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## Litigation under the ADA Amendments Act

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# Overview



- The ADA Amendments Act & EEOC Proposed Regulations (NPRM)
- Litigation Under the ADAAA
  - ❖ Courts Agree Congress Greatly Broadened the Definition of Disability
  - ❖ Courts Have Applied The Expanded List of “Major Life Activities”
  - ❖ Mitigating Measures Are No Longer Considered In Assessing Disability
  - ❖ “Regarded As” Claims
  - ❖ List of Specific Disabilities
  - ❖ The New Standards in the ADAAA Also Apply to the Rehabilitation Act
  - ❖ The ADAAA’s Effect on State Law
  - ❖ Effect on Pleading Standards
  - ❖ Does the ADA Amendments Act Apply Retroactively?

## ADAAA & NPRM

### Acronyms for All

## Broad Interpretation of the Definition of Disability – ADAAA

- In the ADAAA, Congress:
  - ❖ Stated the definition of disability “shall be construed in favor of broad coverage... to the maximum extent permitted by the terms of this Act.” 42 U.S.C. § 12102(4)(A), as amended.
  - ❖ Explicitly overruled U.S. Supreme Court cases that unduly restricted the definition of who is a person with a disability:
    - *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) – held the definition of disability “needs to be interpreted strictly to create a demanding standard for qualifying as a disability” and requiring that an individual demonstrate a substantial limitation in activities of “central importance to daily life.”

## Broad Interpretation of the Definition of Disability – ADAAA

- *Sutton Trilogy* – held mitigating measures should be taken into account when assessing whether an impairment causes a “substantial limitation.” *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
- Under *Sutton & Toyota*, many people with the following impairments were found not to have an ADA disability:
  - ❖ Cancer, intellectual disability, epilepsy, diabetes, a bipolar condition, multiple sclerosis, back injuries, monocular vision, PTSD, depression, heart disease, HIV Infection, and asthma.

## Broad Interpretation of the Definition of Disability – EEOC NPRM

- EEOC NPRM reinforces the idea that disability should now be much easier to prove. (See EEOC fact sheet).
- NPRM reinforces the Congressional mandate that courts should focus on whether covered entities have complied with their obligations instead of disability.
- EEOC fact sheet notes that “far more ADA cases will focus on whether discrimination actually occurred.”

29 C.F.R. §§ 1630.2(j)(2)(i), 1630.2(j)(5)(i), 1630.2(j)(6)(i); 29 C.F.R. § 74 Fed. Reg. at 48440-424, 44; *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, [http://eoc.gov/policy/docs/ganda\\_adaaa\\_nprm.html](http://eoc.gov/policy/docs/ganda_adaaa_nprm.html).

## Broad Interpretation “Substantially Limits” – ADAAA

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- Courts should use a less stringent standard when determining whether a particular impairment is substantially limiting so that more people with disabilities will be able to proceed with their ADA cases.
- “Substantial limitation,” like all of the terms in the definition of disability, must be construed as broadly as possible.
- Rejects *Toyota* “severe restriction” standard as it “has created an inappropriately high level of limitation...”
- Rejects EEOC Title I regulation defining the term “substantially limits” as “significantly restricted.”
- Substantial limitations are measured against “most people in the general population.”

42 U.S.C. § 12102(4)(A); Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.

## Broad Interpretation “Substantially Limits” – EEOC NPRM

- “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a major life activity.”
- Rejects *Toyota’s* “central importance to daily life” standard.
  - ❖ **Example:** “Someone with a 20# lifting restriction that is not of short-term duration is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living...”
- Also uses the term “most people” rather than “average person.”
  - ❖ Emphasizes that “the comparison... may be made using a common-sense standard, without resorting to scientific or medical evidence.”

29 C.F.R. § 1630.2(j), 74 Fed. Reg. at 48440; 29 C.F.R. § 1630.2(j)(2)(iv), 74 Fed. Reg. at 48440; *EEOC Q&A, supra*, Question 6.

