

The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last

By Jana K. Terry

It has been more than three years since the amendments to the Americans With Disabilities Act (ADA) became law. The ADA Amendments Act (ADAAA) was enacted to overrule Supreme Court precedent that had resulted in sharply narrowing the definition of disability to the point that people with epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder had been unable to bring claims because courts found that they did not meet the ADA's definition of disability. The narrow definition of "disability" under pre-ADAAA jurisprudence had the effect of creating a body of law in which the merits of disability discrimination claims were often not reached because, as a threshold matter, the plaintiffs were determined to be not "disabled" under the ADA.

Signed into law in September 2008, the ADAAA was meant to dramatically expand the "tent" of ADAAA coverage. It was not until March 25, 2011, however, that the Equal Employment Opportunity Commission (EEOC) published final regulations implementing the amendments. Court decisions interpreting the ADAAA have also been slow to arrive. Because the ADAAA applies to adverse employment actions occurring only after the law's effective date of Jan. 1, 2009, it has taken a long time for the first ADAAA cases to make their way into litigation, past Federal Rule of Civil Procedure 12(b)(6) motions to dismiss, through discovery, and all the way to motions for summary judgment, where, at last, written rulings are now reaching publication.

So what are the new developments in the EEOC regulations that took so long to be finalized? How are courts deciding the first of the cases to reach rulings on motions to dismiss and for summary judgment? Perhaps most important, are ADA cases getting easier for plaintiffs? Although the court decisions are still not plentiful, interesting trends are emerging.

The ADAAA: Casting a Broad Net to Determine "Disability"

"Disability" under the ADAAA means "with respect to an individual—(A) a physical or mental *impairment* that *substantially limits* one or more of the *major life activities* of such individual [the 'actual impairment' prong]; (B) a record of such impairment [the 'impairment record' prong], or (C) being regarded as having such an impairment [the 'regarded as' prong]."¹ The ADAAA did not change this basic definition, but the highlighted component terms have

now been fleshed out in an effort to overturn federal court precedents and EEOC regulations that, in Congress' view, incorrectly narrowed the scope of the ADA. In particular, the ADAAA was meant to overturn two Supreme Court cases holding that (1) the terms of the ADA must be "interpreted strictly to create a demanding standard for qualifying as disabled," (2) an impairment is not substantially limiting unless it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives,"² and (3) a person whose impairment is corrected by mitigating measures does not have an impairment that "substantially limits" a major life activity. Rejecting narrow interpretations of "disability," Congress amended the ADA to provide "broad coverage" of individuals "to the maximum extent permitted" by the ADAAA. Specifically, in addition to the basic definition of "disability," the ADAAA now provides guidance as to how courts should construe the terms "impairment," "substantially limits," and "major life activities." A few of the significant changes in the statute include the following:

- The term "major life activities" now explicitly includes (but is not limited to) all of the activities and major bodily functions in the chart below. Importantly, a person may have a disability even if he or she has an impairment that substantially limits only one major life activity.
- A person may satisfy the "regarded as" prong if the person has been subjected to a prohibited action "because of an actual or perceived impairment," even if the impairment does not limit or is not perceived to limit a major life activity.
- Although for purposes of the "regarded as" prong of the disability definition the term "impairment" does not encompass impairments that are "transitory [lasting six months or less] and minor," the ADAAA does *not* provide that impairments must have an expected duration longer than six months in order to constitute a disability under the "actual impairment" and "impairment record" prongs of the definition. Further, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- The determination of whether an impairment "substantially limits" a major life activity is to be made without

regard to “the ameliorative effects of mitigating measures,” such as medication, medical devices, prosthetics, hearing aids, accommodations, auxiliary aids or services, or learned behavioral or adaptive neurological modifications.”³

Guidance from the EEOC

On Sept. 23, 2009, the EEOC published proposed regulations to implement the ADAAA. After a 60-day comment period and a long delay, the EEOC published its final regulations on March 25, 2011. The highlights are listed below:

