

ADA Expanded with the Amendments Act of 2008

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I. Introduction

On July 16, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act (“ADA”). President Bush stated at the time, “This Act is powerful in its simplicity.”¹ The Act used a “functional approach” relying on court decisions to flesh out the meanings of terms in the Act.²

Subsequently, the Equal Employment Opportunity Commission’s (“EEOC”) and the Supreme Court’s interpretation of the Act, gave meaning to its terms and created an abundant body of case law on what constitutes being “disabled” and what conduct falls under the protection of the Act. Congress is apparently dissatisfied with those efforts and has amended the ADA to broaden its scope and coverage.

The ADA Amendments Act of 2008 (“ADAAA”), effective January 1, 2009, substantially broadens the current interpretation of the ADA.³ The ADAAA also overturns a number of Supreme Court cases that narrowly interpreted the scope of protection. With the enactment of the ADAAA it will be much easier for an individual plaintiff-employee to bring a discrimination claim, and at the same time, make it more difficult for employers to dispose of ADA lawsuits.

¹Quoted in Howard Moses, “The Americans with Disabilities Act – Summary” *American Rehabilitation* (Summer 1990) (“Am. Rehab.”).

²*Id.*

³ADA Amendments Act of 2008, 42 U.S.C. § 12102, Pub. L. No. 110-325, 122 Stat. 3553. (“ADAAA”).

A. Statutory Background

The language of the ADA originates from Section 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), which provided protection for handicapped individuals in any program or activity that received federal financial assistance.⁴ The definition of “handicapped individual” was eventually amended in 1974 to pertain to “any person who (A) has a physical or mental impairment which substantially limits one or more major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.”⁵ The Supreme Court interpreted the scope and application of this definition in *School Board of Nassau County, Florida v. Arline*.⁶ The Court found that the termination of a school teacher due to her susceptibility to tuberculosis violated Section 504 of the Rehabilitation Act, because the condition satisfied the definition of handicapped individual.⁷ The Court adopted Congress’ need for a broad understanding of “handicapped individual” in an effort to “ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.”⁸ Further, the Court noted Congress’ acknowledgment that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”⁹

⁴29 U.S.C. § 794; see also Pub. L. No. 93-112, § 504, 87 Stat. 355, 393 (1973).

⁵Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a)(6), 89 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 706(7)(B)).

⁶*School Board of Nassau County, Florida v. Arline*, 481 U.S. 273 (1987).

⁷*Id.* 289.

⁸*Id.* at 284.

⁹*Id.*

After the adoption of the ADA in 1990, the “EEOC” issued regulations to further assist in the pursuit of shaping the application of the term “disability” under the ADA. The regulations adopted the same three-part test of the Rehabilitation Act and went on to define a number of other terms including: “physical and mental impairment,” “major life activities,” “substantially limits,” “regarded-as,” and “reasonable accommodation.”¹⁰ The adoption of the language from the Rehabilitation Act and the inclusive definitions in the EEOC regulations pertaining to the ADA indicated that the ADA was to be interpreted broadly.¹¹

The ADA Amendments Act of 2008 suggests that the intention of Congress in passing the ADA in 1990 was to ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ and provide broad coverage.”¹² First, the ADAAA suggests that the EEOC regulations improperly restricted the ADA. Second, in 1999 the Supreme Court began to further restrict the “mandate” for “broad coverage.”

B. Supreme Court Narrows Interpretation of the ADA

In 1999, the Supreme Court dramatically tightened the scope and application of the ADA. Three cases were decided that year which narrowed the scope of which “disabled” persons could seek the protections of the Act: *Sutton v. United Airlines*, *Albertson’s Inc. v. Kirkingburg*, and *Murphy v. UPS*. The cases discussed the meaning of the terms “substantially limits” and “major life activity.” These cases, according to Congress, stated that “whether an impairment

¹⁰29 C.F.R. 1630.2 (1991).

¹¹Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-as Prong of the Americans with Disabilities Act*, 56 UCLA L. Rev. 451, 462 (2008).