## Broad Interpretation “Substantially Limits” – EEOC NPRM

- No longer use the condition/manner/duration terminology
  - ❖ A substantial limitation may be based on the length of time a person can perform the activity, the distance the person can walk, or the weight the person can lift.
  - ❖ “... the time and effort required to think or concentrate, the diminished capacity to effectively interact with others, the length or quality of sleep the individual gets, the individual’s eating patterns or appetite,” or the amount of pain experienced.
  - ❖ An impairment’s duration for “several months” is sufficient to show a substantial limitation, and “an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.”

29 C.F.R. § 1630.2(j)(6)(i)(D), (F), (E), (D); 74 Fed. Reg. at 48442; 29 C.F.R. § 1630.2(j)(2)(v), 74 Fed. Reg. at 48440. See also, 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48446–48447.

## Broad Interpretation “Substantially Limits” – EEOC NPRM

- Relevant inquiry is “how a major life activity is substantially limited, not on what an individual can do in spite of an impairment.”
  - However, “temporary, non-chronic impairments of short duration with little or no residual effects” will not be disabilities...
    - ❖ **Examples:** Common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.
    - ❖ Pregnancy is not a disability, although “certain impairments resulting from pregnancy ... may be disabilities if they substantially limit...”
- 29 C.F.R. §§ 1630.2(j)(2)(vi), (j)(8), (j)(2)(v), 74 Fed. Reg. at 48443; EEOC Q&A, *supra*, Question 18; 29 C.F.R. § 1630.2(j)(2)(v), 74 Fed. Reg. at 48440.

## Episodic Conditions and Those in Remission are Covered

- **ADAAA:** An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
  - **EEOC NPRM:** The EEOC NPRM reinforces the ADAAA’s statement that impairments that are episodic or in remission can still qualify as disabilities.
  - NPRM includes a non-exclusive list of impairments that may be episodic: “epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder.”
- 29 C.F.R. § 1630.2(j)(2)(iv)(A), 74 Fed. Reg. at 48440; 29 C.F.R. Part 1630 App., § 1630.2(j), 74 Fed. Reg. at 48447.

## Major Life Activities – ADAAA



- Definition of actual disability ADA (and ADAAA):
  - ✦ Physical or mental impairment that substantially limits one or more **major life activities**
- No definition of “major life activities” in the text of the original ADA and no examples.
- **ADAAA:** The term major life activity also includes the operation of the following major bodily functions: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine and reproductive functions. 42 U.S.C. § 12102(2)(B), as amended.

## Major Life Activities



### In ADAAA (and previously identified by EEOC):

caring for oneself	walking & standing
lifting	seeing
hearing	learning
eating	speaking
sleeping	breathing
performing manual tasks	concentrating & thinking
working	

## Major Life Activities



### In ADAAA (and previously identified by EEOC):

reading  
bending  
communicating

### In NPRM but not in text of ADAAA:

interacting with others  
reaching  
sitting

Neither lists of major life activities in the ADAAA or the NPRM is exhaustive - no negative implication by omission

## New Category: Major Bodily Functions



### In ADAA

immune system	neurological
normal cell growth	brain
digestive	respiratory
Bowel	circulatory
bladder	endocrine
reproductive functions	

### Added in NPRM

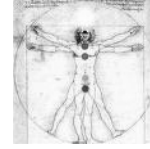
**special sense organs & skin**  
**genitourinary**  
**cardiovascular**  
**hemic**  
**lymphatic**  
**musculoskeletal**

### **EEOC NPRM contains two lists:**

1. Impairments that should consistently be a disability.
2. Impairments that may be disabling for some but not others.



## Possible Application of Major Bodily Functions



- **immune system:** HIV/AIDS, auto-immune disorders, lupus
- **normal cell growth:** cancer
- **digestive:** Crohn's disease, celiac disease
- **bowel:** ulcerative colitis
- **bladder:** kidney disease
- **reproductive functions:** infertility
- **neurological:** multiple sclerosis, epilepsy
- **brain:** schizophrenia, developmental disabilities
- **respiratory:** asthma
- **circulatory:** heart disease, high blood pressure
- **endocrine:** diabetes
- **Note:** Inclusion of major bodily functions will make it much easier for people with many of these impairments identify a major life activity.

