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INTRODUCING THE NEW AND IMPROVED AMERICANS WITH DISABILITIES
ACT: ASSESSING THE ADA AMENDMENTS ACT OF 2008

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INTRODUCTION

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008.

When the first President Bush signed the original Americans with Disabilities Act (ADA) into law in 1990, he stated that it was time “to rejoice in and celebrate another ‘Independence Day,’ one that is long overdue.”¹ For the 43 million Americans with disabilities, the ADA was supposed to represent the opening of doors that had long been closed. Employers, state and local governments, and private businesses – from bowling alleys to restaurants – would now be required to make reasonable modifications to their facilities, policies, and procedures in order to allow full participation by individuals with disabilities. In short, expectations for the ADA were high.

This probably explains why the ADA is viewed so widely by disability rights advocates and its original authors as such a huge disappointment, at least in the employment context. Studies consistently reveal that employees who claim to be the victims of disability discrimination in the workplace face long odds. While plaintiffs have enjoyed more success in requiring government actors and private businesses to make changes to their existing structures and policies, the reality is that many individuals with disabilities are still excluded from participating in activities most of us take for granted.

Probably the biggest limitation of the ADA has been its definition of “disability.” In order to be protected by the Act, one must first show the existence of a disability. To put it mildly, this hasn’t been an easy task. As originally drafted, the definition was vague, and courts tended to interpret the definition narrowly. People with a variety of serious physical or mental impairments, ranging from AIDS to cancer to bipolar disorder, have been found not to have disabilities under the ADA. In one case, an individual

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¹ President George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990).

with cancer brought suit against his employer and died before the resolution of the case, only to be told (posthumously) that the condition that killed him really wasn't a disability under the ADA.²

The ADA Amendments Act of 2008 set out to address some of the more controversial aspects of the definition of disability. The Act retains the same basic three-pronged definition of disability that existed previously. According to the Act,

The term "disability" means, with respect to an individual –

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment³

When one looks at the details, however, it becomes clear that the ADA Amendments Act contains some fairly dramatic changes. The following is a summary of some of the provisions of the new law.

I. CHANGES TO THE DEFINITION OF DISABILITY

A. *No More "Demanding Standards"*

In 2002, the United States Supreme Court announced that the terms in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."⁴ Although the Court drew support from the Findings and Purposes which accompanied the Act, the Court's interpretive gloss was somewhat at odds with the traditional approach to interpreting remedial statutes. One longstanding canon of construction is that remedial statutes should be interpreted broadly. Thus, the Supreme Court's instruction seemed to stand the traditional approach on its head.

The Findings and Purposes section introducing the ADA Amendments Act specifically rejects the Court's "demanding standard" gloss. The Act also includes a section setting forth rules of construction. One of these is that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent

² Hirsch v. National Mall & Serv., Inc., 989 F. Supp. 977 (N.D. Ill. 1997).

³ ADA Amendments Act § 4(a).

⁴ Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197 (2002).

permitted by the terms of this Act.”⁵

B. Redefining the “Substantially Limits” Language

In order to amount to an actual disability under the first prong of the Act’s definition of disability, an impairment still must substantially limit a major life activity. However, the new amendments alter the meaning of the phrase “substantially limits” in several ways.

Under prior Supreme Court decisions, the term had been defined to mean an impairment that “prevents or severely restricts an individual from performing major life activities.”⁶ An earlier version of the bill provided that the term “substantially limits” means ‘materially restricts.’” In terms of providing additional clarity to the substantial limitation concept, this new definition did little.⁷ Ultimately, Congress chose to put the ball in the court of the EEOC. The Findings and Purposes section express “Congress’ expectation that the Equal Employment Opportunity Commission will revise” the definition of the term “substantially limits” “to be consistent with this Act.” As the Findings and Purposes section and Rules of Construction section convey the idea that Congress intended a broader definition of the term, presumably the EEOC’s ultimate definition will be less restrictive than the current “prevents or severely restricts” standard.