¹²ADAAA, *supra* note 1, § 2(a)(1).

substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures[.]”¹³

In 2002, the Court delivered one of its most cited opinions for advocates of a narrow interpretation of the ADA, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*. According to the Amendments, this opinion stated that “the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives’[.]”¹⁴

According to the Amendments, however, these cases improperly limited the scope of the ADA and “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities[.]” Given the fact that the current Congress felt a need to cite and to specifically overturn these cases, a look at them is warranted.

1. Sutton v. United Airlines

Twin sisters suffering from severe myopia were denied the positions of global airline pilots. The defendant airline company required its pilots to have uncorrected 20/100 vision. While the petitioners met the age, education, experience and certification requirements, neither met the uncorrected visual acuity requirement. However, both petitioners had 20/20 vision or better with

¹³ADAAA, Sec. 2 (a)(6).

¹⁴*Id.*, Sec 2(b)(4).

the use of corrective contact lenses or glasses. In determining whether the petitioners were disabled as defined under the ADA, the Court found that mitigating measures are not to be discounted.

Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in major life activity and thus “disabled” under the Act.”¹⁵

The Court reasoned that the ADA’s present indicative verb use of “substantially limits” does not apply to the hypothetical, uncorrected state of an individual’s disability.¹⁶ Therefore, the petitioners did not qualify as disabled under Subsection (A) because their uncorrected vision was not a physical impairment that substantially limits one or more of the major life activities of such individual.

The Court also noted two ways an individual can be “regarded as” having the type of disability defined in Subsection (A): “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.”¹⁷ Further, the Court found that precluding the petitioners from obtaining the positions of global airline pilots does not support the claim that the airline company regarded the petitioners’ poor eyesight as a substantially limiting impairment.¹⁸

¹⁵*Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

¹⁶*Id.*

¹⁷*Id.* at 489.

¹⁸*Id.* at 492-493.

2. **Albertson's Inc. v. Kirkingburg**

Hallie Kirkingburg was hired as a truckdriver by Albertson's. The Department of Transportation requires commercial truck drivers to meet the federal vision standards: corrected distant visual acuity of at least 20/40 in both eyes and distant binocular acuity of at least 20/40 in both eyes.¹⁹ Kirkingburg, who suffered from uncorrectable 20/200 vision in his left eye, was erroneously certified as meeting the vision standards. After working for Albertson's for over a year, Kirkingburg was injured on the job. The examining physician who was administering Kirkingburg's physical before returning to work told him that he did not meet the vision standards.²⁰ In order to bypass the requirement he would need to obtain a waiver; however, Albertson's fired him and subsequently refused to re-hire him when Kirkingburg obtained the waiver. The Court conceded that Kirkingburg's vision was an impairment under the definition of "disability."

On the issue of the disability itself, the Court rejected the Court of Appeals' determination that Kirkingburg's impairment substantially limited a major life activity just because the manner in which he sees was significantly different from the manner in which most people see.²¹ The Court also concluded that his ability to unconsciously compensate for his left-eye vision impairment constituted a mitigating measure.²² Finally, the Court concluded that vision impairment such as Kirkingburg's had to be assessed on a case-by-case basis and this type of impairment does not qualify as a *per se* disability.²³

¹⁹*Albertson's Inc. v. Kirkingburg*, 525 U.S. 555, 558-559 (1999).

²⁰*Id.* at 559.

²¹*Id.* at 561.

²²*Id.* at 565-566.

²³*Id.* at 566-567.

The Court also held that Albertson's, by enforcing the federal vision guidelines, had properly complied with Title I of the ADA, which provides:

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.²⁴

Because the federal vision standard is unchallenged law it was not only reasonable but necessary for Albertson's to enforce compliance. Moreover, Albertson's refusal to re-hire Kirkingburg in light of the waiver did not constitute a violation of the "reasonable accommodation" requirement of the aforementioned statute.²⁵

3. **Murphy v. UPS**

Vaughn Murphy suffered from high blood pressure and was hired as a driver for UPS. His ability to drive commercial motor vehicles was conditioned on his Department of Transportation health certification. He was erroneously granted certification since he did not satisfy the requirement that a driver of commercial motor vehicles must not have a current diagnosis of high blood pressure that could interfere with his ability to drive safely.²⁶ The error was uncovered and Murphy was fired. When medicated, Murphy was only limited in his ability to lift heavy objects. Because the Court considers mitigating measures like medication, Murphy's high blood pressure did not substantially

²⁴42 U.S.C. § 12113(a) (1990).

