

# Welcome to the 2008 Legal Issues Webinar Series



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# The ADA: Performance & Conduct Issues

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**Sharon Rennert**  
Senior Attorney Advisor  
ADA Division  
Office of Legal Counsel

# How the ADA Applies to Performance & Conduct Issues

- An employee's disability typically has no bearing on performance or conduct problems
- Generally, performance and most conduct issues should be addressed in the same manner as done with employees without disabilities

# Role of Reasonable Accommodation

- However, sometimes an employee's disability may contribute to performance or conduct problems
- When this is the case, a simple reasonable accommodation often may be all that is needed to eliminate the problem

# Performance Standards

- Employers establish job-related requirements, including:
  - Specific tasks or assignments (essential and marginal functions)
  - Other job-related requirements (e.g., working well with others, serving the public in a professional manner, handling pressure appropriately, meeting deadlines, hours of work)
  - Production standard

# Performance Standards (cont.)

- Employers establish methods to evaluate job performance, including:
  - How well employee is meeting basic job requirements
  - How well employee is performing essential and marginal functions
  - How well employee is meeting production standards

# Production Standards

- Production standards refer to:
  - Quantitative Standards
  - Qualitative Standards
- An employee with a disability must meet the same production standards as other employees in the same position

## Production Standards (cont.)

- Reasonable accommodation never requires lowering a production standard but may require employer to provide an accommodation to meet the standard

*(Appendix to ADA Regulations, 29 C.F.R. section 1630.2 [n])*



# Practical Guidance

- Supervisors should always give clear guidance to all employees, including those with a disability, regarding the quantity and quality of work that must be produced and the timetables for producing it

# Practical Guidance: Providing Accurate Feedback and Evaluations

- Supervisors should evaluate the job performance of an employee with a disability in the same manner that they would evaluate any other employee's performance
  - Failing to provide an accurate evaluation leaves the employee at a disadvantage to improve performance and, if necessary, request reasonable accommodation
  - Disparate treatment?

# What Should This Employer Do?

- An employee discloses that s/he has a disability in response either to receiving a lower performance rating, or to his supervisor raising the issue of a performance problem

# Employer Response: Performance Rating

- Give lower rating and reiterate that performance problem must be corrected
- Make clear that the employee earned the lower performance rating, regardless of whether the disability played a role

## Employer Response: Performance Rating (con't.)

- May ask why the employee believes that disability plays a role in performance problem and whether employee is asking for reasonable accommodation

# Conduct Standards

- An employer may discipline an employee with a disability for violating a conduct standard if the disability does not cause the misconduct.
- Just be sure that employee is held to the same conduct standard as other employees.
- In most cases, the disability will not be relevant to any conduct violations.

# When Disability Causes/Contributes to Misconduct

- An employer may discipline an employee with a disability if the disability causes violation of a conduct rule which is job-related and consistent with business necessity AND if other employees are held to the same standard

*(42 U.S.C. sec. 12112(b)(6), 29 C.F.R. sec. 1630.10 & 1630.15(c), Ques 35 in Reas. Accommod. Guidance)*

# Where Employee's Disability Causes Misconduct

- Requirement that conduct rules be job-related and consistent with business necessity does not prevent employers from developing and enforcing wide range of conduct rules/standards.



# Conduct Rules that are Job-Related and Consistent with Business Necessity

- Prohibiting violence or threats of violence
- Prohibiting stealing
- Prohibiting destruction of property
- Insubordination
- Showing disrespect to clients, customers, and the public
- Inappropriate behaviors between coworkers
- Prohibiting alcohol use or illegal drug use

# Ambiguous Conduct Rules: Can You Hold Employee with a Disability Accountable?

## Example “Disruptive” Behavior

- Manifestation or symptom of a disability affecting conduct
- Frequency of occurrence of the manifestation/symptom
- Nature of job
- Specific conduct at issue
- Working environment

## When Employer Learns About a Disability After Misconduct Has Occurred

- If employee states that her/his disability is the cause of the conduct problem, and termination is the appropriate form of discipline, the employer may proceed with the termination.
- The ADA would not require further discussion about the employee's disability or a request for reasonable accommodation.

