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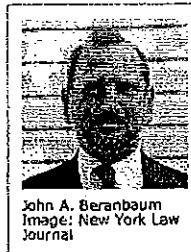
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The Americans With Disabilities Amendment Act: A 'National Mandate'

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December 03, 2008John A. Beranbaum
Image: New York Law Journal

The Americans with Disabilities Act of 1990 was a failed law. Its stated purpose was "to provide consistent, enforceable standards addressing discrimination against individuals with disabilities." However, the ADA resulted in years of litigation that, rather than clarifying appropriate nondiscriminatory standards for employers and others, was mired down in defining "disability" and ascertaining who is covered by the statute. Worse, in a series of decisions construing "disability" very narrowly, the U.S. Supreme Court inappropriately denied the ADA's protections to a wide swath of individuals.

Congress, in enacting the ADA Amendment Act of 2008 (ADAAA or the act) on Sept. 26, 2008, sought to breathe life again into the ADA. The ADAAA's purpose is to carry out the ADA's original goal of providing "a clear and comprehensive national mandate for the elimination of discrimination" against the disabled. To do so, the ADAAA seeks to restore the broad scope of protection that Congress intended to provide disabled individuals when it enacted the ADA, and specifically to reverse the restrictive Supreme Court decisions.

This article focuses on the impact of the ADAAA on Title I of the ADA, banning disability discrimination in employment.

The ADA defines "disability" as:

- (1) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (2) a record or such impairment; or
- (3) being regarded as having such an impairment.

'Sutton' and 'Toyota'

The Supreme Court, in *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), considered the first prong of the definition, in particular, interpreting the terms "substantially limits" and "major life activity."

The plaintiffs in *Sutton* had severe myopia, corrected with eyeglasses. They were denied jobs as airline pilots because of United Air Lines' policy barring anyone from flying intercontinental flights whose uncorrected vision was worse than 20/100. The litigation never reached the issue whether United's policy was discriminatory, because the Supreme Court held that the plaintiffs were not "disabled" and, thus, not protected by the ADA.

Sutton held that mitigating measures, in this case eyeglasses, must be taken into account when determining whether an individual was substantially limited in a major life activity. Since the plaintiffs' eyesight was corrected by wearing eyeglasses, the Court deemed them not disabled. In companion cases to *Sutton*, the Court applied its ruling about mitigative measures to medications, in the case of a plaintiff with high blood pressure, and to self-accommodations, in the case of a truck driver who learned to compensate for his monocular vision.¹

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The Court's rulings contradicted the Interpretative guidance of the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. departments of Justice and Transportation, as well as court decisions and implementing regulations interpreting the ADA's predecessor statute, the Rehabilitation Act.

In *Toyota*, the Supreme Court upheld the dismissal of an assembly line worker with carpal tunnel syndrome on the grounds that her impairment did not "substantially limit one or more major life activities." In reaching its decision, the Court set a very high burden for any employee wishing to establish a disabling impairment affecting manual activities, and more generally, for employees claiming a "disability." The Court held that the terms "substantially limits" and "major life activity" must be "interpreted strictly" to create a "demanding standard" for individuals seeking to qualify as disabled. Although the EEOC had interpreted "substantially limits" to mean "unable to perform" or "significantly restricted,"² the Court set the bar higher by defining the term as "prevents or severely restricts."

With respect to "major life activity," the Court created the additional requirement that the restriction be "of central importance to most people's daily lives." Accordingly, it was not enough that the plaintiff showed an inability to perform the manual tasks needed for assembly line jobs. Because she failed to demonstrate, additionally, that she was unable to do "manual tasks of central importance to people's lives," such as tending to her personal hygiene or doing personal and household chores, she was deemed not disabled.

The ADAAA

The ADAAA expressly repudiates *Toyota* and *Sutton*. It states, in its "Findings and Purposes," that the two Supreme Court decisions had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." In particular, *Toyota's* "exacting standard for proving disability, has created an inappropriately high level of limitation necessary to obtain coverage under the AD[A]." The ADAAA, in no uncertain terms, directs courts that "[t]he 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."

