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Journal of Poverty Law and Policy
July–August 2009
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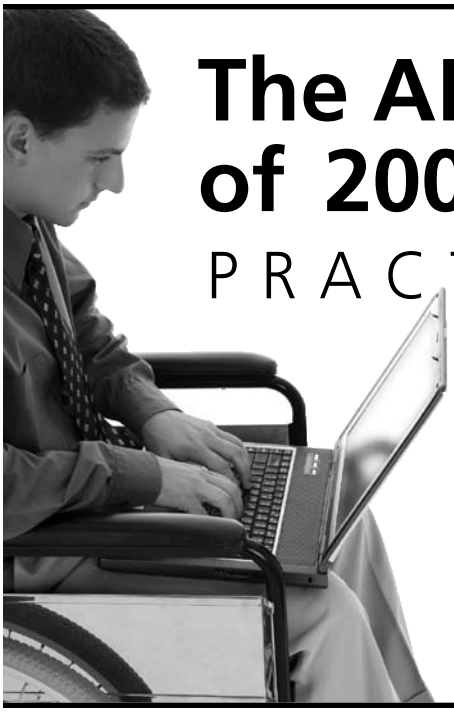

The ADA Amendments Act of 2008 and Employment: PRACTICAL STRATEGIES

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The ADA Amendments Act of 2008 expands the definition of "disability" under the Americans with Disabilities Act (ADA) and under the Rehabilitation Act of 1973.[1] Our focus here is not so much on what the new law says (about which there is already a fair amount of guidance) as on its practical effects and the practice pointers it suggests.

The ADA originally defined a "disability" as a physical or mental impairment that substantially limits one or more of the major life activities; a record of such an impairment; or being regarded as having such an impairment. The amended definition is almost identical so that, for cases involving an actual or "record of" disability, the plaintiff still needs to show a substantial limitation in a major life activity.[2] Likewise, the ADA continues to avoid any list of disabilities so that to argue that a particular condition is a disability per se, even if it may be de facto, is probably unwise because the condition will almost always satisfy the new definition.

Broadest Possible Definition

Although the definition is substantially similar to the original, the new law defines certain terms and establishes certain rules of construction that change the meaning of "disability." First, Congress now mandates that disability be construed "in favor of broad coverage … to maximum extent permitted by the terms of this Act."[3] In fact, the legislative history not only is fully consistent but also clarifies that the ADA *in its entirety*, like all remedial civil rights legislation, should be broadly construed.[4]

[1]ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3554 (2008).

[2]Note that in "regarded as" cases, however, disability may now be established simply based on a diagnosis or impairment without regard to how limiting the condition might be (as discussed below).

[3]42 U.S.C. § 12102(4)(A) (2005).

[4]See, e.g., 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (statement of managers); *id*. at S8842; 154 Cong. Rec. H8292 (daily ed. Sept. 17, 2008) (statement of Rep. Steny Hoyer); 154 Cong. Rec. H8296 (daily ed. Sept. 17, 2008) (statement of Rep. Sheila Jackson-Lee); 154 Cong. Rec. S8354 (daily ed. Sept. 11, 2008) (statement of Sen. Orrin Hatch).

This means that every element of the definition (such as "impairment," "major life activity," "substantial," "mitigating measure," and the like) must also be interpreted as broadly as possible. Older cases finding no disability are no longer good law, although prior cases finding sufficient evidence of a disability are still useful as a "floor"; in other words, plaintiffs can argue that if a particular condition satisfied the much more restrictive standard under the "old" ADA, it surely must do so under the much broader amendments.

Congress declares that a "substantial limitation" means something less than "severe" or "significant," although the term is not affirmatively defined.[5] One suggestion is to consider the conditions, manner, and duration that activities are performed—including the way they are performed and the time it takes to perform them—as compared to "most people in the general population." This language comes from the new law's legislative history, and it is generally consistent with the original ADA regulations.[6] Recent statements by the U.S. Equal Employment Opportunity Commission (EEOC) flesh out this view:

> Condition or manner … may refer to the extent to which a major life activity can be performed, the way it is performed, the effort required to perform it, or the effects on an individual of performing it. Duration refers to the length of time that a function [or activity] can be performed.… The extent to which a major life activity can be performed may also be relevant in cases involving the operation of major bodily functions such as where … diabetes diminishes a person's capacity to produce insulin.[7]

