Disabling the ADAAA

by Stephanie Wilson and E. David Krulewicz

On Jan. 1, 2009, the ADA Amendments Act of 2008 (ADAAA)[1] took effect, bringing with it what many expect to be sweeping reforms to the landscape of federal disability discrimination law. This act, which was widely lauded by both members of the House of Representatives and the Senate, was signed into law by President George W. Bush on Sept. 25, 2008.

Employers who are not fully familiar with the changes the ADAAA brings must quickly learn the nuances of the new law—and the impact it has on the meaning of a "disabled employee"—as it will likely open the floodgates for a new wave of employees seeking reasonable accommodations and the number of discrimination lawsuits. There is good news, however, for employers and attorneys in New Jersey, as these amendments essentially conform the Americans with Disabilities Act (ADA) to the "handicap" protections mandated by the New Jersey Law Against Discrimination (LAD)[2] and interpretative New Jersey Supreme Court decisions.

Introducing the New and Improved ADA

When enacting the ADAAA, Congress and President Bush made their intentions quite clear—to broaden and strengthen the protections afforded disabled individuals by the ADA, as amended.[3] This legislation takes dead-aim at what some critics have deemed pro-employer opinions decided by the United States Supreme Court, such as *Sutton v. United Airlines, Inc.*[4] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[5] Critics of these decisions feel they undermined the initial goals of the ADA. Indeed, the term "broaden" appears no less than five times in the findings and purpose section of the ADAAA, and Congress expressly rejected and overruled the "extensive analysis" and high standard the Court had employed previously in determining whether an individual is disabled.

Generally, the new legislation preserves the traditional verbal

formula that a covered disability is one that "substantially limits one or more major life activities." However, by subtly changing the meaning of these words, Congress has expanded exponentially the number of employees who will be covered by the ADA. These transformations can be seen in several categories:

- The term "disability" is now interpreted broadly to find coverage under the act.
- It is now easier for an employee to prove a "regarded as disabled" claim, as he or she will only have to show an adverse employment action was taken because the employer "perceived" an impairment—which can be any condition with an expected duration of more than six months.
- The employee's condition shall now be judged in its *un*mitigated state (*i.e.*, without regard to the effects of any corrective measures such as medications that would control the symptoms).
- The Equal Employment Opportunity Commission (EEOC) has been directed to draft regulations redefining the term "substantially limits" to be more consistent with the ADAAA's goal of broadening coverage for disabled individuals.

The Competing Definition of "Major Life Activities" Under the ADA and ADAAA

Under the ADA, a qualified individual with a "disability" is one whose "physical or mental impairment substantially limits one or more of the individual's major life activities."[6] Traditionally, and in keeping with the Supreme Court's rulings, "major life activity" had been interpreted narrowly to limit the ADA's application to only those functions that were of "central importance to the individual's daily life," such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[7] A person was deemed to be substantially limited in a major life activity, for purposes of having a disability, if he or she was incapable of performing a major life activity that an average person in the general population could accomplish, or if the condition, manner, or duration under which an individual could perform a particular major life activity was limited considerably in comparison to the way an average person in the general population could perform that same task.[8]

In keeping with its stated purpose of broadening the ADA's perimeters, the ADAAA expands the category of "major" activities that might give rise to a disability by adding such activities as standing, lifting, bending, reading and concentrating, along with performing manual tasks, thinking, eating, sleeping and communicating to the nonexclusive listing of potentially qualifying activities.[9]

The ADAAA also specifies that "the operation of a major bodily function," such as functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, or reproductive functions, will now also be considered major life activities under the ADA.[10] Thus, anyone with a condition that substantially limits even one of these major life activities will be protected by the ADA. Further broadening the coverage of the act, the ADAAA makes clear that impairments that are episodic or in remission are still protected disabilities if they would substantially limit a major life activity when active.[11]

This new "broad" (to borrow a term from the ADAAA itself) definition of a "major life function" will likely increase the number of claims asserted by those with back or other injuries that limit their ability to lift, stand or bend. Additionally, it will likely increase the number of claims by individuals who assert they are disabled because of various learning, reading or concentrating impairments. However, as the ADAAA still requires that the individual be "substantially limited" by the asserted medical condition, an individual seeking an accommodation will, nonetheless, be required to demonstrate the severity of the impairment. This requirement was almost excluded from the ADAAA, as early drafts and commentary had sought to substitute "materially restricts" and "limits" for the "substantially limits" standard.

The ADAAA also requires the EEOC to issue new regulations interpreting when a condition substantially limits an individual, with the clear instruction that those regulations should be more

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expansive than the Court's decisions. In drafting those rules, the EEOC is expected to borrow heavily from the House's version of the ADAAA, which states that an individual's condition substantially limits him or her in a major life activity if it "materially restricts" the individual.