'Substantially Limits'

The ADAAA seeks to assure that courts give "substantially limits" an expansive meaning. The act discards *Sutton's* requirement that mitigating measures be taken into account when determining a disability. As explained by the managers of the Senate bill, an individual with a substantially limiting impairment "should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received accommodations (including informal or undocumented ones) that have the effect of lessening the deleterious impacts of their disability."³ As if to leave no room for argument, the ADAAA includes a nonexclusive list of mitigating measures that may not be considered when determining disability:

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.⁴

The ADAAA does not include a definition of "substantially limited," but explicitly rejects the one found in *Toyota*, i.e., "prevents or severely restricts." The act goes further and finds the EEOC's interpretation of substantially limits, "significantly restricted," overly demanding. The ADAAA also clarifies that to be a qualifying disability an impairment need only substantially limit one major life activity. In addition, in a significant advance, the ADAAA provides that episodic impairments or impairments in remission should be treated as disabilities so long as they are substantially limiting when active. Previously, courts had routinely dismissed ADA claims on the ground that the employee's condition was episodic, and therefore of insufficient duration to be substantially limiting.⁵

The ADAAA similarly broadened the meaning of "major life activity." The ADA did not define "major life activity." However, as part of its implementing regulations, the EEOC provided as examples of major life activities the acts of "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The ADAAA adds to that nonexclusive list: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. Of critical importance, the ADAAA provides that "major life activities" include "major bodily functions," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, brain, respiratory, circulatory, endocrine, and reproductive functions."

'Regarded As' Clause

While the focus of the ADAAA was to restore the broad scope of the first prong of the definition of disability, the act also clarified the "regarded as" clause. Pursuant to *Sutton*, for an employee to meet this prong of the disability test, an employee had to show both that the employer regarded him or her as having an impairment and that it believed the impairment substantially limited a major life activity. The ADAAA rejects this requirement, by providing that the "regarded as" prong is met when the employee shows that the employer perceived him or her as having an impairment, regardless of whether the employer believed the employee's impairment to be substantially limiting. This change relieves an employee of the difficult burden of proving that the employer had actually assessed the degree of functional impairment and found it severe.

The ADAAA does place two limitations on the "regarded as" clause. The lower courts had split on whether an employer is obliged to make a reasonable accommodation for an employee's perceived disability.⁶ Here, the ADAAA sided with management. The statute provides that an employer is not required to reasonably accommodate an employee having only a perceived disability. The other limitation is that the "regarded as" prong will not apply to impairments that are "transitory and minor." Transitory is defined as six months or less.

Finally, the ADAAA gives the EEOC, as well as the departments of Justice and Transportation, the authority to issue regulations implementing the definitions sections of the act. *Sutton* had called that authority into question.

Other Interpretations

• Interpreting "Substantially Limited" and "Major Life Activity" Under the ADAAA

While it is clear that the "highly demanding" standard for determining disability is dead, the ADAAA does not offer a great deal of guidance regarding an alternate standard, particularly with respect to the meaning of "substantially limited." Indeed, the legislative history suggests that Congress purposefully avoided giving a more precise definition of "substantial limitation" and intended the courts to develop a workable interpretation on a case-by-case basis.⁷

However, the ADAAA and its legislative history do provide guideposts for construing the "substantially limited" standard. First, the ADAAA's purpose is to restore "broad coverage to the ADA," and accordingly, as the Senate managers wrote, the threshold question of establishing a disability should not be "an onerous burden." That said, in drafting the ADAAA, Congress deliberately retained the requirement that to be considered a disability an impairment must be functionally limiting.⁸ However, "substantial limitation" now means something less than a "significant restriction," the discarded EEOC definition.

The definition of "substantially limited" most consistent with that envisioned by the ADAAA is found in the preamble to Department of Justice's implementing regulations for Title II of the ADA.⁹ That definition originated in the Senate committee which reported the original ADA: "A person is considered an individual with a disability . . . when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."¹⁰

Substantial limitation, under this formulation, is a "comparative term."¹¹ The definition offers an objective way to measure the severity of an impairment, that is, by comparing the individual's functional capacity to that of the ability of the average person in the general population.¹² To be considered a qualifying disability, the individual's incapacity cannot be minor or short-term;¹³ yet, as compared to the average person, the limitation need not be "significant."

In arriving at its interpretation of "substantially limited," the Supreme Court, in *Toyota*, relied upon one of the dictionary's definitions of "substantial": "[o]f ample or considerable amount." An alternate definition of "substantial" found in the dictionary, and one more consistent with the ADAAA, is "having substance, real."¹⁴ If there is a single phrase best describing "substantially limited" as understood by the ADAAA, it very well might be a "meaningful or real limitation."

