

ADA Amendments Act of 2008: The New Litigation Challenge

Updated Strategies to Avoid and Defend Americans With Disabilities Act Claims

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Joyce Walker-Jones, Senior Attorney Advisor, ADA Policy Division,
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Tuesday, May 12, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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The Americans with Disabilities Act of 2008: Employer Obligation To Provide a “Reasonable Accommodation”

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How Have My Obligations To Accommodate Disabled Employees Changed Under the ADAAA?

Old ADA: Employer must reasonably accommodate a qualified employee or job applicant with a known disability if the accommodation would not impose an “undue hardship” on the operation of the employee’s business

ADAAA: Same obligation

Who Has the Burden of Proof Under the ADAAA?

- Good news: Employee still has the burden to show that he qualifies as a disabled individual under the Act
 - i.e., an individual who can perform the essential functions of the job with or without a reasonable accommodation
- Good news: Employee still has the burden to initiate a request for an accommodation (unless the disability is apparent to the employer)
 - expect more of these requests

The Interactive Process: How Can I Determine What is a Reasonable Accommodation?

- When you use the interactive process with an employee to determine a reasonable accommodation, be sure to document the process

The Interactive Process: How Can I Determine What is a Reasonable Accommodation?

- ❑ Document the accommodation the employee requests and why he made the request;
- ❑ Document other potential accommodations;
- ❑ Document the interactive process. Note all of the accommodations that are discussed and their pros and cons;
- ❑ Document which accommodation was chosen and why.

The Interactive Process: How Can I Determine What is a Reasonable Accommodation?

As the employer, you need not provide the employee with the accommodation he requests, nor are you required to agree to the “best” or most technologically sophisticated accommodation

What Is A Reasonable Accommodation?

- ❑ Under the old and new laws, an employer is obligated to provide a reasonable accommodation that is effective to remove the workplace barrier
- ❑ The types of accommodations that may be offered have not changed

What Is A Reasonable Accommodation?

An accommodation is effective if it will provide an individual who has a disability with an equal employment opportunity to participate in the application process, attain the same level of performance as co-workers in the same position, and enjoy the “benefits and privileges” of employment available to all employees

What Is A Reasonable Accommodation?

Reasonable accommodations relating to the “benefits and privileges” of employment are those accommodations needed to give the individual "equal access to the information communicated in the workplace, the opportunity to participate in employer-sponsored events...and the opportunity for professional advancement."

What Is A Reasonable Accommodation?

- ❑ Accommodation need not be too unreasonable, too difficult or too expensive
- ❑ Need not remove an essential job function, lower production standards or excuse violations of conduct rules (even if the impairment caused the violation, i.e., Tourette's).
- ❑ Employers are required, however, to consider a different accommodation that is less onerous.

How Can I Accommodate An Employee with Diabetes?

- There are multiple accommodations for many limitations caused by a disability.

Example:

- Possible limitation: Hypo or Hyperglycemia

How Can I Accommodate An Employee with Diabetes?

□ Accommodations:

- Allow storage for food or medicine
- Provide private area to test blood sugar/ administer meds
- Provide appropriate containers for disposal of syringes
- Allow meal breaks

Hypothetical Accommodation Scenario for Diabetes

A customer service employee with insulin-dependent diabetes has to regulate her blood sugar levels during the day

□ Accommodation:

Allow the employee breaks that she can make up by coming in 15 minutes early and staying 15 minutes late (cost \$0)

Hypothetical Accommodation Scenario for Lupus

An attorney with lupus is restricted from long periods of typing; he has trouble preparing long documents

Accommodation:

Provide voice recognition software, a Dictaphone or an alternative keyboard to improve hand and arm postures

Hypothetical Accommodation Scenario for Multiple Sclerosis

An office assistant has difficulty carrying papers and packages due to MS-induced weakness of the upper extremities

□ Accommodation:

Purchase a portable cart that the employee can use in the office

Hypothetical Accommodation Scenario for Peanut Allergies

A sales representative is severely allergic to peanuts but must travel within her territory to meet with clients

□ Accommodation:

Research airline policies on snacks to ascertain which airlines do not serve peanuts

□ Accommodation:

Allow her to stay in a hotel with a refrigerator or kitchen so she can bring her own food

Hypothetical Accommodation Scenario for a Recovering Alcoholic

A hospital worker who is a recovering alcoholic needs to meet with her sponsor during working hours

□ Accommodation:

Allow her a flexible schedule that permits her to meet with the sponsor

Try not to mandate work functions where alcohol will be served

Hypothetical Accommodation Scenario for Premenstrual Dysphoric Disorder

A psychiatric nurse has difficulty dealing with job-related stress

□ Accommodation:

Refer her to an employee assistance program for emotional support and stress management tools

Offer a gym membership (as a full benefit or subsidized) for yoga and/or aerobic exercise