Extensive Analysis No Longer Required

Under the ADA Amendments Act the primary subject in ADA cases "should be whether [covered entities] have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[8] Even so, disability still requires admissible evidence, and in most cases that requires some form of medical evidence. That may be fairly easy to satisfy, perhaps through fairly basic medical records (assuming they are in admissible form), but to rely solely on the plaintiff's own testimony in the absence of a stipulation is still unwise because some courts have rejected such testimony on hearsay or *Daubert* grounds.[9]

Pleading Disability

On a related point, remember that ADA complaints filed in federal court may be governed by *Bell Atlantic Corporation v. Twombly*, and so take care to plead disability with sufficient specificity.[10] That may include specifically naming the im-

[5]See ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2, 122 Stat. 3553 (2008) (findings and purposes sections). The Act requires that "substantially limits" be interpreted consistently with those findings and purposes (42 U.S.C. § 12102(4)(B)).

[6]Compare 154 Cong. Rec. S8842 (statement of managers) with 29 C.F.R. § 1630.2(j)(1)(ii) (2009).

[7]See U.S. Equal Employment Opportunity Commission (EEOC), Commission Meeting of December 11, 2008—on Implementing ADA Amendments Act of 2008, http://www.eeoc.gov/abouteeoc/meetings/12-11-08/transcript.html (discussing EEOC's first-draft regulations (not yet adopted)).

[8]ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(5), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (Note)). See also 154 Cong. Rec. S8355 (daily ed. Sept. 11, 2008) (statement of Sen. Edward Kennedy: "the plaintiff's evidentiary burden is minimal").

[9]After *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), courts serve as gatekeepers to ensure that any scientific testimony or evidence is both relevant (i.e., its reasoning or methodology can be properly applied to the facts at issue) and reliable (i.e., the reasoning or methodology underlying the testimony is scientifically valid).

[10]*Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) (although detailed factual allegations are not required, mere conclusory statements are not enough; there must be sufficient facts alleged to state a relief claim that is plausible on its face).

pairment, summarizing at least some of its manifestations, listing some major life activities affected, and describing some ways in which they are limited.[11] To list all of the disability definition's applicable prongs (actual, record of, or regarded as or all three) is also advisable.[12]

Such specificity may have the advantage of yielding an early stipulation of disability in the defendant's answer, pursuant to Federal Rule of Civil Procedure 8(b)(1)(B).[13] If the answer does not include such a stipulation, seeking such a stipulation separately, or seeking an admission in discovery, makes sense.[14] Failing that, plaintiffs should now seriously consider filing a motion for partial summary judgment on disability; the motion not only simplifies the issues for trial and avoids potential juror confusion but also can have a positive effect on settlement prospects.

Mitigating Measures

Perhaps the most prominent feature of the ADA Amendments Act is its overturning of the U.S. Supreme Court's rule on mitigating measures established in *Sutton v. United Air Lines*.[15] Disability must now be assessed without considering the ameliorative effects of mitigating measures.[16]

Mitigating measures are defined very broadly, with a lengthy list of examples.[17] But that list is not exhaustive, and prior case law suggests that the term also includes examples such as blood monitoring, diet, and exercise, among others.[18]

Older cases may help in other ways, too. The *Sutton* decision itself states that when mitigating measures are not considered, "courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities."[19] There is some unofficial EEOC language making a similar point.[20]

But until the case law under the amendments is established, and in the absence of mitigating measures (on the client specifically or on persons with this impairment generally or on both), introducing medical or scientific evidence of the impact of a particular impairment on various major life activities is advisable. For example, the American Diabetes Association has a

[11]See also Joseph A. Seiner, *Pleading Disability*, 51 Boston College Law Review (forthcoming Jan. 2010).

[12]The ADA Amendments Act retains the three types of disabilities in the original Americans with Disabilities Act (ADA): actual (having a substantially limiting impairment), "record of" (having a record of such an impairment), and "regarded as" disability (being regarded as having a substantially limiting impairment), although the interpretation of the terminology has changed (42 U.S.C. § 12102). A particular impairment often satisfies more than one of these prongs.

[13]See, e.g., *Williams v. Illinois Department of Corrections*, 1999 WL 1068669, at *5 (N.D. Ill. Nov. 17, 1999); *Small v. Dellis*, 1997 WL 853515, at *3 n.3 (D. Md. Dec. 18, 1997).