## When Employer Learns About a Disability After Misconduct Has Occurred (cont.)

- If employee states that a disability is the cause of the misconduct, and something less than termination is the appropriate disciplinary action, then employer may ask about the relevance of the disability and whether employee is requesting reasonable accommodation to avoid future misconduct

# Denial of Reasonable Accommodation

- Reasonable Accommodation cannot be withheld as a punishment for a conduct violation
- If an employer refuses to provide an employee with a disability with a reasonable accommodation that could assist him/her in controlling his/her behavior and preventing future conduct violations (without causing undue hardship), the employer has violated the ADA

# Practical Guidance: Performance or Conduct

- Generally inappropriate for employers to focus discussion about a performance or conduct problem on an employee's disability
- Focus should be on correcting performance problems and avoiding future misconduct
- Emphasizing the disability risks distracting from the primary focus on workplace problem and can risk a "regarded as" claim
- Generally preferable for an employee, rather than an employer, to raise disability issue

# Timing of Reasonable Accommodation Requests

- Although the ADA does not require an employee with a disability to request a reasonable accommodation at a specific time, the timing of the request is important. The employer does not have to rescind discipline or other actions warranted by poor performance or misconduct.
- But reasonable accommodation may be required going forward in order to rectify the performance or conduct problem.

## Reasonable Accommodation (cont.)

- If an employee with a known disability has a performance or conduct problem, an employer may ask whether the employee needs a reasonable accommodation if there seems to be a connection between the disability and the problem
- Alternatively, an employer may ask what steps can be taken to improve an employee's performance or conduct without mentioning the disability or accommodation



# Attendance and Leave Issues

- Employees with disabilities must be granted the same access to an employer's existing leave program as all other employees.

# Attendance/Leave and Reasonable Accommodation

- If an employee with a disability requires leave beyond that provided for under an employees' benefit program, the employer may have to grant the request as a reasonable accommodation, if there is no undue hardship (e.g., additional unpaid leave, modified schedule)

## Attendance/Leave and Reasonable Accommodation (cont.)

- However, providing reasonable accommodation does not mean an employer has to exempt an employee with a disability from time and attendance requirements.

# Chronic, Frequent & Unpredictable Leave

- Reasonable accommodation does not require that employers tolerate **chronic, frequent, and unpredictable** tardiness or absences
- Such behaviors:
  - will likely demonstrate an inability to perform one or more essential functions of the job
  - may enable the employer to demonstrate that any accommodation would impose an undue hardship

## Chronic, Frequent & Unpredictable Leave (cont.)

- Courts have uniformly rejected any requirement to extend leave indefinitely for chronic, frequent, and unpredictable absences

# Indefinite Leave vs. Extended Medical Leave

- Indefinite leave is when an employee (or his/her doctor) can give no date of return, or predict whether an employee will return to work
- An approximate date of return (e.g., employee will return at the beginning of October) is not indefinite leave
- A time period for return (e.g., employee will return between Oct. 15 and Oct. 30) is not indefinite leave

## Indefinite Leave vs. Extended Medical Leave (cont.)

- Employers may have to grant extended medical leave as a reasonable accommodation to employees with disabilities, absent undue hardship
- They do not have to grant leave of indefinite duration, which can impose an undue hardship on the employer's operations and render employee unqualified

# Requests for Reasonable Accommodation After Attendance Problems Develop

- If an employee with a disability requests reasonable accommodation after attendance problems develop, thus resulting in disciplinary action, the employer may proceed with the discipline
- The employer must also consider and, if appropriate, grant a reasonable accommodation unless it would pose an undue hardship.







