA is therefore likely to cause, in both ADA-related compliance and litigation, a paradigm shift away from questions of coverage to questions of accommodation and discrimination. After placing the ADAAA in context, this article will outline its most significant provisions.

## An edifice undone

The ADAAA overturns an intellectual edifice built largely over the last 10 years by the U.S. Supreme Court, the cornerstones of which are four of the Court’s decisions narrowing the ADA in two fundamental ways. In 1999, the Court issued its decisions in *Sutton v. United Airlines, Inc.*, *Albertson’s, Inc. v. Kirkingburg*, and *Murphy v. United States Parcel Service, Inc.*, collectively holding that so-called mitigating measures, such as medication and the body’s natural adaptation to certain impairments, should be taken into account when determining whether an individual is disabled under the ADA.<sup>1</sup> Three years later in *Toyota Motor Manufacturing v. Williams*, the Court construed the ADA’s requirement that for an impairment to “substantially limit” a major life activity, it must encroach upon activities of “central importance to most people’s daily lives.”<sup>2</sup> Underpinning the Court’s rationale was its reliance on legislative intent. “That these terms need to be in-

terpreted 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.”<sup>3</sup>

Over the next half-decade, these rulings cut a path to the ADA’s protections that some decried as overly narrow, while others applauded the decisions as a necessary canalization that prevented the ADA’s protections from spilling over on to relatively minor medical conditions and defects of character. Now the ADAAA settles the debate in favor of the former by calling for more robust coverage, by legislatively overruling the aforementioned Supreme Court precedent and by directing the EEOC to revise key portions of its regulations interpreting the ADA.

## ADAAA at a glance

The ADAAA does not disturb the ADA’s definition of “disability.” To qualify for protection under the ADA as amended, an employee of a covered employer must still demonstrate that he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment or is regarded as having such impairment.<sup>4</sup> The ADAAA calls for the more liberal interpretation of the key terms and adds examples that broaden the definition’s scope.

## Major life activities

Of the key terms expanded by the ADAAA is the ADA’s definition of “major life activities.” Congress did not define the term in the ADA, leaving that task to the EEOC. The EEOC’s regulations currently set forth a non-exhaustive list of major life activities, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking,



breathing, learning and working.<sup>5</sup> The ADAAA adds to this list in two ways.

First, the ADAAA identifies major life activities that the EEOC has not specifically recognized and which have the potential to expand the application of the ADA. Among those are learning, reading, bending and communicating.<sup>6</sup> Second, the ADAAA adds a subclass of major life activities under the rubric of “major bodily functions.” Included in this subclass are “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.”<sup>7</sup> The ADAAA’s rejection of the Supreme Court decision in *Williams* also portends a loosening of the standard for determining when one or more life activities become “major” in scope.

Along with its expansion of the class of covered major life activities, the ADAAA broadens the sweep of the ADA by calling for a less restrictive interpretation of what it means to be substantially limited in a major life activity.

## Substantial limitation

In the wake of the ADAAA, the term “substantially limits” will be recast to require an impairment to impose a considerably lower degree of restriction on a major life activity. The EEOC regulations interpreting the ADA currently

construe the phrase “substantially limits” to mean that an individual must be unable to perform or significantly restricted in performing a major life activity as compared to an average person in the general population.<sup>8</sup> In the ADAAA, Congress finds this construction “inconsistent with congressional intent, by expressing too high a standard,” and expresses its “expectation” that the EEOC will “revise that portion of its current regulations[.]”<sup>9</sup> Thus, one can expect the EEOC to issue revised regulations and enforcement guidance on what it means to be substantially limited in performing a major life activity. Such revisions are likely to have a ripple effect that will result in revisions to other regulations and enforcement guidance.

**Mitigating measures**

In addition to legislatively overruling *Sutton*, *Albertson’s* and *Murphy*, the ADAAA makes clear that mitigating measures are not to be considered in determining whether an impairment substantially limits a major life activity.<sup>10</sup> Thus, individuals with impairments whose limitations are largely ameliorated by medication, assistive technology or the body’s natural adaptations can nonetheless be found to be substantially limited in a major life activity. The ADAAA carves out an exception for ordinary eyeglasses and contact lenses, the mitigating effects of which can be considered in determining whether an individual has a covered disability. As a result, individuals requiring glasses or contact lenses to fully correct their vision are unlikely to be covered by the ADA.