Second, the Act expressly rejects the “mitigating measures” approach adopted by the Supreme Court in *Sutton v. United Air Lines, Inc.*⁸ In *Sutton*, the Court held that the question of whether an individual has a disability must be determined with reference to any mitigating or corrective measures the individual uses to offset the effects of a physical or mental impairment. When limited to the facts of *Sutton*, a case involving plaintiffs who were legally blind but whose vision was 20/20 through the use of eyeglasses, the mitigating measures rule did not seem particularly objectionable. However, when 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 took on bizarre qualities.

In *Albertson’s, Inc. v. Kirkingburg*, decided the same day as *Sutton*, the Court further explained that its mitigating measures rule applied not just

⁵ ADA Amendments Act § 4(a).

⁶ *Toyota Motor Mfg.*, 534 U.S. at 198.

⁷ See *Defining Disability Down: The ADA Amendment Act’s Dangerous Details*, Hearing Before the Senate Committee on Health, Education, Labor, and Pensions (July 15, 2008) (statement of Andrew M. Grossman, Heritage Foundation) (noting the lack of prior use of the phrase “materially restricts” and the conflicting dictionary definitions of the terms).

⁸ 527 U.S. 471 (1999).

to artificial measures, but to “measures undertaken, whether consciously or not, with the body’s own systems.”⁹ Thus, an individual’s learned or natural ability to compensate for the effects of an impairment was a “mitigating measure” that must be taken into account when deciding whether the individual had a disability. As a result of this mitigating measures rule, numerous individuals with fairly severe physical or mental impairments have been found not to have an actual disability under the ADA. Prior to the ADA Amendments Act, several states, either through legislation or judicial decision, had rejected this rule for use in their own disability discrimination statutes.¹⁰

The ADA Amendments Act specifically provides that the determination of whether an impairment substantially limits a major life activity must be made “without regard to the ameliorative effects of mitigating measures.”¹¹ This includes medication, artificial aids, assistive technology, reasonable accommodations, and “learned behavioral or adaptive neurological modifications.”¹² However, the Act singles out eyeglasses and contact lenses for special treatment. According to the Act, “[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses” must be considered in determining whether an impairment substantially limits a major life activity.¹³ That said, the Act goes on to provide that if an employer uses a qualification standard based on an individual’s uncorrected vision, the employer must show that the standard is job-related and consistent with business necessity.¹⁴

Finally, the Act gives new hope to potential plaintiffs whose impairments are episodic in nature or in remission. Some plaintiffs have had difficulty establishing that an impairment is substantially limiting when the condition is in remission or episodic because one must focus on the overall effects of an impairment, not just the effects when they are at their most severe.¹⁵ The amendments provide that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major

⁹ 527 U.S. 555, 565-66 (1999).

¹⁰ See *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956 (Mass. 2001) (rejecting Sutton for use in Massachusetts’ anti-discrimination statute); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 634-35 (2004) (discussing California’s and Rhode Island’s statutes).

¹¹ ADA Amendments Act § 4(a).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* § 5(b).

¹⁵ See, e.g., *Walker v. Town of Greeneville*, 347 F. Supp. 2d 566 (E.D. Tenn. 2004) (concluding that individual with episodic, intermittent claustrophobia was not substantially limited in a major life activity).

life activity when active.”¹⁶ This represents a subtle, but fairly substantial change. The Supreme Court has repeatedly emphasized that courts should refrain from engaging in hypothetical inquiries as to the severity of impairments and instead must focus on the individual in his or her present state.¹⁷ By directing courts to consider whether an impairment *would* substantially limit a major life activity if it were active, the ADA Amendments Act allows courts to engage in this type of once-prohibited hypothetical inquiry, at least in this one instance.