Allow flexible schedule

Hypothetical Accommodation Scenario for Cancer

A check-out clerk has difficulty standing through an 8 hour shift, due to lingering nerve damage from earlier chemotherapy

□ Accommodation:

Allow the employee to use an anti-fatigue mat and/or sit/lean stool

Allow frequent rest breaks

The Bottom Line

- ❑ Be creative and flexible
- ❑ Use the interactive process to find the best solution
- ❑ You do not have to spend a lot of money
- ❑ Prepare in advance, since disability limitations can be episodic and flare with little or no notice

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Strategies for Avoiding and Defending Against ADA Claims

Stephen E. Fox and Elizabeth M. Bedell
Fish & Richardson P.C.
May 12, 2009

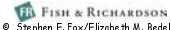


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Agenda

- Litigation landscape post-ADAAA
 - Determining when the ADAAA applies
 - New battleground under ADAAA
- Interactive process
 - Knowing when an employee needs an accommodation
 - Making good faith efforts to accommodate
- Undue hardship
 - Not changed by the ADAAA
- Use of expert testimony
- Discovery issues

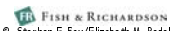


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Litigation Landscape: When does the ADAAA apply?

- Not retroactive
 - *Supinski v. United Parcel Serv., Inc.*, 2009 WL 113796, *5 (M.D. Pa. Jan. 16, 2009)
 - Surveyed cases and observed that "every court that has addressed the issue has concluded that the 2008 Amendments cannot be applied retroactively to conduct that preceded its effective date."
- Only applies if
 - Conduct at issue occurred after January 1, 2009
 - Suit seeks only prospective relief (e.g., injunction)
 - *Jenkins v. Nat'l Bd. of Med. Exam'rs*, 2009 WL 331638 (6th Cir. Feb. 11, 2009)
 - Plaintiff—a third year medical student—requested additional time to take the United States Medical Licensing Examination as an accommodation for a reading disorder



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Litigation Landscape: New Battleground under ADAAA

- Fewer "threshold" cases
 - Broader definition of "disability" reduces likelihood of proving employee is not disabled under the ADA
- Changes focus to other liability issues
 - Did employer know about disability?
 - Could employee perform essential functions of the job with reasonable accommodation?
 - Did the reasonable accommodation pose an undue hardship on the employer?
 - KEY: These standards are unchanged by ADAAA.

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Accommodation Request: *Conneen v. MBNA*, 334 F.3d 318 (3rd Cir. 2003)

- Employee—marketing manager with 12 year tenure—with clinical depression returned from LOA with reduced schedule
- Employee resumed her regular schedule, but was frequently tardy
- On at least 4 separate occasions, employee's supervisors met with her to discuss her tardiness
 - Asked whether there was any reason employee could not report to work on time, and each time employee responded, "No."
 - Employee maintained she did not need any changes
 - Rather than suggest there was a medical reason for her behavior or attempt to involve her physician—which she did after she filed suit against the employer—she explained that her tardiness was the result of being "stuck in traffic," her dog "made a mess," and that she needed to give her mother a ride to work one day
- Ultimately, employee was fired for tardiness. She sued MBNA, claiming that the employer should have accommodated her by adjusting her work hours (i.e., by allowing her to show up an hour later than the schedule permitted)

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Accommodation Request: *Conneen v. MBNA*, 334 F.3d 318 (3rd Cir. 2003)


- Delaware Dist. Ct. granted sj for MBNA
- On appeal, the Third Circuit held
 - MBNA did not fail to accommodate Conneen by withdrawing the modified work hour schedule it originally provided to Conneen
- What did MBNA do right?
 - Granted accommodation requests when employee provided medical reason for accommodation
 - Clearly stated that initial accommodation was temporary and that she needed to re-submit info. from physician justifying extended accommodation
 - Attempted to re-initiate interactive process, but employee declined

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Accommodation Request:
Rask v. Fresenius, 509 F.3d 466 (8th Cir. 2007)


- Employee worked for Fresenius Medical Care as a kidney dialysis technician
- Employee suffered from clinical depression
- Employee met with her two supervisors and told them she might miss a day or two of work due to problems with her medication
 - Employee did not specifically identify any other limitations or reference a disability
- Employer terminated her after a series of attendance problems

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Accommodation Request:
Rask v. Fresenius, 509 F.3d 466 (8th Cir. 2007)


- Minn. Dist. Ct. granted sj for Fresenius
- Eighth Circuit held
 - Employee did not specifically identify any work limitations resulting from a disability
 - Even assuming that complications with medication were a specific identification of a disability, allowing someone to be absent is not a reasonable accommodation

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Take Aways on Recognizing Accommodation Requests


- "Neither the law nor common sense demand clairvoyance of an employer."
 - Employee must indicate s/he needs a change due to a medical condition
- Employers should specify to whom requests are made
 - And train those who receive requests to initiate the interactive process

