

Welcome to the 2013 Legal Issues Webinar Series

The content and materials of this training are property of the Great Lakes ADA Center and cannot be distributed without permission. This training is developed under NIDRR grant #H133A110029. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at webinars@ada-audio.org or toll free 877-232-1990 (V/TTY).



1

Listening to the Webinar



- ▶ The audio for today's webinar is being broadcast through your computer. Please make sure your speakers are turned on or your headphones are plugged in.
- ▶ You can control the audio broadcast via the Audio & Video panel. You can adjust the sound by "sliding" the sound bar left or right.
- ▶ If you are having sound quality problems check your audio controls by going through the Audio Wizard which is accessed by selecting the microphone icon on the Audio & Video panel



2



Listening to the Webinar, *continued*

If you do not have sound capabilities on your computer or prefer to listen by phone, dial:

1-712-432-3066

Pass Code:
148937

This is **not** a Toll Free number

3



Listening to the Webinar, *continued*

MOBILE Users (iPhone and iPad Only)*

Individuals may listen** to the session using the Blackboard Collaborate iPhone or iPad App (Available Free from the Apple Store)



*Individuals using this method must contact webinars@ada-audio.org or call 877-232-1990 (V/TTY) to receive the direct link to the session

**Closed Captioning is not visible via the Mobile App

4



Captioning

- ▶ Real-time captioning is provided during this webinar.
- ▶ The caption screen can be accessed by choosing the  icon in the Audio & Video panel. ↓



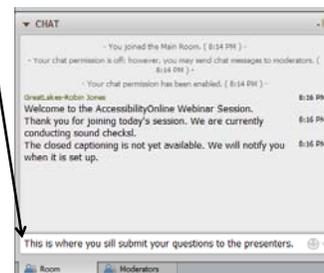
- ▶ Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

5



Submitting Questions

- ▶ You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area
- ▶ If you are connected via a mobile device you may submit questions in the chat area within the App
- ▶ If you are listening by phone and not logged in to the webinar, you may ask questions by emailing them to webinars@ada-audio.org



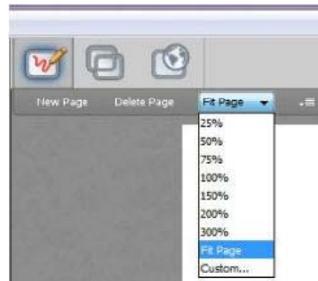
Please note: This webinar is being recorded and can be accessed on the ADA Audio website at www.ada-audio.org within 24 hours after the conclusion of the session.

6



Customize Your View

- ▶ Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”



7



Customize Your View *continued*

- ▶ Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or “stretch/shrink”. Each panel may be detached using the  icon in the upper right corner of each panel.

8

Technical Assistance



- ▶ If you experience any technical difficulties during the webinar:
 1. Send a private chat message to the host by double clicking “Great Lakes ADA” in the participant list. A tab titled “Great Lakes ADA” will appear in the chat panel. Type your comment in the text box and “enter” (Keyboard - F6, Arrow up or down to locate “Great Lakes ADA” and select to send a message); or
 2. Email webinars@ada-audio.org; or
 3. Call 877-232-1990 (V/TTY)

9

ADA ONLINE LEARNING

The Litigation Landscape Five Years After The Passage of the ADA Amendments Act

Presented by:

Barry Taylor, VP for Civil Rights and Systemic Litigation,
Equip for Equality

Rachel Weisberg, Staff Attorney, Equip for Equality

September 18, 2013



10

Continuing Legal Education Credit for Illinois Attorneys



- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**
barryt@equipforequality.org
- **This slide will be repeated at the end.**

Outline



- Background
- Broad definition of disability and substantially limits
- Episodic conditions and conditions in remission
- Mitigating measures
- Major life activities and major bodily functions
- EEOC List of Impairments
- “Regarded as” prong
- Transient or short-term impairments
- Regulatory authority
- Retroactivity
- Additional resources

Background



- 1990: Congress passed the ADA
- Adopted definition of disability from Rehab Act
 - ❖ Supreme Court previously declared the definition of disability to be “broad”
 - *School Bd. of Nassau County, v. Arline*, 480 U.S. 273, 285 (1987)
- Courts narrowly interpreted the ADA’s definition of disability
 - ❖ 1999: *Sutton* trilogy
 - ❖ 2002: *Toyota v. Williams*
- Result = courts regularly found plaintiffs could not establish an ADA-qualifying disability and dismissed claims

ADA Amendments Act



- 2008: Congress passed the ADA Amendments Act
 - ❖ *ADA Amendments Act*, Pub. L. No. 110-325, 122 Stat. 3553 (2008)
 - ❖ Goals
 - “[R]einstat[e] a broad scope of protection” for people with disabilities diminished through erroneous judicial decisions
 - Provide the “clear and comprehensive national mandate for the elimination of discrimination” initially intended by the ADA
- 2013: Five years since Congress passed the ADAAA

Question: How are courts interpreting the definition of disability under the ADAAA’s new standards?

