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CONGRESS REDEFINES THE SCOPE OF DISABILITY RIGHTS UNDER THE ADA

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In September 2008, while most of America was focused on the contentious presidential election, Congress quietly passed, and President Bush signed into law, the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which are effective January 1, 2009. Without substantially altering the fundamental concepts of the Americans with Disability Act of 1990 ("ADA"), Congress decisively enlarged the rights provided by the ADA via a few simple additions and changes to key terminology. These changes will impact employers and businesses as the law was broadened to cover individuals and impairments previously excluded from the ADA's ambit, which will likely result in more costs and litigation. Although the amendments are not so substantial that employers will have to substantially change established discrimination policies, they must understand that some protections previously afforded by the courts have now been removed.

Prelude To The Amendments

The motivation behind enactment of the ADAAA stems from two landmark decisions by the United States Supreme Court and their progeny that narrowed the definition of "disability" beyond what Congress deemed to be the original intent of the ADA when it was passed in 1990. "Disability," as defined by the ADA, means a "(1) physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. § 12102. In *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), the U.S. Supreme Court interpreted what it thought Congress intended by that short, yet deceivingly complex definition.

The Court in *Sutton* was faced with the issue of whether an individual with poor visual acuity could be considered to have a disability if the individual's visual acuity was 20/20 or better when using eyeglasses or contact lenses. In affirming the lower court's dismissal of the complaint, the Court held that in determining whether a person is "disabled" under the ADA, courts should consider measures that mitigate the individual's impairment, such as eyeglasses, contact lenses, or other corrective technology. *Id.* at 488. As the Court explained, if an individual, when utilizing corrective measures, "function[s] identically to individuals without a similar impairment," then that individual is not disabled as defined by the ADA because he or she does not suffer from an "impairment that substantially limits one or more major life activities." *Id.*

The majority opinion in *Williams* further narrowed the definition of "disability," using an admittedly "demanding standard" that required "strictly interpreting" ADA terms when determining whether an individual has a qualified disability. *Williams*, 534 U.S. at 197. Applying this standard, the Court concluded that "substantially limits," as used in that Act, requires a showing that the impairment "severely restricts" or prevents performance of a major life activity. *Id.* at 197-198. In addition, "major life activities," as defined by the *Williams* Court, were held to refer only to "those activities that are of central importance to daily life." *Id.* A major life activity could consist of either one task that is independently important to daily life, or a combination of several tasks that collectively hold such importance. *Id.* Finally, the impairment must be "permanent or long-term" for it to qualify as a disability. *Id.* at 198.

While these decisions provided reasonable protection to employers in making employment decisions, they apparently drew the ire of Congress as being misguided and running contrary to the intent of the ADA, which contentions were explicitly noted in the language of the ADAAA. According to Congress, Sutton, *Williams* and their progeny in the lower courts established an excessively high standard for obtaining coverage under the ADA, which resulted in numerous instances where individuals "with a range of substantially limiting impairments are not [considered] people with disabilities" thereby contravening the intent of the Americans with Disabilities Act of 1990. S. 3406, 110th Cong. § 2(a). Thus, the ADAAA attempts to reinstate the "broad scope of protection" that Congress originally intended to be available under the ADA when it was first enacted, and to convey the message that the determination of whether an "impairment is a disability under the ADA should not demand extensive analysis." *Id.* at § 2(b).

The ADAAA and its Effect

<u>"Major Life Activities"</u>

The intent of Congress to broaden coverage of the ADA is clearly evidenced by the changes imposed by the ADAAA. Although the basic definition of "disability" has not changed, the ADAAA clarifies and expands the

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meaning of "major life activities" by adding two non-exhaustive lists of acts or functions that meet the definition. The first list contains an array of activities common to everyday life, including: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* at § 4. The second list includes major bodily functions, such as "functions of the immune system, [and] normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* The lists allow Congress to directly control how broadly "major life activities" is interpreted. Indeed, it is difficult to conceive of a physical or mental impairment that does not affect at least one of the listed activities or functions under the all-embracing interpretation of the definition intended by Congress.

"Substantially Limits"

The ADAAA does not attempt to set forth a definition for "substantially limits" or "physical or mental impairments." If there was any room for doubt, however, about Congress' preference as to how the scope of such undefined terms should be interpreted, such uncertainty is removed by insertion of the directive that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." *Id.* Therefore, one can presume that "substantially limits" and other undefined terms will be interpreted hereafter in a sweeping manner that is more inclusive than exclusive as long as it is reasonable under the strictures of the Act. Moreover, the ADAAA directs the Equal Employment Opportunity Commission ("EEOC") to change its definition of "substantially limits" to conform to the relaxed standard conveyed by the ADAAA.

