



New Developments in the Americans with Disabilities Act - Important Implications for Occupational Medicine

Carolyn S. Langer, MD, JD, MPH
Medical Director
March 26, 2009

Tonight's Presentation Dedicated in Memory of

**William B. Patterson, MD, MPH, FACOEM
1948-2008**

Colleague, Mentor and All Around Good Guy



© 2009 Harvard Pilgrim Health Care

The Americans with Disabilities Act

- Enacted July 26, 1990
- Effective July 26, 1992, applied to nearly all employers with 25 or more employees
- Effective July 26, 1994, applied to nearly all employers with 15 or more employees



© 2009 Harvard Pilgrim Health Care

Americans With Disabilities Act (ADA) 42 U.S.C. 12101(a)(7)

Finding:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from **stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society.**



© 2009 Harvard Pilgrim Health Care

Myths, Fears, and Stereotypes

- Congress acknowledged the obstacles to full participation in all aspects of society: prejudice, antiquated attitudes, or failure to remove societal and institutional barriers.
- Society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment.



© 2009 Harvard Pilgrim Health Care

Americans with Disabilities Act (ADA)

- Prohibits discrimination against individuals with physical or mental disabilities in employment, public services and places of public accommodation, such as restaurants, hotels and theaters.
- Definition of "disability"
 - A physical or mental impairment that substantially limits one for more major life activities.
 - A record of such an impairment.
 - Regarded as having such an impairment.



© 2009 Harvard Pilgrim Health Care

Inclusion Within The Protected Class

- Determined on a case-by-case basis
 - Qualified individual
 - Disability
 - Reasonable accommodation

Why change the ADA?

- Over the years, the courts have narrowed the ADA's intended, broad protections, continuously ruling against individuals with disabilities.
- In employment discrimination cases, courts have ruled in favor of employers 97% of the time, often before the plaintiff has had a chance to demonstrate the merits of the case.
 - Many employers were granted summary judgment (i.e., case never proceeded to trial) due to the challenge of establishing a disability
 - The individual was not sufficiently disabled to merit the protection of the ADA
- ADA should re-focus on whether covered entities have complied with their obligations under the ADA
 - a greater number of individuals with disabilities need access to accommodations in order to pursue employment and life as an equal member of society.

Why Change the ADA? continued...

Narrow interpretations in Supreme Court cases:


- **Sutton v. United Air Lines, Inc.**, 527 U.S. 471 (1999) determination as to whether an impairment substantially limits a major life activity may consider the corrective/mitigating measures that the individual uses.
- **Toyota Motor Mfg., Kentucky, Inc. v. Williams**, 534 U.S. 184 (2002): "substantially limited in a major life activity" strictly interpreted, creating a demanding standard for establishing the existence of a disability.
Only disabled if "prevented or severely restricted in an activity that is of central importance to most people's daily lives."

ADA



ADAAA

The ADA Amendments Act- ADAAA

- On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments. 
- Became effective on January 1, 2009
- The ADAAA--like the ADA--only applies to employers with 15 or more employees.
- By rejecting several Supreme Court decisions and portions of the EEOC's regulations, the ADAAA retains the ADA's basic definition of a disability, but expands
 - the interpretation of the term "disability"
 - the definition of "major life activities"
 - the protections of the original ADA by encompassing more individuals with less severe impairments.

Expansion of the Definition of Major Life Activity


- Non-exhaustive list of activities includes:
 - Many activities previously recognized by the EEOC (e.g., walking) and
 - Some activities not specifically recognized by the EEOC (e.g., reading, bending, communicating)
- Adds a new major life activity—"major bodily functions"

Major Life Activities

To include:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting

- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working



13 © 2009 Harvard Pilgrim Health Care

The ADAAA added a new major life activity “MAJOR BODILY FUNCTIONS:

Include, but not limited to:

- Functions of the immune system
- Cell growth
- Digestive, bladder, and bowel functions
- Neurological and brain functions
- Endocrine functions
- Reproductive functions

- By including major bodily functions, the Act ensures that the individual whose conditions are well managed or in remission are covered.
- Shifts the focus away from the individual's current functional abilities and limitations to the health condition – e.g., a cancer patient in remission still has abnormal cell growth.