## Impairment – ADAAA

- **ADAAA:** No definition for the term “impairment,” but:
  - ❖ Must be as broadly construed as possible.
  - ❖ Regarded-as disability claims are not actionable if the impairment is both transitory and minor.
    - Suggests that in “present” or “record of” cases, the term “impairment” may include conditions that are both transitory and/or minor.

## Impairment – EEOC NPRM

- The definition of “impairment” is substantially similar to the original EEOC definition, although the preferred term “intellectual disability” is used instead of the disfavored term, “mental retardation.”
- **Examples:** asthma, back impairments, carpal tunnel syndrome, hypertension, hyperthyroidism, leg impairments, a facial tic, carpal tunnel syndrome, Hepatitis C, and heart disease.
- Mental impairments include panic and anxiety disorders, forms of depression beyond just major depression, & dyslexia.

29 C.F.R. § 1630.2(j), 74 Fed. Reg. at 48442.

## Impairments – EEOC NPRM

### **Examples of impairments that will consistently meet the definition include, but are not limited to-”**

- autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, MS, muscular dystrophy, PTSD, OCD, major depression, bipolar disorder, or schizophrenia.

### **Impairments that may be disabling for some but not others:**

- High blood pressure, hyperthyroidism, back or leg impairments, asthma, psychiatric conditions (e.g., anxiety or panic disorders, (non-major) depression, or a learning disability.

29 C.F.R. § 1630.2(j), 74 Fed. Reg. at 48442.

## Mitigating Measures are Not Considered in Assessing Disability – ADAAA



- Rejects *Sutton* and defines mitigating measures by way of a non-exhaustive list:
    - ❖ Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
      - “Ordinary eyeglasses or contact lenses” are defined as lenses that are intended to fully correct visual acuity or eliminate refractive error.
    - ❖ Use of assistive technology;
    - ❖ Reasonable accommodations or auxiliary aids or services; or
    - ❖ Learned behavioral or adaptive neurological modifications.
- 42 U.S.C. § 12102(4)(E)(ii) and (iii).

## Mitigating Measures – EEOC NPRM

- Similar list of mitigating measures but adds: “surgical interventions, except for those that permanently eliminate an impairment.”
- Differentiates “ordinary eyeglasses or contact lenses” from assistive technology, low-vision devices that provide magnification or enhance an image. 29 C.F.R. § 1630.2(3)(ii)(A), 74 Fed. Reg. at 48441.
- An employer cannot use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless it is job-related and consistent with business necessity. 29 C.F.R. § 1630.10(b), 74 Fed. Reg. at 48444.
  - ❖ **Comments to EEOC NPRM:** People who must take a vision test without glasses or contacts “will usually be covered under the ‘regarded as’ prong of the definition of disability.” Note to 29 C.F.R. § 1630.0(b), 74 Fed. Reg. at 48450.

## Mitigating Measures – EEOC NPRM

- Look at limitations without the mitigating measure,” explicitly rejecting caselaw to the contrary.
  - ❖ **Example:** An individual who is “taking a psychiatric medication for depression, or insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that ... [such impairment], if left untreated, would substantially limit a major life activity.”
  - ❖ Benefits of mitigating measures may be considered in showing ability to perform essential job functions.
  - ❖ Negative side effects of mitigating measures may be considered in assessing disability.

29 C.F.R. § 1630.2(j)(3)(i), 74 Fed. Reg. at 48440.

## “Regarded As”



- The bill broadens coverage under the ADA’s “regarded as” prong of the definition of disability.
- This prong may apply “whether or not the impairment limits or is perceived to limit a major life activity.”
- No reasonable accommodations for people who are only covered under the “regarded as” prong.
- **Exception:** Impairments that are “both transitory (lasting or expected to last for six months or less) and minor.”
  - ❖ Sprains, fractures that heal completely, mild intestinal virus,...
  - ❖ **BUT:** Does not establish a durational minimum for the other prongs – “An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.” 29 C.F.R. § 1630.2(j)(2)(v), 74 Fed. Reg. at 48440.