# The ADA Amendments Act of 2008

**Presented by:**

Barry C. Taylor,

Legal Advocacy Director

Equip for Equality

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# Goals of the ADA



**Congress had several goals when it passed the ADA in 1990 including:**

- Providing a clear and comprehensive national mandate for the elimination of disability discrimination; and
- Providing clear, strong, consistent, enforceable standards addressing disability discrimination.



## The ADA in Historical Context

**When signing the ADA on July 26, 1990, President George H. W. Bush stated:**

“I now sign legislation which takes a sledgehammer to a...wall, one which has for too many generations, separated Americans with disabilities from freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, and we will not tolerate discrimination in America.”

# The ADA and Section 504 of the Rehabilitation Act



- When enacting the ADA, Congress intended that the executive agencies and the courts would continue the broad, flexible interpretation of the definition and scope of coverage under Section 504.
- Prior to the ADA, the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), interpreted the definition of disability under Section 504 very broadly and “acknowledged that society’s myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”

# Protected Individuals Under the ADA of 1990



**Under the current law, “The term “disability” 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;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment.

Also covered are people who have an association with someone with a disability.

42 U.S.C. §§ 12102(2), 12112(B)(4); 29 C.F.R. § 1630.2(g).



SUBSTANTIAL

# Substantial Limitation Under ADA of 1990

## Substantial Limitation:

- (i) **Unable to perform a major life activity** that the average person in the general population can perform;  
or
- (ii) **Significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

# Court Interpretations Narrow ADA Coverage



**Unfortunately, ADA goals have not been met due to restrictive court decisions:**

- *Sutton* “Trilogy” – mitigating measures ruling restricted definition of disability
- *Toyota v. Williams* – established that definition of disability should be “interpreted strictly” to create a “demanding standard.”





## ***Sutton v. United Airlines,*** **527 U.S. 421 (1999)**

**Facts:** Twin women sued under ADA after United refused to hire them as pilots because of their inadequate vision. United then claimed they were not covered by the ADA because they were not substantially limited in a major life activity when they wore their glasses.

**Issue:** Are mitigating measures taken into account when assessing disability?

**Supreme Court:** Effects of corrective measures must be taken into account when determining if plaintiff has an ADA disability.

# ***Sutton v. United Airlines,*** **527 U.S. 421 (1999) (cont'd)**



**Impact:** Hundreds of ADA cases have been dismissed because the plaintiff deemed to not have a disability when the mitigating measure was taken into account.

**Catch 22:** Forces people with disabilities to choose between enforcing their civil rights and addressing the manifestations of their disabilities.

**EEOC/DOJ Disregarded:** Court refuses to give deference to regulations on this issue.

# *Toyota v. Williams,* 534 U.S. 184 (2002)



**Facts:** Woman with carpal tunnel syndrome who was denied accommodation and ultimately terminated sued under the ADA.

**Supreme Court:** Plaintiff did not have an ADA disability because she was not substantially limited in performing manual tasks that are “central to most people’s daily lives.” Definition of disability is to be “interpreted strictly” to create a “demanding standard.”

**Impact:** Further narrowed who is considered to have an ADA disability

# Lower Court Decisions Finding No ADA Disability



**People with the following impairments have been found not to have an ADA disability:**

- **Mental Retardation** – *Littleton v. Wal-Mart Stores, Inc.*, (11<sup>th</sup> Cir. 2007)
- **Epilepsy** – *Todd v. Academy Corp.*, (S.D. Tex. 1999)
- **Diabetes** – *Orr v. Wal-Mart Stores, Inc.*, (8th Cir. 2002)
- **Bipolar Disorder** – *Johnson v. North Carolina Dep't of Health and Human Services*, (M.D.N.C. 2006)
- **Multiple Sclerosis** – *Sorensen v. University of Utah Hosp.*, (10<sup>th</sup> Cir. 1999)
- **Hearing Impairment** – *Eckhaus v. Consolidated Rail Corp.*, (D.N.J. 2003)
- **Back Injury** – *Wood v. Crown Redi-Mix, Inc.*, (8<sup>th</sup> Cir. 2003)