14 © 2009 Harvard Pilgrim Health Care

Episodic or in Remission

- An impairment that is “episodic or in remission” may lead to disability even when inactive “if it would substantially limit a major activity when active.”
- Examples may include cancer, epilepsy, and post traumatic stress disorder.
 - Example: A person with epilepsy is substantially limited during a seizure.
- Question: How to reconcile with direct threat analysis?

15 © 2009 Harvard Pilgrim Health Care

Direct Threat

- Significant risk of substantial harm.
- Specific risk identified
 - Duration
 - Nature and severity of potential harm
 - Likelihood of potential harm
 - Imminence of potential harm
- Current risk—not remote, speculative or future.
- Based on *objective* medical or other factual evidence re: a *particular* individual.
- Reasonable accommodation cannot eliminate or reduce risk below level of direct threat.

16 © 2009 Harvard Pilgrim Health Care


Mitigating Measures

- Except for ordinary eyeglasses and contact lenses, the ADAAA prevents courts and employers from considering mitigating measures an individual may be using when determining whether the individual is disabled.
- Therefore, it is possible that many of the tens of millions of individuals with conditions such as diabetes, high blood pressure, carpal tunnel syndrome and cancer may have a “disability” under the ADAAA, even if the conditions are well controlled.

17 © 2009 Harvard Pilgrim Health Care

Mitigating Measures Include:

- Medication, medical supplies, equipment, or appliances, low-vision devices (excluding ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aides and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.
- Use of assistive technology.
- Reasonable accommodations or auxiliary aides or services.
- Learned behavioral or adaptive neurological modifications.



18 © 2009 Harvard Pilgrim Health Care

Reasonable Accommodations

- The duty to accommodate does not extend to the provision of adjustments or modification that are primarily for the personal benefit of the individual with a disability.
 - If the adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job → it may be considered a type of reasonable accommodation.
 - If the adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide.

“Regarded As”

- The ADAAA will hold an employer liable under a “regarded as” theory if the individual can show discrimination due to an actual or perceived physical or mental impairment, whether or not the impairment actually limits or is perceived to limit a major life activity.
- “Regarded As” prong narrowed: Employers do not need to make accommodations for someone who is disabled solely because he or she is “regarded as” disabled.
- The legislation also specifically excludes minor conditions or transitory conditions lasting six months or less from protection under the “regarded as” prong.

The ADAAA’s Impact: Expansion of protection under the ADA

- | | |
|---|--|
| <ul style="list-style-type: none"> ▪ Examples of illnesses likely to be covered: <ul style="list-style-type: none"> – Diabetes – Hypertension – Heart disease – Cancer – Depression – Pregnancy complications | <ul style="list-style-type: none"> ▪ Examples of injuries likely to be covered: <ul style="list-style-type: none"> – Fractures that do not heal properly – Back impairments – Carpal tunnel or other cumulative trauma disorders – Depression/PTSD |
|---|--|

The ADAAA’s Impact: Expansion of protection under the ADA (cont’d)

- Prior to the ADAAA, many individuals were told that they were not entitled to accommodations because they did not have a disability.
- Can deprive individuals of the means to adhere to prescribed treatment.
- Changes under the amended law should discourage discrimination and give patients confidence to follow their physician’s recommendations knowing that the law will protect them.



The ADAAA’s Impact: Expansion of protection under the ADA (cont’d)

- Patients will be better able to maintain treatment & avoid complications of chronic diseases.
 - For example: A factory worker with diabetes will now be able to have short breaks to check blood glucose levels and administer insulin at work.
- ADAAA will provide persons with disabilities new opportunities to work productively, maintain health insurance, and manage their health conditions effectively.



The ADAAA’s Impact: Expansion of protection under the ADA (cont’d)

- These improvements are to ensure robust protection of individuals who experience disability discrimination.
- Rather than focusing excessively on whether a person is disabled enough to qualify for protection, the courts will now focus on whether the person was treated unfairly because of a serious injury or disease.



