Being Regarded as Disabled: New Meanings and ADA Protections

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No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[1]

1. The Course of the Courts Prior to the ADA Amendments Act of 2008

Although many of the terms in the Americans with Disabilities Act of 1990 were borrowed from the Rehabilitation Act of 1973, which represented Congress' first attempt to mitigate discrimination among disabled persons,[2] the federal courts' adopted a much more narrow interpretation of those terms when determining whether an individual was disabled for purposes of the ADA. For example, in interpreting the term "substantially limits,"[3] as it appears in the definition of disability, the United States Supreme Court held, "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[4] Additionally, that Court held that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[5]

As a result of these restricted interpretations, much of the focus in an ADA case concerned whether the plaintiff qualified as a "disabled individual" and was thus covered by the ADA in the first place. Indeed, "[m]any pre-Amendment Act court decisions, including those cited by Congress in the legislative history of the Amendments Act, held that someone was not an individual with a disability in cases where the employer's denial of accommodation had nothing to do with coverage. Rather, coverage was raised as a legal defense after-the-fact against the asserted violation of the ADA."[6] Consequently, little attention was given to whether the covered entity had complied with its ADA obligations.

2. **Changing Course: Renewed Focus on Reasonable Accommodation**

Reacting to the recent court decisions narrowing what was once intended to be a broad scope of protection, Congress enacted the ADA Amendments Act of 2008, which was signed by President George W. Bush on September 25, 2008. In its Findings, Congress specifically found that, "as a result of these Supreme Court cases [*Sutton* and *Touota Motor Mfg*], lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities."[7] One such case, cited in the 2008 House Judiciary Committee Report, concerned a ruling from the Fifth Circuit Court of Appeals, which held that an individual with muscular dystrophy who "has successfully learned to live and work with his disability" was not disabled for purposes for the ADA because of the "mitigating measure of adapting how he performed manual tasks."[8] Another case concerned an Eighth Circuit Court of Appeals holding that an individual with uncontrolled diabetes did not qualify as a "disabled" individual under the ADA because that individual had adopted a "careful regimen of medicine, exercise and diet."[9]

By adopting the Amendments Act, Congress declared its purpose as follows:

> [T]o convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis….[10]

To accomplish this purpose, Congress included two additional definitions to assist courts in determining whether an individual qualifies as "disabled." First, Congress defined "major life activities" to include a variety of activities, including seeing, hearing, eating, sleeping, etc., and to also include the operation of "a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[11] The act also defined being "regarded as having such an impairment" to include being "subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[12] Additionally, Congress included amendments to its rules of construction, which clearly state that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," and that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures," other than ordinary eyeglasses or contact lenses.[13]

Complying with its obligation to revise its regulations to be consistent with the Amendments Act, the Equal Employment Opportunity Commission ("EEOC" published its Notice of Proposed Rulemaking on September 23, 2009. In its proposed amendments to its regulations, the EEOC states that the above-described amendments require that

some types of impairments will consistently meet the definition of disability. Because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity. In addition to examples such as deafness, blindness, intellectual disability (formerly termed mental retardation), partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair, other examples of impairments that will consistently meet the definition include, but are not limited to--

(A) Autism, which substantially limits major life activities such as communicating, interacting with others, or learning;

(B) Cancer, which substantially limits major life activities such as normal cell growth;

(C) Cerebral palsy, which substantially limits major life activities such as walking, performing manual tasks, speaking, or functions of the brain;

(D) Diabetes, which substantially limits major life activities such as functions of the endocrine system (e.g., the production of insulin, see 2008 House Judiciary Committee Report at 17);

(E) Epilepsy, which substantially limits major life activities such as functions of the brain or, during a seizure, seeing, hearing, speaking, walking, or thinking;

(F) HIV or AIDS, which substantially limit functions of the immune system;

(G) Multiple sclerosis and muscular dystrophy, which substantially limit major life activities including neurological functions, walking, performing manual tasks, seeing, speaking, or thinking;

(H) Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia, which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself.[14]

As individuals with these impairments will "consistently" meet the definition of disabled, the EEOC estimates that as much as one million additional workers "will" be covered under the ADA.[15] Moreover, as mitigating measures, with the exception of ordinary eye glasses and contact lenses, shall not be considered when determining whether an individual is disabled, there will be an additional number of workers who "may" qualify as disabled under the Act. Those workers include individuals with asthma, high blood pressure, a learning disability, back or leg impairment, psychiatric impairment, such as a panic disorder or anxiety disorder, carpal tunnel syndrome, or hyperthyroidism.[16]

Because the EEOC has interpreted the Amendments Act to provide that at as much as one million additional workers will now "consistently" be considered disabled, the focus will now shift to whether

the employers have fulfilled their obligations under the Amendments Act in providing the disabled workers reasonable accommodations.

