

## Outside Counsel

## Expert Analysis

# ADA Amendments Breathe New Life Into Disability Claims

Just over three years ago, Congress determined that the Americans with Disabilities Act (ADA) ineffectively addressed disability discrimination because cases brought pursuant to the ADA had become too focused on the question of whether or not an employee had a disability, and not the alleged discrimination resulting therefrom. Seeking to remedy this perceived problem, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA or the amendments act) in September 2008, with the “primary purpose” of “mak[ing] it easier for people with disabilities to obtain protection under the ADA.”<sup>1</sup> With the passage of the ADAAA, Congress redirected the ADA analysis to whether employers “have complied with their obligations and whether discrimination has occurred.”<sup>2</sup>

Since the amendments act does not apply to instances of discrimination occurring prior to the act’s Jan. 1, 2009 effective date, claims arising under the ADAAA are only now beginning to make their way through the courts. If the early returns are indicative of what is to come, it is fair to say that Congress may have achieved its primary purpose. Nevertheless, as detailed below, employers can take several steps to ensure their compliance with the ADAAA.

### Shifting the Focus

As noted above, the stated intent of the ADAAA was to shift the focus from whether or not an individual is disabled, to whether discrimination is occurring. Congress attempted to accomplish this goal by altering the threshold to meet the definition of disability. Indeed, although the act retains the ADA’s definition of “disability” as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, the ADAAA significantly modifies the meaning of the terms comprising this definition.<sup>3</sup> Specifically, the act, along with the Equal Employment Opportunity Commission’s (EEOC) amended ADA regulations, specifies that



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the term “substantially limits” must be construed broadly, and no longer requires an impairment to “significantly restrict” a major life activity.

Furthermore, the determination of whether an impairment substantially limits a major life activity must be made without considering any measures used to alleviate the effects of the impairment, such as medication or medical supplies (excluding “ordinary eyeglasses or contact lenses”), and treatments such as psychotherapy or behavioral therapy. Additionally, an individual’s impairment, even if it is in remission, episodic, or is expected

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to last fewer than six months, is a disability if it would substantially limit a major life activity when its symptoms are present.<sup>4</sup>

The ADAAA also sought to alter the disability threshold by adding reading, bending and communicating to the list of “major life activities” that an impairment could substantially limit. The amendments act also recognizes that the operation of “major bodily functions” (e.g., neurological, digestive, bowel, or cardiovascular functions) can also constitute a “major life activity.” Accordingly, under the ADAAA, a “major life activity” need not be “of central importance to daily life.”<sup>5</sup>

The amendments act was intended to not only make it easier for individuals to demonstrate that they have a covered impairment, but to also minimize the showing necessary to establish that an individual is “regarded as” having a disability. Pursuant to the ADAAA, an

individual is only required to establish that he or she was subjected to an adverse action (e.g., failure to hire or demotion) based on an actual or perceived impairment that is neither transitory nor minor.<sup>6</sup>

Prior to the passage of the ADAAA, an individual was required to demonstrate that the employer believed the actual or perceived impairment substantially limited a major life activity. Thus, the amendments act shifts the focus from what an employer may have believed about an individual’s impairment, to whether or not an employer took action against an individual because of an impairment. Nevertheless, unlike an individual with an actual disability or a record of a disability, employers have no duty to accommodate those “regarded as” being disabled.<sup>7</sup>

As detailed above, the ADAAA was designed to expand the scope of the definition of “disability” to include a greater number of impairments and lower the threshold showing for establishing that an employer regarded an individual as disabled. These changes were made for the express purpose of pushing cases beyond the disability inquiry. Based on recent case law, it appears that the ADAAA is producing the shift in focus that Congress intended.

### The ADAAA in Practice

In *Negron v. City of New York*, the Eastern District of New York held that plaintiff Amelia Negron’s sporadic pain and inflammation in her left hand could form the basis of a disability claim under the ADAAA.<sup>8</sup> Negron was employed by the New York City Department of Correction (DOC) until her termination in April 2010. While training at the correction officer academy in April 2008, Negron injured her left hand and chest during a firing range accident. Although she alleged that her hand only bothered her intermittently in the years following the accident, in March 2010, she reported pain and inflammation to DOC on several occasions. After an initial examination by DOC’s Health Management Division (HMD), Negron was ordered to be placed on restricted status to allow for limited work use of her left hand. DOC refused to comply with HMD’s order and, after re-examining her hand several weeks later, HMD ordered Negron to go on leave.

The City of New York attempted to dismiss Negron’s reasonable accommodation claim on

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the ground that she failed to plead a disability within the meaning of the act. Although she failed to actually plead how her injury affected a major life activity, the court construed her allegations to suggest that her injury affected "two major life activities...her ability to perform manual tasks and her ability to work." In determining whether Negron's injury substantially limited these activities, the court, in accordance with the ADAAA, only considered the effect of the injury when the pain and/or inflammation manifested itself.

Accordingly, since Negron alleged that she could not use her hand to perform tasks at work in March 2010, the court ruled that she sufficiently pled that her injury substantially limited her ability to perform manual tasks.

With respect to the major life activity of working, the court referenced the EEOC's post-ADAAA guidance which provides that an individual can demonstrate a substantial limitation on the activity of working by showing that an impairment substantially limits her ability to perform a class of jobs, or a broad range of jobs in various classes. As such, the court found that Negron's one-month medical leave was sufficient to show that her impairment substantially limited her ability to work. Since the court held that Negron's hand injury and subsequent medical leave were a valid basis for finding her disabled under the ADAAA, the court denied the City of New York's motion to dismiss.