Under a previous House version, the physical or mental condition need not rise to the level of a "severe" or "significant" restriction, but must be more serious than a "moderate" impairment. Congress thus made clear that it wants to lower the bar set by the Supreme Court for what sort of limitation is required to be protected by the ADA, and, as a result, broaden the group of individuals who come within its scope.

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"Mitigating Measures" are Now Immaterial to the Disability Analysis

Under the ADAAA, an individual may now be disabled even if the effects of the individual's impairment can be corrected by mitigating measures, such as medication, prosthetics, hearing aids, medical equipment, learned behavioral or adaptive neurological modifications, assistive technology or accommodations.[12] This amendment is Congress' direct response to the Supreme Court's holdings in *Sutton, Murphy v. United Parcel Service, Inc.*,[13] and *Albertson's Inc. v. Kirkingburg*,[14] which found that the ADA's protections did not extend to individuals who were able to successfully manage their impairment through the use of mitigating devices.

By specifically rejecting the mitigative measures argument, Congress has potentially opened the floodgates for employees, whose impairments are successfully resolved (or at least managed) by the use of medication or other treatments, to seek the benefits of the ADA.

Along a similar vein, the ADAAA now specifically precludes the use of tests or other selection criteria that evaluate an employee's uncorrected vision, unless this requirement is related to the job position and consistent with business necessity.[15] This revision is somewhat surprising, as the ADAAA continues to exclude individuals requiring the need for "normal eyeglasses" from the category of disabled Americans protected by the ADA (unless, of course, they otherwise qualify for protection under the act because of another medical condition).[16]

The New, Expanded Definition of "Regarded as" Disabled

To further augment the ADA's application, the ADAAA changes when an individual will be treated as protected by the ADA because he or she is "regarded as" disabled by an employer. Now, an individual will be regarded as disabled if he or she was subjected to an action prohibited by the ADA "because of an actual or perceived physical or mental impairment," regardless of whether that impairment actually limited or was perceived to limit a major life activity.[17] At the same time, however, if an individual has only a "transitory" impairment, defined as one with "an actual or expected duration of 6 months or less," he or she will not be regarded as disabled.[18] The ADAAA also makes clear that employers must provide reasonable accommodation only to individuals who have an impairment that substantially limits a major life activity, not those who are merely regarded as disabled.[19]

Although subtle, this new distinction is important, particularly in the context of discrimination lawsuits. Previously, a plaintiff could claim that he or she was regarded as disabled only if the perceived condition was thought to limit "a major life function." By eliminating this requirement, Congress has opened courtroom doors to a wave of new litigants who must demonstrate only, for purposes of their *prima facie* claim, that they suffered an adverse employment action (*e.g.*, were not hired, promoted or fired) because of a perceived impairment—not that the impairment caused a substantial impact on one or more major life functions.

What Do These Changes Mean for Employers' Accommodation Obligations?

While the ADAAA greatly transforms what it means to be a disabled individual for purposes of federal protection, the new law leaves an employer's reasonable accommodation obligation unchanged. In fact, the ADAAA only speaks to this point to clarify that an employer need not accommodate a "regarded as" disability. This is certainly good news for employers, but should not be an invitation for complacency. Rather, as the number of employees seeking accommodations is expected to rise—as is the number of lawsuits claiming disability discrimination—employers need to revisit their human resources policies and practices to ensure they comply with the mandates of the ADA. In particular, employers should consider how their policies compare to: 1) the ADA's prohibitions against inquiring into an applicant's/employee's medical

condition, and 2) the ADA's accommodation requirements.

Disability-Related Inquiries

As part of its efforts to protect against discrimination, the ADA places a number of limits on an employer's ability to make disability-related inquiries. These inquiries are defined by the EEOC as any question or series of questions likely to elicit information about a disability.[20] These limitations vary depending on whether an individual is an applicant, has been given a conditional offer of employment or is actively employed.

The most constrictive prohibitions occur during the pre-offer stage when an employer is proscribed from asking an applicant whether he or she has a disability or regarding the nature or severity of a disability, even if the inquiries are job-related.[21] Moreover, if a non-disability-related question unintentionally elicits information that relates to the applicant's disability, the employer may not follow up on this information. These prohibitions, however, do not forestall an employer from inquiring about an applicant's ability to perform job-related essential functions, with or without reasonable accommodation, so long as the inquiries are narrowly tailored to focus on the job's essential functions, not the disability.[22]

Similarly, during the pre-offer process an employer may not ask an applicant whether he or she will require a reasonable accommodation to perform the job, unless the applicant's disability is readily apparent or is voluntarily disclosed by the applicant.[23] If the applicant has a known disability that would appear to limit his or her capacity to perform the essential functions of the job, the employer may ask the applicant to explain or demonstrate how he or she will perform the job's essential functions, with or without a reasonable accommodation.[24]

Reasonable Accommodations

Under the ADA, employers have an affirmative obligation to make "reasonable accommodations" so a disabled, but otherwise qualified, individual can perform the essential functions needed for the job in question.[25] This requirement is particularly important to employers in a post-ADAAA world, as the number of applicants and current employees seeking accommodations will undoubtedly rise under the new, more lenient standard for judging a qualifying disability.