- To the list of the “major life activities” identified by the statute, the EEOC regulations add the activities and major bodily functions as set forth in Table 1.
- “Regarded as” coverage can be established regardless of whether the employer is motivated by fears, myths, or stereotypes. Moreover, evidence that the employer believed that the individual was substantially limited in any major life activity is not required. For example, if an employer refuses to hire an applicant because of skin graft scars, the employer has regarded the applicant as disabled. Also, if an employer terminates an employee because he or she has cancer, the employer has regarded the employee as an individual with a disability.
- An exception to coverage exists under the “regarded as” prong such that an employer cannot “regard a person” as disabled if the impairment the employer believes to affect the person is objectively both transitory and minor. The employer’s subjective belief as to whether the impairment is transitory and minor is not relevant. For example, if an

employer terminates an employee who the employer believes has bipolar disorder, the employer has regarded the employee as disabled and cannot take advantage of the “transitory and minor” exception, because bipolar disorder is not objectively transitory or minor. However, if an employer terminates an employee with an objectively transitory and minor hand wound, mistakenly believing that the hand wound is symptomatic of HIV infection, the employer has “regarded” the employee as disabled because the perceived impairment (that is, HIV infection) is not “transitory and minor.”

- The regulations establish nine “rules of construction” to determine whether an “impairment” “substantially limits” an individual in a “major life activity.” Importantly, these rules apply only to the “actual impairment” prong and the “impairment record” prong (the prongs to be used primarily by plaintiffs seeking reasonable accommodation), because there is no need to determine whether an individual is substantially limited in a major life activity under the “regarded as” prong.⁴

The EEOC’s Rules of Construction

Rule 1. An impairment is a “disability” if it “substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” The term “substantially limits” should be construed broadly in favor of “expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.”

Rule 2. Not every impairment will constitute a disability under the ADA, but an impairment does not have to

Table 1. Major Activities and Bodily Functions Identified in the ADAAA

<i>Major Life Activities and Functions Identified in ADAAA</i>		<i>Major Life Activities and Functions Added by Regulations</i>	
<p>Activities such as:</p> <ul style="list-style-type: none"> • caring for oneself • performing manual tasks • seeing • hearing • eating • sleeping • walking • standing • lifting • bending • speaking • breathing • learning • reading • concentrating • thinking • communicating • working 	<p>Major bodily functions such as:</p> <ul style="list-style-type: none"> • immune system • normal cell growth • digestion • bowel and bladder functions • neurological and brain functions • respiratory functions • circulatory system • endocrine functions • reproductive functions 	<p>Activities such as:</p> <ul style="list-style-type: none"> • sitting • reaching • interacting with others • special sense organs and skin 	<p>Major bodily functions such as:</p> <ul style="list-style-type: none"> • genitourinary system • cardiovascular system • hemic system • lymphatic system • musculoskeletal system

“prevent” or “significantly or severely restrict” a major life activity in order to be “substantially limiting.”

Rule 3. The primary focus in ADA cases should be “whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis.”

Rule 4. Although the determination of whether an impairment “substantially limits” requires an individualized assessment, the term “substantially limits” should be interpreted and applied to require a degree of limitation that is lower than the standard applied prior to the enactment of the ADAAA.

Rule 5. The comparison of an individual’s performance of a major life activity as compared to the performance of that activity by most people in the general population “usually will not require scientific, medical, or statistical analysis.” However, use of scientific evidence to make the required showing is not prohibited.

Rule 6. The determination of whether a person is “disabled” under the statute should be made without regard to the “ameliorative effects of mitigating measures,” such as medication, medical equipment, prosthetics, hearing aids, reasonable accommodations, and compensatory strategies such as learned behavior. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of the impairment. The only exceptions to Rule 6 are eyeglasses and contact lenses that are intended to fully correct vision.

Rule 7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when the impairment is active.

Rule 8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered “substantially limiting.” Furthermore, contrary to pre-ADAAA precedent, a person whose impairment substantially limits a major life activity does not have to demonstrate a resulting limitation in the ability to perform “activities of central importance to daily life” in order to be considered a person with a disability.

- Example 1: A person with diabetes is substantially limited in endocrine function and does not need to show that his or her eating is substantially limited. Similarly, a person whose normal cell growth is substantially limited by lung cancer does not need to show that his or her respiratory function is also substantially limited.
- Example 2: A person with an impairment resulting in a long-term 20-pound lifting restriction is substantially limited in the major life activity of lifting regardless of whether he or she actually performs activities of central importance to daily living that require lifting.