3. **Discussing Reasonable Accommodations with the Disabled Worker**

Although Congress has increased the number of individuals that qualify as disabled under the ADA Amendments Act by expanding the definition of "disabled" to include those with an impairment that is episodic or in remission and to those who may be able to control their impairments with mitigating measures, it is uncertain whether the Amendments Act will actually translate into an increased number of requests for reasonable accommodations. This is so because the "prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of 'disability.'"[17] Therefore, "an individual with a disability [who] uses a mitigating measure which eliminates the need for a reasonable accommodation" alleviates any obligation of the employer to provide one.[18] However, assuming that the need for a reasonable accommodation does exist, the procedure for evaluating whether an employer has complied with its obligations under the ADA have remained largely unchanged.[19]

Under the Act, an employer discriminates against a disabled individual by

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity….[20]

Courts have consistently held that an employer's obligation to provide a reasonable accommodation is not triggered until it has first received notice of the existence of an impairment and the necessity of a

reasonable accommodation.[21] Although such notice must usually come from the employee,[22] there may be cases in which the employer is charged with notice based on obvious "manifestations of an underlying disability," such a frequent seizures.[23] Although employers may be hesitant to ask an employee if he or she has an impairment that requires accommodations, fearing that merely asking the question may give rise to a claim of disability under the "regarded as" definition, the EEOC has attempted to reassure the employers by declaring as follows: "[c]overage under the 'regarded as' prong is triggered only by actions prohibited by the ADA. Asking if an employee who appears to be having difficulty performing a job because of an impairment needs a reasonable accommodation would not violate the ADA."[24] Because the effect of the Amendments Act is that many individuals with no outward symptoms or manifestations of an impairment may nonetheless qualify as disabled under the Act, it can be assumed that the issue of notice will play a large part in many of the cases that will be brought under the Amendments Act.

Once the employer is provided with notice of an impairment or disability and the need for a reasonable accommodation, "it may be necessary for [the employer] to initiate an informal, interactive process with the qualified individual with the disability in need of the accommodation."[25] "This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[26] Such accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [or] the provision of qualified readers or interpreters."[27]

In determining which accommodations, if any, are appropriate for any given situation, it should be noted that employers are only required to provide those employees with an impairment or a record of an

impairment with reasonable accommodations. Therefore, it may be appropriate for the employer to ask the employee for medical information relating to the disability during the interactive process when the disability itself or the need for accommodations is not obvious.[28]

If accommodations are necessary, the employer must first look to see if there is an accommodation available that would allow the employee to continue in his or her current position.[29] If such accommodations are available and would not pose an undue hardship, the employer should work with the employee to identify the appropriate reasonable accommodations. If no such accommodations are available, the employee may request that he or she be reassigned to a vacant position.[30]

If the employee has requested reassignment when no reasonable accommodation is available to allow the employee to continue in his or her current position, "both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company."[31] Although an employer is obligated to act in good faith during this "interactive process," the courts have set some guidelines to define the extent of an employer's obligation when considering whether to reassign a disabled worker.

First, the "right to reassignment … is not absolute."[32] If reassignment is not reasonable or would result in an undue hardship, the employer is not required to offer the reassignment.[33] Second, employers are only required to consider existing vacant positions (or positions that will become vacant in the near future) when determining whether to reassign a qualified disabled individual. Thus, "it is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job."[34] Third, an employer need not violate collective bargaining agreements or other important fundamental policies when reassigning the employee.[35] Fourth, an employer is not required to promote a qualified disabled employee in order to fulfill its reassignment obligations.[36] Fifth,

employers are not required to provide the qualified disabled individual with the reassignment of his or her choice; rather, the employer "is free to choose the reassignment that is to be offered to the qualified individual with a disability."[37] Finally, an employer is not required to modify essential functions of a position to bring it within the qualifications of the disabled worker.[38]

The courts have recognized that the process of determining whether a reasonable accommodation is available and should be offered to a qualified disabled worker is highly fact intensive. Therefore, courts will look to the employer's and the employee's conduct during the interactive process to determine whether the employer acted in good faith in attempted to complete its obligations under the ADA or instead engaged in conduct designed to obstruct or delay the process.[39] Thus, the actions taken by the employer immediately after it obtained notice of the impairment and the need for a reasonable accommodation will play a crucial role in determining whether the employer met its obligations under the Act.

