

Recent Updates to the Americans with Disabilities Act



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The Americans with Disabilities Act

- Enacted July 26, 1990
- Effective July 26, 1992, applied to nearly all employers with 25 or more employees
- Effective July 26, 1994, applied to nearly all employers with 15 or more employees
- ADA Amended Act (ADAAA) effective January 1, 2009



Pre-ADAAA Narrowing of ADA by Court Decisions

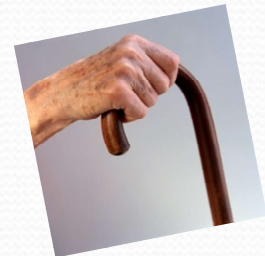
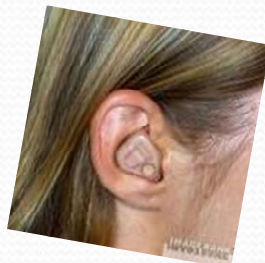
- Focus was on the disability, not on the discrimination
- Significant narrowing of definition of disability
- *Toyota Motor Mfg., Ky, Inc. v. Williams*: impairment must prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives
- *Sutton v. United Airlines, Inc*: court could take into account mitigating measures in determining if impairment "substantially limited"

“Substantially Limits” Under ADAAA

- “Substantially limits” to be construed broadly in favor of expansive coverage
- “Substantially limits” not meant to be a demanding standard
- An impairment is a disability when it substantially limits the ability to perform a major life activity *as compared to most people in the general population*
 - Important life activities are restricted as to the conditions, manner or duration under which they can be performed
 - An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be substantially limiting
 - Not every impairment constitutes a disability

Mitigating Measures Include:

- Medication, medical supplies, equipment, or appliances, low-vision devices (excluding ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aides and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.
- Use of assistive technology.
- Reasonable accommodations or auxiliary aides or services.
- Learned behavioral or adaptive neurological modifications.





Mitigating Measures

- Except for ordinary eyeglasses and contact lenses, the ADAAA prevents courts and employers from considering mitigating measures an individual may be using when determining whether the individual is disabled.
- Therefore, it is possible that many of the tens of millions of individuals with conditions such as diabetes, high blood pressure, carpal tunnel syndrome and cancer may have a “disability” under the ADAAA, even if the conditions are well controlled.

New Major Life Activity under ADAAA

“Major Bodily Function”

- By including major bodily functions (e.g., immune system, neurological, GI, endocrine) the Act ensures that the individual whose conditions are well managed or in remission are covered.
- An impairment that is “episodic or in remission” may lead to disability even when inactive “if it would substantially limit a major activity when active.”
- Examples may include cancer, epilepsy, and post traumatic stress disorder.
 - Example: A person with epilepsy is substantially limited during a seizure.
- Shifts the focus away from the individual’s current functional abilities and limitations to the health condition – e.g., a cancer patient in remission still has abnormal cell growth.

Expansion of Protection Under the ADA

- Examples of illnesses likely to be covered:
 - Diabetes
 - Hypertension
 - Heart disease
 - Cancer
 - Depression
 - Pregnancy complications
- Examples of injuries likely to be covered:
 - Fractures that do not heal properly
 - Back impairments
 - Carpal tunnel or other cumulative trauma disorders
 - Depression/PTSD



Risk Management in Light of the ADAAA

- More employees will fit within the class of disabled persons under the ADA and have a lower burden of proof to establish disability
- Many disabilities (e.g., autoimmune disorder, diabetes, behavioral health disorders) will not be obvious or apparent
- Employers will need to re-assess return to work and job accommodation policies
- Direct threat assessments must adopt an individualized approach based on objective evidence about the specific employee
- Employers must engage in an individualized, interactive process with employees who are seeking reasonable accommodation

ADA: Three Defenses to Discrimination

- Selection criteria are job-related and consistent with business necessity, and a disabled individual cannot perform essential job tasks even with reasonable accommodation.
- Reasonable accommodation would impose an undue hardship on the employer.
- A disabled individual poses a direct threat to the health and safety of self or others in the workplace.



Case Study: Brain Cancer

EEOC v. Maxim Healthcare Services, Inc.