ADAAA: Broad Coverage



- The definition of disability should “be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] Act.” [42 U.S.C. § 12102\(4\)\(A\)](#)
- Rejects the Supreme Court’s 2002 decision in *Toyota Motor Manufacturing v. Williams*, which held that the definition of disability should be “interpreted strictly” to create a “demanding standard.”
- The EEOC regulations reiterate this requirement. [29 C.F.R. § 1630.1\(c\)\(4\)](#)

Case Law: Broad Coverage

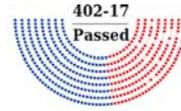


Courts are uniformly acknowledging that the ADAAA significantly broadened the ADA’s definition of disability.

Examples of affirmative statements:

- The “overarching purpose of the [ADA Amendments Act] is to reinstate the ‘broad scope of protection’ available under the ADA.” *Fournier v. Payco Foods Corporation*, 611 F. Supp. 2d 120, n. 9 (D.P.R. 2009).
- The ADA Amendments Act “is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute.” *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009).

Case Law: Broad Coverage



More examples:

- “The ADAAA ‘broadened the category of individuals entitled to statutory protection from discrimination under the ADA.’”
Semenko v. Wendy’s Intern., Inc., 2013 WL 1568407, at *6 (W.D. Pa. April 12, 2013).
- “The ADAAA seeks to broaden the scope of disabilities covered by the ADA after that scope had been narrowed by Supreme Court interpretation.” *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012).
- “We construe this definition liberally, with an eye towards ‘broad coverage of individuals under’ the ADA.” *Diaz v. City of Philadelphia*, 2012 WL 1657866, at *9 (E.D. Pa. May 10, 2012).



17

Case Law: Broad Definition



Many courts reach conclusions about disability quickly, without extensive analysis.

Edwards v. Chevron U.S.A., Inc.
2013 WL 474770 (S.D. Tex. Feb. 7, 2013)

- Plaintiff provided sworn statements that she had been diagnosed with a medical bowel disease that flares up from time to time, requiring her to take several months of medical leave
- Without making any other statements or describing the plaintiff’s limitations in any greater detail, the court concluded that “[u]nder the amended ADA, that is sufficient”



18

ADAAA and Case Law: Substantially Limits



Courts are acknowledging the EEOC's regulations that "[w]hether an impairment 'substantially limits' a major life activity should not demand extensive analysis." 29 C.F.R. § 1630.2(j)(1)

Gibbs v. ADS Alliance Data System, Inc. 2011 WL 3205779 (D. Kan. July 28, 2011)

- Employee with carpal tunnel syndrome underwent multiple surgeries and was unable to use her left hand for a few weeks
- Court noted that "this inquiry is not meant to be 'extensive' or demanding"
- Allowed case to proceed, concluding that employee provided "some evidence that plaintiff's condition affected her ability to perform manual tasks"



19

Case Law: Substantially Limits

Pain Scale



Courts are considering condition, manner and duration when determining whether an impairment substantially limits a major life activity.

Howard v. Pennsylvania Dept. of Public Welfare 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)

- Considering the pain a plaintiff with fibromyalgia experiences while performing activities and determining that the plaintiff presented sufficient evidence that she has a disability

Molina v. DSI Renal, Inc.

840 F. Supp. 2d 984 (W.D. Tex. 2012)

- Considering pain experienced and focusing less on "outcomes" when determining that plaintiff's back injuries could constitute disability under analogous state law



20

ADAAA: Episodic Conditions and Conditions in Remission



- ADAAA rules of construction: “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D).
- EEOC regulations reiterate this statutory requirement. 29 C.F.R. § 1630.2(j)(1)(vii).
- The vast majority of courts are properly evaluating whether an individual’s disability is substantially limiting when active.

Case Law: Episodic Conditions



Kinney v. Century Services Corp. II

2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)

- An employee with “isolated bouts” of depression could have an ADA disability under the ADAAA’s “new paradigm”

Edwards v. Chevron U.S.A., Inc.

