

Special Feature

The EEOC's Regulations Implementing the ADAAA: Expanding Coverage Under the "Disability" Definition

*Amy L. Allbright, J.D.

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the Americans with Disabilities Act Amendments Act of 2008 (ADAAA),¹ which was enacted on September 25, 2008 and became effective on January 1, 2009. The Act made a number of significant changes to the Americans with Disabilities Act's (ADA) "disability" definition, "reinstating a broad scope of protection under the ADA."² In keeping with this purpose, the EEOC states that "the definition of 'disability' shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA."³ Of particular note, the agency emphasizes the "primary object of attention in [ADA] cases . . . should be whether the covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability . . . , [a question] which should not demand expansive analysis."⁴ This article discusses the EEOC's regulations, as well as its *Interpretive Guidance on Title I of the Americans With Disabilities Act (Interpretive Guidance)*.

Disability Defined

The ADAAA retained the ADA's three-prong definition of "disability," but "altered the interpretation and application of this critical statutory term in fundamental ways."⁵ "Disability" means:

- (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (ii) A record of such an impairment; or
- (iii) Being regarded as having such an impairment . . . , mean[ing] that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."⁶

The new regulations refer to the first prong as the "actual disability" prong.⁷ In addition, they clarify that cases involving applicants or employees who are not challenging a covered entity's failure to accommodate and do not require reasonable accommodations can be evaluated solely under the "regarded as" prong.⁸

Physical or Mental Impairment

Neither the ADA nor the ADAAA defined "physical or mental impairment."⁹ The regulations' definition of the term is almost

identical to that found in the regulations implementing §504 of the Rehabilitation Act¹⁰: "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . or [a]ny mental or psychological disorder. . . ." ¹¹ However, the EEOC adds the immune and circulatory systems to the non-exhaustive list of body systems that may be affected by an impairment, as these systems are specifically mentioned in the ADAAA's examples of major bodily functions, and replaces the term "intellectual disability" for "mental retardation. Excluded from the definition of "impairment" are physical characteristics, such as hair and eye color, height, and weight, that do not result from a physiological disorder; "characteristic predisposition to illness or disease"; pregnancy, which also does not result from a physiological disorder; "common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder"; "[e]nvironmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record"; and "advanced age."¹² However, the numerous medical conditions that are commonly associated with advanced age—such as hearing loss, osteoporosis, or arthritis—constitute impairments.¹³ Also, pregnancy-related impairments, such as gestational diabetes, may constitute an actual disability if they substantially limit a major life activity or a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if they are the basis for a prohibited employment action and are not "transitory and minor."¹⁴

Major Life Activities

The regulations add to the ADAAA's non-exhaustive list of major life activities interacting with others, sitting, and reaching, as well as the major bodily functions of special sense organs and skin, cardiovascular, hemic, lymphatic, and musculoskeletal, which are listed in the regulations' definition of "impairment."¹⁵ The regulations also provide that the "operation of a major bodily function includes the operation of an individual organ within a body system,"¹⁶ such as the kidney, liver, or pancreas. Moreover, the regulations specify that, "in determining other examples of major life activities, the term 'major' must 'not be interpreted strictly to create a demanding standard for disability,'" ¹⁷ and reject the definition of "major life activity"¹⁸ set forth by the U.S. Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*—"activities that are of central importance to most people's daily lives."¹⁹ Accordingly, the numerous tasks associated with the major life activity of performing manual tasks—tasks involving fine motor coordination or grasping, hand strength, or pressure—"need not constitute activities of central importance to most people's daily lives."²⁰

Substantially Limits

The regulations set forth nine rules of construction to apply when determining whether an impairment substantially limits a major life activity.²¹ First, the term must be broadly construed "in favor of

expansive coverage” and “is not meant to be a demanding standard” for qualifying as being disabled.²² Second, in making this determination, “most people in the general population”—not similarly situated persons—is the basis of comparison.²³ Moreover, to be considered substantially limiting, an impairment does not have to prevent, or significantly or severely restrict, a person from performing a major life activity.²⁴ Third, whether a person’s impairment substantially limits a major life activity is not the “primary object of attention” in ADA cases and, thus, “should not demand extensive analysis.” Rather, the focus is on whether the covered entity complied with its obligations and whether discrimination occurred.²⁵

Fourth, the “substantially limits” determination requires an individualized assessment.²⁶ Fifth, in comparing a person’s performance of major life activity to that of most people in the general population, typically, scientific, medical, or statistical evidence is not required, although may be used if appropriate.²⁷ The *Interpretive Guidance* explains that this comparison can be made with regard to learning disabilities, even though they are clinically diagnosed based, in part, on a disparity between a person’s aptitude and actual—versus expected—achievement. When compared to most people in the general population, a person with a learning disability will typically be substantially limited in learning, reading, and thinking.²⁸

