

MEMORANDUM

To: Association of Academic Psychiatrists

From: Bobby Silverstein, J.D.

Date: April 2011

RE: Overview of the EEOC Final Regulation Implementing the ADA Amendments Act of 2008

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008 [ADAAA, P.L. 110-325]. The law went into effect on January 1, 2009. On September 23, 2009, the Equal Employment Opportunity Commission (EEOC) issued a Notice of Proposed Rulemaking (NPRM) implementing ADAAA. [74 FR 48431] 600 written comments on this rulemaking were submitted to EEOC. On March 25, 2011, the EEOC published in the Federal Register Final Regulations Implementing the ADAAA. [76 FR 16978] The final regulations are effective on May 24, 2011.

The purpose of this memorandum is to provide an overview of the final regulations implementing the ADAAA. More specifically, the memorandum:

- Provides a historical and policy context for the ADAAA,
- Explains the purposes of the ADAAA, and
- Identifies the practical implications of the ADAAA.

In addition to this memorandum, the author has prepared:

- A power point presentation and a comprehensive handout accompanying the power point describing and analyzing EEOC's final regulation implementing the ADAAA; and
- Resource materials containing links to the ADAAA, the legislative history, and regulatory materials including the EEOC proposed and final regulations and resource materials prepared by EEOC.

HISTORICAL AND POLICY CONTEXT OF THE ADAAA

Prior to the ADA, the major civil rights statute for persons with disabilities was Section 504 of the Rehabilitation Act of 1973, as amended. Section 504 regulations specify, in part, that no

qualified individual with a disability shall, on the basis of disability, be subjected to discrimination under any program or activity which receives Federal financial assistance. In a nutshell, the statute and implementing regulations prescribe a policy framework under which an individual alleging discrimination must demonstrate that he/she is:

- **An individual with a disability** ((1) has a physical or mental impairment that substantially limits a major life activity (prong 1); (2) a record of such an impairment (prong 2); or (3) being regarded as having such an impairment (prong 3)).
- **Qualified** (in the employment context qualified means that the individual meets the essential functions of the job with or without a reasonable accommodation).
- Subjected to **discrimination** (e.g., actions that adversely affect opportunities such as hiring, promotion, termination because of disability).

In accordance with administrative issuances and case law, Section 504 was interpreted in favor of broad coverage and the determination of whether an individual had a disability did not demand extensive analysis. In short, it was relatively easy for an individual seeking protection under the law to establish he or she had a disability and the focus of the complaint was on whether he/she was qualified and had been subjected to discrimination.

In drafting the ADA, it was decided to adopt the Section 504 framework and make it applicable to the private sector and nonrecipients of federal aid. Thus, it was expected that the focus of the ADA would continue to be on whether a covered entity engaged in discrimination on the basis of disability against a qualified person, not the threshold question of whether the individual could demonstrate he/she was an individual with a disability and protected by the ADA.

Notwithstanding this clear intent, the Supreme Court and lower courts narrowed the broad scope of protection, thus eliminating protection for many individuals whom Congress intended to protect, e.g., individuals with mental retardation (now referred to as intellectual disability), epilepsy, diabetes and cancer. In response to these court cases, the business community and the disability community engaged in lengthy negotiations and reached a “deal” and communicated their consensus regarding clarifications to the definition of the term “disability” in the form of recommendations to the Congress. For example, an executive VP of the National Association of Manufacturers stated “The bill corrects narrow court interpretations that have restricted ADA protections in the workplace.” Of course, under the deal, although the definition of disability is intended to be broad, only those individuals who are qualified and can prove discrimination are entitled to relief. Congress accepted these recommendations and enacted the ADAAA. President Bush signed the ADAAA into law on September 25, 2008.

PURPOSE OF THE ADAAA

The purposes of the ADAAA are as follows:

- **Retain** (without amendment) the existing definition of the term “disability” but clarify and provide “rules of construction” regarding the key words and phrases in the definition of disability.

- **Reject** the holdings of several Supreme Court and lower court decisions that restricted/narrowed the scope of protection against discrimination under the ADA.
- **Require** that the definition of disability under the ADA be construed in favor of **broad coverage** to the maximum extent permitted by the terms of the ADA.
- **Require** that the determination of whether an individual has a disability **should not demand extensive analysis**.

The effect of these changes is to **make it easier** for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

In short, the focus of the ADA has returned to the original intent i.e., moving back to a focus on whether an individual is qualified and has been subjected to discrimination rather than on the threshold issue of whether he or she is an individual with a disability.

PRACTICAL IMPLICATIONS

This section of the memo describes the practical implications of EEOC’s final regulations implementing the ADAAA by delineating the core principles used to determine with an individual is protected by the ADA and by including a series of examples of how the definition would apply in particular cases.

In accordance with the ADA, the term disability means, with respect to an individual—

- A physical or mental impairment that substantially limits one or more major life activities of such individual (prong 1);
- A record of such an impairment (prong 2); or
- Being regarded as having such an impairment (prong 3).

The ADAAA does not amend this definition, but rather clarifies and includes rules for construing the key terms.

Physical or Mental Impairment That Substantially Limits One or More Major Life Activities (Prong 1—Actual Impairment)

A “**physical or mental impairment**” is a disability if it “**substantially limits**” the ability of an individual to perform one or more “**major life activities**” as compared to most people in the general population. The determination under prong 1 should be made in favor of **broad coverage** of individuals and **should not require extensive analysis** i.e., the analysis should be based on a common-sense approach that does not require an exacting or statistical analysis. An individual with an actual impairment may be entitled, absent undue hardship, to a **reasonable accommodation** if needed and related to the disability.