Despite the fact that the ADAAA does not elaborate on the definition of "substantially limits," it does expound on two areas of contention involving the application of the term. First, pursuant to the ADAAA, a person is deemed "substantially limited" if an impairment substantially limits at least one major life activity, even though it may not substantially limit any other major life activities. *Id.* For example, if a person establishes that he or she suffers from a cognitive impairment that substantially limits thinking, but is able to adequately perform all other major life activities, that individual would nonetheless be deemed substantially limited under the ADAAA. The other issue is whether impairments that occur periodically or are in remission can be considered "substantially limiting" and qualify as a disability. This question is put to rest by the ADAAA, which conclusively provides that an impairment that is in remission or is episodic qualifies as a disability if the impairment, when active, would substantially limit a major life activity. *Id.*

Mitigating and Corrective Measures

The ADAAA also directly addresses the *Sutton* holding and its companion cases by making it unambiguous that corrective or mitigating measures, except for "ordinary eyeglass or contact lenses," must not be considered when assessing whether an individual has a disability. *Id.* Mitigating measures include things such as medication, medical supplies and equipment, prosthetics, hearing aids, mobility devices, oxygen therapy, assistive technology, reasonable accommodations, and learned behavioral or neurological modifications.

"Regarded As Having an Impairment"

Another area where Congress felt the courts have created too high a standard for "disability" is the third prong of the "disability" definition, which extends protection to individuals "regarded as having such a [physical or mental] impairment." 42 U.S.C. § 12102(2)(C). The ADAAA subdues those court decisions that trimmed the scope of the third prong by expressly providing a broad definition that extends ADA coverage to any individual who establishes that he or she was subjected to a prohibited act under the ADA (e.g. failure to hire) because of an "actual or perceived physical or mental impairment." S. 3406, 110th Cong. § 4. Under this definition, the determination of whether the impairment actually limits or is perceived to limit a major life activity is wholly irrelevant and has no bearing on the individual's coverage under the ADA. *Id.* The result is that the "substantially limits" requirement is left to apply only to claims based upon the first two prongs of the "disability" definition (i.e. having an actual physical or mental impairment that substantially limits a major life activity, or a record of such an impairment).

Nevertheless, Congress does exclude from the "regarded as" definition impairments that are "transitory and minor," which means that the impairment has an "actual or expected duration of 6 months or less." *Id.* This provision emphasizes Congress' intent that ordinary and temporary ailments experienced by most individuals, such as the flu and the common cold, are not encompassed within the protection of the ADA, and will hopefully serve to dissuade plaintiffs from filing claims involving such minor impairments.

One final amendment set forth under the ADAAA relative to the "regarded as" prong is that individuals who are deemed to have a disability solely because they are "regarded as having such an impairment" are not entitled to reasonable accommodations. *Id.* In other words, if an employer simply fails to provide reasonable accommodations to an employee who is regarded as having a physical or mental impairment, but does not actually have such a disability, the employer has not violated the ADA.

Other Significant Amendments

The ADAAA revises the standard for discrimination under the ADA by now requiring a showing of discrimination "on the basis of disability" as opposed to discrimination against a qualified individual with a disability "because of the disability." *Id.* As modified, the ADA resembles the framework of other civil rights laws, and shifts the focus of the ADA away from whether the individual has a disability, and towards the more crucial question of whether an individual's disability was the basis for the adverse employment action at issue.

Finally, Congress expressly bestows upon the EEOC, Attorney General and Secretary of Transportation the authority to issue regulations implementing the definition of "disability" consistent with the broad construction expressed by Congress through the ADAAA. The purpose of this addition is to respond to the U.S. Supreme Court's assertion in

Sutton, 527 U.S. at 479, that no agency has been delegated the authority to interpret the term “disability.”

Conclusion

Despite all the changes to the definition of “disability,” assessing whether an individual has a disability is only the beginning of the analysis. The ADAAA will unquestionably restrict defenses and arguments routinely utilized by employers in having disability claims dismissed on summary judgment. But other defenses have been left unchanged—a disabled individual must still be qualified and able to adequately perform essential job functions, and reasonable accommodations are not necessary if such measures place an undue hardship on the employer.

It will be interesting to see how federal courts grapple with Congress’ stern call for relaxed standards under the ADAAA, especially with any novel regulations implemented by the EEOC and other regulatory authorities, which are invited by the ADAAA, guiding how “disability” is interpreted in the post-ADAAA era. In the meantime, employers should review their policies on disability, ensuring that reasonable accommodations are provided to those individuals who will now fall under the broadened definition of “disability” and be entitled to such measures. As always, accurate record keeping and updating human resource departments on the newly enacted law are strongly encouraged to prevent running afoul of the new provisions of the ADAAA.