In a significant change, the ADAAA essentially eliminates the functional limitation requirement for individuals with certain diseases. As discussed, the statute expands the meaning of "major life activities" to include "major bodily functions." Thus, so long as the individual can prove that a medical condition substantially limits a major bodily function, he or she will not have to show that the impairment has an impact on daily or work life.

By their nature, many medical conditions will cause a deterioration in major bodily functions; for example, the impact of metastatic cancer on normal cell growth; coronary heart disease on the circulatory system; and mental retardation on the functioning of the brain. Since the ADAAA precludes a court from taking into account the palliative effects of medication and other mitigating measures in determining the existence of a disability, and since impairments in remission should be treated as if they were active, certain diseases will become per se disabilities under the ADAAA, regardless of their functional impact on the individual.

ADAAA, "Regarded As"

The ADAAA clarified that to prove "regarded as" discrimination, an employee need only show that the employer took an adverse employment action because it believed the employee had an impairment; it is no longer necessary to show that the employer believed the impairment to be substantially limiting. This broader definition of "regarded as," in the words of the statute, "reinstate[s] the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)."¹⁵ In *Arline*, the Supreme Court stated that Congress, in enacting the Rehabilitation Act, recognized that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." To address this problem, the Rehabilitation Act, as construed by *Arline*, proscribes discrimination against a "person who . . . is regarded as having an impairment [but who] may at present have no actual disability."

Although the ADAAA speaks of following *Arline*, the statute's requirement that a "regarded as" impairment be more than "transitory and minor" is inconsistent with the decision. *Arline* recognizes that "fears and

myths" about disabilities may harm an employee with a perceived impairment, whether or not the individual has an actual disability. The objectives of the ADA are compromised whenever an employer's prejudice and ignorance about disabilities leads it to discriminate against an employee perceived as disabled - regardless of whether or not the employee has an actual impairment. The ADAAA's limited protection on this point creates an unnecessary loophole, that is likely to generate counter-productive litigation over the meaning of "transitory and minor," and impede the statutory goal of rooting out prejudice and ignorance about disabilities.

Nonetheless, the ADAAA's elimination of the requirement that the employer believed the employee to have a substantially limiting impairment for purposes of establishing "regarded as" liability may have an unintended consequence. Disabled employees, not challenging a denial of reasonable accommodation, may well choose to bypass the more difficult task of showing discrimination on the basis of actual discrimination, and rely solely on "regarded as" liability. That way, the employee need not bother proving his or her actual limitations.

Conclusion

Overall, the ADAAA promises to resuscitate a statute rendered stillborn by restrictive court rulings. The courts will now treat the ADA, like the other civil rights laws, as a remedial statute, and construe broadly the protections it affords disabled employees. The courts are now likely to focus their efforts addressing crucial issues for the ADA's future, such as determining how far an employer must go to reasonably accommodate its disabled employees.

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Endnotes:

1. See *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
2. 29 CFR §1630.2(j).
3. Statement of Managers - S. 3406 (Sept. 16, 2008) ("Statement") at S8842.
4. As seen from the list quoted in the text, the ADAAA makes an exception to the rule against considering mitigating measures for eyeglasses and contact lenses.
5. See, e.g., *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998) (dismissing ADA claim where plaintiff's colitis, although permanent, because the condition could be asymptomatic for long periods).
6. Compare *Weber v. Stappit Inc.*, 186 F.3d 907 (8th Cir. 1999), cert. denied, 529 U.S. 1078 (2000) (reasonable accommodation not required for regarded as disability) with *Kelly v. Metallics West Inc.*, 410 F.3d 670 (10th Cir. 2005) (reasonable accommodation required); *Jacques v. DiMarzio*, 200 F.Supp.2d 151 (E.D.N.Y. 2002), aff'd, 386 F.3d 192 (2d Cir. 2004).
7. See Statement at S8841.
8. Id.
9. 28 C.F.R. Pt. 35, App. A §35.104.
10. 28 CFR Part 35 §35.104. The Second Circuit, in *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69, 80 (2d Cir. 2000), also has quoted with approval the language of the DOJ Preamble.
11. See §902 of EEOC Compliance Manual (1995), §902.4(a).
12. Id. §902.4(c).
13. In their discussion of the "regarded as" prong, the Senate managers state that in order to meet the "substantial limitation" requirement, a disability may not be "minor and short term."
14. The Concise Oxford Dictionary (1990) at 1216.