²⁵*Albertson's*, 525 U.S. 555, 577.

²⁶*Murphy v. UPS*, 527 U.S. 516, 519 (1999).

limit him in any major life activity and therefore it did not qualify as a disability.²⁷ Further, the Court found that Murphy was not “regarded as” substantially limited in one or more major life activities. The fact that he could not meet the Department of Transportation regulations did not alone prove that he was regarded as unable to perform a class of jobs or a broad range of jobs. Instead, the Court found:

At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle...Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification.²⁸

Moreover, UPS presented evidence that there were a number of other jobs that Murphy could perform that all required his mechanical skill despite his high blood pressure.²⁹

4. Toyota Motor Mfg. v. Williams

Ella Williams claimed that she was disabled due to carpal tunnel syndrome. She sued her employer because she believed that it failed to provide reasonable accommodations for her as required under the ADA. Under Title I, an employer discriminates against an individual on the basis of a disability by:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...³⁰

²⁷*Id.* at 520-521.

²⁸*Id.* at 524.

²⁹*Id.* at 524-525.

³⁰42 U.S.C. § 12112(5)(a) (1994).

Williams was working at the company's manufacturing plant and after being diagnosed with carpal tunnel syndrome, was assigned duties that would not interfere with her condition. Due to her continued pain she began missing work on a regular basis. Her physician ended up instructing her that she should not perform any sort of work in her condition. The company subsequently fired her for failing to come to work.³¹ The Supreme Court determined the proper understanding of "major" in the phrase "major life activities" and what it means to be "substantially limited." The Court held:

...to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."³²

While Williams was limited in her ability to perform some of the manual tasks that her job required, she was still able to care for herself, garden, fix meals, do laundry and tidy up the house. Her condition did restrict her ability to perform some activities such as dancing, sweeping, playing with her children, and driving long distances. The Court found that these changes in her life caused by her condition did not qualify as "severe restrictions in the activities that [we]re of central importance to most people's daily lives..."³³

The Court drew guidance from the circumstances under which the ADA was enacted:

That these terms need to be interpreted 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. See 42 U.S.C. § 12101. When it enacted the ADA in 1990, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities." § 12101(a)(1). If Congress intended everyone with a physical impairment that precluded the performance of

³¹*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 187 (2002).

³²*Id.* at 197.

³³*Id.* at 202.

some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. Cf. *Sutton v. United Air Lines, Inc.*, 527 U.S., at 487 (finding that because more than 100 million people need corrective lenses to see properly, “[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million] disabled persons in the findings”).

We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term.³⁴

II. Amending the Narrow Guidelines

Congress enacted the ADA in somewhat vague language assuming that the Act would be interpreted by the courts to give it meaning and clarification. The above Supreme Court cases provided an interpretation of “disability” and the other terms associated with the definition under the ADA. The ADAAA explicitly rejects the Supreme Court’s narrow application and reinstates Congress’ desire to provide broad coverage.

A. Summary of the Changes

Because the ADAAA has been in effect for only a month, current case law is still applying pre-ADAAA precedent. The language of the ADAAA is the most useful tool in understanding the major expansion in protection that has occurred since the enactment. Most notably, the ADAAA lays out the proper interpretation of the terms used to define “disability” by building on the foundation of the original definition used in conjunction with the ADA.³⁵

³⁴*Id.* at 197-198

³⁵*See* Rehabilitation Act Amendments of 1974, *supra* note 3.