# Lower Court Decisions Finding No ADA Disability



**People with the following impairments have been found not to have an ADA disability:**

- **Vision in Only One Eye** – *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)
- **Post-Traumatic Stress Disorder** – *Rohan v. Networks Presentations LLC*, (4<sup>th</sup> Cir. 2004)
- **Heart Disease** – *Epstein v. Calvin-Miller Intern., Inc.*, (S.D.N.Y. 2000)
- **Depression** – *McMullin v. Ashcroft*, (D. Wyo. 2004)
- **HIV Infection** – *Cruz Carrillo v. AMR Eagle, Inc.*, (D.P.R. 2001)
- **Asthma** – *Tangires v. Johns Hopkins Hosp.*, (D. Md. 2000)
- **Cancer** – *Burnett v. LFW, Inc.*, 472 F.3d 471 (7<sup>th</sup> Cir. 2006)

# ADA Restoration Act



- Because of restrictive court decisions, agreement in the disability community that ADA needed to be amended
- ADA Restoration Act introduced 7/26/07
- Act changed definition of disability - removed “substantially limits one or more major life activities”
- Similar to many state disability laws, including Illinois

# ADA Restoration Act Becomes ADA Amendments Act



- Concern among business community that ADA coverage would expand too greatly under amended definition of disability
- Representatives from the disability community and the business community agreed on compromise language
- Compromise results in ADA Amendments Act
- Original definition of disability added back in and “substantially limited” was defined as “materially restricts” (in the House version)

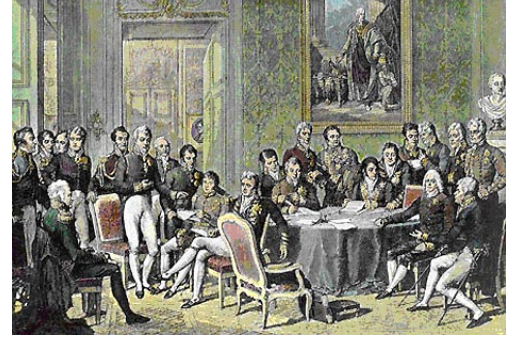
# The ADA Amendments Act (ADAAA)

Looking Ahead





# ADA Amendments Act: Key Findings



- Congress' expectations that "disability" would be interpreted consistently with court interpretations of "handicapped" under the Rehab Act have not been fulfilled;
- Supreme Court's *Sutton* and *Toyota* decisions have narrowed the ADA - eliminating protection for many individuals Congress intended to protect
- As a result of these Supreme Court cases, lower courts have incorrectly found in numerous cases that people with a range of substantially limiting impairments do not have an ADA disability

# ADA Amendments Act: Purposes



CONGRESS

## The purposes of the ADA Amendments Act are to:

- Reject the reasoning in the *Sutton & Toyota* cases and reinstate reasoning from *Arline*;
- Convey that Congress intended that a primary focus in ADA cases is whether entities covered by the ADA have complied with their obligations;
- Convey that whether a person's impairment is an ADA disability should not demand extensive analysis; and
- Make clear Congress expects that the EEOC will revise its current regulations that defines the term "substantially limits" as "significantly restricted."

# ADA Amendments Act: Codified Findings



**Removed:** Paragraph (1) from ADA including the finding that “some 43,000,000 Americans have one or more ... disabilities, and this number is increasing as the population .... is growing older”

**Added:** Paragraph (1) physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination....;

# ADA Amendments Act: Codified Findings



**Removed:** Paragraph (7) individuals with disabilities are a discrete and insular minority ..., subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness ... based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions ....