## “Record Of” – ADAAA & EEOC NPRM

- **ADAAA:** No explicit changes.
- **EEOC NPRM:** Makes it clear “record of”
  - ❖ Is to be construed broadly
  - ❖ may apply even if there’s a misclassification
- A “record of” disability will support a failure-to-accommodate claim. 29 C.F.R. § 1630.2(o)(4), 74 Fed. Reg. at 48443.
- **EEOC Guidance:** An employer need not have relied on an actual written record of a disability. EEOC Q&A, *supra*, Question 19.

## Other topics – EEOC Authority & Rehab Act Conformity

### Authority to Issue Regulations

- **ADAAA:** Clarifies that the authority to issue regulations implementing the Act’s definition of disability is granted to the EEOC, DOJ, and DOT.
- This change responds to the Supreme Court’s hesitation to accept EEOC regulations defining disability.  
42 U.S.C. § 12205(a); *See, e.g., Toyota Motor, supra*, 534 U.S. at 194.

### Rehabilitation Act Conformity

- **ADAAA:** ADA and Rehabilitation Act of 1973 shall use the same definition of disability.  
29 U.S.C. § 705(9)(B) and (20)(B), as amended.

## Other topics – Does the ADAAA Apply Retroactively?

### Does the ADA Amendments Act Apply Retroactively?

- **ADAAA:** Effective date of the law was January 1, 2009. Pub. L. 110–325, § 8, 122 Stat. 3553 (Sep. 25, 2008), codified at, 42 U.S.C. §12101.
- **EEOC Guidance:** ADAAA does not apply retroactively. Contrasted with Lilly Ledbetter Act which exhibits a clear Congressional intent. EEOC Q&A, *supra*, Question 1.
- “The ADAAA would apply to denials of reasonable accommodations where a request was made, or an earlier request was renewed, on or after January 1, 2009.” EEOC Q&A, *supra*, Question 1, cited in *Lawson v. Plantation General Hosp., L.P.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 1258058, at \*13 (S.D. Fla. March 30, 2010).

## Litigation

### Litigation under the ADA Amendments Act and Potential Future Issues for Litigation

## Courts Agree Congress Broadened the Definition of Disability

### ***Fournier v. Payco Foods Corp.*, 611 F. Supp. 2d 120, (D.P.R. 2009)**

- “Overarching purpose of the [ADAAA] is to reinstate the ‘broad scope of protection’ available under the ADA.”

### ***Kingston v. Ford Meter Box Co., Inc.*, 2009 WL 981333, (N.D. Ind. Apr. 10, 2009)**

- Congress criticized the judicial elimination of “protection for many individuals whom Congress intended to protect.”

### ***Brodsky v. New England School of Law*, 617 F. Supp. 2d 1 (D. Mass. 2009)**

- ADA amendment is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute.”

## Case on Expanded Coverage



### ***Gil v. Vortex*, 697 F. Supp. 2d 234 (D. Mass. March 25, 2010)**

- Employee with monocular vision terminated on January 2, 2009 when he sought to return to work following surgery.
  - ❖ ADAAA's effective date was 1/1/09.
- Employee claimed his vision impairment substantially limited him in the major life activities of seeing and working.
- **Court:** Employee had a disability under the ADAAA.
  - ❖ Also a “regarded as” claim as employer took adverse action due to the fear that he would injure himself due to his impairment.
  - ❖ Noted that the employee likely would not have been successful with his claim prior to the ADAAA.

## Substantial Limitation

### ***Franchi v. New Hampton School*, 656 F. Supp. 2d 252 (D.N.H. 2009)**

- **Court:** Employee's eating impairment substantially limited her in eating under the ADAAA's broad construction.
  - ❖ Spent 6 weeks in outpatient & inpatient eating disorder clinics
  - ❖ Still lost nearly five pounds in subsequent 16-day period, dropping her weight to 93% of its ideal.
  - ❖ "Condition ... required a careful watch over her food intake to protect against potentially dangerous weight loss."