Rule 9. Although a person cannot be disabled under the “regarded as” prong of the disability definition if the per-

ceived or actual disability is “minor” *and* expected to last fewer than six months, this “transitory and minor” exception pertains only to the “regarded as” prong. A severe impairment expected to last a short time or an impairment expected to last several months can still be “substantially limiting” for purposes of satisfying the “actual impairment” prong as well as the “impairment record” prong.⁵

Finally, the EEOC has offered guidance on whether certain impairments can generally be considered “disabilities” under the new ADAAA definition. In the proposed regulations published in fall 2009, the EEOC classified example impairments into three categories: impairments that will (1) almost always, (2) sometimes, and (3) never constitute a disability under the ADAAA. The “sometimes” list included asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism. The “never” list included the common cold, seasonal or common flu, sprained joints, minor nonchronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.⁶

In the final regulations, the EEOC deleted these lists but explained that, based on the nine rules of construction, “it should be easily concluded” that the impairments listed in Table 2 (identical to the “almost always” list in the proposed regulations) will, “in virtually all cases,” give rise to a substantial limitation of a major life activity.⁷

Trends Emerging From the First Court Decisions Interpreting the ADAAA

The ADAAA Results in a Relaxed Pleading Standard.

Several court decisions indicate that it will be easier for ADAAA plaintiffs to withstand motions to dismiss for failure to sufficiently allege a substantial limitation on a major life activity.

- *Gil v. Vortex LLC* (monocular vision): Even though the Supreme Court has held that courts must conduct “case-by-case” analyses to determine whether individuals with monocular vision have an impairment that is substantially limiting, the *Gil* court held that the plaintiff’s failure to describe the precise nature of his substantial limitations should not result in dismissal. The plaintiff had pled enough to satisfy the “relaxed disability standard” of the ADAAA.⁸
- *Franchi v. New Hampton School* (eating disorder): A complaint alleging that the plaintiff continued to drop weight in the days following six weeks of outpatient and inpatient treatment at clinics that deal with eating disorders was sufficient to state a claim that the plaintiff’s eating disorder substantially limited the major life activity of eating, particularly under the broad construction dictated by the ADAAA.⁹
- *Horgan v. Simmons* (HIV infection): The plaintiff’s complaint alleged that he had been HIV positive for 10 years and that his employment was terminated one day after the company president compelled him to disclose

Table 2. Impairments that Substantially Limit Major Activities or Functions

<i>These impairments will, “in virtually all cases,”</i>	<i>substantially limit these functions:</i>
• deafness	• hearing
• blindness	• seeing
• intellectual disability	• brain function
• partially or completely missing limbs or mobility impairments requiring use of a wheelchair	• musculoskeletal function
• autism	• brain function
• cancer	• normal cell growth
• cerebral palsy	• brain function
• diabetes	• endocrine function
• epilepsy	• neurological function
• HIV infection	• immune function
• multiple sclerosis	• neurological function
• muscular dystrophy	• neurological function
• major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia	• brain function

his HIV status, and the complaint was not subject to dismissal. Although defendant argued that the plaintiff had failed to plead that the HIV impairment substantially limited a major life activity, the court denied the defendant’s motion to dismiss and noted that it was “certainly plausible—particularly under the amended ADA—that Plaintiff’s HIV positive status substantially limits a major life activity: the function of his immune system.”¹⁰

- *Feldman v. Law Enforcement Associates Corp.* (multiple sclerosis and ministroke): This case involved two plaintiffs who suffered from separate medical conditions. One suffered a stress-related exacerbation of previously diagnosed multiple sclerosis, which caused him to be hospitalized for several days. Notwithstanding three requests for medical leave, his employment was terminated for job abandonment. The other plaintiff suffered a transient ischemic attack (TIA, also known as a “ministroke”) that resulted in hospitalization for two days and required recovery at home for several additional weeks. This plaintiff was terminated the day following his stroke. The court rejected the defendant’s argument that the impairments were not “disabilities” because they were “temporary and not severe.” Even though the TIA impairment was not chronic, the duration of the impairment was relatively short and there was no allegation that the residual effects of the TIA would be permanent, the court found that the effects of the TIA were significant and both plaintiffs had alleged sufficient facts to show that they had suffered from a disability under the ADAAA.¹¹
- *Fleck v. Wilmac Corporation* (chronic ankle injury): The plaintiff alleged that she had an ongoing ankle condition