[14]See, e.g., *Wright v. Illinois Department of Corrections*, 204 F.3d 727, 735 (7th Cir. 2000); *Baker v. Potter*, 294 F. Supp. 2d 33, 42–43 (D.D.C. 2003).

[15]*Sutton v. United Air Lines*, 527 U.S. 471 (1999).

[16]42 U.S.C. § 12102(4)(E)(i).

[17]*Id.*

[18]As to surgery, see *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 111–12 (5th Cir. 2005) (surgery), and *Stephenson v. United Air Lines*, 9 F.App'x 760, 763–64 (9th Cir. 2001) (unpublished) (surgery); as to blood monitoring, see *Sutton*, 527 U.S. at 483; as to diet, *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861–62 (9th Cir. 2009), and *Orr v. Wal-Mart Stores*, 297 F.3d 720, 724 (8th Cir. 2002); as to exercise, *Hayes v. Guy*, 2008 WL 2926038, at *3 (E.D. Ark. July 23, 2008), and *Carruth v. Continental General Tire*, 2001 WL 1775992, at *4 (S.D. Ill. June 21, 2001); and as to other subjects, *Prentice v. County of Lancaster, Nebraska*, 2004 WL 210641, at *4 (D. Neb. Feb. 3, 2004) ("following a routine, staying on schedule, and avoiding stress"), and *Kramer v. Hickey-Freeman Incorporated*, 142 F. Supp. 2d 555, 559 (S.D.N.Y. 2001) ("effective medical treatment").

[19]*Sutton*, 527 U.S. at 483.

[20]See *supra* note 7, discussing EEOC's first-draft regulations (not yet adopted) and pointing out that "in many instances the substantial limitations that would exist in the absence of mitigating measures would be obvious and not require much analysis."

detailed description of what happens with "unmitigated" diabetes as well as an explanation of the advantage of introducing at least some medical evidence.[21]

Although "mitigating measures" is a very broad concept, it has limits. For example, it does not include "ordinary eyeglasses or contact lenses" so that whether one's vision is substantially limited may be assessed in light of one's eyeglasses.[22] Note, however, that an employer cannot use qualification standards, employment tests, or other selection criteria based on one's uncorrected vision unless it is job-related and consistent with business necessity.[23] Thus employees and applicants who are affected by such a policy should be able to bring a qualifications-standard claim whether or not they have any disability, and in any event they are likely able to establish that they have a regarded-as disability.

Note, too, that only the *ameliorative* effects of mitigating measures are no longer considered; negative side effects of such measures are still relevant under the ADA Amendments Act and can be compelling evidence.[24] Because many plaintiffs now have the "luxury" of proving a disability in a variety of ways under the new law, not focusing on negative side effects in certain cases, however, may be advisable if such a focus invites a claim that the plaintiff is not qualified or would pose a safety risk in the workplace.[25]

Major Life Activities

One purpose of the new law is to reject the analysis in *Toyota Motor* that major life activities are only those "activities that are of central importance to most people's daily lives."[26] The statute now defines "major life activities" via a non-exhaustive list.[27] This adds several activities that may be useful. For example, "bending" is relevant in many cases involving orthopedic injuries, and "concentrating" in cases involving learning disabilities.[28] Rejecting prior Supreme Court equivocation, the statute also expressly identifies "working" as a major life activity.[29] Note, however, that in the past EEOC said that a substantial limitation in working required proof of an impact on a "class" or "broad range" of jobs, and not just on one particular job.[30] Whether EEOC, which will be revising its regulation on "substantially limits," will keep that standard is unclear. As a result, working should still be viewed as the major life activity of last resort.

Perhaps more important, "major life activities" are now also defined to include "the operation of a major bodily func-

[21]See Brian Dimmick & Katie Hathaway, American Diabetes Association, Proving Diabetes Is a Disability Under the New Americans with Disabilities Act: A Guide for Lawyers 12–16 (2009), www.diabetes.org/uedocuments/ad-adaaa-and-diabetes-feb09-final.pdf.

[22]42 U.S.C. §§ 12102(4)(E)(ii), (iii).

[23]*Id.* § 12113(c); see also 154 Cong. Rec. S8842 (statement of managers).

