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Legal Issues Webinar Series**

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1



**The Litigation Landscape
Three Years after the Passage
of the ADAAA**

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2

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- **This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.**
- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**
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- **This slide will be repeated at the end.**

Overview



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

The ADAAA, the EEOC Regulations and Subsequent Litigation

Query: How many participants today are -

- A. Advocates for people with disabilities
- B. Represent employers or other covered entities
- C. Innocent, unbiased bystanders

Broad Interpretation of the Definition of Disability – ADAAA

- ADAAA: 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) – definition “needs to be interpreted strictly to create a demanding standard,” looking at activities of “central importance to daily life.”
 - ❖ *Sutton Trilogy* – held mitigating measures should be taken into account when assessing “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).

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.”

Courts Agree Congress Broadened the Definition of Disability

Markham v. Salina Concrete Prod., Inc., 2011 WL 5093769 (D. Kan. Dec. 8, 2010)

“Congress expressed its explicit intent that ‘definition of a disability should be construed in favor of broad coverage to maximum extent permitted.’”

Gesegnet v. J.B. Hunt Trans., Inc., 2011 WL 2119248 (W.D. Ky. May 26, 2011)

“Given the broad definition of disability Congress intended, the Court will assume that Plaintiff has a disability under the ADAAA.”

Naber v. Dover Healthcare Assocs., Inc., 765 F. Supp. 2d 622, 646 (D. Del. 2011)

Recognizing that the “ADAAA provides that the definition of a disability ‘shall be construed in favor of broad coverage of individuals.’”

Case on Expanded Coverage under the ADAAA

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.

Case on Expanded Coverage under the ADAAA

Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. July 13, 2011)

- Employee claimed violation of ADA when his employer terminated him shortly after he disclosed a back condition.
- **Court:** “Under the less restrictive standards of the ADAAA, plaintiff has offered sufficient evidence to raise a genuine issue of fact as to whether he [had a disability] at the time of his termination.”
- Impairment duration not too short to qualify as a disability. No strict durational requirement under “actual disability” prong.
- Plaintiff’s ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu. [29 C.F.R. pt. 1630.2, app. § 1630.2\(l\)](#).

Broad Interpretation “Substantially Limits” – ADAAA

- “**Substantial limitation**,” must be construed as **broadly** as possible.
- Rejects prior EEOC Title I definition of “substantially limits” as “significantly restricted.”
 - ❖ Now, “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity...”
 - ❖ Evidence as to condition, manner, and duration may be relevant in some cases, but is not necessary in every case.
- Substantial limitations are measured against “most people in the general population,” rather than an “average person.”
 - ❖ “the comparison... may be made using a common-sense standard, without resorting to scientific or medical evidence.”
 - ❖ EEOC: “more ADA cases will focus on whether discrimination ... occurred.”

See 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630; 29 C.F.R. §§ 1630.1(c)(4); 1630.2(j)(1)(4); *EEOC Questions and Answers for the Final Rule Implementing the ADA Amendments Act of 2008*, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

Substantial Limitation Case Interpretations

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.
Carmona v. Southwest Airlines Co., 604 F.3d 848 (5th Cir. 2010)
- **Court:** 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.
Gibbs v. ADS Alliance Data Systems, Inc., 2011 WL 3205779 (D. Kan. July 28, 2011)
- **Court:** Genuine issue as to whether plaintiff’s carpal tunnel syndrome constitutes a disability. Condition affected plaintiff’s ability to perform manual tasks and under ADAAA inquiry about substantial limitation is not meant to be ‘extensive’ or demanding.

Substantial Limitation Case Interpretations

Eldredge v. City of St. Paul,
2011 WL 3609399 (D. Minn. Aug. 15, 2011)

- Plaintiff with permanent, progressive eye disease causing small blind spot negatively impacting central visual acuity was substantially limited in seeing

Pridgen v. Department of Public Works/Bureau of Highways,
2009 WL 4726619 (D. Md. Dec. 1, 2009)

- Under ADAAA, a person who has lost sight in one eye but retains full use of his other eye is disabled. Disability is to be construed “in favor of broad coverage.”