that substantially limited the major life activities of standing and walking (by preventing her from standing for more than an hour or walking for more than half a mile), that she was plagued with the condition throughout her employment with defendant, that the defendant was aware of the ankle injury because she wore a visible cam boot to aid her in standing and walking, that she had notified her employer of the need for additional surgery on the ankle, that she had requested leave as provided by the Family Medical Leave Act (FMLA) as well as short-term disability, and that she was fired at the end of her leave period after she notified her employer of work limitations, the court found that she had asserted allegations sufficient to raise an inference that she was disabled. The court also found that the plaintiff’s allegations raised a plausible inference that the defendants had regarded her as disabled when they terminated her employment because, “[i]n contrast to the pre-amendment ADA, an individual is ‘regarded as’ disabled under the ADAAA ‘whether or not the impairment limits or is perceived to limit a major life activity.’”¹²

- *Lowe v. American Eurocopter LLC* (obesity): The plaintiff alleged that she was disabled because of her weight and that her disability made her “unable to park and walk from the regular parking lot.” The court refused to dismiss the case despite the existence of pre-ADAAA cases and EEOC interpretive guidance providing that obesity is not a disabling impairment, except in rare circumstances. The court found such pre-ADAAA guidance irrelevant and held that the plaintiff had stated a claim for relief for purposes of Rule 12(b)(6) by asserting that her obesity affected her major life activity of walking.

By alleging merely that her employer harassed her for parking in a parking spot reserved for the handicapped, treated her “differently,” and forced her to perform “more and additional work” than others due to her obesity, the court found that she also stated a claim for disability-based workplace harassment.¹³

- *Chalfont v. U.S. Electrodes* (heart condition and leukemia): Because the plaintiff alleged that he had leukemia and heart disease, that he was on medical leave for seven months to undergo chemotherapy, that his cancer was in remission but was a lifelong condition that at times caused him to be fatigued and subject to easy bleeding and bruising, and that he was substantially limited in the major life activity of normal cell growth and circulatory function, the court refused to dismiss the plaintiff’s ADA claim.¹⁴

Impairments on the EEOC’s “Always” List Create a Fact Issue on Disability.

Courts are generally finding that when plaintiffs have impairments that are included on the list of impairments that will, in virtually all cases, substantially limit certain functions (as listed in Table 2), defendants cannot obtain summary judgment on the ground that the plaintiff is not disabled under the ADAAA. These cases include the following:

- *Meinelt v. P.F. Chang’s China Bistro* (brain tumor with no symptoms): A plaintiff alleged that he had been fired three days after telling his supervisor that he had a brain tumor that would require both surgery and a leave from work for six to eight months. The court held that the defendant was not entitled to summary judgment on the theory that the impairment was not a “disability,” because it did not substantially limit a major life activity. The court rejected the defendant’s reliance on pre-ADAAA case law and noted that major life activities included “normal cell growth” and “brain functions.”¹⁵
- *Cohen v. CHLN Inc.* (back pain, sciatica, and ruptured disc): A restaurant general manager who presented evidence that he had suffered for four months from debilitating back and leg pain that prevented him from walking more than 10 to 20 yards at a time and affected his ability to climb stairs and sleep was fired one day after telling his employer that he had an appointment with a surgeon to discuss surgery for his back condition. The court ruled that the plaintiff had offered sufficient evidence to raise a genuine issue of fact as to whether he was disabled under the ADAAA at the time of his termination. The court also found that he had offered sufficient evidence under the “regarded as” prong that he had been perceived to have a severe, ongoing impairment because, for months before his termination, he walked with a cane and was often seen “limping slowly” or “doubled over with pain” and he discussed his back condition with his supervisor on multiple occasions.¹⁶
- *Naber v. Dover Healthcare Associates Inc.* (work-related anxiety and depression): In this case, the plaintiff had significant work-related grievances with her supervisor, and these probably played a significant role in the

development of her depression. She testified that her depression limited her ability to sleep, eat, and concentrate. In particular, she stated that she got no sleep one or two nights per week. Although the defendant argued extensively from pre-ADAAA case law that the plaintiff’s disability claim was flawed because it was “entirely related to her strained relationship with [her supervisor],” the court refused to grant summary judgment on the plaintiff’s ADA discrimination claim for failure to set forth a prima facie case of disability.¹⁷

Impairments on the “Always” List May Be Disabilities as a Matter of Law.