The final regulation provides a non-exhaustive list of examples of “**major life activities**”: bending, breathing, caring for oneself, communicating, concentrating, eating, hearing, interacting with others, learning, lifting, performing manual tasks, reaching, reading, seeing, sitting, sleeping, standing, thinking, walking, working.

- The term “major” shall not be interpreted strictly to create a demanding standard for disability.
- Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

A major life activity also includes the operation of **major bodily functions** in order to better address chronic impairments that can be substantially limiting e.g., diabetes, HIV infection. The final regulations include a non-exhaustive list of major bodily functions such as functions of the immune system, special sense organs, and neurological functions.

Whether a physical or mental impairment “**substantially limits**” one or more major life activities is determined in accordance with nine “**rules of construction**” delineated in the regulation. In general, under the “rules of construction”:

- The term “substantially limits” must be construed **broadly** in favor of **expansive coverage** and is not meant to be a demanding standard and should not require extensive analysis.
- The impairment need not **prevent, or significantly or severely restrict**, the individual from performing a major life activity in order to be considered a disability. Nonetheless, not every impairment will constitute a disability.
- The **ameliorate effects of mitigating measures** shall not be considered in determining whether an impairment substantially limits a major life activity. The final regulations include a non-exhaustive list of mitigating measures-- medication, medical equipment and devices, prosthetic limbs, low vision devices, hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, learned behavioral or adaptive neurological modifications, and psychotherapy, behavioral therapy, and physical therapy. An individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability if the impairment would be substantially limiting without the mitigating measures.
- However, the ameliorative effects of **ordinary eyeglasses or contact lenses** shall be considered when determining whether an impairment substantially limits a major life activity.
- An impairment that is **episodic or in remission** is a disability if it would substantially limit a major life activity when active. Examples of impairments that may be episodic include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form may also be a disability under prong 1.
- An individual need only be substantially limited in one major life activity to be covered under prong 1.

With respect to prong 1 of the definition, disability is determined based on an individualized assessment. There is no “per se” disability. However, the individualized assessment of certain impairments will virtually always result in a determination of disability. The inherent nature of

these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. Applying the nine rules of construction, it should be easily concluded that the following types of impairments will, at a minimum, substantially limit the major activities listed:

- Deafness substantially limits hearing
- Blindness substantially limits seeing
- An intellectual disability (formerly termed mental retardation) substantially limits brain function
- Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair or prosthetic limbs or braces substantially limit musculoskeletal function
- Autism substantially limits brain function
- Cancer substantially limits normal cell growth
- Cerebral Palsy substantially limits brain function
- Diabetes substantially limits endocrine function
- Epilepsy substantially limits neurological function
- HIV infection substantially limits immune function
- Multiple sclerosis substantially limits neurological function
- Muscular dystrophy substantially limits neurological function
- Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Has a Record of Such Impairment (Prong 2)

An individual has a record of a disability if the individual has a **history of, or** has been **misclassified as** having an impairment that substantially limits a major life activity. The determination should be construed **broadly** and should not demand an extensive analysis. An individual with a record of impairment may be entitled, absent undue hardship, to a **reasonable accommodation** if needed and related to the past disability.

Examples include:

- An applicant who in the past was diagnosed with prostate cancer that was treated, and whose doctor says he no longer has cancer.
- Someone erroneously deemed to have had a learning disability but who did not.

Is Regarded as Having Such an Impairment (Prong 3)

An individual is “regarded as” having a disability if the individual is subjected to an **action prohibited** by the ADA (e.g., refusal to hire, demotion, termination) based on an **actual or perceived** physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. To qualify for coverage under prong 3, the individual is not subject to

any functional test i.e., whether an individual's impairment substantially limits one or more major life activities is not relevant to coverage under prong 3.

Examples include:

- If an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability.
- If an employer terminates an employee because of cancer, the employer has regarded the employee as an individual with a disability.
- An employer who terminates an employee with angina from a manufacturing job that requires the employee work around machinery, believing that the employee will pose a safety risk to himself or others if he were to suddenly lose consciousness, has regarded the individual as an individual with a disability. Whether the employer has a defense e.g., (he or she poses a direct threat to himself or others) is a separate inquiry.

An individual may not establish coverage under prong 3 where the impairment is **both transitory (lasting or expected to last for six months or less) and minor**. The defense should be construed narrowly and based on objective data, not whether the employer claims it subjectively believed the impairment was transitory and minor. For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was temporary and minor.

Note, covered entities are **not** required to make **reasonable accommodations or modifications** for someone considered to have a disability under prong 3.

Summary Analysis Regarding the Use of the Three Prongs for Coverage Determinations

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 prong 1 (actual disability) or prong 2 (record of), which require a showing that a physical or mental impairment substantially limits one or more major life activities. or has a record of such an impairment.

In these cases, the evaluation of coverage can be made solely under prong 3 (regarded as), which does not require a showing of an impairment that substantially limits one or more major life activities or has a record of such an impairment. An individual may choose, however, to proceed under prong 1 or prong 2, regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Establishing that an individual has a disability and is thereby protected by the ADA, does not by itself establish liability. Liability is established only when an individual proves that a covered entity discriminated against the individual on the basis of disability and there are no legitimate defenses.