Final ADAAA Regulations Take Effect

The EEOC Further Broadens the Definition of Disability

By Mary L. Lohrke and Shannon P. Wheeler

On March 25, 2011, the Equal Employment Opportunity Commission issued final regulations[1] implementing and interpreting the ADA Amendments Act (ADAAA) signed into law on Sept. 25, 2008. The ADAAA, which became effective Jan. 1, 2009, amends the Americans with Disabilities Act of 1990 (ADA)[2] by expressly rejecting a narrow definition of "disability" and restoring broad protections to disabled individuals in the employment context. The new regulations took effect May 24, 2011, and like the ADA itself, apply to employers with 15 or more employees. Consistent with the ADAAA, the regulations broaden the definition of disability. The changes will make it easier for individuals seeking protection under the ADA to establish a disability within the meaning of the ADA.

THE EEOC REGULATIONS BROADEN THE DEFINITION OF DISABILITY

The ADA was enacted to prohibit employment discrimination against a qualified individual on the basis of disability.[3] The ADA defines "disability" as a physical or mental impairment that "substantially limits" an individual's ability to perform a "major life activity."[4] The ADA also prohibits discrimination against individuals who have a "record of" or are "regarded as" having such an impairment.[5] Discrimination under the ADA includes an employer's failure to provide reasonable workplace accommodations to qualified individuals with known disabilities, unless doing so would impose an undue hardship.[6]

Federal courts, following U.S. Supreme Court precedent, adopted a narrow interpretation of "disability" under the original ADA. The result was that many plaintiffs could not make the threshold showing that they were disabled within the meaning of the ADA. Consequently, the issue of whether the employer discriminated on the basis of disability was never reached in many cases. The ADAAA legislatively overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly.[7] Although the statutory definition of "disability" did not change, Congress mandated in the ADAAA that the term "disability" be *broadly* construed "to the maximum extent permitted" by the statute.[8]

The EEOC final regulations echo congressional intent, expressly stating that the "primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA."[9] The regulations make clear that courts should focus their attention in ADA cases on "whether covered entities have complied with their obligations and whether discrimination has occurred, *not* whether the individual meets the definition of disability."[10] The final regulations lower the standard for proving a disability by:

- expanding the definition of "major life activity"
- relaxing the definition of "substantially limits"
- eliminating from consideration the ameliorative effects of mitigating measures
- including coverage to impairments that are episodic or in remission
- revising the definition of "regarded as" disabled

EXPANDED DEFINITION OF MAJOR LIFE ACTIVITY

While the original ADA was silent, the ADAAA defines "major life activity" to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, breathing, learning, reading, concentrating, thinking, communicating and working.[11] The ADAAA also defines "major life activity" to include the operation of major bodily functions, such as the "immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions."[12] The new regulations add to the list of major life activities: sitting, reaching, bending, lifting and interacting with others.[13] The regulations also add special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal to the list of "major bodily functions."[14] Rejecting the Supreme Court's holding in *Toyota Motor Manufacturing v. Williams*,[15] the regulations further clarify that the term "major life activity" is not to be interpreted strictly to create a demanding standard and is not determined by reference to whether the activity is of "central importance to daily life."[16]

The regulations significantly expand the number of individuals who potentially qualify as "disabled" under the ADA. This is particularly true with respect to impairments affecting "bodily functions." In the past, an individual had to show that an impairment substantially limited a major life activity such as walking, seeing, hearing, etc. Now, an individual may be disabled if he or she has a disability that substantially limits a "major bodily function," regardless of whether the impairment has an obvious effect on the performance of day-to-day activities. Given that the list of major life activities and major bodily functions is meant to be non-exhaustive, many more activities may be covered in the future.