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Good Faith Effort to Accommodate:
Mobley v. Allstate, 531 F.3d 539 (7th Cir. 2007)


- Employee had trouble concentrating and staying awake due to medical condition
- Employee requested accommodations:
 - Working from home
 - Working only on certain types of cases
 - Work 4, 10-hour days with Wednesdays off
- Employer offered:
 - Different office space
 - Lighter case load
 - Half-hour schedule change
- During this process, Allstate asked for info from Mobley's dr. and asked the dr. for recommendations
 - One of which was different office space

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Good Faith Effort to Accommodate:
Mobley v. Allstate, 531 F.3d 539 (7th Cir. 2007)


- Ill. Dist. Ct. granted sj for Allstate
- Seventh Circuit held
 - Employer satisfied its burden to offer reasonable accommodations
- What did Allstate do right?
 - Engaged in interactive process to understand limitations and identify alternate accommodations
 - Offered at least one accommodation suggested by Mobley's physician
 - Lesson for employers—co-opt the employee's dr. to support your offers of accommodation

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Good Faith Effort to Accommodate:
Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007)


- Employee led team that produced educational materials for Federal Aviation Administration
- Employee had back condition
 - Previous supervisors had allowed him to telecommute
 - Current supervisor allowed him to set telecommuting scheduling on a weekly basis and to take breaks mid-day
- Current supervisor revoked all accommodations
 - Said could not provide accommodations "indefinitely" and that employee needed to have a more predictable schedule

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Good Faith Effort to Accommodate: *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007)


- D.C. Cir. reversed grant of sj in favor of employer
 - Did not conclude that telecommuting was "reasonable"
 - But, held that there was a genuine issue of fact as to whether plaintiff could perform essential functions while telecommuting
- What went wrong?
 - Employee's experience telecommuting under prior supervisors undercut employer's argument that indefinite telecommuting was an "unreasonable" accommodation
 - FAA policy permits telecommuting up to 5 days per week
 - Other employees were team leaders for out-of-state divisions, suggesting that employee did not need to be present in office

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Take Aways on Making Good Faith Effort to Accommodate


- Engage in dialogue with employee
 - Pinpoint employee's restrictions
 - Explore all options for accommodation
- Need not provide employee's preferred accommodation
- Clearly state the length or limitations of accommodation

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Proving Undue Hardship

- Nothing changed in ADA
- Factors to consider per EEOC Guidance:
 - Nature and cost of accommodation
 - Composition, structure, and functions of the employer's workforce
 - Type of business
 - Impact of accommodation on business operations
- Note—very few cases where employer prevailed on issue of undue hardship

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Undue Hardship:
Talley v. Family Dollar, 542 F.3d 1099 (6th Cir. 2008)

- Employee with degenerative osteoarthritis needed stool to sit down at cash register
- Employer initially gave her stool
 - But, later took away because other employees complained of unfair treatment
- Held: Co-worker complaints, standing alone, did not give rise to undue hardship
 - Evidence showed that employee was able to adequately perform her job at the register with use of stool
 - Jury must decide whether request was reasonable

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Undue Hardship:
Rodal v. Anesthesia Group, 369 F.3d 113 (2^d Cir. 2004)

- Physician with cancer requested light duty
 - No nights or weekends
- Employer claimed undue hardship
 - Would require other doctors to bear burden of additional workload
- Dist. Ct. granted sj to employer on UH grounds
- Held: Did not give rise to undue hardship
 - Insufficient evidence that burden was "so disproportionately heavy" that it made request unreasonable
 - No proof of schedules indicating how work was covered at night and on weekends
 - No evid. of medical group's financial resources, costs associated with requested accommodation

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Effective Use of Experts


- Traditionally, a battle of the experts on "threshold" issues
 - What is the employee's medical condition?
 - Does it "substantially limit" one of the new major life activities?
 - Many cases of experts who testified about effect of mitigating measures on determination of "disability"
 - Under ADAAA, this may not be as effective because cannot analyze mitigating measures
 - Can the employee perform the essential functions of the job?
 - What impact does condition have on employee's ability to perform essential functions?