Sixth, except for ordinary eyeglasses or contact lenses—“lenses that are intended to fully correct visual acuity or to eliminate refractive error”²⁹—with regard to the major life activity of seeing, the “substantially limits” determination must be made without regard to the ameliorative (positive) effects of mitigating measures,³⁰ thereby rejecting the U.S. Supreme Court’s ruling in *Sutton v. United Air Lines, Inc.*³¹ and its companion cases that corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA. Nonetheless, persons who use ordinary eyeglasses or contact lenses are not automatically excluded from coverage.³² To show that an impairment would be substantially limiting absent the ameliorative effects of mitigating measures, a plaintiff can present evidence of the limitations that he or she experienced prior to using the mitigating measures and the particular impairment’s course absent these measures.³³

The “substantially limits” determination is unaffected by whether a person chooses to forgo mitigating measures.³⁴ Nonetheless, the use or non-use of mitigating measures—including ameliorative and non-ameliorative effects—can be relevant in determining whether a person is qualified under the ADA, needs a reasonable accommodation, or poses a direct safety threat.³⁵ By contrast, non-ameliorative (negative) effects of mitigating measures may be considered in determining whether a person is substantially limited in a major life activity.³⁶ In many cases, however, consideration of these negative effects will be unnecessary.³⁷ For instance, because a person with end-stage renal disease is substantially limited in kidney function, the negative effects of dialysis need not be considered.³⁸

Seventh, impairments that are episodic or in remission constitute a protected disability if, when active, they substantially limit a major life activity.³⁹ Examples of such impairments include epilepsy, post-traumatic stress disorder, major depressive disorder, hypertension,

diabetes, and asthma.⁴⁰ Significantly, the fact that the active periods may be brief or infrequent is not relevant. “For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.”⁴¹

Eighth, an impairment need only be substantially limiting with respect to one major life activity.⁴² Finally, the definition of a “transitory” impairment—“lasting or expected to last for six months or less”⁴³—that applies as part of the “transitory and minor” defense to the “regarded as” coverage does not apply to the “actual disability” and “record of” prongs.⁴⁴ Accordingly, the effects of an impairment that last or are expected to last fewer than six months can be substantially limiting.

Regarded As Prong

The regulations provide that the determination as to whether an individual is substantially limited in a major life activity is not relevant to the “regarded as” prong.⁴⁵ The ADAAG rejected the Supreme Court’s finding to the contrary in *Sutton*.⁴⁶

Predictable Assessments

As mentioned under the regulations’ rules of construction, whether a person has a protected disability under the ADAAG is determined by an individualized assessment. Accordingly, there is no “per se” disability.⁴⁷ However, certain impairments, due to their inherent nature—and to the extensive changes made to the definitions of “major life activity” and “substantially limits”—virtually always will be covered under the “actual disability” or “record of” prongs.⁴⁸ These impairments include, but are not limited to, deafness, blindness, intellectual disability, partially or completely missing limbs or mobility impairments requiring wheelchair use, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.⁴⁹

Condition, Manner, or Duration

In determining whether an impairment substantially limits a major life activity, consideration of the condition, manner, or duration of a person’s performance of a major life activity—as compared to most people in the general population—may be useful.⁵⁰ The condition or manner may refer to: the way in which the person with an impairment performs a major life activity; how performance of that activity affects the person with an impairment (i.e., does it cause pain, shortness of breath, fatigue?); or the extent to which the major life activity, including major bodily functions, can be performed.⁵¹ Duration refers to the length of time that a person can perform, or takes to perform, a major life activity.⁵²

Of particular note, in determining whether a person is covered under the “actual disability” or “record of prongs,” “the focus is on

how a major life activity is substantially limited, and not on what outcomes an individual can achieve.”⁵³ For instance, a person with a learning disability who achieves a high level of academic success can still be substantially limited in the major life activity of learning due to the additional time or effort that he or she must spend in order to read, write, or learn, as compared to most people in the general population.⁵⁴

Mitigating Measures

The regulations provide a non-exhaustive list of mitigating measures, including medication, prosthetics, implantable hearing devices, mobility devices, assistive technology, reasonable accommodations or auxiliary aids or services, and learned behavioral or adaptive neurological modifications.⁵⁵ The regulations add “[p]sychotherapy, behavioral therapy, and physical therapy” to the list cited in the ADA.⁵⁶ The regulations distinguish ordinary eyeglasses and contact lenses, which are excluded, from low vision devices, i.e., “devices that magnify, enhance, or otherwise augment a visual image.”⁵⁷ Surgical interventions, except for those that permanently eliminate an impairment, are excluded from the list of mitigating measures.⁵⁸