### ***Carmona v. Southwest Airlines Co.*, 604 F.3d 848 (5th Cir. 2010)**

- Court found no ADA disability under the pre-ADAAA definition for a plaintiff with psoriatic arthritis but said under the ADAAA, it would be "easier for a plaintiff with an episodic condition" to establish disability.

## Courts Have Applied An Expanded List of "Major Life Activities"

### ***Horgan v. Simmons*, 2010 WL 1434317 (N.D. Ill. April 12, 2010)**

- Employee with HIV terminated after disclosing his HIV status.
  - ❖ Employee alleged that his supervisor "demanded" to know whether he had "something medical going on," so he felt "compelled" to disclose that he was HIV positive."
- Claimed discriminatory termination & impermissible medical inquiries.
- **Court:** Applied ADAAA and held that "functions of the immune system" constitute major life activities under the definition of disability.
  - ❖ Noted EEOC's proposed regulations list HIV as an impairment that consistently meets the definition of disability.
  - ❖ Mentioned Congress instructed courts that the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."



## Courts Have Applied An Expanded List of “Major Life Activities”

### ***Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (6th Cir. 2008) (unpublished)**

- “There is no longer any dispute that ‘sleeping’ and ‘thinking’ are major life activities.”
- **Expectation:** Less litigation over disability issues, more litigation on:
  - ❖ Qualified
  - ❖ Direct threat
  - ❖ Undue Hardship
  - ❖ Deference to EEOC Regulations (e.g., musculoskeletal system as a major bodily function)
  - ❖ Unlisted Major Life Activities: Sexual relations, driving, commuting.

## Mitigating Measures Are No Longer Considered in Assessing Disability

### ***Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850(9th Cir. 2009)**

- **Court:** “Impairments are to be evaluated in their unmitigated state...”
- “... for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.”
  - ❖ **Note:** preferred language is “person with diabetes” rather than “diabetic.”

## Mitigating Measures Are No Longer Considered in Assessing Disability

- **Sleep problems assessed without considering sleep medication** - *Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488 (2008)
- **Hearing aids not considered** - *Godfrey v. New York City Transit Authority*, 2009 WL 3075207 (E.D.N.Y. Sep. 23, 2009).
- **Prosthetics no longer considered** - *E.E.O.C. v. Burlington Northern & Santa Fe RR Co.*, 621 F. Supp. 2d 587 (W.D. Tenn. June 3, 2009).
- **ADHD must be considered without Adderall medication** - *Geoghan v. Long Island R.R.*, 2009 WL 982451 (E.D.N.Y. Apr. 9, 2009).
- **Side effects from medical treatment may be considered** as potentially negative side effects of medical treatment as side effects from medication may themselves constitute an impairment under the ADA - *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3d Cir. 2010).

## “Regarded As” Claims

- Courts agree - proof of an actual or perceived impairment is sufficient.
- No longer a requirement that the impairment be limiting in any way (either actually or perceived). See, e.g., *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 566 (6th Cir. 2009).
- Under the ADAAA, and “contrary to *Sutton*, an individual who is ‘regarded as having... an impairment’ is not subject to a functional test.” - *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010).
- “Congress dramatically expanded the reach of the ADA by protecting individuals who are ‘regarded as’ having a disabling impairment even when the impairment neither is, nor is perceived to be, substantially limiting.” - *Brooks v. Kirby Risk Corp.*, 2009 WL 3055305, at \*3 (N.D. Ind. Sep. 21, 2009).
- Prior “regarded as” case law is superseded by the ADAAA. - *Loperena v. Scott*, 2009 WL 1066253 (M.D. Fla. Apr. 21, 2009).

## List of Specific Disabilities

### ***Horgan v. Simmons*, 2010 WL 1434317 (N.D. Ill. April 12, 2010)**

- **Court:** Noted NPRM lists HIV as an impairment that consistently meets the definition of disability.
  - ❖ “It is 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.”
  - ❖ “Such a conclusion is consistent with the EEOC’s proposed regulations to implement the ADAAA which lists HIV as an impairment that will consistently meet the definition of disability.”
  - ❖ Also noted that HIV may substantially limit the major bodily function of the immune system.

