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Getting up to Speed...

How Key Changes to the ADA Amendments Act Have Impacted Accommodating and Litigating Disability Claims

Presented by
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Today's Presenter



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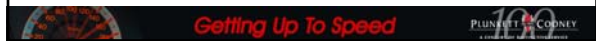
Americans with Disabilities Amendments Act

- On Sept. 25, 2008, President Obama signed the ADA Amendments Act (ADAAA), which expands scope of ADA coverage for cases **arising as of January 1, 2009.**

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Focus of ADAAA

- Act retained ADA's basic definition of "disability" as an impairment that substantially limits one or major life activities, a record of such impairment or being regarded as such impairment
- Act changed way those statutory terms should be interpreted



Our Focus Today

- Key terms discussed in the ADAAA
- Accommodation issues
- Drug, alcohol and other conduct rules in relation to the ADAAA
- Ensuring compliance with the law regarding disability-related questions and medical exams



Definitions ... for \$400!

- Physical or mental impairment that substantially limits one of major life activities;
OR
- Record of physical or mental impairment that substantially limited major life activity;
OR
- Actual or perceived impairment that is not both transitory and minor.



What is ... a Disability?

- What to look for:
 - Major life activity
 - Expanded by ADAAA by including two non-exhaustive lists
 - Substantially limiting
 - Directed EEOC to revise portion of its regulations defining term “substantially limits”

Continued



What is... a Disability?

- “Record of” and “regarded as” claims
 - Applicant or employee is “regarded as” disabled if he or she is subject to an action prohibited by the ADA (i.e., termination) based on impairment that is not transitory and minor.



What are These? For \$1,000

- These include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.



What are... Major Life Activities?

- Note: Law also includes 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.
- Note: What's not listed → sexual relations, driving and using a computer.



Case Law Interpreting 'Major Life Activities'

- Before ADA, litigation commonly focused on definition of "major life activity."
- However, there has not been a significant amount of litigation since enacting ADA.
- Two district court cases indicate that courts will not likely delve deeply into this issue:
 - *Bar-Meir v University of Minnesota* (interacting with others)
 - *Thomas v Bala Nursing & Retirement Center* (waking up)



Case Names for \$2,000

- In a significant pre-Amendments Act case, U.S. Supreme Court stated that "substantially" limited means "considerable" or "to a large degree."
- Therefore, to be "substantially limited" in a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central important to most people's daily lives."



What is... *Toyota Motor Manufacturing, Kentucky, Inc. v Williams (Williams)*?

- Congress stated this was too high of a burden, lowered standard.
- “Substantially limits” should be given a broad interpretation.
- Courts will generally not assume that an impairment is substantially limiting.



Case Law Interpreting ‘Substantially Limiting’

- In *Allen v Southcrest Hospital*, 10th Circuit Court of Appeals held that *even after* ADAAA, plaintiff must “make more than a conclusory showing that she was substantially limited” in a major life activity.
- Alleged limitation: caring for herself because of migraine headaches.

Continued



Case Law Interpreting ‘Substantially Limiting’

- Plaintiff failed to present evidence concerning such factors as: (1) how much earlier she went to bed than usual; (2) which specific activities of caring for herself she was forced to forego; (3) how long she slept after taking her medication; (4) what time she woke up the next day; (5) whether it was possible for her to complete activities of caring for herself the next morning that she had neglected the previous evening; or (6) her difficulties in caring for herself on days she had migraines.



Case Law Interpreting 'Substantially Limiting'

- In *Miller v Ameritech Corporation*, Seventh Circuit Court of Appeals held plaintiff must present "specific evidence" regarding how limitation is "substantial."
- Court noted that "when walking is the major life activity at issue, a plaintiff must demonstrate that his limited ability to walk is permanent or covers a long period of time and is considerable compared to the walking most people do in their ordinary lives."

Continued



Case Law Interpreting 'Substantially Limiting'

- Plaintiff did not present sufficient evidence where he did not indicate: (1) how far he is unable to walk; (2) why is he unable to walk; or (3) how long he will be unable to walk.



Shifting Gears... Accommodation Issues

- Duty to provide reasonable accommodations to qualified individuals with disabilities is considered one of the most important statutory requirements of the ADA.



Reasonable Accommodation Issues

- Important to keep in mind: Reasonable accommodation involves removal of **workplace barriers**.
- **Non-workplace barriers** are generally outside of employer's reasonable accommodation obligations.
 - For example: Employers are not required to provide personal use items, on *and* off the job (i.e., prosthetic limbs, wheelchairs or eyeglasses).



Categories of Reasonable Accommodation

- Changes to **job application process** so qualified applicants with disabilities can be considered for job
- Modifications to **work environment**, including how job is performed, so qualified individuals with disabilities can perform job
- Changes so that employees with disabilities can enjoy **equal benefits and privileges** of employment



Examples of Reasonable Accommodations

- Part-time or modified work schedules
- Job restructuring
- Reassignment to a vacant position
- Acquiring or modifying equipment
- Providing qualified readers or interpreters
- Changing exams, training materials or **policies**



Concerns About Differential Treatment

- Supreme Court has explicitly ruled that reasonable accommodations can involve “preferences” for employees with disabilities.



Continued

Concerns About Differential Treatment

- “The very purpose of reasonable accommodation laws is to require employers to treat disabled individuals differently in some circumstances – namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer.”

Do we Have to Accommodate *That*?

- Employers are **only** required to provide accommodations that are for individual's disability.
 - “Employers are not required to provide reasonable accommodations to non-disabled workers” pursuant to ADA section prohibiting discrimination because employee has a relationship with someone who has a disability.