1. Mitigating Measures

The new guidelines under the ADAAA reject the mitigating measures discussed in *Sutton*.³⁶ Under *Sutton* any ameliorative effects caused by corrective measures that offset the effects of a physical or mental impairment had to be taken into account in determining whether the individual's impairment substantially limited a major life activity. While the facts of *Sutton* were not necessarily controversial under the ADA, seeing as how the case dealt with correcting one's vision, the application to other more debilitating disabilities was great. "[W]hen applied to other situations, such as individuals who employed prosthetic devices or who take medication to control the effects of epilepsy, diabetes, or bipolar disorder, the rule sometimes caused bizarre results."³⁷ The *Albertson's* case took the *Sutton* holding one step further by including the body's own unconscious ability to compensate for an impairment as an example of a mitigating measure. The ADAAA's language includes a non-exhaustive list of mitigating measures that now receive no weight in the determination of whether an impairment substantially limits a major life activity. That list includes:

- (I) medication, medical supplies, equipment, or appliances, low-vision devices³⁸ (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;
- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services³⁹; or

³⁶ADAAA, supra note 1, §3(3)(E)(i).

³⁷Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U. L. Rev. Colloquy 217, 220 (2008).

³⁸The terms "ordinary eyeglasses or contact lenses" and "low-vision devices" are defined further at ADAAA, supra note 1, §3(E)(iii).

³⁹The term "auxiliary aids and services" is defined further at ADAAA, supra note 1, §4(1).

(IV) learned behavioral or adaptive neurological modifications”⁴⁰

Ordinary eyeglasses or contact lenses, however, are an exception to the mitigating measure doctrine. These types of mitigating measures can be taken into account in the determination process of whether the disability exists.

2. “Substantially Limits”

In *Toyota Motor Mfg. of Kentucky*, the Court created a high standard for addressing whether an impairment “substantially limits” an individual in performing a major life activity. While Congress was drafting the ADAAA there was turmoil around the definition of this term. Instead of deciding the issue and codifying a definition, “Congress chose to punt and put the power to define the term “substantially limits” in the Equal Employment Opportunity Commission’s hands.”⁴¹ The Findings and Purposes section of the ADAAA explains that lower courts have erroneously determined that people are not disabled even though they have a range of impairments that in fact are substantially limiting. The ADAAA explicitly rejects the interpretation of “substantially limits” from *Toyota Motor Mfg.* and places in the hands of the EEOC the duty to revise the current regulation to define the term consistent with the ADAAA.⁴²

3. “Major Life Activity”

The ADAAA similarly rejects the “major life activity” definition from *Toyota Motor Mfg.*, which required an activity to be of central importance to most people’s daily lives.⁴³ The ADAAA

⁴⁰ADAAA, *supra* note 1, §3(3)(E)(ii).

⁴¹Long, 103 Nw. U. L. Rev. Colloquy at 219.

⁴²ADAAA, *supra* note 1 §2(b)(6).

⁴³*Toyota Motor Mfg.*, 534 U.S. 184 at 202.

sets out another non-exhaustive list of activities that constitute a major life activity. These tasks include, but are not limited to:

caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.⁴⁴

In addition, the ADAAA includes major bodily functions like “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions” as major life activities.⁴⁵

4. Episodic Conditions and Multiple Major Life Activities.

The ADAAA also has two provisions in the Rules of Construction section regarding the definition of disability relating to episodic conditions and multiple major life activities. Under the original ADA it was unclear how to examine impairments that were episodic in nature or were in remission. Impairments such as epilepsy or post-traumatic stress disorder were not necessarily covered under the law. The ADAAA addressed the issue by stating that such an impairment falls within the law “...if it would substantially limit a major life activity when active.”⁴⁶ Moreover, the ADAAA provides that an impairment need only substantially limit one major life activity in order to be considered a disability.⁴⁷

⁴⁴ADAAA, *supra* note 1 §3(2).

⁴⁵*Id.*

⁴⁶*Id.* §3(3).

