

ADA UPDATE RECENT DEVELOPMENTS
The ADA Amendments Act of 2008 and Employment in the Public Schools

AASPA Webinar Series

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I. Americans with Disabilities Act (ADA) Basics

- A. The ADA was enacted by Congress in 1990. The Congressional findings included the statement that “43,000,000 Americans have one or more physical or mental disabilities.”
- B. The ADA is enforced and administered by the EEOC.
- C. The ADA applies to any employer with 15 or more employees that engages in any industry affecting commerce.
- D. The ADA prohibits discrimination against any applicants or employees who are “qualified individuals with a disability.” Discrimination means taking adverse action against an applicant or employee because of his/her disability in regard to:
 - 1. Job application procedures.
 - 2. Hiring or promotion (advancement).
 - 3. Discipline or discharge.
 - 4. Compensation.
 - 5. Job training.
 - 6. Other terms, conditions and privileges of employment.

- E. The ADA defines a “disability” in three ways:
1. A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
 2. A record of such an impairment; or
 3. Being regarded as having such an impairment.
- F. Under the ADA, a “qualified” individual with a disability can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.
- G. If an applicant or employee cannot meet a specific qualification standard because of a disability, the ADA requires that the employer demonstrate the importance of the standard by showing that it is “job-related and consistent with business necessity.” If an employer cannot show that a particular standard is “job-related and consistent with business necessity,” the employer cannot use the standard to take an adverse action against an individual with a disability.
- H. Employers may have to provide a “reasonable accommodation” to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of his/her position.
1. A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities.
 2. An employee generally has to request accommodation, but does not have to use the term “reasonable accommodation,” or even “accommodation,” to put the employer on notice. Rather, an employee only has to say that he/she requires the employer to provide him/her with an adjustment or change at work due to a medical condition.
 3. An employer never has to provide an accommodation that would cause undue hardship, meaning significant difficulty or

expense, which includes removing an essential function of the job.

- I. The ADA did not define the following terms:
 1. Physical or mental impairment.
 2. Substantially limits.
 3. Major life activities.

II. U.S. Supreme Court Interpretations

- A. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).
 1. Facts: In 1977 Gene Arline was a tenured teacher with the Nassau County School system, teaching in the South Side Elementary School. The School Board had no knowledge that she had suffered from tuberculosis (TB) since age 14. In 1977, she had a TB relapse when she became infectious and had a positive culture. As a result, she was suspended briefly. She had another relapse in 1978. As a result, the School District superintendent, relying upon the suggestion of the State Health Department, removed Ms. Arline from the classroom because of the risk of the young children in her class catching the disease. In 1979, when she tested positive for TB, once again, the School Board terminated her employment.
 2. Procedural Facts: In 1982, Ms. Arline filed a complaint in the District Court in Jacksonville alleging that the School Board violated her rights under Section 504 of the Rehabilitation Act of 1973 (many of the concepts used in the ADA originated in Section 504, its regulations, and judicial interpretations). The Court of Appeals reversed the District Court, holding that “persons with contagious diseases are within the coverage of section 504,” and that Ms. Arline’s condition “falls . . . neatly within the statutory and regulatory framework” of the Act. The School Board appealed to the United States Supreme Court.
 3. Supreme Court Decision: The Court examined the standards to be used to determine if an individual with a contagious

disease is otherwise qualified. In most cases, the Court observed, an individualized inquiry is necessary in order to protect individuals with disabilities from “deprivation based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.” The Court adopted the test enunciated by the American Medical Association (AMA) amicus brief and held that the factors which must be considered include “findings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.” The Court also emphasized that courts “normally should defer to the reasonable medical judgments of public health officials” and that courts must consider whether the employer could reasonably accommodate the employee. Because the District Court did not make appropriate findings, it is impossible for this Court to determine whether respondent is “otherwise qualified” for the job of elementary school teacher, and the case is remanded for additional findings of fact.

B. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

1. Facts: Severely myopic twin sisters, who have uncorrected visual acuity of 20/200 or worse, but with corrective measures function identically to individuals without similar impairments, applied to work for United Air Lines, a major commercial airline carrier as commercial airline pilots. United Air Lines rejected them because they did not meet the minimum requirement of uncorrected visual acuity of 20/100 or better.
2. Procedural Facts: The twin sisters filed suit against United Air Lines under the ADA. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court held that the sisters were not actually disabled under subsection (A) of the disability definition because they could fully correct their visual impairments. The Court also determined that the sisters were not

“regarded” by United Air Lines as disabled under subsection (C) of this definition. The Tenth Circuit Court of Appeals affirmed the District Court’s decision. The sisters appealed their case to the United States Supreme Court.

3. Supreme Court Decision: The Court affirmed the decision upholding the dismissal of the sisters’ claims under the ADA because they were not disabled within the meaning of the ADA. According to the Court, because the phrase “substantially limits” appears in the ADA in the present indicative verb form, the language is properly read as requiring that a person be presently (not potentially or hypothetically) substantially limited in order to demonstrate a disability. Therefore, a “disability” exists only where an impairment “substantially limits” a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken. As such, a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity. Furthermore, there are two ways in which individuals may be “regarded as” disabled under the ADA. First, an employer mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities. Second, an employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more of the individual’s major life activities. In both cases, it is necessary that the employer entertain misperceptions about the individual.

C. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

1. Facts: Ella Williams worked on the assembly line in Toyota’s automobile manufacturing plant in Kentucky. She developed pain in her hands, wrists, and arms; and was diagnosed with impairments including carpal tunnel syndrome. She was reassigned to two quality-control inspection jobs. However, when Toyota added a third such quality-control job, there was a dispute as to what happened next. Ms. Williams asserted that, as her condition worsened, Toyota refused a request by her for an accommodation. Toyota asserted that she simply

began missing work on a regular basis. Eventually, she was terminated and the reason cited was poor attendance.