### ***Geoghan v. Long Island R.R.*, 2009 WL 982451 (E.D.N.Y. Apr. 9, 2009)**

- **Court:** ADAAA is intended to cover people with ADHD.

## The New Standards in the ADAAA Also Apply to the Rehabilitation Act

### ***Franchi v. New Hampton School*, 656 F. Supp. 2d 252 (D.N.H. 2009)**

- The ADAAA applies to Rehabilitation Act claims, and in the absence of contrary argument by the defendant, to the Fair Housing Act as well.

## The ADAAA's Effect on State Law

### ***Damron v. Butler County Children's Services*, 2009 WL 5217086, at \*10 n.14 (S.D. Ohio Dec. 30, 2009)**

- "It is yet unclear whether federal caselaw applying the ADAA will also be applicable to the analysis of Ohio law disability discrimination claims or whether disability claims under Ohio law will continue to be analyzed using the pre-amendment standards."
- Some states have amended their own statutes to track the ADAAA, e.g., Tex. H.B. 978, 81st Leg., R.S. (2009).
  - ❖ It is unclear if such amendments are necessary if case law already required conforming state law to the ADA. See *Munoz v. Echosphere, L.L.C.*, 2010 WL 2838356, at \*10 (W.D. Tex. July 15, 2010).

## The ADAAA's Effect on State Law

- Some courts appear to assume that state laws that follow ADA guidance will conform to the ADAAA.
- ADAAA standards apply under Mass. state law based on state-law precedent rejecting *Sutton* and adopting more liberal disability standard. - *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, (D. Mass. 2010); See also, *Medlin v. Springfield Metro. Hous. Auth.*, 2010 WL 3065772, at \*7, n.5 (Ohio App. Aug. 6, 2010).
- **Note:** Some state laws may explicitly mirror federal law or set federal law as a minimum standard to be followed.

## Effect on Pleading Standards

### The expanded definition of disability makes compliance with federal pleading rules easier.

See Rule 12 of the Federal Rules of Civil Procedure

- “It is 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.” *Horgan v. Simmons*, 704 F.Supp.2d 814, 819 (N.D. Ill. April 12, 2010).
- “Here, the facts viewed in the light most favorable to Gil establish a plausible allegation that Vortex believed him to be disabled, and terminated him as a result.” *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 239–240 (D. Mass. 2010).
- However, a plaintiff must still allege the major life activities that were substantially limited. *Broderick v. Research Foundation of State University of New York*, 2010 WL 3173832 (E.D.N.Y. Aug. 11, 2010).

## Does the ADA Amendments Act Apply Retroactively?

- The U.S. Supreme Court has held that generally, statutes are *not* applied retroactively. The reasoning is that it is unfair to hold a defendant liable for a standard that is articulated after the alleged violation occurred. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298 (1994).
- All courts that have looked at this issue so far have held that the ADAAA, as a general matter, does not apply retroactively. See e.g., *Nyrop v. Indep. Sch. Dist. No. 11*, \_\_\_ F.3d \_\_\_, 2010 WL 3023665, at \*4 n.4 (8th Cir. Aug. 4, 2010); *Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33 n.7 (1st Cir. 2010); *Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255, 1261 n.2 (10th Cir. 2009) (implicitly finding no retroactivity).

## Does the ADA Amendments Act Apply Retroactively?

### **Exception:**

***Jenkins v. National Board of Medical Examiners, 2009 WL 331638 (6<sup>th</sup> Cir. Feb. 11, 2009)***

- Plaintiff had a reading disorder and was seeking an accommodation of additional time on a medical licensing examination.
- **Trial court:** Relying on previous Supreme Court precedent, the trial court found that the plaintiff did not have an ADA disability.
- **Appellate Court:** ADAAA may be applied retroactively when the plaintiff was only seeking prospective injunctive relief, as opposed to monetary damages per Supreme Court precedent.
  - ❖ Rather than seeking damages for some past act of discrimination, the plaintiff was seeking the right to receive an accommodation on a test that will occur in the future, well after the ADAAA's effective date.