Working

Because no other major life activity receives special attention in the regulations, the EEOC discusses the major life activity of working in the *Interpretive Guidance*. In most cases, in light of the expanded definition of “disability”—in particular, the inclusion of major bodily functions as “major life activities” and changes to the “regarded as” prong—individuals with disabilities will be able to establish a substantial limitation of a major life activity other than working, since impairments that substantially limit working also limit one or more other major life activities.⁵⁹ To establish a substantial limitation in working, a plaintiff must prove that his or her impairment substantially limits “his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.”⁶⁰ Being substantially limited in performing the unique aspects of a single specific job is insufficient.⁶¹ In the past, courts “imposed a complex and onerous standard” that no longer applies under the ADA.⁶² Now, to prove a limitation in a class of jobs, a plaintiff can refer to either the nature of the work that he or she is limited in performing (e.g., commercial truck driving, clerical, law enforcement, food service, or assembly line jobs), or the job-related requirements that he or she is limited in meeting (e.g., jobs that require repetitive or heavy lifting, repetitive bending or reaching, prolonged sitting or standing, extensive walking, or driving).⁶³

Record of Disability

Under the regulations a person is covered under the “record of” prong if he or she has a history of an impairment that substantially

limits a major life activity when compared to most people in the general population, or has been misclassified as having such an impairment.⁶⁴

Particularly noteworthy, the regulations clarify that a person with a “record of” disability “may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability.”⁶⁵ For instance, a person whose impairment previously substantially limited a major life activity may need leave or a schedule change to attend follow-up or “monitoring” appointments with his or her health care provider.⁶⁶

The *Interpretive Guidance* points out that persons protected under the “record of” prong often are covered under the “actual disability” prong as well.⁶⁷ This is because impairments that are episodic or in remission can be protected under the “actual disability” prong if the impairments, when active, would be substantially limiting.⁶⁸ For example, consider a person whose cancer is in remission. When active, cancer substantially limits the person’s normal cell growth. Also, the person has a history of an impairment that substantially limits normal cell growth.⁶⁹

Regarded As Disabled

Under the regulations, a person is covered under the “regarded as” prong if he or she is “subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.”⁷⁰ Accordingly, this prong requires proof of causation. Prohibited actions include the “refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.”⁷¹ A person is covered under this prong, regardless of whether “the entity asserts, or may or does ultimately establish, a defense to such action.”⁷²

However, once a person establishes coverage under this prong, he or she still must show that the covered entity discriminated “because of his or her disability.”⁷³ Although a person must prove causation for both coverage under the “regarded as” prong and for ultimate liability, “this showing need only be made once.”⁷⁴

A covered entity may challenge a claim under this prong by showing that the impairment, whether actual or perceived, is objectively both “transitory and minor.”⁷⁵ Accordingly, an entity does not defeat such a claim by asserting that it believed that an impairment was “transitory and minor,” when objectively it is not. As noted earlier, “transitory” means “lasting or expected to last six months or less.”⁷⁶ Finally, the regulations provide that persons who are only covered under the “regarded as” prong are not entitled to reasonable accommodations.⁷⁷ Consequently, the “regarded as” prong “provides a more straightforward framework for analyzing whether discrimination occurred” in those cases where the issue is not reasonable accommodations.⁷⁸

Conclusion

By expanding the definition of “disability,” the ADAAA and the EEOC’s final regulations will make it easier for persons with disabilities to show that they have a protected disability. Under the original ADA, a large percentage of employers prevailed at summary judgment in Title I⁷⁹ cases, because employees or applicants with many types of impairments—both physical and mental—were unable to meet the “disability” prong of their *prima facie* case of discrimination. The American Bar Association’s Commission of Mental and Physical Disability, in its survey of 2009 Title I cases found that, of the 339 cases—none of which were covered by the ADAAA—97.4 percent resulted in employer wins and 2.6 percent in employee wins.⁸⁰ Employers “win” if the employee’s case is dismissed for whatever reason (e.g., the employer’s motion to dismiss or for summary judgment is granted), or the employer prevails on the merits. Employees “win” only if they prevail on the merits. The percentage of employee “wins” was the third lowest among the previous surveys, all of which have been less than eight percent. This pattern of employers prevailing continues because the ADAAA does not apply retroactively to discriminatory acts that occurred prior to the Act’s effective date, January 1, 2009. Whether the ADAAA will change this pattern remains to be seen.

In addition, as a result of the expanded definition of “disability,” many more ADA claims will focus on the merits of the case, rather than the *prima facie* showing of “disability.” The regulations state: “The primary object of attention in [these] cases . . . should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability . . . The question of whether an individual meets the definition of disability should not demand extensive analysis.”⁸¹

*Amy L. Allbright, J.D., is the Managing Editor of the *Mental & Physical Disability Law Reporter*.