Impact on Employers and Occupational Medicine Professionals

- ADAAA may lead to a rise in discrimination claims due to expanded interpretation of "disability."
- More employees will fit within the class of disabled persons under the ADA.
- Patients with chronic medical conditions, including autoimmune disorders, will likely have a lower burden of proof in establishing a disability under the ADA.
- More employees will be protected by the ADA, with protections often arising from conditions that may not be obvious in the workplace.
- Expansion of the cohort considered to be "disabled" will likely
 - increase requests by employees for disability-based accommodations
 - increase the affirmative obligation to provide reasonable accommodation.

25 © 2009 Harvard Pilgrim Health Care



Medical Examinations and Inquiries

- Prior to extending a job offer, an employer may not:
 - require a job applicant to undergo a medical examination
 - make any pre-employment inquiry about a disability or the existence, nature or severity of a disability.
- Applicants may be asked about their ability to perform specific job functions and, with certain limitations, may be asked to describe or demonstrate how they would perform these functions.
- A job offer may be conditioned on the results of a pre-placement medical examination, but only if the examination is required of all entering employees in the same job category.
- Post-employment/post-placement medical examinations must be job related and consistent with the employer's business needs.

26 © 2009 Harvard Pilgrim Health Care



ADA Three Defenses to Discrimination:

- Selection criteria are job-related and consistent with business necessity, and a disabled individual cannot perform essential job tasks even with reasonable accommodation.
- Reasonable accommodation would impose an undue hardship on the employer.
- A disabled individual poses a direct threat to the health and safety of self or others in the workplace.

27 © 2009 Harvard Pilgrim Health Care



With the passage of the ADA Amendments Act, a greater number of individuals with disabilities will have access to the accommodations they need to pursue employment and life as an equal member of society.



28 © 2009 Harvard Pilgrim Health Care



Best employees possible

- The ADAAA does not require employers to hire unqualified candidates.
- It requires all employers to do what most good employers do already.....

LEVEL THE PLAYING FIELD

29 © 2009 Harvard Pilgrim Health Care



Post-Test Questions

Q: Will impairments be considered "disabilities" if they are controlled?

A: Under a prior U.S. Supreme Court decision, physical and mental impairments were not considered "disabilities" if controlled by "mitigating measures," such as medication or corrective devices (e.g., hearing aids or prosthetics). The ADAAA explicitly states that with the exception of eyeglasses or contact lenses, such measures may not be considered when analyzing whether the impairment substantially limits a major life activity. The employer must now consider whether the impairment is a disability without considering how much the mitigating measures correct the disability. Previously, certain employees whose impairments (e.g. asthma, diabetes or epilepsy) were controlled by medication and treatments could be excluded from coverage because their condition was not severe enough. Now, those employees are likely protected as "disabled."

30 © 2009 Harvard Pilgrim Health Care



Q: What happens under the ADAAA if an employer discriminates against someone “regarded as” having a disability?

A: The ADAAA also makes it easier to prove an employer discriminated against someone it wrongly “regarded as” having a disability. Under the original ADA, an individual bringing suit needed to prove that the employer regarded the employee as being substantially limited in a major life activity. This was a difficult standard to meet. Now, the individual only has to show that the employer perceived the individual as having a mental or physical impairment, regardless of whether the impairment substantially limits, or is perceived to limit, a major life activity.

Q: I understand that it will be harder for employers to defend ADA claims. Does any part of the new ADAAA favor employers?

A: The ADAAA does clarify that “regarded as” claims cannot be based on impairments that are minor or “transitory,” i.e., expected to last less than six months. In addition, the ADAAA makes it clear that employers do not have to provide a reasonable accommodation to individuals who are “regarded as” disabled. Finally, the ADAAA prohibits “reverse discrimination” claims. Thus, a non-disabled employee may not claim discrimination if a disabled employee is favored in an employment decision.

Which of the following is NOT true about the ADAAA?

- a. It will reverse several key U.S. Supreme Court decisions.
- b. It will expand the definition of “disability” to include more conditions.
- c. It will require employers to provide accommodations to more employees.
- d. It will apply to all employers
- e. It will expand and specifically list “major life activities” covered by law
- f. It will prohibit consideration of “mitigating measures” (other than glasses and contact lenses) in determining whether someone is disabled.

Congratulations

The correct answer is: D

- The ADAAA does not change the range of employers covered by the law. The ADAAA-- like the ADA-- only applies to employers with 15 or more employees.