Taking the *Negron* case as a prime example of the ADAAA's new threshold for establishing an actual disability, *Darcy v. City of New York* demonstrates how the ADAAA has altered "regarded as" disability claims. In *Darcy*, the Eastern District of New York held that a police officer's claim that he was transferred to another division because he was "regarded as" disabled due to alcoholism could survive summary judgment.<sup>9</sup> Plaintiff James Darcy was employed by the New York City Police Department (NYPD) as a lieutenant in the Queens Narcotics Division from August 2001 until December 2004.

In December 2004, Darcy was transferred to a less prestigious position in the NYPD's Transit Division. Prior to his transfer, Darcy socialized as friends with a fellow police officer who was allegedly an alcoholic. In June 2004, the officer's brother, a deputy chief, called Darcy into his office and allegedly stated that, "You are a lowly lieutenant and you suffer from the same disease as my brother," referring to his brother's alcoholism. Darcy subsequently informed several superiors of the deputy chief's comment. One of the superiors to whom Darcy reported the deputy chief's remark was ultimately responsible for Darcy's transfer in December 2004.

Darcy argued that his transfer was discriminatorily motivated because, as a result of his social interactions with a known alcoholic, he was "regarded as" being disabled due to alcoholism. In response, the City of New York argued that, even assuming Darcy was "regarded as having" alcoholism, he was not regarded as being substantially limited in a major life activity. The court sided with Darcy, explaining that the city's argument failed to recognize that the ADAAA expressly exempts a "regarded as" claimant from having to show that the disability

he or she is perceived as having substantially limits (or is perceived to substantially limit) a major life activity.

Rather, a claimant need only demonstrate that he or she was subjected to an adverse employment action because the employer perceived the claimant to suffer from a recognized disability. Ultimately, the court determined that Darcy's transfer, in conjunction with the deputy chief's comment, satisfied Darcy's obligation to show that he was regarded as disabled. Accordingly, the City of New York's motion for summary judgment was denied.

### Practical Measures

*Darcy* and *Negron* demonstrate that the ADAAA is achieving its stated objective and is, in fact, breathing new life into disability claims. The act not only broadens the scope of the ADA to protect impairments that may not have been recognized previously, but it also changes the focus of the claim from whether a person is disabled, to the alleged discrimination resulting therefrom. Accordingly, it is now more important than ever for employers to take proactive measures to address issues that may arise under the act.

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Notwithstanding the ADAAA's lower thresholds, employers should not simply assume that every impairment qualifies as a disability. For instance, in situations where an employee's impairment presents symptoms that are difficult to observe, employers should ask for medical documentation to support the employee's accommodation request.

First, employers should review their job descriptions to ensure that they adequately describe the tasks required by each job position because even after the ADAAA, employees who cannot perform the essential functions of a job do not qualify for the act's protections. Moreover, since the act continues to give consideration to an employer's judgment in determining what job functions are essential, written job descriptions can provide indispensable evidence of what the essential functions of a job actually are.

Second, employers should also review their employee handbooks, manuals and policies to ensure that they do not conflict with the act and its regulations. However, well-drafted policies are of limited use without properly training human resources representatives, supervisors, and managers on how to apply them. These individuals should understand how to react to an employee who requests a reasonable accommodation, how to engage such employees in the interactive process, and what types of reasonable accommodations can be offered for particular impairments. Furthermore, it is imperative that personnel are instructed not to retaliate against employees who

request reasonable accommodations.

Finally, and notwithstanding the ADAAA's lower thresholds, employers should not simply assume that every impairment qualifies as a disability. For instance, in situations where an employee's impairment presents symptoms that are difficult to observe, employers should ask for medical documentation to support the employee's accommodation request. This request should be part and parcel of the interactive process that employers engage in with employees to determine what reasonable accommodations, if any, would allow the employee to perform the essential functions of the job. Each step of the interactive process should be adequately documented, including all accommodation requests and the reasons why such requests were ultimately granted or denied.

### Conclusion

Congress' express purpose in enacting the ADAAA was to make it easier for individuals to meet the definition of "disability." Three years after the ADAAA's enactment, the act's intended effect is beginning to play out in the courtroom. Employers should not be caught off guard by disability claims arising under the act and should be prepared to respond to employees' reasonable accommodation requests. By utilizing some of the tips outlined above, employers will be better positioned to react to issues arising under the ADAAA.

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1. 29 C.F.R. §1630.1(c)(4).
2. 29 C.F.R. §1630.1(c)(4).
3. See 42 U.S.C. §12102.
4. See 42 U.S.C. §12102(4); 29 C.F.R. §1630.2(j).
5. 29 C.F.R. §1630.2(i).
6. See 42 U.S.C. 12102(3) ("A transitory impairment is an impairment with an actual or expected duration of 6 months or less").
7. 29 C.F.R. §1630.2(o).
8. See *Negron v. City of New York*, No. 10-CV-2757, 2011 WL 4737068 (E.D.N.Y. Sept. 14, 2011).
9. *Darcy v. City of New York*, No. 06-CV-2246, 2011 WL 841375 (E.D.N.Y. March 8, 2011) (applying the ADAAA to plaintiff's pre-2009 claims because the U.S. Court of Appeals for the Second Circuit had not yet ruled on the ADAAA's retroactive application).