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Other Uses for Experts


- No cases out there
 - Probably because case ended at threshold issue
- Could offer expert to demonstrate reasonableness of alternative accommodations
 - Remember: Employers need not provide the employee's preferred accommodation
- Prove undue hardship
 - Rare, but experts may be used to show undue hardship in modifying work facilities or acquiring certain equipment

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Discovery Issues


- Requests for physical or mental examination
 - Federal Rule 35 permits exam if plaintiff's physical or mental condition is "in controversy"
 - Simply filing suit under ADA may not be enough
- Value of videotaped depositions
 - Ask for performance of job duties on video
 - Show employee (not) performing essential functions of his/her job
- Preparing for summary judgment issues
 - Likely to shift from whether employee is disabled to reasonableness of accommodations

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Other Defensive Strategies

- Update job descriptions
 - Do they clearly state all the essential functions of the job?
 - Are the essential functions listed truly "essential"?
- Train managers to handle requests for accommodation appropriately
- Reduce workforce to 14 to avoid coverage

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Questions



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Overview of the ADA Amendments Act (ADAAA) of 2008

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ADAAA: Introduction and History

- Signed into law by President George W. Bush on September 25, 2008
- Goes into effect on January 1, 2009

ADAAA: Introduction and History cont'd

- Negotiated between **business** and **disability groups** (e.g., U.S. Chamber of Commerce, Society for Human Resources Management, Epilepsy Foundation, American Diabetes Association, American Association of People with Disabilities)
- Negotiations focused on original Congressional intent in light of recent Supreme Court decisions

ADAAA: Introduction and History cont'd

- Clarifies that EEOC has the authority to issue regulations implementing the definition of “disability” consistent with the broad remedial purposes expressed by Congress
- Instructs courts to give EEOC’s regulations and guidance proper deference

Why Did Congress Amend the ADA?

- Congress intended the ADA definition of disability to be construed broadly, but courts were finding too many people outside the ADA's protections
- The ADA's definition of "disability" was based on Section 504 of the Rehabilitation Act of 1973, which courts construed broadly before the ADA
- The Supreme Court's decisions in the Sutton trilogy and in Toyota Motor Mfg., Ky v. Williams construed the term "disability" too narrowly
- The EEOC's current regulation defining "substantially limits" as "significantly restricted" is inconsistent with Congressional intent by expressing too high a standard

Major Goals of the ADAAA

- To **restore** the original intent and scope of the ADA by reinstating a broad scope of protection
- To **overturn** the Supreme Court's rulings in the Sutton trilogy that "disability" should be determined by reference to the ameliorative effects of mitigating measures
- To **reject** the Supreme Court's holding in Toyota that the ADA requires a "demanding standard" for establishing coverage and requires that an impairment "severely restrict" major life activities
- To express Congress's intent that the focus should be whether covered entities have complied with their obligations

Significant Changes

- Rejects the term “substantially limits” as defined by Supreme Court and EEOC
- Provides illustrative list of major life activities that includes for the first time “major bodily functions”
- Makes clear that mitigating measures (*other* than ordinary eyeglasses or contact lenses) **cannot** be considered in determining “disability”
- Expressly states that an impairment can be disability even if **episodic** or **in remission**
- Redefines “regarded as”

Changes to the Definition of “Disability”

- Retains the basic 3-part definition by defining “disability” as:
 - A physical or mental impairment that substantially limits a major life activity;
 - A record of such an impairment;
 - Being regarded as having such an impairment

Changes to Definition of “Disability”

“Major Life Activities”

- Contains list two non-exhaustive lists:
 - **General:** includes most of the major life activities that EEOC has recognized in addition to some activities that EEOC has not specifically recognized (e.g., **bending, reading, and communicating**)
 - **Major bodily functions:** functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

Changes to the Definition of “Disability”

“Substantially Limits”

- Determination of whether an impairment substantially limits a MLA must be made **without regard** to the ameliorative effects of mitigating measures, such as:
 - medication, medical supplies, equipment, prosthetics, hearing aids and cochlear implants
 - use of assistive technology
 - reasonable accommodations or auxiliary aids or services
 - learned behavioral or adaptive neurological modifications

Changes to Definition of “Disability”

Substantially Limits” cont’d

- **“Ordinary Eyeglasses or Contact Lenses”**
 - “Shall” be taken into account in determining “disability”
 - Definition: “lenses that are intended to fully correct visual acuity or eliminate refractive error”
 - **Distinguished from mitigating measures:** “low vision devices,” defined as “devices that magnify, enhance, or otherwise augment a visual image”

Changes to Definition of “Disability”

“Regarded as” Substantially Limited in a MLA

- If employer makes employment decision (e.g., hiring, demotion, promotion, termination) based on individual’s **actual** or **perceived** impairment (that is **not** transitory and minor), employer has regarded individual as having a disability and must defend its actions
- No need to demonstrate that an impairment is “substantially limiting”
- Individuals “regarded as” disabled are **not** entitled to reasonable accommodation

Other Provisions

- Employers using uncorrected vision standards as a qualification standard for certain jobs must show that they are **job-related and consistent with business necessity**
- The phrase “**discriminate on the basis of a disability**” replaces “discriminate against a qualified individual with a disability because of the disability of such individual”
- Prohibits **reverse discrimination** claims by explaining that claims based on a **lack of a disability** are not actionable

ADAAA: What has not Changed

- Impairment
- Reasonable accommodation
- Undue hardship
- Interactive process