[24]Cf. *Branham v. Snow*, 392 F.3d 896, 903 (7th Cir. 2004) (decided under "old" ADA).

[25]One is "qualified" under the ADA if one can perform one's essential job functions with or without a reasonable accommodation (42 U.S.C. § 12111(8)). Employers may raise safety concerns under the ADA's "business necessity" and "direct threat" defenses (see *id.* § 12113(a)–(b)); *Equal Employment Opportunity Commission v. Exxon Corporation*, 203 F.3d 871 (5th Cir. 2000)).

[26]*Toyota Motor Manufacturing, Kentucky, Incorporated v. Williams*, 534 U.S. 184, 198 (2002) (interpreting definition of disability under preamendments ADA).

[27]42 U.S.C. § 12102(2)(A), as amended; see also 154 Cong. Rec. S8842 (statement of managers).

[28]Learning disabilities have been particularly difficult to prove, but the ADA Amendments Act "reject[s] the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking" (154 Cong. Rec. S8842 (statement of managers)); see also 154 Cong. Rec. H8296 (daily ed. Sept. 16, 2008) (statement of Rep. Joe Courtney); 154 Cong. Rec. H8290–H8291 (daily ed. Sep. 17, 2008) (statements of Reps. George Miller and Pete Stark).

[29]Cf. *Sutton*, 527 U.S. at 492 ("there may be some conceptual difficulty in defining 'major life activities' to include work").

[30]29 C.F.R. § 1630.2(j)(3)(i).

tion, including[,] but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[31] EEOC's unadopted draft regulations point out, for example, that "normal cell growth" applies to people with cancer, "functions of the immune system" to people who are HIV (human immunodeficiency virus)–positive, and "functions of the endocrine system" to individuals with diabetes.

Showing a substantial limitation in a bodily function may be easier just because courts are writing on a "clean slate" and are not burdened by the extensive negative case law surrounding more traditional major life activities. Again, the list of such bodily systems is not an exhaustive one; other examples may be found in the EEOC regulatory definition of the term "impairment," and preamendments case law may be a guide.[32] Note that until the new case law is more developed, plaintiffs are advised to have medical or scientific support for the identification of the bodily system and for its limitations. Of course, the term must be as broadly construed as the statute's language permits.

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.[33] Courts must be made to understand that the ability to do many things is not inconsistent with a finding of disability.[34] Otherwise the ADA would be inapplicable to those individuals most likely to have the capacity to perform various jobs if such individuals were provided with reasonable accommodations.[35]

Conditions that Are "Episodic or in Remission"

While the exclusion of mitigating measures has been well publicized, a less prominent alteration may be equally valuable. As amended, the ADA now explicitly includes impairments that are "episodic or in remission" but that would be substantially limiting if active: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[36] This rejects the approach of the *Sutton* case, which "require[d] that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."[37]

The new language is likely to be important for episodic or remitted conditions with an uncertain relationship to mitigating measures, such as remitted multiple sclerosis or depression, where, for a particular plaintiff, medication and treatments may or may not determine the extent of symptoms. As courts continue to construe the revised language of the ADA, lawyers should cite and emphasize the plain language of this provision.

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[31]42 U.S.C. § 12102(2)(B).

[32]29 C.F.R. § 1630.2(h)(1); *Heiko v. Colombo Savings Bank Federal Savings Bank*, 434 F.3d 249, 255 (4th Cir. 2006), cert. denied, 548 U.S. 941 (2006) (waste elimination); *Fiscus v. Wal-Mart Stores*, 385 F.3d 378, 384–85 (3d Cir. 2004) (eliminating waste in the blood); *Motsay v. Pennsylvania American Water Company*, 2008 WL 376298, at *2 (M.D. Pa. Feb. 11, 2008) (pumping and circulating blood); *Snyder v. Norfolk Southern Railway Corporation*, 463 F. Supp. 2d 528, 536–37 (E.D. Pa. 2006) (same); *Herman v. Kvaerner of Philadelphia Shipyard Incorporated*, 461 F. Supp. 2d 332, 336 (E.D. Pa. 2006) (cardiovascular functioning); *Bukta v. J.C. Penney Company*, 359 F. Supp. 2d 649, 664 (N.D. Ohio 2004) (secreting insulin sufficient to process blood glucose); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746–47 (N.D. Ill. 1998) (waste elimination).

[33]42 U.S.C. § 12102(4)(C).