C. Expanding the List of Major Life Activities

In order to constitute an actual disability, an impairment must substantially limit one or more major life activities of an individual. The original version of the ADA did not contain a definition of the term “major life activities.” Instead, the task of defining this concept was left to the agencies charged with enforcing the various titles of the Act. The Equal Employment Opportunity Commission (EEOC), for example, chose not to define the term, but instead included an illustrative list of major life activities. The relative brevity of this list led to numerous questions over the years as to whether certain activities, such as learning or lifting, qualify as major life activities. In addition, most of the activities listed in the regulations (e.g., caring for oneself, performing manual tasks, and walking) involve volitional behavior to some extent. This led to at least some dispute as to whether non-volitional bodily activities, such as eliminating waste from one’s blood, amounted to a major life activity.¹⁸

For its part, the Supreme Court defined the term “major life activities” in a fairly narrow fashion. In keeping with its belief that the terms in the ADA’s definition of disability needed to be interpreted strictly, the Court held that the term “major life activities” referred to those activities that are of “central importance to most people’s daily lives.”¹⁹

The ADA Amendments Act makes several changes with respect to the concept of major life activities. First, it clarifies what has always been implicit: an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.²⁰ Second, it rejects the Supreme Court’s “demanding standard.” According

¹⁶ ADA Amendments Act § 4 (a).

¹⁷ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

¹⁸ *Fiscus v. Wal Mart Stores, Inc.*, 385 F.3d 378, 384 (3d Cir. 2004); *Kammüller v. Loomis, Fargo & Co.*, 383 F.3d 779, 785 (8th Cir. 2004).

¹⁹ *Toyota Motor Mfg.*, 534 U.S. at 198.

²⁰ ADA Amendments Act § 4(a).

to the Findings and Purposes section, one of the purposes of the Act is to reject the notion that the term “major” in the definition of major life activities needs to be interpreted strictly.²¹

Instead of offering an actual definition, the Act includes a non-exhaustive list of major life activities designed to illustrate the concept. Aside from the fact that this list is now in the actual statute, rather than the accompanying regulations, the list is significant because it contains several new additions to the previous list. According to the Act,

major life activities 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, thinking, communicating, and working.²²

Eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating all represent new additions to the list of major life activities.

The Act also clarifies that the term “major life activities” includes the operation of major bodily functions, including, but not limited to,

functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.²³

D. Major Changes to the “Regarded as” Prong

One of the most significant changes to the ADA involves the third prong in the ADA’s definition of disability. Under the original definition, one did not actually have to have an impairment that substantially limits a major life activity in order to have a disability. Instead, one could be regarded as having such an impairment and still qualify as having a disability. Therefore, an individual who had no impairment at all, but was treated as having a substantially limiting impairment would be covered. Similarly, an individual who had an impairment, but one that was not substantially limiting, would be covered if the defendant incorrectly believed the impairment was substantially limiting.

In many ways, the “regarded as” prong represents the essence of the

²¹ *Id.* § 2(b)(4).

²² *Id.* § 4(a).

²³ *Id.*

ADA. The ADA's definition of disability was based on a nearly identical definition contained in the Rehabilitation Act. In addressing the "regarded as" prong in this context, the Supreme Court wrote in *School Board of Nassau County v. Arline*, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."²⁴ Thus, the EEOC originally took the position that an individual who was rejected from a job because of the "myths, fears, and stereotypes" associated with an impairment would be covered under the "regarded as" prong.

Over time, however, it became clear that this was not how the "regarded as" prong operated in practice. The problem has been that many individuals who proceeded under this prong faced is that that they were ultimately forced to confront many of the restrictive interpretations associated with the actual disability definition. Because an individual was covered only if the defendant regarded the individual as having "such an impairment," i.e., an impairment that substantially limits a major life activity, ADA plaintiffs proceeding under the "regarded as" prong were frequently disqualified by the rules that prevented them from having an actual disability in the first place.

The ADA Amendments Act takes a new approach. According to the Findings and Purposes section, one of the purposes of the Act is "to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, ... which set forth a broad view of the third prong of the definition" of disability."²⁵ In keeping with that purpose, the Act sets forth a separate definition for 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.²⁶

Thus, an 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 amendments place the focus on the employer's motivation, regardless of the severity of the impairment. If a plaintiff has a

²⁴ *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

²⁵ ADA Amendments Act § 2(b)(3).

²⁶ *Id.* § 4(a).

physical or impairment and can show that the impairment motivated the defendant's adverse action, the plaintiff can claim coverage under the "regarded as" prong, regardless of how limiting the impairment actually is. Likewise, if the plaintiff can show that the defendant, rightly or wrongly, perceived the plaintiff as having an impairment and that this perception motivated the adverse action, the plaintiff is covered under the "regarded as" prong, regardless of how limiting the defendant perceives the impairment to be.