Episodic Conditions and Those in Remission are Covered

- **ADAAA & EEOC Regulations:** Impairments that are episodic or in remission are disabilities if they substantially limit a major life activity when active.
- Appendix for EEOC Regulations includes a non-exclusive list of impairments that may be episodic: “epilepsy, hypertension, diabetes, asthma, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, schizophrenia, and post-traumatic stress disorder.”

42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii);
29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii)

Episodic Impairments Can Be Substantially Limiting

Kinney v. Century Services Corp., Simmons, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)

- Employee requested leave to receive in-patient treatment for depression
- Supervisor said employee was “overreacting” and that “people get sad all the time” and “why do you need to go somewhere for it?”
- Employee not allowed to return from leave, and ultimately terminated.
- **Court:** Applied ADAAA and held that employee had raised question of fact that she has disability and rejected employer’s claim that her “isolated bouts” with depression did not constitute an ADA disability. Court found that an impairment that is “episodic or intermittent” can be an ADA disability if it substantially limits a major life activity when active.

Episodic Impairments Can Be Substantially Limiting

Feldman v. Law Enforcement Assocs. Corp., 2011 WL 891447 (E.D.N.C. Mar. 10, 2011)

- Two former employees alleged ADA violations.
- **Court:** Plaintiff with multiple sclerosis is covered by the ADA.
- “ADAAA clearly provides that ‘an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.’”
- Because none of the parties disputed that MS, when active, constitutes a disability, this court found plaintiff had sufficiently stated a claim that under the ADAAA.
- The court also cited EEOC’s proposed regulations that listed multiple sclerosis as an “impairment that will consistently meet the definition of a disability.”

Episodic Impairments Can Be Substantially Limiting

Medvic v. Compass Sign Co., LLC,
2011 WL 3513499 (E.D. Pa. Aug. 10, 2011)

Court finds that stuttering substantially limiting when active

Norton v. Assisted Living Concepts, Inc.,
2011 WL 1832952, at *8 (E.D. Tex. May 13, 2011)

“... the court finds that renal cancer, when active, ‘substantially limits’ the ‘major life activity’ of ‘normal cell growth.’ Therefore, that Norton may have been in remission when he returned to work at ALC is of no consequence.”

EEOC: No minimum duration period for “actual” or “record of” disability cases

- The EEOC’s regulations found that impairments that are “transitory and minor” will not be recognized under the “regarded as” prong of disability. (see Slide 46)
- However, the EEOC found that “transitory” part of the “transitory and minor” exception (defined as 6 months or less) does *not* apply to the “actual” or “record of” prongs of the definition of disability.
- Thus, the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting in cases brought under those two prongs.

29 C.F.R. § 1630.2(j)(1)(ix)

ADA Coverage of Impairments of Short Duration

Feldman v. Law Enforcement Assocs. Corp., 2011 WL 891447 (E.D.N.C. Mar. 10, 2011)

- **Employer:** Plaintiff with transient ischemic attack (TIA, or a 'mini-stroke') not is covered by the ADA because of its temporary nature, relying on EEOC's proposed regulations which stated that "Temporary, non-chronic impairments of short duration with little or no residual effects ...usually will not substantially limit a major life activity."
- **Court:** Plaintiff with TIA is covered by ADA. "TIA 'produces stroke-like symptoms[,] ... As a result, the court finds that a TIA is not comparable to a common cold, a sprained joint, or any other of the examples listed in the proposed EEOC regulations."

ADA Coverage of Impairments of Short Duration

Patton v. eCardio Diagnostics LLC, 2011 WL 2313211 (S.D. Tex. June 9, 2011)

- Employee filed FMLA suit claiming employer terminated her in retaliation for taking time off to care for her daughter who broke her femurs in car accident.
- **Employer:** Daughter's broken femurs did not "substantially limit" her in the major life activity of walking because she was unable to walk for only a few months, relying on pre-ADAAA cases that "temporary, non-chronic impairments generally do not constitute disabilities."
- **Court:** In the spirit of the ADAAA, the intensity of the plaintiff's broken femurs (she could not walk unassisted and used a wheelchair for a number of weeks) allowed the FMLA case to proceed, despite the temporary nature of the impairment.