⁴⁷*Id.*

5. “Regarded as” Having a Disability

The *Sutton* case interpreted the “regarded as” prong in a way that made it very difficult for a plaintiff to qualify as an individual with a disability. “It was not enough for an ADA plaintiff to show that a defendant based an adverse decision on uninformed stereotypes about the plaintiff’s condition. Instead, a plaintiff had to establish that a defendant mistakenly believed that an impairment substantially limited a major life activity of the plaintiff.”⁴⁸ The ADAAA clarifies this term by first reinstating the ruling of *School Board of Nassau County*, which applied the broad view of the term “handicapped individual” from the Rehabilitation Act of 1973.⁴⁹ In addition, the ADAAA sets forth a separate definition of the “regarded as” prong:

An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.⁵⁰

This new definition not only broadens the coverage of the prong itself, but changes the focus. “[A]n ADA plaintiff no longer faces the difficult task of proving that a defendant’s misperception of his or her condition was so severe as to amount to a belief that the condition substantially limited a major life activity. Instead, the new amendment places the focus on the employer’s motivation.”⁵¹

⁴⁸Long, 103 Nw. U. L. Rev. Colloquy at 223.

⁴⁹ADAAA, supra note 1 §2(b)

⁵⁰*Id.* at §3(3).

⁵¹Long, 103 Nw. U. L. Rev. Colloquy at 224.

While this new definition substantially expands the “regarded as” prong, the ADAAA modifies its application by excluding “transitory and minor impairments.” An impairment is transitory and minor if it has an “actual or expected duration of 6 [six] months or less.”⁵²

B. Practical Implications for Employers.

While the ADAAA addresses a number of Congress’ concerns with the Supreme Court’s interpretation of the original ADA, there are a number of questions still to be determined in the application of the new ADAAA. Because it was just enacted, there have not been cases providing instruction on the interpretation of the ADAAA. Over time, some of the following issues will need to be addressed to fully comprehend the application of the ADAAA.

1. Reasonable Accommodations

The ADA requires employers to provide reasonable accommodations for its employees with disabilities. The regulations interpreting the Act provides:

It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.⁵³

With the passage of the ADAAA, there is concern over the ramifications for the accommodations that employers would have to make for those employees regarded as having a disability. On one hand, requiring accommodations for such employees may provide a “windfall” for the employees with qualifying disabilities. This may create tension with co-workers who do not receive these benefits. On the other hand, requiring accommodations for an employee who an

⁵²ADAAA, supra note 1 §3(3).

⁵³29 C.F.R. § 1630.9 (2008).

employer believes is disabled would help uncover instances of employer discrimination on the basis of disability.⁵⁴ The ADAAA addresses the issue and sides with the employers. The ADAAA states that an entity “need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability” under the third prong “regarded as having a disability” definition.⁵⁵

2. Single Job Rule.

In the *Sutton* case the Court determined that an impairment must do more than limit the individual from performing one single job. Instead it must preclude the individual from a class of jobs or a broad range of jobs. The ADAAA is silent on that issue but it seems that with the broadened scope of the “regarded as” prong plaintiffs will be able to bypass the single-job rule all together.⁵⁶

3. More Comprehensive “Major Life Activity” List.

The ADAAA includes “learning, reading, concentrating, thinking, communicating...” as major life activities that qualify an individual as a person with a disability. This raises questions as to how employers can reasonably accommodate such disabilities. Employment in general usually requires the ability to learn, concentrate, think and communicate. Because of the broadened list of major life activities, courts will have the difficult task of carving out how the reasonable accommodation requirement fits within these types of disabilities.⁵⁷

⁵⁴Long, 103 Nw. U. L. Rev. Colloquy at 225.

⁵⁵ADAAA, *supra* note 1, § 6(1).

⁵⁶Long, 103 Nw. U. L. Rev. Colloquy at 226-227.

⁵⁷American Law Institute-American Bar Association, SP024 ALI-ABA 375 (2008).

III. Conclusion

The ADAAA has made it much easier for a plaintiff to qualify as an individual with a disability. The Supreme Court's past interpretation of the original ADA did not adequately provide the broad, reaching coverage that Congress intended. As courts begin hearing cases under the new ADAAA it will be interesting to see if the goal of Congress is adequately fulfilled.