This represents a dramatic change. If courts give effect to the literal language of the definition, the meaning of the "regarded as" prong has effectively been restored to something approaching the "myths, fears, and stereotypes" standard. Therefore, if the language of the new definition is read literally, it should greatly expand the coverage of the "regarded as" prong.

Perhaps to compensate, the Act singles out "transitory and minor" impairments for special treatment under the regarded as prong. An individual who is subjected to an adverse action because of an actual or perceived impairment is not covered under the "regarded as" prong if the impairment is transitory and minor. "A transitory impairment," the Act explains, "is an impairment with an actual or expected duration of 6 months or less."²⁷

II. OTHER CHANGES

A. *Accommodation of Individuals Who are Regarded as Having a Disability*

One of the most fundamental components of the ADA is the reasonable accommodation requirement. Employers and other defendants are required to provide reasonable accommodations for the known physical or mental impairments of qualified individuals with disabilities. Reasonable accommodations can be viewed as the means of eliminating the unnecessary barriers that exclude full participation by individuals with disabilities.²⁸ Generally speaking, reasonable accommodations include modifications to the work environment or to the manner in which a job is customarily performed.²⁹

One issue that has recently divided the courts is whether an employer must provide a reasonable accommodation to an individual whom it merely regards as having a disability. An employee with an impairment

²⁷ *Id.*

²⁸ 29 C.F.R. app. § 1630.9 (2008).

²⁹ 29 C.F.R. § 1630.2(o)(1)(ii) (2008).

that substantially limits a major life activity (like lifting, hearing, or walking) may be unable to perform the essential functions of a position unless the employer somehow modifies the way the job is normally performed. However, if an individual is merely regarded as having a disability, the individual may have no need for any type of accommodation. In addition, courts have expressed concern over the possibility that employees without actual disabilities will gain a “windfall” that their non-disabled coworkers are not entitled to.³⁰ On the other hand, some have argued that requiring employers to provide accommodations for individuals it believes have a disabling impairment may help “ferret out” disability discrimination.³¹

The ADA Amendments Act takes the side of defendants in this instance. The Act provides that employers and other covered entities “need not provide reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets” the “regarded as” definition.³² Thus, the new amendments effectively end the ongoing dispute among the courts on this issue.

B. Power to the EEOC

One issue that has come up regarding the ADA is the authority that the various agencies charged with enforcing the Act have with respect to defining the terms within the definition of disability. The EEOC, Attorney General, and Secretary of Transportation are charged with the enforcement of different titles of the ADA. However, the definition of disability does not appear in any of those titles. Instead, the definition appears in the general provisions of the Act. This fact led the Supreme Court in *Sutton* to question whether the EEOC’s regulations regarding the definition of disability were entitled to deference. The ADA Amendments Act specifically provides that “the authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under the Act includes the authority to issue regulations implementing the definition of disability.”³³

III. UNRESOLVED ISSUES

Despite the numerous changes to the language of the ADA, the ADA Amendments Act fails to address a number of controversial and potentially

³⁰ *Webber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999).

³¹ *Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998) (en banc).

³² ADA Amendments Act § 6(1).

³³ *Id.*

contentious issues.

A. The Single-Job Rule

The Act does not address one of the more limiting interpretations of the definition of disability: the so-called “single-job rule.” Under this rule, in order to be substantially limited in the major life activity of working, it is not enough that an individual be precluded from a single job or narrow category of jobs. Instead, the individual must be precluded from a class of jobs or a broad range of jobs.³⁴ As a result of this rule, ADA plaintiffs have had great difficulty establishing that they were actually disabled when working was the major life activity in question. The new amendments do nothing to assist ADA plaintiffs in this regard. However, by expanding the coverage of the “regarded as” prong, the rule is unlikely to have quite the same preclusive effect it has in the past.

