

**AMERICANS WITH DISABILITIES UPDATE**

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## AMERICANS WITH DISABILITIES UPDATE

The Americans with Disabilities Act became law in 1990. In 1999, the United States Supreme Court narrowed the coverage of the ADA in the case of *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). The Court further narrowed the ADA's application in the case of *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). On September 25, 2008, Congress passed the "ADA Amendments Act of 2008" (ADAAA) whose purpose, as defined by Congress, was "an Act to restore the intent protections of the Americans with Disabilities Act of 1990." The ADAAA will become effective on January 1, 2009.

The purpose of the ADA is to prohibit discrimination against those with disabilities, and to provide reasonable accommodation to qualified individuals with disabilities. It applies to employers who have 15 or more employees.

Under the ADA, disability is defined as

- (a) a physical or mental impairment which substantially limits one or more major life activities,
- (b) a record of impairment, or
- (c) being regarded as having an impairment.

In deciding whether an individual has a substantial limitation or not, each case needs to be examined on an individual basis to determine (1) the nature and severity, (2) the duration and (3) the long-term impact of the condition. The law is clear that temporary non-chronic impairments are not disabilities.

Major life activities as defined under the ADAAA "include, but are not limited to, caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating,

and working.” The Act goes on to define major bodily functions as “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

The ADAAA goes on to define “regarded as having such an impairment” as: “an individual meets the requirement of ‘being regarded as having 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.” The Act goes on to state specifically that this should not apply to impairments that are transitory or minor, finding that “a transitory impairment is an impairment with an actual or expected duration of six months or less.”

The 2008 Amendments clearly set forth Congress’ intent to broaden the applicability of the ADA, as interpreted by the courts. Congress found that the Court had limited the application of the ADA through its decisions, and the courts have “created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

Congress also found that the EEOC, in its regulations, by defining the term “substantially limits” as “significantly restricted” was inconsistent with congressional intent by setting forth too high a standard. Congress also expressed their expectations that “the Equal Employment Opportunity Commission will revise that portion of its current regulation that defines the term

‘substantially limits’ as ‘significantly restricted’ to be consistent with this Act, including the Amendments made by this Act.”

In order to be a qualified individual with a disability, the individual must meet the prerequisites for the job such as skill, experience, education, and other job related requirements. The individual must also be able to perform the essential functions of the job with or without a reasonable accommodation.

A reasonable accommodation is one that allows the disabled person to perform the job with some change. A reasonable accommodation may include different equipment or an assistive device, job restructuring, part-time or modified work schedules, reassignment to another position or flexible leave policies. Two exceptions to the obligation to provide a reasonable accommodation are undue hardships such as expense, effect on the work force and operations and a direct threat to the individual or co-workers.

It is important to note that the ADA also applies pre-employment. Employers must be careful not to make any medical inquiries prior to an offer of employment, and even then should only be done based upon the essential functions of the job.

### **ADA v. ADAAA**

The following is a brief comparison between the ADA, as interpreted by the courts, and the ADAAA, as recently enacted by Congress.

#### **“Major Life Activity”**

The *Toyota Motor Mfg.* case found that “major life activity” must be an activity that is of central importance to most people’s daily lives. The ADAAA rejects the finding in *Toyota Motor Mfg.* As discussed previously, the ADAAA sets forth a non-exhaustive list of major life activities as well as the operation of “major bodily functions.”

### **“Substantially Limits”**

In *Toyota Motor Mfg. of Kentucky v. Williams*, the Supreme Court found that an impairment “substantially limits” a major life activity if it “prevents or severely restricts the individual” from performing the activity. Congress, with the ADAAA, found that the Supreme Court incorrectly interpreted the term “substantially limits” to establish a greater degree of limitation than had been intended by Congress. Congress instructs the court to interpret “substantially limits” consistently with the findings and purposes of the ADA.

### **Episodic Conditions and Multiple Major Life Activities**

A number of lower courts have found that an individual must be limited in more than one major life activity in order to have a disability under the law. Other lower courts have held that episodic or intermittent impairments such as epilepsy or post-traumatic stress disorder are not covered under the ADA. The ADAAA makes it clear that an impairment that substantially limits a major life activity need not also limit other major life activities in order to be considered a disability. The ADAAA also sets forth that impairments that are episodic or in remission are considered a disability if the impairment would substantially limit a major life activity when the condition is in its active state.

