

The ADA Amendments Act of 2008 and the EEOC Notice of Proposed Rulemaking

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Major Goals

- To restore the ADA's broad protections as intended by Congress
- To reject the Supreme Court's view in the Sutton trilogy that "disability" should be determined by reference to the ameliorative effects of mitigating measures
- To reject the Supreme Court's holding in Toyota that the ADA requires a "demanding standard" for establishing coverage and requires that an impairment "severely restrict" major life activities
- To express Congress's expectation that EEOC will revise its regulation that defined "substantially limits" as "significantly restricted"

Definition of “Disability”

Language of basic 3-part definition remains the same:

- A physical or mental impairment that substantially limits a major life activity; or
- A record of such an impairment; or
- Being regarded as having such an impairment

But meaning of the terms has changed.

Statutory Changes to Definition of “Disability”

- “Substantially limited” redefined
- Major life activities include “major bodily functions”
- Ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) cannot be considered in determining “disability”
- Impairment that is episodic or in remission is a **disability if it would be** “substantially limiting” when active
- “Regarded as” redefined

NPRM Definition of “Substantially Limited” Uses Statutory Language

- When is an impairment a disability under prongs 1 or 2 of the definition?
 - When it “substantially limits” (or substantially limited in the past) individual in performing a major life activity as compared to most people in general population
 - need not prevent, or significantly or severely restrict
 - NPRM provides many examples of “substantially limited”

Major Life Activities

- NPRM follows statute's expansion of major life activities to include "major bodily functions"
- NPRM includes all statutory examples, plus additional ones EEOC has previously recognized or that further illustrate concept
 - e.g., caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working;
 - e.g. functions of the immune system, special sense organs, and skin; normal cell growth; digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions

Horgan v. Simmons, Inc., 2010 WL 1434317 (N.D. Ill. 2010)

- Plaintiff alleged company president questioned him about the fact that he was HIV-positive and then terminated him
- Defendant filed motion to dismiss for failure to state a claim on ground that plaintiff does not have a disability
- Court holds that disability is sufficiently plead, referencing functions of the immune system as major life activities and EEOC proposed rule

New Statutory Rule on Mitigating Measures

- DO NOT take into account the “ameliorative effects” of mitigating measures in determining if individual is substantially limited
- Someone who uses a mitigating measure is “individual with a disability” if impairment would substantially limit a major life activity without benefit of the mitigating measure
- Exception: ordinary eyeglasses and contact lenses

Examples of “Mitigating Measures”

- Medication
- Medical supplies, equipment, or appliances, low-vision devices, prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment and supplies
- Assistive technology
- reasonable accommodations or auxiliary aids or services
- learned behavioral or adaptive neurological modifications
- NPRM” surgical interventions, except for those that permanently eliminate an impairment

“Ordinary Eyeglasses or Contact Lenses”

- Ameliorative effects of ordinary eyeglasses or contact lenses “shall be considered” in determining “disability”
 - Statutory Definition: “lenses that are intended to fully correct visual acuity or eliminate refractive error”
 - Distinguished from “low vision devices” (defined in statute as “devices that magnify, enhance, or otherwise augment a visual image”)

NPRM Examples of “Ordinary Eyeglasses or Contact Lenses” Exception

- Not substantially limited in seeing because the ameliorative effects of the lenses are taken into account:
 - severe myopia but visual acuity is fully corrected with lenses
 - ordinary reading glasses for someone whose only limitation is the ability to see well enough to read
 - lenses are wrong or outdated prescription but proper prescription would fully correct

Episodic or In Remission

- Amendments Act
 - An impairment that is episodic or in remission is a disability if it would be substantially when active
- NPRM examples of Impairments that are episodic or in remission include --
 - multiple sclerosis
 - epilepsy
 - bipolar disorder
 - Cancer

Hoffman v. Carefirst of Ft. Wayne, case 1:09-cv-00251-RL (N.D. Ind.)