2013 WL 474770 (S.D. Tex. Feb. 7, 2013)

- A plaintiff with a medical bowel disease that “flared up from time to time” could be a disability
- Court noted that the definition of disability “now includes” episodic impairments that “would substantially limit a major life activity when active”

Case Law: Episodic Conditions



Howard v. Pennsylvania Dept. of Public Welfare 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)

- Defendant asserted that plaintiff's fibromyalgia was not a disability because her symptoms "wax and wane."
- Court declined to consider this argument because the "ADAAA plainly forecloses this line of reasoning"

Case Law: Episodic Conditions



Courts have found the following episodic conditions to constitute disabilities:

- Kidney stones *Esparza v. Pierre Foods*, 923 F.Supp.2d 1099 (S.D. Ohio 2013)
- Back conditions *Molina v. DSI Renal*, 840 F. Supp. 2d 984 (W.D. Tex. 2012)
- Vocal cord enema *Pearce-Mato v. Shinseki*, 2012 WL 2116533 (W.D. Pa. June 11, 2012)
- Multiple Sclerosis *Carbaugh v. Unisoft Int'l*, 2011 WL 5553724 (S.D. Tex. Nov. 15, 2011)
- Hepatitis C *Hardin v. Christus Health Southeast Texas St. Elizabeth*, 2012 WL 760642 (E.D. Tex. Jan. 6, 2012).

Case Law: Episodic Conditions



At least one court has failed to apply the ADAAA's revised standard.

Wurzel v. Whirlpool Corp.

2010 WL 1495197 (N.D. Ohio Apr. 14, 2010)

- Court concluded an individual's sporadic angina spasms were not substantially limiting
- Stated erroneously: "The principal that intermittent impairments, such as those resulting from plaintiff's sporadic angina spasms, are not deemed disabling remains good law."
- **Note:** It appears that this court's holding is the exception and that most courts are properly applying the ADAAA's rules of construction regarding episodic conditions.

Case Law: Conditions in Remission



Courts also consistently find the ADAAA to cover individuals with cancer in remission.

Hoffman v. Carefirst of Fort Wayne, Inc.

737 F. Supp. 2d 976 (N.D. Ind. 2010)

- Defendant argued no disability because employee's cancer was in remission and employee had no work restrictions
- Defendant "highly doubts that Congress intended all cancer survivors in remission, with no medical evidence of active disease, to be considered disabled as a matter of law for the rest of their lives."
- Court disagreed, citing the "clear language of the ADAAA"
- Plaintiff need not show that he was substantially limited in a major life activity at the time of the alleged adverse employment action
- Conclusion further bolstered by EEOC guidance listing cancer as an example of an impairment that is episodic or in remission

ADAAA: Disregard Ameliorative Effect of Mitigating Measures



- Congress passed ADAAA, in part, to respond to *Sutton* trilogy
- ADAAA rules of construction: Requires courts to consider whether an individual has a disability without taking into account the ameliorative effects of mitigating measures (except for ordinary eyeglasses and contact lenses). [42 U.S.C § 12102\(4\)](#)
 - ❖ Examples: medication, equipment, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, use of assistive technology, reasonable accommodations or auxiliary aids or services, and learned behavioral or adaptive neurological modifications.
 - ❖ EEOC's regulations added psychotherapy, behavioral therapy, and physical therapy. [29 C.F.R. § 1630.2\(j\)\(5\)\(v\)](#)

Case Law: Disregarding Ameliorative Effects



Courts are applying disregarding ameliorative effects of mitigating measures.

Orne v. Christie

2013 WL 85171 (E.D. Va. Jan. 7, 2013)

- Employee was diagnosed with sleep apnea and began to treat condition with a CPAP machine
- Employee previously struggled to stay awake and concentrate at work, but once he started to use the CPAP machine, he no longer experienced these symptoms
- Employer argued that employee did not have a disability because the CPAP machine “cure[d]” or “relieve[d]” the employee
- Applying the ADAAA, the court found the employer’s argument without merit and allowed the employee’s claim to go forward

Case Law: Disregarding Ameliorative Effects



Harty v. City of Sanford

2012 WL 3243282 (M.D. Fla. Aug. 8, 2012)

- Plaintiff had restrictions in his ability kneel, squat, run, jump, climb stairs or a ladder, or walk up or down inclines
- During his job as a city foreman, plaintiff found ways to mitigate the impact of his physical restrictions
- When disregarding the ameliorative measures employed by plaintiff, court found that plaintiff had substantial limitations

ADAAA and Case Law: Negative Effects of Mitigating Measures



Even though the mitigating measure itself cannot be considered, the negative side effects of mitigating measures may be considered in assessing disability. [29 C.F.R. Part 1630 app. § 1630.2\(j\)\(1\)\(vi\)](#).

