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The ADA Amendments Act: *A Real Older Workers Protection Act?*

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By expanding the protection offered by the Americans with Disabilities Act (ADA), the ADA Amendments Act of 2008 (ADAAA) may provide a means for workers to keep their jobs and move to less physically demanding positions as they age. Under the ADAAA, conditions not uncommon to older people are now deemed disabilities, making it likely that employers will see a substantial increase in accommodation requests and litigation.

Consider, for example, diabetes. According to the National Institute of Diabetes and Digestive and Kidney Diseases, 12.2 million Americans aged 60 and older have diabetes. Under the ADAAA, every single one of them is likely disabled. In an aging workforce, the fact that older people are likely to suffer from conditions such as diabetes at a higher incidence rate than their younger counterparts is significant. It means that a growing number of older workers are protected by the ADAAA and thus will have a legally protected right to request accommodations from the physical demands of their positions as they age.

Signed into law on Sept. 25, 2008, and made effective Jan. 1, 2009, the ADAAA was enacted to expand the scope of protection under the ADA to individuals with a wide range of impairments. It was a reaction to a series of court decisions some believed narrowed the scope of protection Congress intended under the ADA by limiting what it meant to be disabled. The two most significant court decisions that



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the ADAAA sought to undo were *Sutton v. United Air Lines Inc.* and *Toyota Manufacturing, Kentucky Inc. v. Williams*.

Under the ADA, an individual is disabled if the individual has a physical or mental condition that "substantially limits one or more major life activities." In *Sutton*, the U.S. Supreme Court ruled that whether an impairment substantially limits a major life activity is to be determined after the ameliorative effects of mitigating measures are considered. The impact of this decision was that conditions that can be controlled or have their effects ameliorated through medication or assistance devices were found not to be disabilities.

Three years later in *Toyota*, the Supreme Court concluded that the terms "substantially" and "major" in the definition of a disability under the ADA must be "interpreted strictly to create a demanding standard for qualifying as disabled," and

that to be substantially limited in 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."

Following this decision, courts rejected an array of ADA claims finding no substantial limitation, which included the 7th U.S. Circuit Court of Appeals case *Williams v. Excel Foundry & Machine Inc.*, stating an employee's inability to stand for long periods did not substantially limit major life activity of standing; the 8th Circuit's *Nuzum v. Ozark Automotive Distributors Inc.*, stating that a lifting restriction did not substantially limit ability to perform manual tasks; and the 9th Circuit's *EEOC v. United Parcel Service Inc.*, stating monocular vision did not substantially limit ability to see.

The ADAAA was also a reaction to court decisions concerning perceived disabilities. In addition to providing protection to people who are substantially limited in a major life activity, the ADA provides protection to individuals who are wrongly considered by their employers to be impaired. This so-called "regarded as" prong of the ADA takes two forms: employees who have impairments that are not, in fact, substantially limiting, but are believed to be so; and employees who do not have impairments but are believed by their employers to be impaired. Before the ADAAA, courts held that employees needed to prove that they were regarded as being substantially limited in a major life activity; it was not enough to prove that the employer believed them to be impaired.

Rejecting this narrow reading of disability, the ADAAA made significant changes to the definitional framework under which the term “disability” is to be interpreted. Specifically, the act:

- Expanded the definition of major life activity to include nearly any major bodily function, including such things as breathing, thinking, digestion, reproduction and all other bodily systems;
- Expanded protection under the ADA to episodic or dormant impairments, even when not actively causing any impairment, if the impairment would substantially limit a major life activity when active without regard to how frequently or for how long the episodes of impairment occur;
- Eliminated consideration of most mitigating measures by stating that with the exception of ordinary eyeglasses, the determination of whether an impairment is a disability must be made without regard to the corrective effects of mitigating measures such as medication, medical equipment, prosthetics, mobility devices and assistive technology; and
- Expanded “regarded as” claims by allowing an employee to prove merely that he or she was perceived to have an impairment, regardless of whether the employer perceived the employee to be limited in a major life activity.

The combined impact of these changes made by the ADAAA is substantial, especially on an aging workforce. By broadening the definition of disability to include episodic impairments and eliminating from consideration most mitigating measures, the ADAAA will make it easier to establish a number of conditions as disabilities.