Although the estimated costs of providing reasonable accommodations to the additional workers that will now qualify as disabled under the ADA Amendments Act is difficult to predict,[40] it is undisputed that employers will benefit from fulfilling their obligations under the Act by providing reasonable accommodations to otherwise qualified workers. Indeed, while the employers may be required to incur certain costs to provide the accommodation, providing the accommodation allows the employer to retain a qualified worker, thereby reducing quantifiable administrative costs incurred in hiring and training another employee. Moreover, the employer will benefit in an unquantifiable amount by an increase in employee morale.

[1] 42 U.S.C. § 12111(a).

[2] The Rehabilitation Act of 1973 sought to minimize discrimination against "handicapped" individuals by regulating entities participating in federal programs or receiving federal financial assistance. In particular, Section 504 of the Rehabilitation Act provided that "[n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

[3] The ADA defined disability as one of the following: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) a record of such an impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2). Although the ADA Amendments Act did not change this definition, the Act makes clear that the relevant terms must be interpreted broadly. *See* Publ. L. No. 110-325 § 2(a)(4) (Sept. 25, 2008) ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA….").

[4] Toyota Motor Mfg, Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002).

[5] Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

[6] 74 Fed. Reg. 48431, 48433 (Sept. 23, 2009).

[7] Publ. L. No. 110-325 § 2(a)(6) (Sept. 25, 2008).

[8] 2008 House Judiciary Committee Report at 20-21 (*citing* McClure v. General Motors Corp., 75 Fed. Appx. 983 (5th Cir. 2003)), *cited in* 74 Fed. Reg. at 48441.

[9] *Id.* (*citing* Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002), *cited in* 74 Fed. Reg. at 48441.

[10] Publ. L. No. 110-325 § 2(b)(5) (Sept. 25, 2008).

[11] *Id.* § 4(a).

[12] *Id.*

[13] *Id.*

[14] 74 Fed. Reg. at 48441.

[15] *Id.* at 48437.

[16] *Id.* at 48442 (proposed amendments to 29 C.F.R. 1630.2).

[17] Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, at No. 11, available at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

[18] *Id.*

[19] The only major change related to an employer's obligation to provide reasonable accommodations is found in the amendment to 42 U.S.C. § 12201, which now provides that a covered entity "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section." Thus, an individual that is only "regarded as" having an impairment but that does not qualify under any other definition of disabled is not entitled to a reasonable accommodation.

[20] 42 U.S.C. § 12112(a)(5)(A).

[21] *See* Whitney v. Board of Educ. of Grand County, 292 F.3d 1280, 1285 (10th Cir. 2002) ("If a mental limitation is not 'known' to the employer, then any failure to accommodate that limitation is not discrimination within the meaning of the ADA."); Ekstrand v. School Dist. of Somerset, ___ F.3d___, 2009 WL 3172690 (7th Cir. 2009) ("Thus, our cases have consistently held that disabled employees must make their employers aware of any nonobvious, medically necessary accommodations with corroborating evidence such as a doctor's note or at least orally relaying a statement from a doctor, before an employer may be required under the ADA's reasonableness standard to provide a specific modest accommodation the employee requests.")

[22] Generally, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Montoya v. New Mexico, 208 F.3d 226, 2000 WL 216593, at *2 (10th Cir. 2000).

[23] Hedberg v. Indiana Bell Tele. Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995).

[24] Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, at No. 22, available at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

[25] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166 (10th Cir. 1999).

[26] *Id.*

[27] 42 U.S.C. § 12111(9)(B).

[28] The EEOC has stated that such inquiries would not trigger "regarded as" coverage. *See* Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008, at No. 22, available at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

[29] Smith, 180 F.3d at 1166 ("In general, reassignment should be considered only when accommodations within the individual's current position would pose an undue hardship.").

[30] Although the employee should "provide enough information about his or her limitations and desires so as to suggest at least the possibility that reasonable accommodation may be found in a reassignment job within the company," the employee "need not use magic words." *Id.* at 1172.

[31] Bartee v. Michelin North America, Inc., 374 F.3d 906, 916 (10th Cir. 2004).

[32] Smith, 180 F.3d at 1166.

[33] *Id.* at 1166, 1178.

[34] *Id.* at 1174.

[35] *Id.* at 1175-76.

[36] *Id.* at 1177.

[37] *Id.*

[38] *Id.* at 1178.

[39] *See, e.g., id.* at 1172.

[40] The EEOC has cited several studies that estimate the average cost of an accommodation. While one study has estimated the cost of an average accommodation to be $45, other studies have suggested a higher cost, ranging from $200 per accommodation to approximately $1,400 per accommodation. *See* 74 Fed. Reg. at 48434-48435.