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	

“New” Major Life Activities


In ADAAA (and previously not identified by EEOC):

- reading
- bending
- communicating

In EEOC Regulations but not in text of ADAAA:

- interacting with others
- reaching
- sitting


Neither list of major life activities in the ADAAA or regulations is exhaustive


23

New Category: Major Bodily Functions

<u>In ADAAA</u>		<u>Added in Regulations</u>
immune system	neurological	special sense organs & skin
normal cell growth	brain	genitourinary
digestive	respiratory	cardiovascular
bowel	circulatory	hemic
bladder	endocrine	lymphatic
reproductive functions		musculoskeletal
		individual organ operation

Lists are not exhaustive - no negative implication by omission


24

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 to identify a major life activity.

Courts Have Applied The 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 ADA 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 The Expanded List of “Major Life Activities”

Norton v. Assisted Living Concepts, Inc., 2011 WL 1832952 (E.D. Tex. May 13, 2011)

- **Issue:** Is renal cancer a disability after the ADAAA?
- **Court:** “Normal cell growth” now constitutes a major life activity. The EEOC’s regulations list cancer as an impairment that will “in virtually all cases, result in a determination of coverage ... because it substantially limits the [major life activity] of normal cell growth.”
- Based on this line of reasoning, the court held unequivocally that “Norton’s renal cancer qualifies as a disability even if the only ‘major life activity’ it ‘substantially limited’ was ‘normal cell growth.’” (Note: this case also illustrates that plaintiffs only have to identify one major life activity for ADA coverage.)

Courts Have Applied The Expanded List of “Major Life Activities”

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

- “No longer any dispute ‘sleeping’ and ‘thinking’ are major life activities.”

Chalfont v. U.S. Electrodes, 2010 WL 5341846 (E.D. Pa. Dec. 28, 2010)

- Under ADAAA, leukemia and heart disease substantially limited plaintiff’s normal cell growth and circulatory functions.

Courts Have Applied The Expanded List of “Major Life Activities”

Meinelt v. P.F. Chang’s China Bistro, Inc.,
2011 WL 2118709 (S.D. Tex. May 27, 2011)

- “Normal cell growth” established coverage for person with a brain tumor.

Seim v. Three Eagles Communications, Inc.,
2011 WL 2149061 (N.D. Iowa June 1, 2011)

- Graves’ Disease and medication side effects substantially limited major bodily functions of the immune, circulatory and endocrine systems.

EEOC: Impairments that easily should be found to be substantially limiting

Deafness	Diabetes
Blindness	Epilepsy
Mobility impairments requiring use of a wheelchair	HIV Infection
Intellectual disability	Multiple Sclerosis
Partially or completely missing limbs	Muscular Dystrophy
Autism	Major Depressive Disorder
Cancer	Schizophrenia
Cerebral Palsy	Bi-Polar Disorder
	OCD
	PTSD

29 C.F.R. §§1630.2(j)(3)(iii)

Case applying EEOC list of Impairments that easily should be found to be substantially limiting

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.

Case with Major Life Activity not Listed in ADAAA or Regulations

Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. July 13, 2011)

- Plaintiff with back impairment argued substantial limitation in major life activity of “climbing stairs”
- **Court:** “Even if [a court] were to find that climbing stairs is not a major life activity, Plaintiff’s inability to walk more than ten or twenty yards at a time easily passes muster under the more inclusive standards of the ADAAA.”
 - ❖ “[W]hether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance in daily life.’”
- **Note:** Analysis is consistent with the spirit of the ADAAA and allows the focus of a case to be on the actions of the defendant, rather than on the medical condition of the plaintiff.

ADAAA: Mitigating Measures are Not Considered in Assessing Disability



- 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 \(iii\).](#)

Additional Mitigating Measures Examples EEOC Regulations and Guidance

- In addition to the examples listed in the ADAAA, EEOC regulations identified three additional examples of mitigating measures: psychotherapy, behavioral therapy, and physical therapy.
[29 C.F.R. § 1630.2\(j\)\(5\)\(v\).](#)
- EEOC guidance on mitigating measures also includes: assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test; a regimen of medicine, exercise and diet; and dialysis.
[29 C.F.R. Part 1630 App., § 1630.2\(j\)\(1\)\(v\); 29 C.F.R. Part 1630 App., §1630.2\(j\)\(1\)\(vi\); 76 Fed. Reg. at 16982.](#)
- **Note:** Surgical interventions were originally included in proposed regulations as a mitigating measure, but not included in the final regulations.