RELAXED DEFINITION OF 'SUBSTANTIALLY LIMITS'

Like the ADAAA, the EEOC final regulations provide that the term "substantially limits" should be construed broadly and is not meant to be a demanding standard.[17] The regulations provide rules of construction for determining whether an impairment is substantially limiting.[18] Under the new regulations, 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.[19] However, the impairment need not prevent or significantly or severely restrict the individual's ability to perform a major life activity in order to be considered a disability.[20] Although the determination of whether an impairment is substantially limiting requires an individualized assessment, the term "substantially limited" is to be interpreted and applied to require a degree of functional limitation that is lower than the standard applied prior to the ADAAA.[21] Further, the regulations provide that the comparison of an individual's performance of a major life activity to the same major life activity by most people in the general population usually will not require scientific, medical or statistical analysis.[22]

The condition, manner or duration[23] under which a major life activity can be performed are factors that may be considered in determining whether an individual is substantially limited.[24] This assessment may include consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.[25] According to the new regulations, the focus should be on the extent to which a major life activity is substantially limited — not on what outcomes the individual can achieve.[26] For example, someone with a learning disability

may achieve a high level of academic success, but may be substantially limited in the major life activity of learning because of the additional time or effort required to learn as compared to most people in the general population. Further, it may not be necessary to use these concepts with respect to those conditions which the regulations recognize will almost always substantially limit a major life activity, including: deafness, blindness, an intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia.[27]

While employers retain the right to argue on a case-by-case basis that an impairment is not substantially limiting, as a practical matter employers should expect that the impairments listed above will nearly always qualify as a disability. The relaxed standards will make it increasingly risky for employers to attempt to determine on their own whether or not an individual is disabled and to deny an accommodation on that basis.

ELIMINATION OF AMELIORATIVE EFFECTS OF MITIGATING MEASURES

Rejecting the Supreme Court's decision in *Sutton v. United Airlines*,[28] the regulations make clear that the ameliorative effects of mitigating measures are not taken into account in determining whether someone is disabled.[29] Under the ADAAA, 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 supplies, equipment, prosthetics, hearing aids, mobility devices, assistive technology or auxiliary aids.[30] The EEOC regulations add psychotherapy, behavior therapy and physical therapy to this non-exhaustive list of mitigating measures.[31] The only exception to this rule remains that ordinary eyeglasses or contact lenses can be considered mitigating measures.[32]

While the ameliorative effects of mitigating measures are not considered, the *negative* effects of mitigating measures may be taken into account in determining whether an impairment is substantially limiting. That means that an employee whose condition does not substantially limit a major life activity may nevertheless be disabled if the employee is taking a medication, the effects of which substantially limit a major life activity.

INCLUSION OF EPISODIC CONDITIONS AND CONDITIONS IN REMISSION

The new regulations provide that disabilities include episodic conditions or conditions in remission, provided the impairment would substantially limit a major life activity in an active state.[33] The appendix to the regulations provides a non-exhaustive list of conditions which generally will constitute a disability despite their episodic nature or the fact the condition is in remission, including cancer, epilepsy, multiple sclerosis, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, schizophrenia and post-traumatic stress disorder.[34] This means that an employee whose cancer is in remission may still be considered disabled under the ADAAA, if, at the time the cancer was active, it substantially limited a major life activity. An individual can potentially be rendered permanently disabled under the ADAAA without regard to the current effects of the impairment.

Further, the new regulations provide that a temporary impairment, lasting or expected to last fewer than six months, can also be a disability under the ADA as long as the impairment substantially limits a major life activity.[35] Although the interpretive guidance states that the duration of an impairment may be considered in determining whether it is substantially limiting, it will be increasingly difficult for employers to defend an ADA claim on the basis that the impairment was temporary or transitory.

REVISED DEFINITION OF 'REGARDED AS'

The ADAAA makes it easier for an individual to meet the definition of a person "regarded as" having a disability. Specifically, the ADAAA departs significantly from the old rule that an employee, under the "regarded as" prong, had to show that the employer wrongfully perceived the individual as being substantially limited in a major life activity. Consistent with the ADAAA, the new regulations expressly provide that whether an individual's impairment "substantially limits" a major life activity is *not* relevant to coverage under the "regarded as" prong.[36] Rather, an employer regards an individual as having a disability if it makes an adverse employment decision because of the employer's belief that the individual has an

impairment.[37] An individual no longer has to demonstrate that the employer wrongfully perceived the individual as being substantially limited in a major life activity.[38]

Unlike claims brought under the "actual" or "record of" prongs, employers may defend against a "regarded as" claim by showing that the actual or perceived impairment is transitory (lasting or expected to last six months or less) and minor.[39] However, this defense is limited by an objective analysis of the impairment.[40] An employer cannot claim that it subjectively believed the impairment to be transitory and minor, but rather must demonstrate that the impairment was actually transitory and minor, or that it could objectively be considered transitory and minor.[41]

The regulations clarify that an employer is not required to provide a reasonable accommodation to an individual who meets the definition of disability under the "regarded as" prong.[42] Further, an employee who is not asserting an accommodation claim can proceed under the less demanding standard of a "regarded as" claim — even if the employee has an *actual* disability.[43] The result will likely be an increase in "regarded as" claims.