Some courts are finding, especially in connection with Federal Rule of Civil Procedure 56(f), that impairments included on the EEOC’s list of impairments that will, in virtually all cases, substantially limit certain functions are disabilities under the ADAAA as a matter of law. These decisions include the following:

- *Hoffman v. Carefirst of Fort Wayne Inc.* (cancer in remission): The plaintiff claimed that he had been terminated without reasonable accommodation and because his employer regarded him as disabled. The court found that the plaintiff’s Stage III renal cancer was a disability even though, at the time of the adverse employment action, the cancer was in remission and the plaintiff was able to carry out his regular job duties as a service technician 40 hours per week. The court found that its conclusion followed “the clear language of the ADAAA” and refused to certify its order denying the defendant’s motion for summary judgment for interlocutory appeal.¹⁸
- *Norton v. Assisted Living Concepts Inc.* (kidney cancer): In this case, the plaintiff argued that his kidney cancer was a “disability” under the “actual impairment” prong, and the court agreed. Emphasizing that the plaintiff’s renal cancer qualifies as a “disability” under the ADAAA, even if the only “major life activity” it “substantially limited” was “normal cell growth,” the court denied the defendant’s motion for summary judgment. Noting the changes to Federal Rule of Civil Procedure 56(f), which was amended effective Dec. 1, 2010, to permit motions for summary judgment on *parts* of claims or defenses, the court also granted the *plaintiff’s* motion for partial summary judgment that the renal cancer was a disability under the ADAAA *as a matter of law*.¹⁹

Sometimes Courts “Assume” Disability but Express Doubt.

In some cases, courts “assume” that plaintiffs are disabled under the expanded ADAAA definition but express strong doubt about the disability even when the impairment at issue is on the EEOC’s list of impairments that will, in virtually all cases, substantially limit certain functions. The relevant cases include the following:

- *Gesegnet v. J.B. Hunt Transport Inc.* (bipolar and anxiety disorders, aversion to small spaces): In this case, the plaintiff, who was applying to be a tractor trailer driver,

was required to undergo screening for drugs. He and the other applicants were told that they could not leave the clinic area until they had given their urine sample for the drug test. Because the plaintiff allegedly suffered from bipolar and anxiety disorders, the plaintiff told the defendant that he had difficulty with confined spaces. Nevertheless, the defendant's employee requested that he remain in the small, L-shaped waiting room. The plaintiff apparently managed to stay in the waiting room for two or three hours, but when someone closed the blinds, he felt that the room had "slammed shut" and he hurriedly left the room, took anxiety medication, and called the employee in charge of the drug screening. That employee said that the plaintiff was considered to have refused the drug screening and, therefore, the defendant not only would not hire the plaintiff but also would publish the employee's drug screening failure in a report available to other major freighting companies. The plaintiff claimed that he had explained his medical condition but was told that nothing could be done. He filed suit, claiming that the defendant had discriminated against him in refusing to reasonably accommodate his disabilities. Citing deficient medical evidence, but not referring to the EEOC's proposed regulations classifying bipolar disorder as an impairment that would almost always constitute a disability, the court expressed "doubt" that the evidence was sufficient to show "an actual inability to perform a basic function of life." However, the court "assumed" that the plaintiff met the definition of disability before finding that the defendant was entitled to summary judgment, because the plaintiff did not propose a reasonable accommodation with "sufficient specificity" and did not supply enough information upon which the defendant could infer the link between his statements and his psychiatric diagnoses.²⁰

- *Bliss v. Morrow Enterprises Inc.* (badly broken arm): The plaintiff in this case had a badly broken arm resulting from a car accident and wore a brace throughout her term of employment with the defendant. For purposes of ruling on the motion for summary judgment, the court stated that it would "assume[]" that the plaintiff was disabled under the ADAAA "even though it ha[d] its doubts." The court did not offer any further explanation and none was required, because the court found that there was not a causal connection between her termination and her broken arm that would enable her to prevail on an ADA claim.²¹

Some Courts Continue to Cite Pre-ADAAA Cases and Find that Plaintiffs Are Not Disabled as a Matter of Law.

In some cases, and without much explanation, courts continue to rely on pre-ADAAA rulings to hold that plaintiffs are not disabled, even though it is likely that their impairments would be substantially limiting if analyzed under the terms of the statute and the EEOC's regulations.