Seim v. Three Eagles Communications,

2011 WL 2149061 (N.D. Iowa June 1, 2011)

- Considering limitations caused by plaintiff's Graves' disease, as well as the negative side effects of the medications he took to ameliorate symptoms of this disease, including drowsiness and confusion

Wells v. Cincinnati Children's Hosp. Med. Ctr.

860 F. Supp. 2d 469, (S.D. Ohio 2012)

- Found substantial limitation due to medications prescribed to ameliorate plaintiff's gastrointestinal condition, which in turn caused her to experience blackout, disorientation, and confusion interfering with her work performance as a nurse

Case Law: Mitigating Measures



Tip for litigants: Plaintiffs still need to demonstrate how their conditions substantially limit a major life activity absent the mitigating measures.

Lloyd v. Housing Authority

857 F.Supp.2d 1252 (M.D. Ala. 2012)

- Court recognized that the ADAAA required it to evaluate the plaintiff's condition in its unmitigated state. Still concluded that plaintiff failed to produce evidence about how his asthma and high blood pressure would affect him if left untreated.

O'Donnell v. Colonial Intermediate Unit 20

2013 WL 1234813 (E.D. Pa. March 27, 2013)

- Court granted defendant's motion to dismiss because plaintiff failed to identify how his "treated or untreated" mental health disorders were substantially limiting.

ADAAA: Major Life Activities



- Prior to the ADAAA, there was significant litigation over what constituted a major life activity
- ADAAA included a non-exhaustive list of major life activities.
 - ❖ caring for oneself, walking and standing, performing manual tasks, reading, seeing, lifting, hearing, bending, eating, speaking, sleeping, breathing, learning, communicating, concentrating and thinking, and working
 - ❖ 42 U.S.C. § 12102(2)(A)
- EEOC added: interacting with others, sitting, and reaching
 - ❖ 29 C.F.R. § 1630.2(i)(1)(i)

Case Law: Major Life Activities



No significant amount of litigation to date on definition of major life activities.

Bar-Meir v. Univ. of Minnesota

2012 WL 2402849 (D. Minn. June 26, 2012)

- Court confirmed that “social interaction” or “interacting with others” was a major life activity under the ADAAA pursuant to EEOC regulations
- Note that court ultimately dismissed case because plaintiff failed to show causation between disability and adverse employment action

Case Law: Major Life Activities



Prediction: Unlikely to be major litigation on this issue

Thomas v. Bala Nursing & Retirement Center

2012 WL 2581057 (E.D. Pa. July 3, 2012)

- Plaintiff asserted that she was substantially limited in sleeping because her anemia caused her to sleep up to 12 hours
- Defendant asserted that limitation should be “characterized as ‘waking up’ instead of ‘sleeping,’ and that sleeping longer than average individual is hardly a substantial *limitation* in sleeping”
- Court rejected defendant’s argument: it cannot conclude as a matter of law that “waking up” is not a major life activity

ADAAA: Major Bodily Functions



- Before ADAAA - Some impairments where plaintiffs had difficulty showing they were substantially limited in a traditional major life activity, leading courts to dismiss many cases involving impairments that most thought would be covered by the ADA
 - ❖ Examples: cancer, heart disease and diabetes
- ADAAA - Congress broadened definition of “major life activities” to include the concept of “major bodily functions”

ADAAA: Major Bodily Functions



- ADAAA – examples of major bodily functions:
 - ❖ Immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine, and reproductive functions, and clarified that this is not an exhaustive list. [42 U.S.C. § 12102\(2\)\(B\)](#)
- EEOC – additional examples of major bodily functions:
 - ❖ Special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, musculoskeletal, and individual organ operation. [29 C.F.R. § 1630.2\(i\)\(1\)\(ii\)](#).

Case Law: Major Bodily Functions



Courts are consistently applying the concept of major bodily functions in numerous cases involving a variety of impairments.