Additional info about Mitigating Measures – EEOC Regulations and Guidance

- Negative side effects of mitigating measures may be considered in assessing disability, even though the mitigating measure itself cannot be considered.
- The availability of mitigating measures has no bearing on whether the impairment substantially limits a major life activity for individuals who do not use a mitigating measure that could alleviate the effects of an impairment
- Benefits of mitigating measures may be considered in showing ability to perform essential job functions.

29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi)

Cases Applying ADAAA: 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.”

Cases Applying ADAAA: 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).

Cases Applying ADAAA: Mitigating Measures Are No Longer Considered in Assessing Disability

- **Side effects from medical treatment may be considered** - *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3d Cir. 2010).
- **Leg brace would not be considered for post-ADAAA claims** - *Kintz v. United Parcel Serv., Inc.*, 766 F. Supp. 2d 1245, 1253 (M.D. Ala. 2011)
- **Stuttering substantially limiting, without considering alleviating medication** - *Medvic v. Compass Sign Co., LLC*, 2011 WL 3513499 (E.D. Pa. Aug. 10, 2011)
- **Low vision device would not be considered for post-ADAAA claims** - *Edwards v. Marquis Companies I, Inc.*, 2009 WL 2424670 (D. Or. Aug. 6, 2009)

More Case Law on Mitigating Measures

- **Negative medication side-effects** - may be considered when determining substantial limitation. *Seim v. Three Eagles Communications, Inc.*, 2011 WL 2149061 (N.D. Iowa June 1, 2011) (sufficient evidence that Graves' disease and its medication side effects substantially limited various major life activities). 29 C.F.R. § 1630.2(j)(4)(ii); 29 C.F.R. Part 1630 App., § 1630.2(j)(4), EEOC Q&A, *supra*, Question 15
- **Ordinary eye glasses are not mitigating measures/low vision devices are mitigating measures** - *Eldredge v. City of St. Paul*, 2011 WL 3609399 (D. Minn. Aug. 15, 2011) (magnifiers are mitigating measures, so do not take into account when assessing disability); 42 U.S.C. § 12102(4)(E)(i)(I); 29 C.F.R. § 1630.2(j)(5)(i)

“Regarded As” - ADAAA

- ADAAA broadens coverage under the “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.”
- **Exception:** Impairments that are “both transitory (lasting or expected to last for six months or less) and minor.”
- No **reasonable accommodations** for people who are only covered under the “regarded as” prong.

“Regarded As” – EEOC Regulations

- **EEOC:** Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.

29 C.F.R. §1630.2(g)(3)

Cases Interpreting “Regarded As” Under the ADAAA

- 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). *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 566 (6th Cir. 2009).
- Now 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).
- ADA protects “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 (N.D. Ind. Sep. 21, 2009).
- “Defendant relies upon cases applying the much narrower, pre-ADAAA definition of “regarded as” disabled, which are not relevant.” - *Dube v. Texas Health and Human Services Com’n*, 2011 WL 3902762 (W.D. Tex. Sept. 6, 2011)

Cases Interpreting “Regarded As” Under the ADAAA

Lowe v. American Eurocopter, LLC, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010)

- Plaintiff who was obese claimed she was discriminated under ADA under the “regarded as” prong of disability.
- **Court:** Based on the substantial expansion of coverage by the ADAAA, defendant's assertion that plaintiff's weight cannot be considered a disability is misplaced.
- Under the ADAAA, plaintiff is not required to demonstrate that the disability she is regarded as having is an actual qualified disability under the ADA or that it substantially limits a major life activity.
- Thus, a plaintiff now might be covered by ADA due to obesity if her employer *perceived* her weight as an impairment.”

Cases Interpreting “Regarded As” Under the ADAAA

Fleck v. WILMAC Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011)

- Plaintiff with ankle injury claimed she was discriminated by employer who regarded her as having a disability.
- **Court:** For regarded as claim, ADAAA de-emphasizes employer's beliefs as to the severity of a perceived impairment,
- The fact that the plaintiff wore a plainly visible boot, that she notified her employer of her need for ankle surgeries, and that she notified her employer that she would need breaks when returning to work raised a plausible inference that defendant regarded plaintiff as disabled within the meaning of the ADAAA.