**Episodic or remitting conditions**

An impairment that is episodic or in remission qualifies as a covered disability if it would substantially limit a major life activity when active.<sup>11</sup> Therefore, the lines of precedent holding that individuals with conditions such as cancer are not necessarily covered by the ADA when those conditions are in full remission will have to be redrawn.

**“Regarded as” claims**

Perhaps just as significant as the ADAAA’s widening of the definition of covered im-

pairments is its expansion of protections for those perceived as having a disability. No longer will applicants or employees asserting such claims be required to demonstrate that they were perceived as having an impairment that would substantially limit a major life activity. Instead, those asserting “regarded as” claims need only show that they were subjected to an adverse employment action because of “an actual or perceived mental or physical impairment whether or not the impairment limits or is perceived to limit a major life activity.” The sole exclusion to this astonishing expansion of ADA liability is impairments that are both “transitory and minor,” which is defined to mean impairments with an actual or expected duration of “6 months or less.”<sup>12</sup> Applicants or employees covered only under the “regarded as” prong of the ADA are not entitled to reasonable accommodations—though such failure to accommodation claims have always been a relatively minor constellation in the universe of ADA litigation.

**Reverse discrimination**

Other than relieving covered employers of the obligation to accommodate applicants or employees with perceived impairments, the only limiting principle to be found in the ADAAA is its pre-emption of claims of reverse discrimination. The ADAAA makes clear that the ADA does not countenance claims that an applicant or employee was subjected to discrimination because of such individual’s *lack* of a disability.<sup>13</sup> This presumably includes claims by nondisabled workers that disabled workers are receiving special treatment. These provisions present interesting questions concerning the future of so-called affirmative action programs aimed at the disabled.

**A new era**

By expanding the classes of covered conditions and extending coverage to individuals whose conditions are in remission or asymptomatic; whose conditions are ameliorated by medication, assistive technology or the body’s natural adaptations; and who are perceived as being impaired in a way that is not “transitory and minor,” the

ADAAA is likely to make ADA compliance and litigation the epicenter of the federal law of the workplace. The ADA’s powerful gravitational pull is likely to change the orbits of state law as well. With such broad coverage, particular emphasis will be placed on the interactive process, identifying congruent reasonable accommodations and the care with which individuals with conditions such as learning disabilities are treated.<sup>14</sup> ♦

**Endnotes**

<sup>1</sup>1527 U.S. 471 (1999), 527 U.S. 555 (1999), 527 U.S. 516 (1999). To be sure, the Court noted that if the mitigating measure had side effects, those effects should also be taken into account in determining whether the individual remains substantially limited in a major life activity. Thus, courts were directed to determine whether an individual was substantially limited in a major life activity after taking into account the impact—both positive and negative—of any mitigating measures.

<sup>2</sup>534 U.S. 184 (2002); *id.* at 534 U.S. at 198.

<sup>3</sup>*Id.* at 197 (citing 42 U.S.C. §12101).

<sup>4</sup>42 U.S.C. §12102(2).

<sup>5</sup>29 C.F.R. §1630.2(i).

<sup>6</sup>S. 3406 at §3(2)(A). Because the ADAAA has not yet been codified, citations are to the Senate Bill signed into law.

<sup>7</sup>*Id.* at §3(2)(B).

<sup>8</sup>29 CFR §1630.2(j).

<sup>9</sup>S. 3406 at §2(a)(8), and at §2(b)(6).

<sup>10</sup>*Id.* at §3(E).

<sup>11</sup>*Id.* at §3(D).

<sup>12</sup>*Id.* at §3(A) and at Sec. 3(B).

<sup>13</sup>*Id.* at §6(g).

<sup>14</sup>For more on the interactive process, see Hogan, Christopher, “Guidelines for ADA Accommodation Dialogues,” *Ohio Lawyer*, Vol. 19, No. 6.



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