Fortunately for employers, a reasonable accommodation can take a variety of forms, and rarely will there be only one possible accommodation available to fulfill the employer's ADA obligation. For example, an employer may be required to make existing facilities used by employees readily accessible for individuals with disabilities; install modifications to the workspace that will enable the area to be more easily used by individuals with disabilities; or create part-time or modified work schedules to accommodate for medical treatment or Family Medical Leave Act leave.[26] Employers should, therefore, engage in an interactive dialogue with the qualified individual with a disability to ascertain the particular limitations caused by the disability, and possible accommodations that will alleviate those limitations.[27]

The ADA gives covered employers flexibility in finding solutions that are beneficial to both the employee and the employer. Indeed, where the requested accommodation would cause an "undue hardship"—defined as being any accommodation that would cause significant difficulty or expense to the employer—the accommodation may not even be required.

In determining whether an accommodation would impose an undue hardship, the EEOC has promulgated a series of guidelines to aid an employer's analysis. However, a prudent employer would be wise to consult an attorney before reaching the conclusion that no accommodation is possible.

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In pertinent part, these factors include, but are not limited to:

> (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> (iii)The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.[28]

Clearly, as the EEOC envisions a case-by-case review of what constitutes an "unreasonable burden," employers have further incentive to engage in an open dialogue with the employee to ensure that all possible accommodations have been considered.

Blurring the Line Between a "Disability" and a "Handicap"

For those already familiar with the LAD's requirements against "handicap" discrimination, the ADAAA should present many familiar concepts. For example, both critics and proponents of the ADAAA have focused their attention on the new, lower standard a plaintiff must meet to prove he or she is "substantially impaired" and, accordingly, the greater number of Americans who will be able to claim the act's protections. Yet, this standard will become more akin to that seen under the New Jersey Law Against Discrimination—which "unquestionably protects a broader range of 'disabilities' or 'handicaps' than the ADA."[29]

Indeed, the Third Circuit Court of Appeals, the United States District Court of New Jersey and the New Jersey Supreme Court have long recognized that a plaintiff bringing an ADA claim, rather than a LAD claim, has a higher burden of proof because the LAD's definition of "handicapped" did not incorporate the requirement that the condition result in a substantial limitation on a major life activity.[30] Moreover, as both the ADA and the LAD have similar prohibitions against discriminatory testing procedures and require employers provide reasonable accommodations, as necessary, to qualifying individuals, employers in New Jersey should already be accustomed to engaging in the "interactive process" with most, if not all, employees seeking accommodations. In this regard, employers in New Jersey should be aware, but not overly fearful, of the ADAAA's revisions. ⚖

Endnotes

1. S. 3406TE 110th Cong. (2008) (enacted).
2. 42 U.S.C. § 12102(2)(A).
3. 42 U.S.C. Section 12101, *et seq.*
4. 527 U.S. 471 (1999).
5. 534 U.S. 184 (2002).
6. 42 U.S.C. § 12102(2)(A).
7. *See* 29 C.F.R. § 1630.2(i); *see also Toyota, supra*, at 198.
8. *See* 29 C.F.R. § 1630.2(j).
9. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(2)(A).
10. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(2)(B).
11. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(4)(D).
12. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(4)(E).
13. 527 U.S. 516 (1999).
14. 527 U.S. 555 (1999).
15. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12113(C).
16. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(4)(E)(ii).
17. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(3)(A)-(B).
18. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C § 12102(3)(B).
19. *See* S. 3406TE 110th Cong. (2008) (enacted); 42 U.S.C. § 12201(h).
20. 29 C.F.R. § 1630.10 -13.
21. *See* 42 U.S.C. 12112(d)(2)(A); 29 C.F.R. § 1630.13(a).
22. *See* 29 C.F.R. § 1630.13(a).
23. *See* 42 U.S.C. § 12112 (d)(2)(a)(1994).
24. *Id.*
25. *See* 29 U.S.C. § 1630.9.
26. *See* 29 C.F.R. § 1630.2 (o)(2).
27. *See* 29 C.F.R. § 1630.2 (o)(3).
28. *See* 29 C.F.R. § 1530.2(p)(2).
29. *Fasano v. Federal Reserve Bank of New York, et al.*, 457 F.3d 274, 289 (3d Cir. 2006).
30. *See, e.g., Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998) (finding police officer's back condition could qualify for protection under the LAD, but not the ADA, warranting a reasonable accommodation); *Olson v. General Elec. Astrospace*, 966 F. Supp. 312, 314-15 (D.N.J. 1997) (distinguishing plaintiff's *prima facie* case under the LAD requires a lower threshold than for ADA and, as such, LAD had broader application); *Viscik v. Fowler Equip. Co.*, 173 N.J. 1 (N.J. 2002) (noting the more stringent ADA standard).

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