- Successful at significantly broadening ADA's coverage
- Examples:
 - ❖ Type II Diabetes substantially limits the endocrine function *Szarawara v. Cnty. of Montgomery*, 2013 WL 3230691 (E.D. Pa. June 27, 2013)
 - ❖ Cancer substantially limits normal cell growth *Haley v. Community Mercy Health Partners*, 2013 WL 322493 (S.D. Ohio Jan. 28, 2013)
 - ❖ HIV substantially limits the immune system *Horgan v. Simmons*, 704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010)
 - ❖ Heart disease substantially limits circulatory function *Chalfont v. U.S. Electrodes*, 2010 WL 5341846 (E.D. Pa. Dec. 28, 2010)

Case Law: Major Bodily Functions



Additional examples:

- IBS substantially limits bowel functions *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638 (E.D. Pa. Dec. 12, 2011)
- Graves' Disease substantially limits immune, circulatory and endocrine functions *Seim v. Three Eagles Commc'ns, Inc.*, 2011 WL 2149061 (N.D. Iowa June 1, 2011)
- Multiple Sclerosis substantially limits normal neurological functions *Feldman v. Law Enforcement Assoc. Corp.*, 779 F.Supp.2d 472 (E.D.N.C. 2011)
- Brain tumor substantially limits brain functions and normal cell growth *Meinelt v. P.F. Chang's China Bistro*, 787 F.Supp.2d 643 (S.D. Tex. 2011)

Case Law: Major Bodily Functions



Additional examples:

- Spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limit operation of the musculoskeletal system *Barlow v. Walgreen Co.*, 2012 WL 868807 (M.D. Fla. Mar. 14, 2012)
- Removal of stomach and other parties of gastrointestinal system substantially limit bowel and digestive bodily functions *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663 (S.D.N.Y. July 9, 2012)
- Post Traumatic Stress Disorder substantially limits brain function *Franklin v. City of Slidell*, 2013 WL 1288405 (E.D. La. Mar. 27, 2013)
- Hepatitis C substantially limits the immune system, digestive, bowel and bladder function *Hardin v. Christus Health Se. Texas St. Elizabeth*, 2012 WL 760642 (E.D. Tex. Jan. 6, 2012)

Case Law: Major Bodily Functions



Tip to litigants: Include clear articulation of major life activities/major bodily functions impacted by impairment.

Fierro v. Knight Transportation
2012 WL 4321304 (W.D. Tex. Sept. 18, 2012)

- *Pro se* plaintiff brought an ADA claim and asserted that his cancer rendered him “disabled”
- Relying on pre-ADAAA precedent, court stated that “merely having cancer-which, though, may be an ‘impairment,’” is insufficient to establish a disability
- Court dismissed claim without mentioning that concept of major bodily functions or cancer’s impact on normal cell growth

EEOC: List of Impairments



- EEOC's regulations include a list of eighteen impairments that should easily be found to substantially limit a major life activity
- Impairments:
 - ❖ Deafness, blindness, mobility impairments requiring wheelchair, intellectual disability, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, human immunodeficiency virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, and schizophrenia

29 C.F.R. § 1630.2(j)(3)(iii)

Case Law: List of Impairments



Courts are generally deferring to this list and finding plaintiffs with listed impairments to be covered without engaging in a detailed analysis.

Franklin v. City of Slidell

2013 WL 1288405 (E.D. La. Mar. 27, 2013)

- “Considering . . . that the EEOC regulations interpreting the ADA indicate that post-traumatic stress disorder is an impairment that should easily be concluded to substantially limit brain function, the Court finds that Plaintiff has adequately pleaded that he is disabled within the meaning of the ADA.”

Case Law: List of Impairments



Angell v. Fairmount Fire Prot. Dist.
907 F. Supp. 2d 1242 (D. Colo. 2012)

- Court avoided a drawn-out analysis and relying on EEOC regulations, found that it “should easily be concluded” that cancer is a disability under the ADA

Horgan v. Simmons, 704 F.Supp.2d 814 (N.D. Ill. 2010)

- Citing regulatory guidance stating that HIV should easily be concluded to substantially limit the immune system

Szarawara v. County of Montgomery
2013 WL 3230691 (E.D. Pa. June 27, 2013)

- “The EEOC has advised that diabetes “will, as a factual matter, virtually always be found to impose a substantial limitation” on endocrine function”

Case Law: List of Impairments

PTSD

Some courts will not conclude that an individual has a disability without proof that he actually has one of the impairments listed.