[34]For earlier cases making this point, see, e.g., *Emory v. AstraZeneca Pharmaceuticals Limited Partnership*, 401 F.3d 174, 180–81 (3d Cir. 2005) ("The District Courts focus on what Emory has managed to achieve misses the mark."); *Belk v. Southwestern Bell Telephone Company*, 194 F.3d 946, 950 (8th Cir. 1999) (finding disability despite employer's litany of all of the activities that the plaintiff could engage in).

[35]*Finical v. Collections Unlimited Incorporated*, 65 F. Supp. 2d 1032, 1038–39 (D. Ariz. 1999).

[36]42 U.S.C. § 12102(4)(D).

[37]*Sutton*, 527 U.S. at 482.

Greatly Expanded "Regarded as" Prong

Lawyers representing persons with disabilities should plead and pursue "regarded as" discrimination whenever possible because a perceived disability now requires only a showing that a prohibited action occurred because of an actual or perceived impairment.[38] Thus "regarded as" claims no longer require any consideration of limitations or major life activities. Note that conservative practice dictates specifically pleading the "regarded as" theory in administrative and civil complaints.[39]

The expanded "regarded as" prong does not apply if the impairment is "transitory and minor."[40] A transitory impairment is defined as one "with an actual or expected duration of 6 months or less."[41] There is no definition of "minor." Note that the exception requires both elements so that the simplest way to avoid this exception is to submit medical evidence that the plaintiff's impairment lasted (or is expected to last) more than six months. If it did not last that long, the plaintiff should then submit evidence showing that the condition was more than minor, pointing out that, like other terms, "minor" must be construed to create the broadest possible coverage, and noting that the legislative history suggests that the term is intended to include only fairly inconsequential conditions.[42]

No Reasonable Accommodation Under the "Regarded as" Prong

Importantly (and resolving a split in the circuits in favor of employers) the ADA Amendments Act eliminates the right to reasonable accommodation for persons who are covered solely by the third, "regarded as" prong.[43] If affirmative changes by the employer are required by the client to work successfully, disability-rights lawyers may need to proceed under a "failure to accommodate" theory and will have to demonstrate a prong 1 or prong 2 disability.

However, lawyers should also consider whether the needed changes may be characterized as relief for "disparate impact" or "disparate treatment" discrimination.[44] For example, if an employee needs telecommuting or a flexible schedule, the lawyer may advance this claim under a garden-variety disparate treatment theory by showing that employees without disabilities are provided such benefits. If an employee needs a leave of absence longer than that provided by an employer's policy, or is barred from returning to work by a "100 percent–healed" policy, the lawyer may allege that the policy screens out persons with disabilities and must be changed absent "business ne-

[38]42 U.S.C. § 12102(3)(A). See also ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(3), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (Note)); 154 Cong. Rec. S8840, S8842 (statement of managers) ("third prong … does not require a functional test to determine whether an impairment substantially limits a major life activity").

[39]The cases are mixed on whether pleading disability generally in a civil complaint is sufficient to cover a "regarded as" disability (compare, e.g., *Riemer v. Illinois Department of Transportation*, 148 F.3d 800, 804 (7th Cir. 1998) (sufficient), with *Livingston v. Fred Meyer Stores Incorporated*, 567 F. Supp. 2d 1265, 1274–75 (D. Or. 2008) (insufficient)). Cases are similarly mixed about the sufficiency of simply referring to "disability" in an administrative charge (compare *Lara v. Unified School District* 501, 2008 WL 58870, at *4–5 (D. Kan. Jan. 3, 2008) (sufficient), with *Livingston*, 567 F. Supp. 2d at 1275 (insufficient)).

[40]42 U.S.C. § 12102(3)(B).

[41]*Id*.

[42]See H.R. Rep. No. 110-730, at 14, 18, 30 (2008); 154 Cong. Rec. H6067 (daily ed. June 25, 2008) (joint statement by Reps. Steny Hoyer and James Sensenbrenner) ("common cold"); 154 Cong. Rec. H6064 (daily ed. June 25, 2008) (statement of Rep. Jerrold Nadler) ("stomachaches, the common cold, mild seasonal allergies, or even a hangnail"); 154 Cong. Rec. H6074 (daily ed. June 25, 2008) (statement of Rep. Lamar Smith) ("trivial impairments such as a simple infected finger"); *id*. ("stomachaches, a common cold, mild seasonal allergies, or even a hangnail").