### **Disability**

The Supreme Court narrowly interpreted the definition of disability in a way to permit lower courts to exclude a range of individuals from coverage, including individuals with muscular dystrophy, cancer, epilepsy, diabetes, and artificial limbs. This was done notwithstanding the ADA’s definition of disability, in part, as a physical or mental impairment that essentially limits a major life activity of an individual. The ADAAA adopts the same language used under the ADA, defining a disability, in part, as a physical or mental impairment

that substantially limits a major life activity of an individual. However, the ADAAA specifically rejects the Supreme Court's strict interpretation of "substantially limits" by setting forth the rule of construction that "substantially limits" shall be interpreted consistently with the findings and purposes of the ADAAA. The congressional record clearly indicates that Congress intended to apply a less demanding standard than that adopted by the courts, to cover a broader range of individuals. Congress specifically found that the definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.

### **Mitigating Measures**

In *Sutton v. United Airlines*, the Supreme Court significantly reduced the number of people impacted by the ADA by ruling that mitigating measures, such as medication, were to be taken into account in determining whether a person was substantially limited in a major life activity. The ADAAA specifically provides that the ameliorative effects of mitigating measures should not be considered in determining whether or not an individual has an impairment that substantially limits a major life activity. The only exception is made for "ordinary eyeglasses or contact lenses," which may be used as a mitigating measure.

### **"Regarded as Having a Disability"**

In the *Sutton* case, the Supreme Court set a high burden for an individual to prove that he or she is substantially limited in working. Congress again lowered the bar by stating that an individual can establish coverage under the ADA by being "regarded as" disabled by showing that he or she was subject to an action prohibited by the ADA based on an actual perceived impairment.

## **Interpretation of the ADA**

In the *Sutton* case, the ADA was narrowly construed by the Supreme Court. At that time, the Court found that “some 43,000,000 Americans have one or more physical or mental disabilities.” The Court found that this was too large a category to be meaningful. The ADAAA rejects the *Sutton* analysis and goes back to the original intent to have a broad interpretation of the definition of disability. The ADAAA also sets forth Congress’ expectation that the EEOC will revise its regulations which it considers too constricting, and the lower courts should not demand extensive analysis to determine whether an individual’s impairment is a disability.

## **CASE UPDATE**

The following cases have been decided by the 11<sup>th</sup> Circuit over the last six months. It is imperative to remember that these cases were decided under the Americans with Disabilities Act prior to the 2008 Amendments, which become effective on January 1, 2009. Because of this, the outcome of these cases may have been different if decided under the ADA Amendments Act of 2008.

*Sicilia v. United Parcel Service, Inc.*, 208 WL 2223051 (CA 11 FL). Sicilia worked UPS as an export PM Shift Clerk, on the night shift. He began working in 1997, but never informed anyone at UPS that he had epilepsy until he suffered his first seizure at work in February 2006. The seizure lasted only a few minutes, and he returned to his normal work activities afterwards. He had a second seizure in April 2006, but did not lose any work because of it. Sicilia advised his doctor that he thought the seizures were caused by working the night shift, and the doctor recommended that he stop working the night shift. In June 2006, UPS obtained a second opinion and this doctor stated that Sicilia was restricted to working the day shift, and should have no

quality control responsibilities. Based on these restrictions, he was removed from the export PM Shift Clerk position and his employment was suspended because no other positions were available. UPS continued to pay his benefits while he looked for another position. In August 2006, Sicilia requested a job related accommodation, and Sicilia's doctor filled out the required medical form and stated that he could perform all functions of his position. Based on his doctor's report, UPS concluded that Sicilia did not qualify for any accommodation. Sicilia applied for two available day shift positions, which were filled by equally qualified employees who had more seniority at UPS than Sicilia, based on UPS's length of service seniority system. Sicilia was eventually terminated in September 2006. A lawsuit was filed shortly thereafter, alleging that his epilepsy diagnosis qualified him as handicapped, and that UPS failed to accommodate his disability, and retaliation. The trial court granted summary judgment in favor of UPS on all of Sicilia's claims. The Court found that the epilepsy did not substantially limit Sicilia's major life activities, since his seizures were infrequent, not severe, and controlled with medication. Since Sicilia did not qualify as disabled, UPS was not required to accommodate him. On the retaliation claim, although the lawsuit was filed in November 2006, and UPS removed the case to federal court shortly thereafter, they informed him in February 2007 that his employment would be terminated as of March 3, 2007. Because he was removed from his position before he filed his EEOC and the original lawsuit, the retaliation claim was defeated. The Court also found that because there was a four month period between the filing of the state court complaint and when he was terminated, this time frame in and of itself was not sufficient to establish retaliation.