Kravits v. Shinseki

2012 WL 604169 (W.D. Pa. Feb. 24, 2012)

- Court noted that post-traumatic while stress disorder will “virtually always” be found to impose a substantial limitation on a major life activity
- Plaintiff “identified no evidence” that he lived with PTSD
- Note, the plaintiff still survived summary judgment because he successfully established different disabilities

Case Law: List of Impairments



- Parties are spending less time arguing about whether impairments found on the EEOC's list are ADA qualifying disabilities
- What about impairments not on the list?
 - Examples: Learning disabilities, arthritis, anxiety, back injuries
- Projection: Due to ADAAA's other provisions requiring broad interpretation of the definition of disability, people with disabilities and their advocates can be optimistic that their cases will not be dismissed on definition of disability.

ADAAA: Regarded As



- Individual only needs to show that he or she was regarded as having an impairment
- No need to show that the impairment substantially limits a major life activity [42 U.S.C. § 12012\(3\)](#)
- EEOC: "Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment." [29 C.F.R. § 1630.2\(g\)\(3\)](#)

Case Law: Regarded As



Courts are properly applying this new iteration of the “regarded as” prong.

Meinelt v. P.F. Chang's China Bistro

787 F.Supp.2d 643 (S.D. Tex. 2011)

- Employee was terminated three days after disclosing his disability (brain tumor) to his employer
- Court held that employer “regarded” employee as having a disability without any discussion of whether employee’s condition substantially limited a major life activity

Darcy v. City of New York

2011 WL 841375 (E.D.N.Y. Mar. 8, 2011)

- Employee presented sufficient evidence that he was “regarded as” having a disability because his employer commented that he was an “alcoholic” and transferred him to a new position five months later



47

Case Law: Regarded As



FARMERS

Courts are finding that whether an individual is regarded as having an impairment is not subject to a functional test.

Saley v. Caney Fork, LLC

886 F. Supp. 2d 837 (M.D. Tenn. 2012)

- Employee with hemochromatosis “may recover under the ‘regarded as’ prong in the absence of visible symptoms, or any symptoms at all”

Johnson v. Farmers Insurance Exchange

2012 WL 95387 (W.D. Okla. Jan. 12, 2012)

- Rejecting defendant’s argument that plaintiff was not regarded as having a disability because her sleep apnea did not substantially limit a major life activity



48

Regarded As: Before and After



Wolfe v. Postmaster General

488 F. App'x 465, 467 (11th Cir. 2012)

- An individual with ADHD alleged that he endured discrimination both before and after the ADAAA's effective date
- Pre-ADAAA allegations:
 - ❖ Some of employee's supervisors testified that they believed employee's limited attention span occasionally affected his ability to stay in his work area
 - ❖ No evidence that supervisors perceived employee's impairment to foreclose or substantially limit his ability to work in a "broad class of jobs"

Regarded As: Before and After



- Post-ADAAA allegations:
 - ❖ "[A] plaintiff need demonstrate only that the employer regarded him as being impaired, not that the employer believed the impairment prevented the plaintiff from performing a major life activity."
 - ❖ Court quickly concluded that the plaintiff "carried his burden of showing that [his employer] regarded him as disabled."
 - ❖ Note that the court still granted employer's motion for summary judgment because employee failed to provide sufficient evidence that he was discriminated against because of his perceived disability

ADAAA: Regarded As and Reasonable Accommodations



- Pre-ADAAA: Unclear whether someone only covered under the regarded as prong was entitled to a reasonable accommodation
- ADAAA clarified: Individuals that qualify for coverage under the “regarded as” prong are not entitled to a reasonable accommodation under Title I. [42 U.S.C. § 12201\(h\)](#)
- Courts are concluding that employees covered by the ADAAA’s “regarded as” prong no longer may bring a claim for failure to accommodate.

Case Law: Regarded As and Reasonable Accommodations



Ryan v. Columbus Regional Healthcare System 2012 WL 1230234 (E.D.N.C. Apr. 12, 2012)

- Plaintiff worked as an operating room nurse, and had a degenerative joint disease and arthritis in her knee
- Plaintiff requested accommodations of limited standing, stooping, kneeling, and crouching
- Employer denied requests
- Employee filed suit, alleging that she was regarded as having a disability
- Court dismissed claim: The ADAAA does not require employers to accommodate employees who are regarded as disabled

Case Law: Implications for “Qualified”