THE PRACTICAL EFFECTS OF THE EEOC REGULATIONS

Due to the broadened definition of disability, there will likely be an increase in cases filed under the ADA. The focus in such cases will no longer be on whether an individual has a covered disability. Rather, litigation will be focused on the lack of discrimination. Practioners should ensure their employer clients are aware of their obligations under the ADA, including the obligation to engage in the interactive process and to make reasonable accommodations where warranted. In the past, many employers did not have their accommodation practices challenged since claims were dismissed for failure to establish a covered disability. In the future, an employer's accommodation process will be scrutinized, and cases will be won or lost based on whether the employer met its obligation to accommodate.

1. Regulations to Implement the Equal Employment Provisions of the American with Disabilities Act, as amended, 76 Fed. Reg. 16999 (Mar. 25, 2011).
2. ADA Amendments Act of 2008 §8.
3. The ADAAA prohibits discrimination against an individual "on the basis of disability" rather than against a "qualified individual with a disability" on the basis of disability. Consistent with the ADAAA, the new regulations refer to an "individual with a disability" and "qualified individual" as separate terms. The regulations are intended to make the primary focus of an ADA inquiry on whether the discrimination occurred — not whether an individual meets the definition of disability.
4. 42 U.S.C. §12102(1)(A).
5. 42 U.S.C. §12102(1); 42 U.S.C. 12112(a).
6. 42 U.S.C. §12102(5).
7. 42 U.S.C. §12101 note.
8. 42 U.S.C. §12102(4)(A).
9. 29 C.F.R. §1630.1(4).
10. 29 C.F.R. §1630.1(4).
11. 42 U.S.C. §12102(2)(A).
12. 42 U.S.C. §12102(2)(B).
13. 29 C.F.R. §1630.2 (i)(1)(i).
14. 29 C.F.R. §1630.2(i)(1)(ii).
15. 534 U.S. 184 (2002).
16. 29 C.F.R. §1630.2(i)(2).
17. 29 C.F.R. §1630.2(j)(1)(i).
18. 29 C.F.R. §1630.2(j)(1)(i)-(ix).
19. 29 C.F.R. §1630.2(j)(1)(ii).
20. 29 C.F.R. §1630.2(j)(1)(ii).
21. 29 C.F.R. §1630.2(j)(1)(iv).
22. 29 C.F.R. §1630.2(j)(1)(v).
23. Duration does not refer to the duration of the impairment but rather refers to the length of time it takes an individual to carry out the major life activity. 29 C.F.R. §1630.2(j)(4)(i).
24. 29 C.F.R. §1630.2(j)(4).
25. 29 C.F.R. §1630.2(j)(4)(ii).
26. 29 C.F.R. §1630.2(j)(4)(iii).
27. 29 C.F.R. §1630.2(j)(3)(iii).
28. 527 U.S. 471 (1999).
29. 29 C.F.R. §1630.2(j)(1)(vi).
30. 42 U.S.C. §12102(4)(E).
31. 29 C.F.R. §1630.2(j)(5)(v).
32. 42 U.S.C. §12102(4)(E)(iii); 29 C.F.R. § 1630.2(j)(1)(vi).
33. 29 C.F.R. §1630.2(j)(1)(vii).
34. 29 C.F.R. §1630, app. (Section 1630.2(j)(1) Rules of Construction).
35. 29 C.F.R. §1630.2(j)(ix).
36. 29 C.F.R. §1630.2(l).
37. 29 C.F.R. §1630.2(l)(1).
38. 29 C.F.R. §1630.2(l)(1).
39. 29 C.F.R. §1630.15 (f).
40. 29 C.F.R. §1630.15(f).
41. 29 C.F.R. §1630.15(f).
42. 29 C.F.R. §1630.2(o)(4).
43. 29 C.F.R. §1630.2(l)(1).

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