- *Wurzel v. Whirlpool Corp.* (Prinzmetal angina): A plaintiff with Prinzmetal angina, which causes unpredictable coronary artery spasms, failed to make a prima facie claim

under the ADAAA because his angina was intermittent. Without citing the ADAAA's provision including episodic impairments within the definition of "impairment" and without consulting the EEOC's proposed regulations, the court found that, based on the ruling handed down in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, "[t]he princip[le] that intermittent impairments, such as those resulting from plaintiff's sporadic angina spasms, are not deemed disabling remains good law."²²

- *Noriega-Quijano v. Potter* (arched feet, plantar fasciitis, and chronic lower back pain): In this case, the plaintiff had two service-related disabilities (highly arched feet with plantar fasciitis and chronic lower back pain), and the Department of Veterans Affairs had assigned the plaintiff a disability rating of 60 percent. Doctors had limited the plaintiff to an eight-hour workday and 40-hour workweek and had restricted him from running, jumping, marching, lifting, and prolonged standing. The court found that the plaintiff did not qualify as disabled "even under the newly broadened standards set forth in the ADAAA," because the restrictions did not rise to the level of a substantial limitation on a major life activity, "even when those terms are broadly construed."²³
- *Griffin v. Prince William Health System* (unspecified permanent condition resulting in 25-pound lifting restriction): This case involved a nurse's aide who was restricted from lifting more than 25 pounds. The court found as a matter of law that she was not disabled under the ADAAA, citing no post-ADAAA cases or regulations but quoting a pre-ADAAA decision that held that "a twenty-five pound lifting restriction ... does not constitute a significant restriction on one's ability to lift, work or perform any other major life activity."²⁴
- *Rumbin v. Association of American Medical Colleges* (convergence insufficiency that causes difficulty seeing and reading): The plaintiff in this case, a college graduate who had studied at Harvard University and the University of Chicago, sought MCAT testing accommodations from 2001 to 2009. Claiming that he had suffered from "convergence insufficiency," a condition resulting in difficulty focusing on close-in objects and causing headaches, fatigue, eye strain, and double vision, he requested the following accommodations: (1) three days to take the test, which lasted five hours and 20 minutes and (2) submission of his practice test results to medical schools. Although the court noted that the ADAAA applied to defendant's denial of accommodations after Jan. 1, 2009, the court exclusively cited pre-ADAAA case law when holding, after a bench trial, that the plaintiff had failed to prove that he was substantially limited in his ability to see, learn, and read vis-à-vis the general population.²⁵

Some Cases Involve Interactions Between the ADAAA and the FMLA.

There are a few cases showing that the amendments to the ADA will have an impact on the Family Medical Leave Act and accommodations that employers may need to provide to employees who return from FMLA leave. For example, in one case, the court explained that the

ADAAA's expanded definition of "disability" governs whether an employee is entitled to FMLA leave in order to care for an adult child with a disability.

- *Patton v. Ecardio Diagnostics LLC*: In this case, the plaintiff, a staff accountant, took approximately one week off from work when her daughter was seriously injured in a car accident in which the driver was killed. The plaintiff's daughter had two broken femurs, a small hole in her lung, and a small hole in her bladder. During the plaintiff's weeklong leave from work, the defendant hired someone to work at the company as the plaintiff's replacement and conducted training for a new accounting software program. Upon the plaintiff's return to work, she requested that she be allowed to train herself on the new software program. Her request was denied and, approximately two weeks later, she was fired. In a motion for summary judgment, the defendant argued that the plaintiff did not qualify for FMLA leave, because her daughter was 18 years old and did not suffer from a physical disability that rendered her unable to care for herself. Specifically, the defendant argued that the plaintiff's daughter's broken femurs did not substantially limit the daughter's major life activity of walking, because she was unable to walk for only a few months. Because for FMLA purposes, a physical disability is a physical impairment "that substantially limits one or more of the major life activities of an individual" *as these terms are defined by the ADAAA*, the court found that the plaintiff had raised a genuine issue of material fact regarding whether her daughter's condition during her one-week leave satisfied the ADAAA's definition of "physical disability" for purposes of the plaintiff's FMLA claim.²⁶

In another case, the court explained that, although an employer did not need to accommodate an employee returning from FMLA leave under the FMLA, the employer may be required to make a reasonable accommodation under the Americans With Disabilities Act.