## Does the ADA Amendments Act Apply Retroactively?

### **Possible Exception:**

***Michael M. v. Board of Educ. of Evanston Tp. High School Dist. No. 202, 2009 WL 2258982, at \*3 (N.D. Ill. July 29, 2009)***

- Student and School disputed whether the student was entitled to a reasonable accommodation under Section 504 and the ADA due to his ADHD.
- Student filed this lawsuit, appealing a decision from a Section 504 hearing that found in favor of the School.
- Student sought a court order compelling Defendants to immediately convene a meeting in order to determine a student's eligibility for Section 504 accommodations under the ADAAA.
- **Court:** Denied School's motion to dismiss, suggesting that it allowed retroactive application of the to determine student's future eligibility for § 504 accommodations under the ADAAA.

## Does the ADA Amendments Act Apply Retroactively?

### Several courts have distinguished *Jenkins*.

- Retroactive application is not warranted when the focus of the plaintiff's complaints were on the employer's past conduct. *Nyrop v. Independent School Dist. No. 11*, 2009 WL 961372 (D. Minn. April 7, 2009); *Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255 (10th Cir. 2009).
- **Courts have occasionally consulted the ADAAA in other cases.**
  - ❖ "While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions." *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 862 (9th Cir. 2009).
  - ❖ Bowel functioning is a major life activity. - *Green v. American University*, 647 F. Supp. 2d 21(D.D.C. 2009).
  - ❖ Concentrating is a major life activity. - *Geoghan v. Long Island R.R.*, 2009 WL 982451(E.D.N.Y. Apr. 9, 2009).

## Does the ADA Amendments Act Apply Retroactively?

Similarly, there are a few cases that seem to follow ADAAA standards without expressly finding retroactivity.

### ***Quinones v. Potter*, 661 F.Supp.2d 1105, 1119 (D. Ariz. 2009)**

- The definition of "disability" and "substantially limits" are "to be broadly construed."
- Plaintiff raised a genuine issue that she was substantially limited in lifting a, given that she can only lift between 5 and 20 pounds, and restricted in the continuous and repetitive overhead use of her arms.

### ***Franchi v. New Hampton School*, 656 F. Supp. 2d 252 (D.N.H. 2009)**

- A person with an eating impairment is covered under the ADA.

## ADA Litigation Post – ADAAA

- As courts now recognize that most plaintiffs will more easily meet the definition of disability, the focus of the courts' inquiry in ADA cases will be on whether covered entities have met their legal obligations under the ADA – as Congress intended.
- Issues that have been occasionally litigated
  - ✦ Qualified (including essential job function issues)
  - ✦ Direct threat
- Issues that have been rarely litigated:
  - ✦ “Undue hardship”

## ADA Litigation Post – ADAAA

- May be litigation over deference given to the EEOC's interpretation.
  - ✦ NPRM includes additional an major life activity (interacting with others)
  - ✦ NPRM also adds major bodily functions (musculoskeletal, genitourinary, cardiovascular, and other systems).
- May be litigation over activities not listed in ADAAA or NPRM
  - ✦ Sexual Relations
  - ✦ Driving
  - ✦ Commuting
- May be litigation over listing of mitigating measures.
  - ✦ NPRM includes “surgical interventions, except for those that permanently eliminate an impairment.” 29 C.F.R. § 1630.2(j)(3)(ii)(E), 74 Fed. Reg. at 48441.



Thank you for your attention  
today

## Litigation under the ADA Amendments Act

## General ADA Resources

- **National Network of ADA Centers:** [www.adata.org](http://www.adata.org);  
800/949 –4232(V/TTY)
- **Equal Employment Opportunity Commission (EEOC):**  
[www.eeoc.gov](http://www.eeoc.gov)
- **Equip For Equality:** [www.equipforequality.org](http://www.equipforequality.org); 800/537-  
2632 (Voice); 800/610-2779 (TTY)
- **Job Accommodation Network:** <http://askjan.org>



Thank you for Participating In  
Today's Session

**Next Legal Webinar:**  
**November 10, 2010**  
**Service Animals and the ADA**



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## Litigation under the ADAAA

The End

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