# ADA Amendments Act: Definition of Disability



- ADA's original definition of disability put back in legislation (i.e. substantially limited in a major life activity is added back in)
- **Rules of Construction:** Explicitly states that the definition of disability “shall be construed in favor of broad coverage” ... “to the maximum extent permitted by the terms of this Act.”

# Rejection of *Sutton* Decision



The definition of disability rejects *Sutton*:

- Mitigating measures are **NOT** to be considered in determining whether a person has a disability.
- Eliminates the “Catch-22” that exists under current law
- **Exception** - eyeglasses or contacts lenses



# Episodic Impairments Covered

**Clarification:** impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active

**Examples:** epilepsy, PTSD, cancer, diabetes

Rejects cases that such conditions are not protected by the ADA

# ADA Amendments Act: Major Life Activities



## A non-exhaustive list of major life activities:

caring for oneself

performing manual tasks

seeing

hearing

eating

sleeping

learning

concentrating & thinking

walking & standing

reading

lifting

bending

speaking

breathing

communicating

working

**Activities not previously recognized by EEOC include:  
reading, bending, and communicating**



# ADA Amendments Act: Major Life Activities – cont'd



**Major life activities also include the operation of “major bodily functions”**

immune system

normal cell growth

digestive

bowel

bladder

reproductive functions

neurological

brain

respiratory

circulatory

endocrine

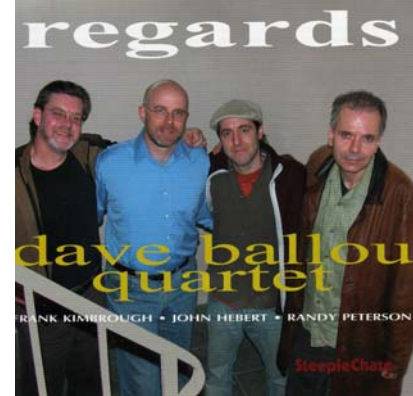


# Major Life Activities: One is Sufficient

Only **one** major life activity need be impacted.

The Act clarifies that individuals are not excluded from coverage because of an ability to do many things, as long as substantially limited in one major life activity.

# “Regarded As” Prong



- The bill broadens coverage under the ADA’s “regarded as” prong of the definition of disability.
- Clarifies that “regarded as” applies “whether or not the impairment limits or is perceived to limit a major life activity.”
- Exception – provision does not apply to impairments that are “transitory and minor.”
  - ❖ Defined as “an actual or expected duration of six months or less.”



# “Regarded As” Prong Cont'd

- Many previous ADA cases were dismissed because it was difficult to prove the employer regarded the employee as being limited in a specific major life activity
- Act focuses more on whether there was unequal treatment instead of the specifics of the employer’s perceptions
- No need to show employer perceived the impairment to limit a major life activity.



# “Regarded As” Prong and Reasonable Accommodation

Courts have differed on whether people who are “regarded as” having a disability are entitled to reasonable accommodations

Bill clarifies that reasonable accommodations do **not** extend to those who are only covered by the ADA under the “regarded as” prong

# “Qualified ”



The ADA Restoration Act had removed the term “qualified” from the anti-discrimination provision

The ADA Amendments Act makes it unlawful to discriminate against a *qualified* individual on the basis of disability



# Regulatory Authority

- EEOC, DOJ and Secretary of Transportation granted explicit authority to issue regulations interpreting the definition of disability under the ADA
- Repudiates Supreme Court's ruling in *Sutton* allowing courts to ignore federal regulations interpreting definition of disability
- EEOC indicated it will be issuing new regulations including redefining "substantial limitation"

# Interplay with Rehab Act

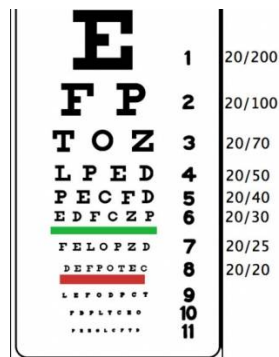


Section 504 of the Rehabilitation Act prohibits discrimination by entities that receive federal funding