- *Fleck v. Wilmac Corporation*: In this case, the plaintiff, who suffered from a chronic ankle condition, took FMLA leave from work in order to undergo surgery on her ankle. The plaintiff claimed that, when she returned from leave, she submitted a note from her doctor indicating that she was able to return to work at a schedule of four hours per day and the number of hours could be gradually increased over a six-week period. When the defendant told her that she was terminated because she could not work eight hours per day, the plaintiff allegedly submitted an alternative order from her doctor stating that she could work an eight-hour day if she had a break every hour. The plaintiff claimed that the defendant had refused to discuss any alternative work schedules. In response to plaintiff's claim that she had been discriminated against on the basis of disability because the defendant had failed to make reasonable accommodation, the defendant argued on summary judgment that the plaintiff's inability to return to full-time employment after

surgery during FMLA leave rendered her unqualified for ADA protection. The court rejected this position and held that, although the FMLA does not require an employer to provide a reasonable accommodation to an employee to facilitate her return to the same or equivalent position at the conclusion of her medical leave, the employee may, nevertheless, be able to state a valid claim for accommodation under the ADAAA because the term "reasonable accommodation" may include "part-time or modified work schedules." Because the plaintiff had raised fact issues both as to whether she was "disabled" under the ADAAA as well as whether her requested accommodations were reasonable, the court refused to grant summary judgment on the plaintiff's ADA claim.²⁷

Implications for Practice

Since the Americans With Disabilities Act was first passed in 1990, much of ADA jurisprudence has centered on the question of whether a plaintiff was "disabled" for purposes of the statute. All indications are that those days are over and impairments ranging from depression to cancer in remission may now be disabilities virtually per se. Moving forward, there is little doubt that cases will start to turn on the defendant's conduct rather than on the plaintiff's health. With the amendment to Federal Rule of Civil Procedure 56(f), which now permits plaintiffs to move for partial summary judgment on parts of claims, plaintiffs' attorneys are likely to begin filing motions for partial summary judgment on the issue of disability so as to streamline the issues for trial and eliminate the need for expensive expert testimony. The changes to the ADA will also have an impact any other areas of law (such as the Family Medical Leave Act) as well as state versions of the ADA that depend on the new definition of disability included in the ADA Amendments Act. **TFL**

Jana Terry has a litigation practice in Greenberg Traurig's Austin, Texas, office, where she focuses on bankruptcy, employment law, and general litigation. She has litigated cases before state courts; federal district, bankruptcy, and appellate courts; and the American Arbitration Association. Terry also has significant experience in litigation management, having managed a nationwide litigation and bankruptcy docket for a global health care company for three years. A former clerk for U.S. District Judge John D. Rainey in the Southern District of Texas, Terry graduated with honors from the University of Chicago Law School. Copyright © 2011 Jana K. Terry. All rights reserved.



Endnotes

¹42 U.S.C.A. § 12102(1)(A)–(C) (citations omitted) (emphases added to reflect key terms).

²See *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184, 197–98 (2002); *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482–83 (1999).

³⁴²U.S.C.A. § 12102(2)(A), (2)(B), (3)(A), (3)(B); (4)(A), (4)(C), (4)(D), and (4)(E).

⁴Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 29 C.F.R. § 1630.2(g)(3); § 1630.2(i)(1)(ii); *see also* Appendix to Part 1630: Interpretive Guidance) (Congress anticipated that “[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation ... —should be bringing a claim under the [“regarded as” prong] which will require no showing with regard to the severity of his or her impairment.”) (quoting Joint Hoyer–Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 at 4).

⁵29 C.F.R. § 1630.2(j)(1)(i)–(ix); *see also* Appendix to Part 1630.2(j)(1)(viii–ix): Interpretive Guidance.

⁶Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441–42 (proposed Sept. 23, 2009).

⁷29 C.F.R. § 1630.2(j)(3).

⁸697 F. Supp. 2d 234, 239–40 (D. Mass. 2010).

⁹656 F. Supp. 2d 252, 258–59 and n.4 (deciding case involving pre-ADAAA conduct under ADAAA as defendant did not question that the ADAAA’s provisions applied).

¹⁰704 F. Supp. 2d 814, 818–19 (N.D. Ill. 2010) (citing the EEOC’s proposed regulations that list HIV as an impairment that will consistently meet the definition of disability).