*Davis v. Sailormen, Inc.*, 2008 WL 2439999 (CA 11 FL). Sailormen, Inc. is a franchisee of Popeye's Restaurant and operates Popeye's restaurants in Florida. Ms. Davis was born with a

right arm that is shorter and smaller than her left arm, and she lacks a thumb on her right hand. She applied for a cook job at Popeye's and Davis alleges that the manager told her that "he didn't know if he could hire me because of my arm." He also stated that "he didn't think that she could handle the lifting and anything else that came along with it." Davis was not hired. Davis filed a lawsuit contending that she was regarded as disabled. In order to successfully pursue a "regarded as disabled" claim, the individual must show that she "(1) has an impairment that does not substantially limit a major life activity but is treated by an employer as though it does, (2) has an impairment that substantially limits a major life activity only because of others attitudes towards the impairment or (3) has no impairment whatsoever but is treated by an employer as having a disability recognized by the ADA." In affirming the trial court's granting of summary judgment in favor of Sailormen, the court stated "we understand but reject Davis' argument that Sailormen regarded her as substantially limited in the major life activities of maneuvering, scrubbing, heavy-lifting, grasping, manipulating items, and other major life activities. Assuming, arguendo, that the foregoing law constitutes major life activities, the record indicates that Sailormen was referring to tasks associated with the cook job, and not, commenting on Davis' ability to perform these tasks in daily life." The Court relied upon the reasoning in the *Toyota Motor Mfg. Kentucky, Inc. v. Williams* case in reaching its conclusion. In light of the specific rejection of this case by the ADA Amendments Act of 2008, it is questionable if this case would be decided the same way after January 1, 2009.

*Wofsy v. Palm Shores Retirement Community*, 2008 WL 2747025 (CA 11 FL). Wofsy worked for Westminster Palms as a bus driver. He had asthma, and requested that he be allowed to limit the scope of his duties as a bus driver to the local area. Wofsy was terminated, and he subsequently filed a complaint for alleging violation of the ADA and retaliation. The trial court

found that Wofsy failed to show that he had a disability because his asthma was not a substantial limitation on a major life activity and was well treated with medication. Additionally, Wofsy was not a qualified individual under the ADA because he could not perform an essential function of the amended driver position because he refused to drive outside the local area. On the retaliation claim, Wofsy received information a month before he made his request for an accommodation and his hours and position could change if he did not accept the new driver position. There was no causal connection between his demotion and his request for accommodation. The summary judgment was affirmed by the court on appeal. Again, this case was decided under existing ADA law, and not pursuant to the ADA Amendments Act of 2008. The outcome of this case may have been substantially different if it had been decided under the new standards.

*Bass v. Lockheed-Martin Corporation*, 2008 WL 2831988 (CA 11 GA). Bass was an engineer employed at Lockheed-Martin. His complaint against Lockheed-Martin set forth claims under the ADA, Age Discrimination and Employment Act, FMLA and retaliation for use of his leave time under FMLA. Bass alleged that Lockheed discriminated against him on the basis of his morbid obesity, obstructive sleep apnea, hypertension, and depression. Before his discharge, he was granted a one year medical leave to participate in an in-patient weight loss study in New York, two months of leave for medical attention shortly after he returned from his year leave, and that his supervisor who was not the decision maker told his mother that Lockheed had went along with him in the past, but the company was not going to do that anymore and he would be fired. Lockheed-Martin contended that Bass was laid off as a result of a reduction in force (RIF) that was proposed by management as a result budgetary constraints on a particular project. The court found that supervisors' comments were not a clear indication of discriminatory animus, and

not direct evidence of ADA discrimination. The Court found that Lockheed's lay off of employees with the lowest "stack rankings" were done for legitimate business reasons, and not in violation of the ADA. Employees were ranked on the following criteria "(1) whether the employee was adaptable or multi-disciplined, (2) the employee's communication skills, (3) the employee's quality of work, (4) the employee's productivity, (5) the employee's management skills and technical leadership, (6) the employee's technical knowledge, (7) the employee's values and behaviors, including attendance, a can-do attitude, and their personal skills and responsiveness and (8) the difficulty of replacing the employee." It was undisputed that Bass was the lowest scoring employee in his category. The Court granted summary judgment in favor of Lockheed-Martin on the ADA claim, finding that the RIF was done properly. The RIF was also the reason why Bass's ADA claim was dismissed on summary judgment. The FMLA retaliation claim was also dismissed on summary judgment in light of the fact that his lay off occurred eleven months after he last took FMLA leave, and thus there was no causal connection.