B. Short-Term Impairments

In *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, the Supreme Court held that in order to constitute a disability, the impact of an impairment *must* be permanent or long-term.³⁵ To some extent, this holding conflicts with the position taken by the EEOC. Under the EEOC’s approach, the permanent or long-term impact of an impairment was simply one factor to consider in making the disability determination. Other factors include the nature and severity of the impairment and the duration or expected duration of the impairment.³⁶ Although the new amendments provide that the definition of an impairment that is regarded as being a disability does not include transitory and minor impairments, the new amendments do not address this aspect of *Toyota Motor*.

C. The Forgotten “Record of” Prong

Despite the extensive revisions to the actual disability and “regarded as” prongs in the ADA’s three-pronged definition of disability, the ADA Amendments Act does not address the second prong, the so-called “record of” prong. This portion of the definition has almost fallen into disuse. Despite that fact, there are still a number of interpretational issues concerning the “record of” prong, such as whether an employer must rely on an actual tangible “record” indicating the existence of disability, that

³⁴ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 91-92 (1999).

³⁵ *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002).

³⁶ 29 C.F.R. § 1630.2(j)(2) (2008).

have tripped up ADA plaintiffs.³⁷ The new amendments provide no express clarification on this and other issues involving the “record of” prong.

D. Interacting with Others as a Major Life Activity

Courts have split on the question of whether interacting with others qualifies as a major life activity. Indeed, this is probably the most divisive major life activity issue currently facing the courts. Despite its inclusion of several new major life activities, the ADA Amendments Act is silent on this issue. Arguably, its inclusion of “communicating” might conceivably cover “interacting with others,” but there is no express resolution of this question.

E. Limited Guidance on Reasonable Accommodations

With the exception of the amendment concerning accommodation of “regarded as” plaintiffs, nearly all of the focus of the ADA Amendments Act is on the definition of disability. In order to be protected by the ADA, one must be a qualified individual with a disability. In the employment context, this means an individual with a disability who is capable of performing the essential functions of the position the individual holds or desires. By amending the ADA’s definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff’s requested accommodation was reasonable.

Unfortunately, Congress has done little to assist courts in devising a clearer standard regarding what qualifies as a “reasonable” accommodation. One of the more persuasive explanations as to why the federal courts initially made it so difficult for ADA plaintiffs to qualify as having a disability is that the courts sought to avoid having to deal with complex and messy reasonable accommodations that were not easily resolvable on summary judgment motions. Congress failed to provide courts with any guidance beyond a generic reasonableness standard. The result was that courts strained to avoid having to make decisions as to the reasonableness of an accommodation by adopting a strict definition of disability.³⁸

The new amendments do virtually nothing in terms of more clearly defining the reasonable accommodation concept. The few times the Supreme Court has addressed the concept of reasonable accommodation or

³⁷ Alex B. Long, *(Whatever Happened To) The ADA’s “Record of” Prong(?)*, 82 WASH. L. REVIEW 669 (2006).

³⁸ See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 336-37 (2001) (discussing this theory).

reasonable modification, the cases have been so fact specific as to provide little guidance for future cases.³⁹ Currently, there are a host of reasonable accommodation issues, such as whether an employer must, as part of its duty of reasonable accommodation, reassign an individual with a disability to a vacant position when there is another, more qualified applicant⁴⁰ and whether there should be a presumption that allowing an employee to work from home is not a reasonable accommodation,⁴¹ that have resulted in competing standards. Unfortunately, Congress has done little to help the courts in this regard, and, by relaxing the standard for qualifying as having a disability, may have made the job of courts tougher.

CONCLUSION

The ADA Amendments Act of 2008 represents a fairly dramatic change in disability law. Despite the skepticism of some (myself included) that Congress would enact any meaningful changes to the ADA in the near term, Congress has produced legislation that addresses some of the more pressing and controversial issues associated with the ADA. Although there are still numerous issues that remain unresolved, many of the changes that Congress did make were long overdue.

³⁹ *US Airways, Inc. v. Barnett*, 534 U.S. 591 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

⁴⁰ *See, e.g., EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

⁴¹ *See, e.g., Van Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir.1995) (“[I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.”).