ADA Amendments Act explicit that its provisions apply to the Rehabilitation Act and that the two laws should be interpreted consistently



# Vision Tests



Covered entities cannot use “qualification standards, employment tests, or other selection criteria based on an individual’s **uncorrected vision** unless the standard, test, or other selection criteria is shown to be “job-related for the position in question and consistent with business necessity.”  
(Emphasis added)



**PROVISIONS**  
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# Additional Provisions:

- No cause of action for “reverse discrimination.”
- Changes definition from “qualified individual with a disability” to “qualified individual.” [Sec. 12111(8)]
- Discrimination must be “on the basis of disability.”



# **ADA Amendments Act: Passes House of Representatives**

Voted out of the House Education and Labor Committee (43-1)

Voted out of the House Judiciary Committee (27-0)

Passed the House by an overwhelming vote (402-17)

# ADA Amendments Act: Introduced in the Senate

- The Senate Bill was very similar to the House Bill
- Main Difference:
  - ❖ Removed the House version's "materially restricts" language to clarify definition of "substantially limits," but aims to accomplish the same result by stating that the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA.

# The ADA Amendments Act Becomes Law



- On 9/11/08, the Senate Bill passed by unanimous consent (voice vote).
- House approved the Senate version on 9/17/08 (voice vote).
- President Bush signed the Bill on September 25, 2008.
- The effective date of the law is 1/1/09.

# ADAAA – Summary of Main Changes



1. Removes *Sutton* requirement for mitigating measures;
2. States that the EEOC & courts' interpretations of the term "substantially limits" were too restrictive;
3. Defines "major life activity" more broadly;
4. Eliminates the "substantial limitation" requirement for "regarded as" claims;
5. Clarifies that an impairment that is episodic or in remission is evaluated when active;
6. Directs the courts to interpret the ADA as a remedial statute, i.e., liberally; and
7. Amends the Rehabilitation Act for consistency.

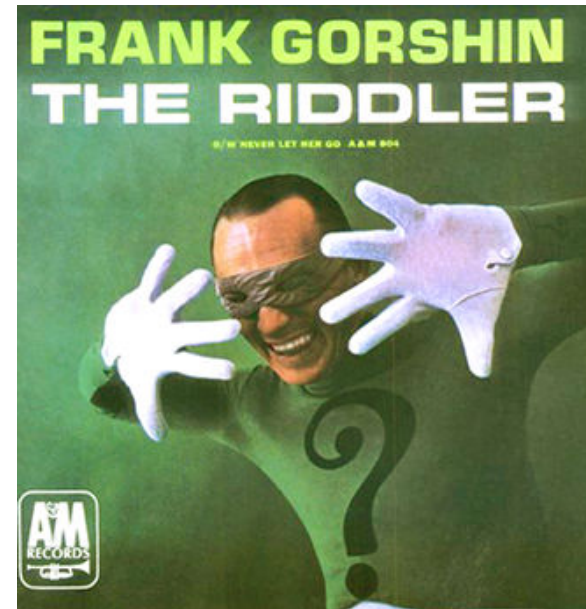
# ADAAA – Ramifications for Employers



- More coverage for people:
  - ❖ With “episodic conditions”
  - ❖ Who use “mitigating measures”
  - ❖ With limiting conditions that do not meet the current standard
  - ❖ Who are “regarded as” being disabled
- Emphasis will be on employer’s conduct rather than employee’s medical condition.
- Make sure job criteria meets “business necessity” test.
- Having training on the new requirements, periodic ADA training, and reevaluating ADA policies may be helpful.

# ADA Amendments Act

## QUESTIONS?





# Thank you for Participating In Today's Session



Please join us for the next session in this series:

**January 13, 2009**

Interplay between the Americans with Disabilities Act and the Family and  
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