2. Procedural Facts: Ms. Williams filed a charge of disability discrimination with the Equal Employment Opportunity Commission. After receiving a right-to-sue letter, she filed suit against Toyota in the United States District Court for the Eastern District of Kentucky alleging that she had a disability, for purposes of the ADA because her impairments substantially limited her in the major life activity of performing manual tasks. She further alleged that Toyota violated the ADA when it refused to accommodate her and then terminated her. The District Court granted summary judgment to Toyota when it found that Ms. Williams did not have a disability, as defined by the ADA, at the time that the company allegedly refused to accommodate her. On appeal, the United States Court of Appeals for the Sixth Circuit reversed the District Court's decision in part when it held that in order for Ms. Williams to demonstrate that she had a disability for ADA purposes, she had to show that her disability involved a class of manual activities affecting the ability to perform tasks at work. The Court of Appeals concluded further that she satisfied this test because her ailments prevented her from doing the tasks associated with certain jobs involving repetitive work with hands and arms extended at or above shoulder levels for extended periods of time. Toyota appealed this decision to the United States Supreme Court.
3. Supreme Court Decision: The United States Supreme Court reversed the decision and remanded. The Court explained that order for an individual to be "substantially limited" in performing manual tasks, the individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives, and the impairment's impact must also be permanent or long-term. The Court concluded that the terms "substantial" and "major" must be interpreted strictly to create a demanding standard to qualify as an individual with a disability under the ADA. The Court cited the Congressional findings when the Act was passed when it reminded the litigants that some 43,000,000 Americans had one or more physical or mental disabilities. The Court suggested that, if

Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as having a disability, then the number of Americans with disabilities would have been much higher.

III. ADA Amendments Act of 2008

- A. On September 25, 2008, President George W. Bush signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments Act” or “the Act”).
- B. The Act is effective January 1, 2009.
- C. The intent of the ADA Amendments Act is “to restore the intent and protections of the Americans with Disabilities Act of 1990.”
- D. Section 2(a) of the Act contains new Congressional findings, which are as follows:
 - 1. In enacting the ADA, Congress intended that the Act provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage.
 - 2. In enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.
 - 3. While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.
 - 4. The holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.

5. The holding of the Supreme Court in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA.
 6. As a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.
 7. In particular, the Supreme Court, in the case of *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress.
 8. Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressional intent, by expressing too high a standard.
- E. Section 2(b) of the Act contains Congress stated purposes with regard to the Act, which are as follows:
1. To carry out the ADA’s objectives by providing “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA.
 2. To reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.
 3. To reject the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the *Supreme Court in School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.

4. To reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”
5. To convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), for “substantially limits” and applied by lower courts in numerous decisions has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA 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.
6. To express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term “substantially limits” as “significantly restricted” to be consistent with this Act, including the amendments made by this Act.

F. Major Life Activities Changes.

1. The ADA Amendments Act expands the definition of “major life activities” by adding a non-exhaustive list of “major life activities,” to the statute which include:
 - a. Caring for oneself,
 - b. Performing manual tasks,
 - c. Seeing,
 - d. Hearing,
 - e. Eating,
 - f. Sleeping,

- g. Walking,
- h. Standing,
- i. Lifting,
- j. Bending,
- k. Speaking,
- l. Breathing,
- m. Learning,
- n. Reading,
- o. Concentrating,
- p. Thinking,
- q. Communicating, and
- r. Working.

2. In accordance with the Act, the ADA now includes an explicit statement that “a ‘major life activity’ also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”
3. The ADA Amendments Act clarifies that an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active.

G. Substantially Limits and the Definition of Disability.

1. The ADA Amendments Act directs the EEOC to revise the regulations that currently define the term “substantially limits” as that term is used in the ADA.
2. The Act requires courts to interpret the definition of “disability” broadly and to interpret the term “substantially limits” consistent with the findings and purposes of the ADA Amendments Act.
3. The Act explains that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability.
4. The ADA Amendments Act provides a non-exhaustive list of “auxiliary aids and services,” which includes:

- a. Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- b. Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- c. Acquisition or modification of equipment or devices; and
- d. Other similar services and actions.

H. Regarded as Prong.

- 1. In accordance with the ADA Amendments Act, an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the “regarded as” prong in the definition of disability, except where impairment is transitory and minor (which is defined as an impairment with an actual or expected duration of 6 months or less).
- 2. Individuals covered only under the “regarded as” prong are not entitled to a reasonable accommodation(s) under the terms of the Act.

IV. Now What?

- A. The EEOC will be evaluating the impact of the Act’s changes on its publications addressing the ADA.
- B. The EEOC will issue new regulations defining the term “substantially limits” in a manner that is consistent with the broad definitions contained in the findings and purposes of the ADA Amendments Act.
- C. The EEOC may issue new interpretive guidance concerning the term “regarded as.”
- D. The courts’ focus will shift from whether an employee or applicant is a qualified individual with a disability to whether the employee or

applicant was, in fact, discriminated against on the basis of a disability.

- E. Fewer discrimination lawsuits will be won by employers on a motion to dismiss and/or on motions for summary judgment.
- F. It is advisable for employers to:
 - 1. Review and revise policies concerning employees and applicants with disabilities.
 - 2. Train management and supervisory personnel concerning the impact of the ADA Amendments Act and its implications.
 - 3. Engage in and fully document the flexible interactive process when faced with a request for (or a demonstrated need for) a reasonable accommodation of a disability from an employee or applicant.
 - 4. Be careful not to make assumptions about an individual's impairment, in light of the ADA's new relaxed requirements of the "regarded as" prong of the definition of disability.