Continued

Do we Have to Accommodate *That*?

- Association does not obligate employers to accommodation schedule of disabled relative.
 - For example, leave for disabled child.
Overley v Covenant Transport, Inc.
- Employers are not required to accommodate individuals who are "regarded as" disabled.



Case Law Examples of Accommodations

- *Miller v Illinois Department of Transportation*
 - Reasonable to allow bridge repairer with acrophobia to avoid working at heights where these tasks were not essential because employer routinely allowed members of crew to swap tasks
- *Hoffman v Caterpillar, Inc.*
 - Reasonable to assign "marginal functions" (i.e., running scanners) to another employee



Case Law Examples of Reasonable Accommodations

- *Supinski v UPS, Inc.*
 - Where heavy lifting was not essential function of job, employer was required to provide someone who could assist employee in doing the lifting.
- *Roberts v Progressive Independence, Inc.*
 - Personal care attendant may have been a reasonable accommodation for individual with mobility impairments who was required to travel on trips.



Examples of Unreasonable Accommodations

- *Steinmetz v Potter*
 - Employer did not have to provide an employee with a new supervisor as a reasonable accommodation.

Continued



Examples of Unreasonable Accommodations

- *Barton v Board of Regents of the University System of Georgia*
 - Employer was not required to hire full-time administrative assistant for director of marketing (who suffered a stroke) because this went beyond requirement of job restructuring.

Continued



Examples of Unreasonable Accommodations

- *Bratten v SSI Services, Inc.*
 - Employer was not required to assign existing employees or hire new employees to perform individual's essential functions.



Unpaid Leave

- Courts have held that unpaid leave is form of reasonable accommodation.
 - Modify “no-fault” attendance policies
- Not required to wait “indefinitely” for medical condition to be corrected
 - Repeated extensions of leave requests = indefinite leave

Continued



Unpaid Leave

- How much leave?
 - Fact-specific analysis depending on whether particular amount of time imposes an undue hardship on employer and on whether individual is still considered “qualified.”
 - Generally, up to a year



Drug & Alcohol-Related Disabilities

- Significant amount of litigation involves case where employer enforces its conduct rules; employee claims she broke conduct rules because of disability.
- Employer does not have to allow employee with disability to engage in misconduct, even if misconduct is caused by the disability.
- Keep in mind: courts have held that alcoholism is a covered disability.



Use of Illegal Drugs

- Distinction between drug addicts and drug users
 - To have a protected “disability,” recovering drug addicts must show that condition “substantially limits, or is perceived by his employer as substantially limiting, his ability to perform a major life function.”
 - ADA specifically **excludes** individuals who currently use illegal drugs from ADA protection.



What is Illegal Drug use?

- “Illegal use” includes use of illegal drugs *and* illegal use of prescription drugs that are controlled substances.
- Important to determine if use is illegal.



Use of Medical Marijuana

- If employee is taking marijuana for a disability under supervision of a licensed healthcare professional in a state where such use is lawful, employee might argue that use was not illegal.

Continued



Use of Medical Marijuana

- In *James v City of Costa Mesa*, 9th Circuit held that marijuana use, even though authorized by state law, was not protected by federal law.
 - “Doctor-recommended” marijuana use permitted by state law, but prohibited by federal law, is illegal use of drugs for purposes of ADA, and plaintiffs’ federally proscribed medical marijuana use, therefore, brings them within ADA’s illegal drug exclusion.



Reasonable Accommodation for Addicts (Alcohol & Drug)

- Generally would involve leave to get treatment for addiction
- Not required to *enable* addiction
- Employer is not required to provide leave to alcoholic employee if treatment would appear futile.
 - Repeated leaves of absences for employee with poor prognosis of recovery



Temporary Workers

- Staffing firms: Have obligations to provide accommodations for application process.
 - Once worker has been placed, both staffing firm and client may have an obligation to accommodation, if both qualify as joint employers.



Employee's Duty to Request an Accommodation

- EEOC has stated that, in general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."
- "An individual with a disability should request a reasonable accommodation when she knows that there is a barrier that is preventing her from performing the job."
- Employer must know about disability to be liable for failing to provide reasonable accommodation.



Employer's Inquiry After Request for Accommodation

- Employer may generally ask employee/applicant for information about disability.
- Employer is entitled to know that individual has covered disability and that she needs accommodation **because of** the disability.
- EEOC: "Employer may ask for reasonable documentation about the individual's disability and functional limitations."



What Documentation can Employer Obtain?

- *May not* obtain complete medical records
- In cases where disability is not obvious, employer may ask for documentation:
 - Describing impairment
 - Nature, severity and duration of impairment

Continued



What Documentation can Employer Obtain?

- Activity or activities that impairment limits; and extent to which impairment substantially limits employee's ability to perform activity or activities.
- May ask for limited release allowing employer to submit a list of specific questions to treating professional

What About Independent Medical Examinations?

- Employer may require individual to go to health professional of employer's choice if individual provides insufficient information.



Continued

TYPICAL OPINION FROM INSURANCE COMPANY DOCTOR

What About Independent Medical Examinations?

- Employer should first explain why information is insufficient and allow individual to provide missing documentation or information.

Final Thoughts

- Keep in mind: BROAD interpretation of "disability"
- Revisit your company policies: No-fault attendance policies; drug and alcohol use; misconduct
- Create templates for documentation requests after receiving requests for reasonable accommodation → ensure consistent and fair procedures.



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Questions?



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Thank You!

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