- Plaintiff, who had cancer surgery, asked for reasonable accommodation of working 40 hours per week at a location near his home
- Employer argues cancer in remission not a disability
- Court finds sufficient evidence for trial, noting that conditions that are episodic or in remission can be disabilities if they would be substantially limiting when active and citing to EEOC proposed rule

NPRM Examples of Impairments That Will “Consistently Meet the Definition of Disability”

- NPRM states: for some types of impairments, “the individualized assessment of the limitations on a person can be conducted quickly and easily” and they will “consistently meet the definition of disability”
 - Examples: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia

NPRM Examples of Impairments that May Be Disabling for Some But Not for Others

- Asthma, back and leg impairments, carpal tunnel syndrome, and learning disabilities
- May require somewhat more analysis to determine whether they are substantially limiting for a particular individual
- Level of analysis still should not be extensive
- NPRM has examples showing how these impairments might be substantially limiting

NPRM Examples of Impairments that Usually Will Not Be Disabilities

- Temporary, non-chronic impairments of short duration with little or no residual effects are usually not disabilities:

e.g., the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely

NPRM Simplified Approach to “Working”

- Because an individual will usually be substantially limited in another major life activity, will generally be unnecessary to use “working”
- NPRM replaces “class” or “broad range of jobs” analysis with more straightforward “type of work”

Type of Work

- “Type of work” may be based on nature of work itself:
 - e.g., commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs
- Alternatively, “type of work” may be identified by job-related requirements:
 - e.g., jobs requiring repetitive bending, reaching or manual tasks; frequent or heavy lifting; or prolonged sitting or standing

“Record of” a Disability

- Not changed under Amendments Act
 - Protects an individual who may have had a physical or mental impairment that substantially limited a major life activity in the past but no longer does
 - NPRM notes EEOC’s long-held position that accommodation available for “record of” if still needed

“Regarded As”

- no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity
- Applicant or employee is “regarded as” disabled if he or she is subject to an action prohibited by the ADA based on an impairment that is not transitory and minor
 - Transitory means lasting or expected to last for six months or less
- No accommodation if only regarded as

George v. TJX Cos., 2009 WL 4718840 (E.D.N.Y. Dec. 9, 2009)

- Plaintiff claims he was denied accommodation for, and terminated because of, fractured arm
- Court finds fractured arm was “transitory and minor” because it healed within two months

“Regarded As” Examples

- Not hired due to broken leg or sprained wrist expected to heal normally – not “regarded as”
- Not hired due to carpal tunnel syndrome or Hepatitis C – regarded as
- Terminated due to condition employer misperceives as heart disease – regarded as

“Regarded As” Examples

- NPRM says that actions taken on basis of mitigating measures used for an impairment or symptoms of an impairment are actions based on an impairment:
 - Employer that refuses to hire someone because he takes anti-seizure medication regards the individual as having a disability
 - Employer who does not hire someone because of a facial tic associated with Tourette’s Syndrome has regarded the individual as having a disability

Wurzel v. Whirlpool Corp., 2010
WL 1495197 (N.D. Ohio April 14,
2010)

- Materials handler diagnosed with Prinzmetal angina, which causes coronary spasms without warning, challenged employer's decision to place him on leave because of spasms he experienced at work that the employer considered to pose safety risks
- Plaintiff not regarded as disabled because he posed direct threat and because employer was motivated by the consequences of plaintiff's condition, not the condition itself

Other Statutory Provisions

- Employer must show that “uncorrected vision” standard is job-related and consistent with business necessity
- In the general statutory prohibition of discrimination, phrase “**discriminate on the basis of a disability**” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”
- No cause of action based on lack of disability

Retroactivity Questions

- Courts to have considered the issue have said the ADAAA is not retroactive.
- Accommodation decisions made before January 1, 2009, if challenged, would likely be evaluated under standards in effect before that date.
- Evaluate accommodation requests made before January 1, 2009 but that are still pending on that date under new standards.
- Evaluate accommodation requests renewed after January 1, 2009 under new standards.

Implications

- Easier to establish disability
- Most reasonable accommodation decisions will focus on need for accommodation rather than coverage.
- Documentation sought in support of accommodation requests will often be different (e.g., describe effects on major bodily functions, limitations without mitigating measures).

Implications (cont'd)

- Many ADA disparate treatment claims will probably be brought under the “regarded as” prong, even if the individual may also be covered under first or second prong.
- Avoid qualification standards that screen individuals out based on impairments, or be prepared to defend them as applied to each individual who may challenge them.