[43]42 U.S.C. § 12201(h).

[44]See *id.* §§ 12112(a), (b)(3), (b)(6); see also *Raytheon Company v. Hernandez*, 540 U.S. 44, 52–54 (2003) (reviewing theories of disability discrimination).

cessity."[45] Courts have reviewed a wide variety of employer practices under the ADA's "screen out" standard.[46] Framing the challenge in this way can reduce or eliminate the need to include an accommodation claim, thus allowing the case to proceed under the (much easier to prove) "regarded as" disability.

Similarly, if an employee needs workplace education or sensitivity training to eliminate bias, or to ensure appropriate supervisor or coworker response to events such as a seizure or to supports such as a service animal, lawyers may argue that without intervention the employee faces a hostile work environment and that the employer has an affirmative obligation to remedy and prevent harassment under Supreme Court authority.[47]

Reasonable Accommodation for "Record of" Disabilities

Under the basic rules of statutory construction, the explicit exclusion of reasonable accommodation for persons covered solely by the third prong confirms that reasonable accommodations are available for persons with a "record of" disability.[48] This clarification may assist drug addicts and alcoholics who are in recovery and who seek accommodations (such as scheduling changes to manage stress or to attend meetings) to maintain sobriety. Although coverage of recovered drug addicts or alcoholics under the first prong may now be appropriate because the mitigating measure of rehabilitation is not considered, such coverage can be counterintuitive as other statutory requirements—"qualified," no current illegal drug use, compliance with drug- and alcohol-free workplace policies, and so on—may create tension with the need to show a current substantially limiting impairment. But coverage of past addiction fits comfortably under the "record of" prong.

Regulatory Authority

The ADA Amendments Act specifically grants authority to EEOC, the U.S. Department of Justice, and the U.S. Department of Transportation to write regulations on the "disability" definition.[49] EEOC's plan to "fast-track" regulations late last year was shelved in favor of traditional rule making, which will permit disability advocates to participate through coordinated commentary. For example, advocates should urge the agency to delete the "class or broad range of jobs" language, which was never required by the ADA's terms and which contributed to the crisis preceding the amendments. Advocates should also seek helpful regulatory guidance regarding the coverage of learning disabilities by advising EEOC to track the relevant discussion in the legislative history and to apply the principles regarding "condition, manner, or duration" developed in several court opinions.[50]

Impact of the Amendments on Other Disability Rights Statutes

The 2008 legislation amends the antidiscrimination portions of the Rehabilita-

[45]See 42 U.S.C. §§ 12112(b)(6), 12113(a); cf. *U.S. Airways v. Barnett*, 535 U.S. 391, 397–98 (2002) (reviewing role of reasonable accommodation in altering "neutral" employer policies).

[46]See, e.g., *McWright v. Alexander*, 982 F.2d 222, 229 (7th Cir. 1992) (employee challenging neutral leave-of-absence rules created triable issue of fact under disparate-impact theory). See also *Cripe v. City of San Jose*, 261 F.3d 877, 889–90 (9th Cir. 2001) (officer transfer policy requiring beat-patrol service as a "qualification standard" for securing special assignment screened out disabled officers who could not perform beat duties); *Hendricks-Robinson v. Excel Corporation*, 154 F.3d 685, 699 (7th Cir. 1998) (separate criterion of "physical fitness" unrelated to job requirements tends to screen out disabled employees); *Stutts v. Freeman*, 694 F.2d 666, 669–70 (11th Cir. 1983) (written test for training program screened out applicant with dyslexia); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 309–10 (5th Cir. 1981) (physical fitness test screened out disabled veteran).

[47]See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–6 (1998) (noting that under Title VII EEOC directs employers to "take all steps necessary to prevent sexual harassment from occurring").

[48]See 2A Sutherland Statutory Construction § 47:23 (discussing the rule of *expressio unius*).

[49]42 U.S.C. § 12206.