¹¹No. 5:10-CV-08-BR, 2011 WL 891447, at *5–8 (E.D.N.C. March 10, 2011).

¹²Civil Action No. 10-05562, 2011 WL 1899198, at *1–6 (E.D. Pa. May 19, 2011).

¹³No. 1:10CV24-A-D, 2010 WL 5232523, at *6–9 (N.D. Miss. Dec. 16, 2010).

¹⁴Civil Action No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010).

¹⁵Civil Action No. H-10-0311, 2011 WL 2118709, at *1–2, 6–7 (S.D. Tex. May 27, 2011).

¹⁶Civil Action No. 10-00514, 2011 WL 2713737, at *3 and 6–8 (E.D. Pa. July 13, 2011) (noting that the inability to walk more than 10 or 20 yards at a time “easily passes muster under the more inclusive standards of the ADAAA”).

¹⁷65 F. Supp. 2d 622, 643–47 (D. Del. 2011) (noting, however, that summary judgment was nevertheless appropriate because she could not show that the defendant’s legitimate, nondiscriminatory reason for her termination was pretextual).

¹⁸737 F. Supp. 2d 976, 985 (N.D. Ind. 2010); No. 1:09-CV-251, 2010 WL 3940638 (N.D. Ind. Oct. 6, 2010).

¹⁹No. 4:10-cv-00091, 2011 WL 1832952, at *7–9 (E.D. Tex. May 13, 2011).

²⁰Civil Action No. 3:09-CV-828-H, 2011 WL 2119248, at *1–6 (W.D. Ky. May 26, 2011).

²¹No. 09-CV-3064C PJS/JJK, 2011 WL 2555365, at *1,d2a & 6 (D. Minn. June 28, 2011).

²²No. 3:09CV498, 2010 WL 1495197, at *7 and n.5 (N.D. Ohio April 14, 2010).

²³No. 5:07-CV-204-FL, 2009 WL 6690943, at *5 (E.D.N.C. March 31, 2009) (declining to decide whether the ADAAA applied retroactively because the plaintiff did not qualify as disabled under the revised standard).

²⁴Civil Action No. 01:10-cv-359, 2011 WL 1597508, at *3 (E.D. Va. April 26, 2011). This holding was not necessary to the ruling as lifting up to 40 pounds was an essential function of plaintiff’s job and the requested accommodation (which would have eliminated the essential job function) was not reasonable. *See id.* at *3-5.

²⁵Civil No. 3:08cv983, 2011 WL 1085618, at *8-10 (D. Conn. March 21, 2011).

²⁶Civil Action No. H-10-1847, 2011 WL 2313211, at *1-4 (S.D. Tex. June 9, 2011).

²⁷Civil Action No. 10-05562, 2011 WL 1899198, at *1, 2, 4-7 (E.D. Pa. May 19, 2011).

RULEMAKING *continued from page 45*



Endnotes

¹The most recent significant amendment to representation case rules was the 1987 notice regarding the determination of appropriate bargaining units in the health care industry. On Dec. 22, 2010, the NLRB published a Notice of Proposed Rulemaking in the *Federal Register* proposing a regulation requiring employers, including labor organizations in their capacity as employers, subject to the NLRA, to post notices informing their employees of their rights as employees under the NLRA. The comment period closed on Feb. 22, 2011. More than 7,000 comments were sorted and evaluated. On Aug. 25, 2011, the NLRB issued a Final Rule requiring private-sector employers (including labor organizations acting as employers) to post a notice informing employ-

ees of their rights under the NLRA, effective Nov. 14, 2011. On Oct. 5, 2011, the NLRB issued a press release postponing the effective date of the employee rights notice rule to Jan. 31, 2012. Copies of this notice may be downloaded from the agency website at www.nlr.gov.

²All dates are for calendar year 2011 unless otherwise noted.

³76 Fed. Reg. 36812 (June 22, 2011).

⁴Transcripts and video of the NLRB’s July 18–19, 2011, public meeting on proposed amendments to election rules and regulations are posted on the NLRB’s public website at www.nlr.gov.

⁵*See Bally’s Atlantic City*, 338 NLRB 443 (2002). *See generally* Berton B. Subrin, *The NLRB’s Blocking Charge Policy: Wisdom or Folly?* 39 LAB. L.J. 651 (1988).