- Anne Whitley worked as Director of Clinical Services for Maxim Healthcare Services, a national home care agency with over \$1.3B in revenues and 35,000 employees
- Denied reasonable accommodation upon returning from medical leave for treatment of brain cancer
- Treating doctor indicated she could work full-time, and needed only occasional days off for treatment
- Terminated in February 2009



Case Study (cont'd): Brain Cancer

EEOC v. Maxim Healthcare Services, Inc.

- Employer cited inability to do job and direct threat to self and others
- Whitledge died in August 2010
- EEOC settles in favor of Whitledge
 - \$160,000 settlement
 - Letter of condolence to her survivors

Lessons from the Whitledge Case

- Employees with cancer more easily able to prove disability
- Employers should refrain from writing policies that require employees with disabilities to be free from restrictions before returning to work after a medical leave of absence
- Employers must engage in an individualized, interactive process with employees who are potentially disabled
 - Reasonable accommodation
 - Direct threat analysis
- Direct threat assessments must be based on objective evidence and information



Case Study: Bipolar Disorder

EEOC v. Cottonwood Financial, Ltd. (2010)

- Sean Reilly—honors student in high school, attended college in Portland, Ore. on an academic scholarship
- While in college, was diagnosed with bipolar disorder; his symptoms forced him to leave school
- Hired by Cottonwood (dba The Cash Store) as an assistant manager in June 2006; swiftly promoted to store manager in October 2006 and received an award for the success of his store in November 2006.
- In late January 2007 Reilly requested a short leave to adjust to new medication prescribed by his doctor to treat his condition.
- The Cash Store fired Reilly in February 2007—just days after employer was aware of need for sick leave
- Reilly alleged that the company denied this request, forcing him to return to work too soon.

Case Study: Bipolar Disorder

EEOC v. Cottonwood Financial, Ltd.

- Employer regarded Mr. Reilly as disabled
- Employer failed to reasonably engage in an interactive process
- Employer's termination decision and alleged failure to accommodate were motivated by Mr. Reilly's bipolar disorder
- Reilly awarded \$6,500 in back wages and \$50,000 for emotional pain and suffering.
- The court also issued a three-year injunction, requiring the employer to train its managers and human resources personnel on anti-discrimination and anti-retaliation laws.

The Impact of Misperceptions about Disability

- Reilly: “It felt as if several years of emotional damage had suddenly been healed. After my diagnosis, I really challenged myself to beat the odds and do well at work. To have my **disability outweigh my performance in my employer’s eyes was crushing.**”
- “This case was never about money or any sort of payback—it was always about doing the right thing to help protect the rights of people with disabilities. I hope this verdict enables other people with bipolar disorder to have an equal chance at obtaining and maintaining successful and fulfilling careers and to prevent future discrimination. It makes me very happy and proud to know that justice prevailed in this case.”
- William Tamayo, the EEOC’s regional attorney in San Francisco: “The court sent an important message today that employers **can’t substitute fiction for facts** when making employment decisions about disabled workers. Employers acting on **outdated myths and fears about disabilities** need to know that the EEOC will not shy away from taking ADA cases to trial to bring them into the 21st century.”
- Reilly’s private counsel Keller Allen: “The court saw through the multiple and changing excuses offered by Cottonwood for firing Sean Reilly. This is a well-deserved victory for a hard-working individual who **refused to allow his disability to be used to set a limit on his achievements.**”

Risk Management Principles for Behavioral Health Disorders

- Under the ADAAA a number of mental health conditions are almost always considered covered disabilities, e.g., major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder or schizophrenia.
- Employees with episodic conditions may be entitled to an accommodation; i.e., the health condition need not be active and/or continuous to be a disability
- Accommodations must be reasonable for the business and not pose an undue hardship. Time off work, telecommuting, changed, narrowed responsibilities or a reduced schedule may or may not be reasonable accommodations for an employee, depending on the specific facts of the case; i.e., business' specific situation and the employee's needs.

Risk Management Principles for Behavioral Health Disorders (cont'd)

- Performance issues
 - Employer may make further inquiries of employee with poor attendance, performance, productivity
 - Treat medical and behavioral health conditions the same with respect to offering accommodation, and always document attempts at reasonable accommodation
 - Assuming reasonable accommodation has been offered, employer should treat disabled and non-disabled workers the same with respect to performance issues
- ADAAA does not protect current users of illegal drugs which may be subject to discipline. An employee who is a recovering addict or in a treatment program is entitled to protection.

Questions