[50]See, e.g., *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1135 (9th Cir. 2001) ("An individual who has a physical or mental impairment that causes him to take inordinately more time than others to complete a major life activity is substantially limited as to that activity under the ADA.").

tion Act of 1973 to conform its definition of "disability."[51] However, the Fair Housing Act was not explicitly amended, and whether its definition of "disability" will parallel the ADA's development remains to be seen. Another open question is the impact of the federal amendments on state disability nondiscrimination laws, most of which implicitly or explicitly track the ADA.[52]

Retroactivity

The ADA Amendments Act states that the Act "shall become effective on January 1, 2009."[53] That the new law applies to discrimination occurring on or after that date is clear. The question remains, however, whether the law applies to discrimination that occurred prior to January 1, 2009, but whose case was pending on that date. Supreme Court precedent suggests that the Act may not govern claims involving conduct that predates January 1, 2009.[54] Most courts addressing the issue said that the new law was not applied retroactively, although such statements are typically dicta because they are describing issues that were neither argued nor briefed.[55]

Note, however, that in *Jenkins v. National Board of Medical Examiners* the court pointed out that whether or not the amendments applied to *all* claims arising pre-2009, they *did* apply to claims for prospective injunctive relief.[56] Note, too, that because the ADA Amendments Act simply clarifies past misinterpretations of the ADA, courts may well consult the ADA Amendments Act in cases that are not controlled by binding precedent.[57]

Some cases may involve a "continuing violation" that began prior to the effective date of the ADA Amendments Act but continued afterward. In such cases the act or practice becomes a violation upon the effective date, "and to the extent an employer continued to engage in that act or practice, it is liable under that statute."[58] Other cases may involve discrete acts, some of which occurred before the effective date and some after; the Act should at least apply to the more recent conduct. Moreover, even if not separately actionable, a discriminatory act that "occurred before the statute was passed … may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue."[59]

Other Resources

In analyzing and briefing a case under the new Act, review the congressional findings and purposes as well as the legislative history, much of which is collected on the ArchiveADA website; the website's contents are almost all helpful.[60]

Perhaps the most important advice is to seek assistance on the best ways to estab-

[51]29 U.S.C. §§ 705(9)(B), (20)(B).

[52]See ArchiveADA, State-by-State Chart, www.law.georgetown.edu/archiveada/documents/statebystatechart--updated.pdf.

[53]ADA Amendments Act of 2008, Pub. L. No. 110–325, § 8, 122 Stat. 3553, 3559.

[54]See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Rivers v. Roadway Express Incorporated*, 511 U.S. 298 (1994).

[55]See, e.g., *EEOC v. Agro Distribution Limited Liability Corporation*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *King v. City of Madison*, 550 F.3d 598, 600 n.** (7th Cir. 2008).

[56]*Jenkins v National Board of Medical Examiners*, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (unpublished) (holding that ADA Amendments Act's disability analysis applied to request for testing accommodation on upcoming medical licensing examination).

[57]See, e.g., *Menchaca v. Maricopa Community College District*, 2009 WL 166923, at *4–6 (D. Ariz. Jan. 26, 2009). See also *Rohr*, 555 F.3d at 862 ("While we decide this case under the ADA, and not the [ADA Amendments Act], the original congressional intent as expressed in the amendment bolsters our conclusions.").

[58]See *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Title VII case); *Morton v. GTE North Incorporated*, 922 F. Supp. 1169, 1177 (N.D. Tex. 1996) (ADA).

[59]*Hazelwood School District v. United States*, 433 U.S. 299, 310 n.15 (1977) (Title VII case).

[60]See ArchiveADA, www.law.georgetown.edu/archiveada.

lish disability in your case. Many health-advocacy organizations have resources to help, as do members of the National Employment Lawyers Association or its state and local affiliates, the protection and advocacy systems in many states.

■ ■ ■

With careful attention to statutory language, legislative history, and relevant case law, lawyers representing persons with disabilities are likely to find that the ADA Amendments Act has resolved and will continue to resolve the most vexing problems posed by the word "disability." Indeed, the struggle will speedily shift to the "merits" inquiry—can the individual demonstrate discrimination made unlawful by the Act? And can the defendant disprove any required element or put forth an affirmative defense? As advocates and judges focus on merits, the next few years will likely see the further development of the law as to the meaning of the many statutory terms unrelated to "disability." Although posing many high-stakes inquiries, such attention is welcome after far too much time spent by plaintiffs' lawyers grappling with the frustrating and counterintuitive rulings on "disability."

COMMENTS?

We invite you to fill out the comment form at http://tinyurl.com/JulyAugustSurvey. Thank you.

—The Editors

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