For example, because episodic impairments are disabilities, as long as they are substantially limiting when active, then chronic conditions that are prone to flare-ups, such as arthritis or migraines, which may not significantly impact a major life activity between episodes, are disabilities under the ADAAA. Similarly, because mitigating measures, such as medication, are ignored in determining whether an individual is disabled, then conditions like diabetes, cardiovascular disease and high blood pressure — conditions that are often effectively controlled with medication — are also disabilities under the ADAAA. Because the incidence of many of these conditions increases with age, the ADAAA will, as a practical matter, expand the number of older workers who are deemed disabled and thus subject to its protections.

This effect is further magnified by the expansion of the “regarded as” prong. To

the extent that older workers are more likely to have certain types of conditions, then they are also more likely to be regarded as disabled, even if they are not, in fact, substantially limited in any major life activity. In fact, one could credibly argue that under the ADAAA, an employer’s mere awareness of an employee’s medical condition could make the employee “disabled” for purposes of the ADA. Thus, nearly all workers, particularly older workers, may now be protected by the ADA.

Although very few cases have been decided under the ADAAA to date addressing the expanded definition of disability, an analysis of how cases decided before the ADAAA’s enactment would likely come out now highlights the implications of the act. Consider the following:

In the pre-ADAAA case of *Brown v. BKW Drywall Supply Inc.*, the Southern District of Ohio held that an employee who experienced episodic flare-ups of lower back pain, swelling in his feet and pain when standing or walking, including a three-week period where the employee was completely unable to walk due to the swelling in his feet, was not disabled because of the temporary nature of the employee’s condition. According to the court, the only time the employee’s ability to walk was substantially limited was during a single three-week period, and he was not “more than moderately impaired” at other times. Under the ADAAA, however, the employee is likely disabled, notwithstanding the episodic nature of his impairment, because the employee’s condition when active (i.e., during flare-ups) inhibited his ability to walk.

Similarly, in *Moore v. J.B. Hunt*, the 7th Circuit held that because the employee’s flare-ups from rheumatoid arthritis were infrequent and his symptoms controlled by medication, the employee was not disabled. Under the ADAAA, a different result is likely. That the employee’s symptoms were controlled by medication is now irrelevant to determining whether he was disabled. So, too, is the frequency of the flare-ups. Because the employee’s symptoms during his flare-ups substantially limit his ability to move, his arthritis is now likely a disability.

With the existence of a disability now a foregone conclusion in many circumstances, we are seeing under the ADAAA a shift in focus away from whether an employee has a disability, to whether and how to reasonably accommodate the disability. Although the ADAAA itself did not change the interactive process or the duty to

accommodate under the ADA, the ADAAA has hidden implications in the context of an aging workforce.

Consider, for example, the case of a 63-year-old nurse with chronic arthritis that has continued to worsen as she has aged to the point that she can no longer lift patients, an essential function of her job. Because the nurse cannot perform the essential functions of her job, she is no longer a qualified individual with a disability under the ADA, and her employer has no obligation to accommodate her in that position.

However, that does not end our inquiry. The nurse still has the right to go through the interactive process to determine if there is an accommodation that will allow her to perform the essential functions of the position. Even assuming there is no reasonable accommodation that would allow her to do so, the employer must then consider the accommodation of last resort: transfer to an available position for which she is qualified, with or without accommodation.

According to the EEOC, an individual with a disability must be given the position as an accommodation, even if he or she is not the most qualified, so long as the employee meets the minimum qualification. So, if the hospital that employs the nurse in the example above has a case manager position available that the nurse can do, the hospital likely has to award the position to her, even if there is another candidate with far more experience or better skills.

To the extent that more conditions linked to age or that are more prevalent as we age are now disabilities, the ADAAA, through the vehicle of the reasonable accommodation, is likely to disproportionately provide job protection to older workers. Providing this sort of protection may be sound social policy — an issue on which we express no opinion — but it is one for which many employers may be ill-prepared. Employers should review their job descriptions and selection criteria to ensure that they appropriately capture the essential functions of the positions and the necessary qualifications. •

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