

## **Fitness for Duty and ADA Issues in the Compromised Worker**

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### **Why Be Concerned?**

- **ADAAA**
- **Aging workforce**
- **Increased prevalence of chronic medical and behavioral health conditions in the workplace**
- **Health care delivery system failures**
  - Fragmented care
  - Poor coordination of care
  - Variability in adherence to EBM in the treatment of chronic disease
  - Access?

## 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.**

## 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.

## 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”
  1. A physical or mental impairment that substantially limits one for more major life activities.
  2. A record of such an impairment.
  3. Regarded as having such an impairment.

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# ADA

# ADAAA



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## 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.

## ADA Charges Resolved by Impairment Type EEOC (2010)

#	Impairment Type	Percentage
1	Other Disability	26.4%
2	Regarded as Disabled	14.0%
3	Orthopedic and Structural Impairments-Back	9.7%
4	Non-paralytic Orthopedic Impairment	7.8%
5	Record of Disability	7.0%
6	Depression	6.9%
7	Diabetes	5.4%
8	Anxiety Disorder	5.1%
9	Cardiovascular	4.0%
10	Manic Depressive Disorder	3.8%
11	Cancer	3.7%
12	Other Neurological Impairment	3.6%

## 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 **basic 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**”
  - Impairments need not be readily apparent or obvious
  - Covers individuals with conditions that are well managed, episodic, or in remission
  - 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

## 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



## 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

## The ADAAA's Impact: Expansion of protection under the ADA

- Examples of illnesses likely to be covered:
  - Diabetes
  - Hypertension
  - Heart disease
  - Cancer
  - Crohn's disease
  - Depression
  - Bipolar disorder
  - Aspergers/autism spectrum
  - Pregnancy complications
- Examples of injuries likely to be covered:
  - Fractures that do not heal properly
  - Back impairments
  - Carpal tunnel or other cumulative trauma disorders
  - Amputation/prosthetic limb
  - Traumatic brain injury

## 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.

## How to Reconcile ADAAA with Direct Threat?

### 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.

## Case Study: Brain Cancer EEOC v. Maxim Healthcare Services, Inc.

- Anne Whitlege worked as Director of Clinical Services for Maxim Healthcare Services, a national home care agency with over \$1.3B in revenues and 35,000 employees
- Denied reasonable accommodation upon returning from medical leave for treatment of brain cancer
- Treating doctor indicated she could work full-time, and needed only occasional days off for treatment
- Terminated in February 2009
- Employer cited inability to do job and direct threat to self and others
- Whitlege died in August 2010
- EEOC settles in favor of Whitlege
  - \$160,000 settlement
  - Letter of condolence to her survivors

## Lessons from the Whitledge Case

- Employees with cancer more easily able to prove disability
- Employers should refrain from writing policies that require employees with disabilities to be free from restrictions before returning to work after a medical leave of absence
- Employers must engage in an individualized, interactive process with employees who are potentially disabled
  - Reasonable accommodation
  - Direct threat analysis
- Direct threat assessments must be based on objective evidence and information

## Case Study: Multiple Chemical Sensitivity (McBride v. City of Detroit)

- McBride sued the city of Detroit under the ADA after it allegedly refused to accommodate her multiple chemical sensitivity
- Co-worker unplugged deodorizer, but refused to stop wearing perfume
- McBride brought ADA claim based on her having a disability that substantially limited the major life activity of breathing
- Employer cites “scent-free policy” as an unreasonable accommodation causing an undue hardship

## Lessons from Multiple Chemical Sensitivity Case

- Employer needs to engage in an individualized and proper interactive process to identify a reasonable accommodation
  - McBride did not request complete “no-scent policy,” but rather offered that mild scents may be worn\*
  - The city failed to explain why the policy would create an undue hardship
    - why it could not have ordered the co-worker to stop wearing “offensive perfumes or oils,” or
    - why such a directive would be an unreasonable accommodation
  - Employer did not adequately explain why relocation of one of the employees was not feasible

\*Mandatory “no-scent policy” is not reasonable as a matter of law

## Case Study: Misconduct (Palmer v. Cook County Social Services Dept.)

Caseworker engaged in disruptive and abusive behavior at work. Following her termination, she brought an ADA claim against the employer, alleging that she was fired due to her disability (inability to get along with others).

## Misconduct - Holding (Palmer v. Cook County Social Services Dept.)

- Plaintiff dismissed due to misconduct
- Inability to get along with others is not a disability
- Even if disabled, not otherwise qualified because caseworker job requires getting along with supervisors and co-workers
- No reasonable accommodation without undue hardship
- Employer treats other employees similarly with regard to discipline for misconduct

## The Compromised Worker in light of the ADAAA

- More employees will fit within the class of disabled persons under the ADA and have a lower burden of proof to establish disability
- Many disabilities (e.g., autoimmune disorder, diabetes, behavioral health disorders) will not be obvious or apparent
- Employers will need to re-assess return to work and job accommodation policies
- Direct threat assessments must adopt an individualized approach based on objective evidence about the specific employee
- Employers must engage in an individualized, interactive process with employees who are seeking reasonable accommodation

**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.**