Walker v. Venetian Casino Resort, LLC

2012 WL 4794149 (D. Nev. Oct. 9, 2012)

- Employee was injured on the job and subsequently terminated
- Defendant argued that server was not qualified
- Employee agreed that she was not qualified without a reasonable accommodation, but asserted that she would have been qualified under an accommodated reassignment
- Court: ADAAA does not require employers to accommodate individuals under the “regarded as” prong
- Because employee could not demonstrate that she was qualified absent a reasonable accommodation, she failed to properly allege the elements of her ADA claim

ADAAA: Exception for Transitory and Minor



- Congress created an exception to the “regarded as” prong for impairments that are both transitory and minor.
- Transitory = Actual or expected duration of six months or less
- Minor = No definition

42 U.S.C. § 12102(3)(B)

Case Law: Transitory and Minor



Courts are correctly exempting impairments that are both transitory and minor.

Davis v. NYC Dept. of Education

2012 WL 139255 (E.D.N.Y. Jan. 18, 2012)

- Plaintiff injured back and shoulder in a car accident
- Plaintiff alleged that she was regarded as disabled because she was granted a three-month leave of absence
- Court noted that this might imply that her employer regarded her as having a “transitory” impairment
- But nothing suggests that her impairments were also minor
- Found plaintiff sufficiently pled and let case proceed



55

Case Law: Transitory and Minor

TEMPORARY

Courts found the following conditions to be both transitory and minor:

- Flu / H1N1
 - ✦ *Lewis v. Florida Default Law Group*, 2011 WL 4527456 (M.D. Fla. 2011)
- Non-episodic anemia lasting one week
 - ✦ *LaPier v. Prince George's County, Maryland.*, 2011 WL 4501372 (D. Md. Sept. 27, 2011)
- Note: These decisions appear to be consistent with the plain language of the ADA and EEOC regulations



56

Case Law: Defendant's Burden to Show Impairment is Transitory and Minor



Dube v. Texas Health and Human Services Commission

2011 WL 3902762 (W.D. Tex. Sept. 6, 2011)

- Employee terminated for using 11 weeks of leave to undergo treatment for a “serious medical condition”
- Alleged that she was regarded as having a disability
- Defendant moved to dismiss, asserting that employee was only temporarily impaired
- Court denied motion: Although employee sought 11 weeks of leave, the complaint did not suggest that employee’s impairment was objectively transient
- Also, court found that nothing in the complaint suggested that employee’s disability was objectively “minor”

ADAAA: Short-Term Impairments Under “Actual Disability” and “Record of” Prongs



- EEOC regulations: Short term impairments can be substantially limiting, and the exception regarding temporary impairments under the “regarded as” prong does not apply to the other two methods of proving disability.
 - ✦ 29 C.F.R. § 1630.2(j)(1)(ix)
- “The effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting within the meaning” of the definition of actual disability and record of disability.
 - ✦ 29 C.F.R. § 1630.2(j)(1)(ix)

ADAAA: Short-Term Impairments Under “Actual Disability” and “Record of” Prongs



Newman v. Gagan LLC

2013 WL 1332247 (N.D. Ind. Mar. 28, 2013)

- Employee’s workplace injury resulted in a lifting restriction
- Court allowed employee’s claim to proceed, even though the duration of his disability was not completely clear
- Citing the EEOC’s regulations, court stated that the “apparently transitory nature of Plaintiff’s lifting impairment does not automatically negate the conclusion that he qualified as disabled under the ADAAA standard”

Lewis v. Florida Default Law Grp., P.L.

2011 WL 4527456 (M.D. Fla. Sept. 16, 2011)

- Plaintiff contracted the H1N1 virus and could not perform various major life activities for a period of one to two weeks
- No ADA qualifying disability because plaintiff’s inability to perform functions for this “extremely short duration” is not a substantial limitation



59

ADAAA: Short-Term Impairments Under “Actual Disability” and “Record of” Prongs



Green v. DGG Properties Co., Inc.