ENDNOTES

1. See 76 Fed. Reg., 16978, 16999 (2011).
2. 29 C.F.R. §1630.1(c)(4).
3. *Id.*
4. *Id.*
5. Appendix to Part 1630—*Interpretive Guidance on Title I of the Americans With Disabilities Act* §1630.2(g); 76 Fed. Reg. 17003, 17006 (2011).
6. 29 C.F.R. §1630.2(g)(1)(i)–(iii).
7. *Id.* §1630.g(2).
8. *Id.* §1630.2(g)(3).
9. *Interpretive Guidance, supra* note 5, at §1630.2(h); 76 Fed. Reg. at 17006.
10. 34 C.F.R. §104.3(j)(2)(i).
11. 29 C.F.R. §1630.2(h)(1)–(2).
12. *Interpretive Guidance, supra* note 5, at §1630.2(h); 76 Fed. Reg. at 17007.
13. *Id.*
14. *Id.*
15. 29 C.F.R. §1630.2(i)(1)(i)–(ii).
16. *Id.* §1630.2(i)(1)(ii).
17. *Id.* §1630.2(i)(2).
18. *Id.*
19. 534 U.S. 184, 185 (2002).
20. *Interpretive Guidance, supra* note 5, at §1630.2(i); 76 Fed. Reg. at 17008.
21. 29 C.F.R. §1630.2(j)(1)(i)–(ix).
22. *Id.* §1630.2(j)(1)(i).
23. *Id.* §1630.2(j)(1)(ii).
24. *Id.*
25. *Id.* §1630.2(j)(1)(iii).
26. *Id.* §1630.2(j)(1)(iv).
27. *Id.* §1630.2(j)(1)(v).
28. *Interpretive Guidance, supra* note 5, at §1630.2(j)(1)(v); 76 Fed. Reg. at 17009.
29. 29 C.F.R. §1630.2(j)(6).
30. 29 C.F.R. §1630.2(j)(1)(vi).
31. 527 U.S. 471 (1999).
32. *Interpretive Guidance, supra* note 5, at §1630.2(j)(1)(vi); 76 Fed. Reg. at 17010.
33. *Id.*
34. *Id.*
35. *Id.*
36. 29 C.F.R. §1630.2(j)(4)(ii).
37. *Id.*
38. *Interpretive Guidance, supra* note 5, at §1630.2(j)(4); 76 Fed. Reg. at 17012.
39. 29 C.F.R. §1630.2(j)(1)(vii).
40. *Interpretive Guidance, supra* note 5, at §1630.2(j)(1)(vii); 76 Fed. Reg. at 17011.
41. *Id.*
42. 29 C.F.R. §1630.2(j)(1)(viii).
43. *Id.* §1630.15(f).
44. *Id.* §1630.2(j)(1)(ix).
45. *Id.* §1630.2(j)(2).
46. 527 U.S. 471, 489 (1999).
47. *Interpretive Guidance, supra* note 5, at §1630.2(j)(3); 76 Fed. Reg. at 17011.
48. 29 C.F.R. §1630.2(j)(3)(ii).
49. *Id.* §1630.2(j)(3)(iii).
50. *Id.* §1630.2(j)(4)(i).
51. *Id.* §1630.2(j)(4)(ii).
52. *Id.* §1630.2(j)(4)(i).
53. *Id.* §1630.2(j)(4)(iii).
54. *Id.*
55. *Id.* §1630.2(j)(5)(i–iv).
56. *Id.* §1630.2(j)(5)(v).
57. *Id.* §1630.2(j)(6).

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58. 76 Fed. Reg. 16978, 16983 (2011) (“Supplementary Information”).
59. *Id.* at 16999, 17013.
60. *Id.*
61. *Id.*
62. *Id.* at 17013, n.3.
63. *Id.* at 17014.
64. 29 C.F.R. §1630.2(k)(1) & (2).
65. *Id.* §1630.2(k)(3).
66. *Id.*
67. *Interpretive Guidance, supra* note 5, at §1630.2(k); 76 Fed. Reg. at 17014.
68. *Id.*
69. *Id.*
70. 29 C.F.R. §1630.2(l)(1).
71. *Id.*
72. *Id.* §1630.2(l)(2).
73. *Id.* §1630.2(l)(3).
74. *Interpretive Guidance, supra* note 5, at §1630.2(l); 76 Fed. Reg. at 17015.
75. 29 C.F.R. §§1630.2(l)(2), .15(f).
76. *Id.* §1630.15(f).
77. *Id.* §1630.2(o)(4).
78. *Interpretive Guidance, supra* note 5, at §1630.2(l); 76 Fed. Reg. at 17015.
79. 42 U.S.C. §§12111-117.
80. Amy L. Allbright, “2009 Employment Decisions Under the ADA Title I—Survey Update,” 34 *Mental & Physical Disability L. Rep.* 339 (2010).
81. 29 C.F.R. §1630.1(c)(4).
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