*Boykin v. Honda Manufacturing of Alabama*, 2008 WL 2894343 (CA 11 AL). Boykin was employed at Honda Manufacturing as a process associate. He was terminated following an extended period of non-occupational long-term disability leave due to his Chronic Obstructive Pulmonary Disease (COPD), also known as Emphysema. The Court found that Boykin's COPD did not substantially limit him in either of the two major life activities he had identified, breathing or working. Because his breathing problems are short, approximately one to three minutes in duration, and infrequent, no more than approximately once a month, and he is able to manage his symptoms with two inhalers and does not require any additional breathing devices or an oxygen mask, the court found that his COPD did not substantially limit him in the major life activity of working. Additionally, the evidence showed that at the time of his deposition, he was

working two jobs hauling fertilizer and concrete, and was not under any medical restrictions with regards to those jobs. The trial court granted summary judgment, and it was affirmed by the 11<sup>th</sup> Circuit Court of Appeals.

**THE INTERPLAY BETWEEN ADA, FMLA AND WORKERS' COMPENSATION**

<i>ADA/FMLA/WC Comparison</i>			
<i>Entitlements</i>	<i>ADA</i>	<i>FMLA</i>	<i>WC</i>
<i>Purpose</i>	<i>Prohibits discrimination and to provide reasonable accommodation</i>	<i>Provides leave for personal serious health conditions or family care</i>	<i>Provides compensation for occupational injuries &amp; disease arising out of and during course of employment</i>
<i>Exception</i>	<i>Undue hardship Direct threat</i>	<i>No undue hardship</i>	<i>No Fault</i>
<i>Employer coverage</i>	<i>15 employees</i>	<i>50 employees (combined w/75 miles)</i>	<i>Generally 5 employees</i>
<i>Employee Eligibility</i>	<i>No time/service requirements; Covers part time employees  Applicants covered</i>	<i>1250 hours  12 months  Employees only</i>	<i>Injury arising out of employment. Excludes willful misconduct; intentional injury (self or others); refusal to use safety protections; impaired due to drugs or alcohol; No comp if when hired employee misrepresents condition &amp; condition is</i>
<i>Entitlements</i>	<i>ADA</i>	<i>FMLA</i>	<i>WC</i>
			<i>exacerbated due to work</i>
<i>Family</i>	<i>No; Personal only (Except no discrimination based upon association)</i>	<i>Provide leave for family care</i>	<i>No</i>
<i>Leave</i>	<i>Only if assists employee to return and perform job</i>	<i>Primary purpose</i>	<i>If necessary</i>
<i>Duration of leave</i>	<i>a. No cap; may be more or less; however not indefinite</i>	<i>a. 12 weeks b. Mandatory; other</i>	<i>No set time</i>

	<i>b. Last resort if no other accommodation</i>	<i>accommodation not option</i>	
<i>Intermittent Leave</i>	<i>Maybe – if reasonable accommodations &amp; no other accommodation in current position</i>	<i>Yes – but implementation shouldn't be disruptive</i>	<i>If necessary</i>
<i>Job Modification: Transfer; reduced hours; light duty</i>	<i>Maybe – If reasonable accommodation</i>	<i>Maybe, to accommodate intermittent leave but not to avoid providing leave</i>	<i>No obligation; but incentive to decrease benefits &amp; return to work</i>
<i>Pay</i>	<i>No requirement for paid leave</i>	<i>No; but may require substitution of paid leave</i>	<i>Yes</i>
<i>Medical</i>	<i>Certification required; job related and consistent with business necessity</i>	<i>Certification only for serious health condition necessitating leave</i>	<i>Certification; employer's choice of physician; panel of four for second opinion</i>
<i>Health Benefits</i>	<i>May be reduced if part time work is accommodation</i>	<i>Must be maintained regardless of reduced leave hours</i>	<i>Yes; lifetime medical benefits</i>
<i>Job Restoration</i>	<i>Must be based upon employee's ability to perform</i>  <i>Modifying restructuring reassignment allowed</i>	<i>Same or equivalent position</i>	<i>Based upon ability to do job</i>
<i>Retaliation</i>	<i>No adverse action for exercising rights</i>	<i>No adverse action for exercising rights</i>	<i>No termination solely for exercising rights</i>

## **PRACTICE POINTERS**

In light of the impending effective date of the ADAAA, January 1, 2009, there are a number of steps that should be taken by employers prior to that time. These include, but are not necessarily limited to, the following:

1. Review and revise the essential functions of the jobs at your place of business.
2. Train your employees as to the impact of the ADAAA, and how individuals who claim to be disabled must be treated.
3. Train those individuals who are responsible for the interactive process as to how the process works.
4. Review and revise your Employee Manual as necessary. Remember that the coverage and protection given to employees under the ADAAA will expand significantly.
5. Clearly document disability claims, accommodation requests, accommodations provided and/or denied, and the rationale for the decisions made, and make sure the documentation is secured and not lost.
6. As the work force continues to age, be aware that there will be more combined age/disability issues arising.
7. Review previous denials of requested accommodations by current employees, using the new ADAAA standards.