2013 WL 395484 (D. Conn. Jan. 31, 2013)

- *Pro se* plaintiff brought Title III claim against inaccessible hotel
- Plaintiff had mobility impairment and had undergone three surgeries
- His complaint qualified such allegations and pled that he used a walker and wheelchair *at the time of his visit*
- Court interpreted this pleading to imply that the plaintiff’s need for a mobility device was temporary
- Court cited pre-ADAAA cases and concluded that the plaintiff was not covered by the ADAAA because “even under the ADAAA’s broadened definition of disability, short term impairments would still not render a person disabled within the meaning of the statute”



60

ADAAA: Regulatory Authority



- Congress expressly granted authority to EEOC, Department of Justice, and Department of Transportation to issue regulations interpreting the definition of disability under the ADA. **42 U.S.C. § 12205a**
- No real dispute in current cases about whether courts should afford deference to agency regulations
- Cases are relying on federal agency regulations
- Many cases are citing **42 U.S.C. § 12205a** along with federal agency regulations issued by the EEOC
- The Department of Justice and the Department of Transportation have not yet issued new regulations under the ADAAA

Case Law: Regulatory Authority



Kravits v. Shinseki

2012 WL 604169 (W.D. Pa. Feb. 24, 2012)

- Court cited the EEOC's regulations regarding the term "substantially limits" and noted the statutory rule of construction regarding regulatory authority

Angell v. Fairmount Fire Protection District

907 F. Supp. 2d 1242, 1250 (D. Colo. 2012)

- Court cited the EEOC's regulations, along with the statutory grant of authority to do so. "The authority to issue regulations granted to the Equal Employment Opportunity Commission ... under this Act includes the authority to issue regulations implementing the definitions of disability ... consistent with the ADA Amendments Act of 2008." 42 U.S.C. § 12205a.

Retroactivity of the ADAAA



- At first, a significant number of cases assessed whether the ADAAA applied retroactively to claims that arose before 1/1/09
- Courts nearly universally held that the ADAAA should not be applied retroactively
- Courts applied the general rule that absent clear congressional intent, statutes are not applied retroactively because it is unfair to hold a defendant liable for a standard articulated after it engaged in the alleged conduct
- EEOC also opined that the ADAAA does not apply retroactively in its *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*
www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Case Law: Retroactivity of the ADAAA



At least one court applied the ADAAA retroactively, when the plaintiff sought prospective injunctive relief.

Jenkins v. National Board of Medical Examiners

2009 WL 331638 (6th Cir. Feb. 11, 2009)

- Sixth Circuit reversed the district court's decision that held that the plaintiff did not have an ADA-qualifying disability.
- Applied ADAAA because the plaintiff sought "the right to receive an accommodation on a test that will occur in the future, well after [the ADAAA's] effective date."

Case Law: Retroactivity of the ADAAA



Although courts declined to apply the ADAAA retroactively, many still noted the new law or used it to bolster their holding.

Rohr v. Salt River Project Agric. Improv. and Power District
555 F.3d 850, 862 (9th Cir. 2009)

- “While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.”

Want to Learn More?



- **National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, July 23, 2013**
 - ❖ www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb
- **An Empirical Analysis of Case Outcomes Under the ADA Amendments Act, Stephen F. Befort, University of Minnesota Law School, August 23, 2013**
 - ❖ http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2314628_code702020.pdf?abstractid=2314628&mirid=1
- **Exactly What Congress Intended? Kevin M. Barry, Quinnipiac University - School of Law, January 11, 2013**
 - ❖ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240043

General ADA Resources



- **National Network of ADA Centers:** www.adata.org; 800/949-4232 (V/TTY)
- **Equal Employment Opportunity Commission:** www.eeoc.gov
- **Job Accommodation Network:** <http://askjan.org>
- **U.S. Department of Justice, ADA Info:** www.ada.gov
- **Equip For Equality:** www.equipforequality.org; 800/537-2632 (Voice); 800/610-2779 (TTY)

Conclusion



- Courts are generally complying with Congress's statutory directives and broadly interpreting the definition of disability
- There are a handful of cases where courts do not correctly apply the ADAAA, but these appear to be the exception and not the rule
- It appears that the ADAAA has effectively broadened protections for people with disabilities
- The ADAAA has successfully focused judicial analysis away from whether an individual has a disability, and toward whether discrimination occurred

Continuing Legal Education Credit for Illinois Attorneys



- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**
barryt@equipforequality.org

Session Evaluation

Your feedback is important to us

You will receive an email following
the session with a link to the
on-line evaluation

The logo features the text "ADA ONLINE" in a serif font, with a green sunburst icon between "ADA" and "ONLINE". Below this, the word "LEARNING" is written in a smaller, sans-serif font. A thin green horizontal line is positioned above "LEARNING".

ADA ONLINE
LEARNING

Thank you for Participating In
Today's Session

We are currently working to develop the 2013-2014 Series Schedule.
Please check back at the website for announcement of future sessions.
We will send out an email to all Series participants when the schedule is available and registration is open.

<http://www.ada-audio.org/Webinar/ADALegal/>



71