Cases Interpreting “Regarded As” Under the ADAAA

Cohen v. CHLN, Inc., 2011 WL 2713737 (E.D. Pa. July 13, 2011)

- Terminated employee claimed various ADA violations, including claim based on employer regarding him as having a disability.
- **Court:** Employer’s motion for summary judgment is denied
 - ❖ Employee used a cane, had visible struggles with walking, occasionally doubling over with pain, and discussed his back ailment with the employer in the months leading to his termination.
- Pursuant to the broadened standards of the ADAAA, the Court found such evidence sufficient to allow a jury to conclude that employee was regarded as having an ADA disability.

“Regarded As” – Transitory and Minor Defense

“Regarded As” Exception –

- Although “regarded as” only requires a real or perceived impairment, the impairment cannot be something that is both “transitory” and “minor.” This is a defense, and must be determined objectively. 29 C.F.R. § 1630.15(f); *Dube v. Texas Health and Human Services Com’n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011).

Burden of Proof –

- Plaintiff does not have the burden of proof on this defense, but can defeat it by showing that the impairment was non-transitory or was more than minor. Compare *Dube* at *4–5 (denying motion to dismiss in light of pleading “serious health condition;” fact that plaintiff would be off work less than six months does not mean impairment did not last longer).

“Record Of” – ADAAA & EEOC Regulations

- **ADAAA:** No explicit changes for “record of” prong
- **EEOC Regulations:** Make it clear that
 - ❖ “Record of” prong should be construed broadly and may apply to a misclassification. [29 C.F.R. § 1630.2\(k\)\(2\)](#)
 - ❖ A “record of” disability can support a failure-to-accommodate claim. [29 C.F.R. § 1630.2\(k\)\(3\)](#)
 - ❖ The six-month “transitory” part of the “transitory and minor” exception does not apply to the “record of” prong [29 C.F.R. § 1630.2\(j\)\(1\)\(ix\)](#)

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.

Case Confirming 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.

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** : ADAAA does not apply retroactively - “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).

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Exception:

Jenkins v. National Board of Medical Examiners, 2009 WL 331638 (6th 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.

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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.

The ADAAA's Effect on State Law

Damron v. Butler County Children's Services,
2009 WL 5217086, (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 (W.D. Tex. July 15, 2010).

The ADA's Effect on State Law

- Some courts appear to assume that state laws that follow ADA guidance will conform to the ADA.
- ADA 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.

ADA 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).

ADAAA Effect on Pleading Standards


- Although plaintiff did not explicitly identify her disability nor the major life activity impacted, she did plead serious injuries requiring more than six months leave, restrictions on lifting and limited motions affecting her ability to work, and the receipt of short and long-term disability benefits; that was sufficient to plead a physical impairment that substantially limited working) [Coffman v. Robert J. Young Co., Inc.](#), 2011 WL 2174465 (M.D. Tenn. June 1, 2011)
- Pleading standard on disability should be easier under ADAAA; "[h]ere, 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)

Looking Ahead: 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 or rarely litigated
 - ❖ Qualified (including essential job function issues)
 - How relevant is a broad or dated job description?
 - How much deference should be given to an employer's determination?
 - When does the need for leave make an individual unqualified?
 - ❖ Direct threat
 - ❖ Undue hardship
 - When can cost alone constitute an undue hardship?

Looking Ahead: ADA Litigation Post – ADAAA

- May be litigation over deference to the EEOC.
 - ❖ Regs include an additional major life activity - interacting with others
 - ❖ Regs also add major bodily functions (musculoskeletal, genitourinary, cardiovascular, and other systems).
- May be litigation over activities not listed in ADAAA or Regs
 - ❖ Sexual Relations
 - ❖ Driving
 - ❖ Commuting
 - ❖ Surgical interventions (originally included in NPRM as a mitigating measure, but not included in the final regulations).

 59



Thank you for your attention
today

Litigation under the ADA
Amendments Act


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60

General ADA Resources

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

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- **Illinois attorneys interested in obtaining continuing legal education credit should contact Barry Taylor at:**
barryt@equipforequality.org



Thank you for Participating In
Today's Session

**Keep an eye out for the new schedule!
It will be posted some time in October at
<http://ada-audio.org/Webinar/ADALegal/Schedule/>**

