



ON THE LEGAL FRONT

Understanding the ADA Amendments Act of 2008 (ADAAA): Back to the Future?

**Eric Dunleavy
DCI Consulting**

**Arthur Gutman
Florida Institute of Technology**

On September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA) into law, with an effective starting date of January 1, 2009. The act had support from a host of civil rights groups and businesses, and bipartisan support in the House and the Senate. The plain text of the statute reveals that the impetus for the amendments was that when Congress enacted the ADA in 1990, it expected that the definition of *being disabled* under the ADA would be synonymous with the definition *being handicapped* under the Rehabilitation Act of 1973 and that this “expectation” has *not* been fulfilled. The ADAAA targets four Supreme Court rulings and one major EEOC regulation. By our count, there are four major amendments, including:

1. The ADAAA overturns the ruling in *Sutton v. United Airlines* (1999) and its two 1999 “companion” rulings (*Murphy v. UPS* and *Albertsons v. Kirkingburg*) on “whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures”;

2. The ADAAA overturns the ruling in *Toyota v. Williams* (2002), which “narrowed the scope” of being “substantially limited” with respect to “manual tasks”;

3. The ADAAA overturns EEOC’s definition of the term “substantially limits,” which required individuals to be “significantly restricted” with respect to a major life activity;

4. The ADAAA overturns the ruling in *Sutton* as it relates to the “third prong of the definition of disability” (being regarded as being disabled) and reinstates “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.”

These are critical changes that will enable ADA plaintiffs to more easily overcome the hurdle of proving they are *disabled* within the meaning of the ADA. Next, we first review the ADA’s definition of being disabled before discussing each of the major amendments.

Being Disabled Within the Meaning of the ADA

As discussed by Gutman (2000a, 2000b), ADA plaintiffs must prove (a) disability and (b) qualification before they can (c) state an adverse action based on being disabled. For example, in *McKay v. Toyota* (1997), McKay's prima facie burden was to prove the following three things:

- (1) that she is a disabled person within the meaning of the Act; (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation; and (3) that she suffered an adverse employment decision because of her disability.

The *McKay* ruling is typical of many other rulings both before and after this case. McKay was never permitted to prove parts 2 (qualification) or 3 (adverse action) because she was unable to overcome the hurdle in part 1 (that she is disabled within the meaning of the ADA).

Proving disability is itself a two-part challenge. First, the plaintiff must establish one of three prongs: (a) a current physical or mental impairment, (b) a record of such impairment, or (c) being regarded as having such an impairment. Second, the plaintiff must also prove that the impairment cited *substantially limits* at least one *major life activity*. The "substantial limitation" criterion has been a difficult part for plaintiffs to prove, and it is at the core of the ADAAA.

One of the major hurdles in this proof is that the EEOC's definition of "substantially limited" means there must be a *significant restriction* of the major life activity cited. The EEOC demands that comparisons must be made to "average" people, and the impairment must be relatively permanent. For example, moderate difficulty in walking (*Penny v. UPS, 1997*) and the inability to lift 25 pounds (*Williams v. Channel Master, 1996*) have failed the average-person test, and the effects of major surgery (*McDonald v. Pennsylvania, 1998*) and even major heart attacks (*Katz v. City Metal, 1996*) have failed the permanence test.

A final point to note is that working may serve as the substantially limited major life activity in the absence of other choices. However, the major caveat with *working* is that the individual must be excluded from a *broad* range of jobs. For example, in *McKay v. Toyota* (1997), McKay's carpal tunnel syndrome prevented her from performing secretarial work. However, she failed the substantial limitation test because her educational background qualified her for a broader range of other higher level jobs.

Four Major Amendments

Our choice of four amendments is, admittedly, arbitrary. There are more than four numbered statements in the ADAAA. We feel that these four amendments are the major conceptual alterations to the definition of being disabled.

1. External and Internal Mitigation Measures

This amendment relates to the central opinions by the Supreme Court in three 1999 rulings: *Sutton v. United Airlines*, *Murphy v. UPS*, and *Albertsons v. Kirkingburg*. All three rulings are examples of plaintiffs failing to prove disability within the meaning of the ADA. Of primary importance to Congress, the *Sutton* and *Murphy* rulings overturned Section 1630.2(j) of the EEOC's Interpretative Guidance relating to external mitigation measures. Accordingly:

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

The issue in *Sutton* was mitigation of visual impairments by eyeglasses. Two sisters were not hired as commercial airline pilots because they did not meet *uncorrected vision* requirements of the airline. They claimed that they were substantially limited in the major life activity of *working*. The Supreme Court ruled that a disability claim was inappropriate because their vision was corrected with glasses, even though the airline requirement did not take correction (i.e., glasses) into consideration in the hiring process. In addition, the plaintiffs had held jobs as pilots flying smaller aircraft, which limited their argument that they were substantially limited in the major life activity of *working*. Interestingly, the sisters did not claim the obvious; that they were substantially limited in the major life activity of *seeing*.

Of additional interest in *Sutton*, Congress estimated in the original ADA that 43 million Americans would be protected by the statute. As part of its reasoning for rejecting the claim in *Sutton*, the Supreme Court suggested that "corrected physical limitations" were different than most disabilities, that the number of Americans protected by the ADA would reach at least 100 million if that protection included visual impairments, and that that number would grow to 160 million if other forms of mitigation (e.g., hearing aids) were included.

That argument, however, was not applicable to *Murphy*. Here, the plaintiff was fired from a mechanic job that required driving. The Court ruled that *Murphy* was not substantially limited by high blood pressure because the condition was controlled by medication. In this case the Department of Transportation had certain blood pressure requirements for driver positions where safety was a concern, and that regulation led to *Murphy's* termination.

In *Kirkingburg*, the Supreme Court ruled that natural (or internal) mitigation (poor vision in one eye that was compensated for via adequate vision in the other eye) could be considered in determining disability. The plaintiff was excluded from driving by DOT regulations regardless of the fact that his driving record suggested qualification. The Court again ruled that the plaintiff was not substantially limited postmitigation and that the difference between seeing with one versus two eyes was not necessarily a substantial limitation in this particular case.

Interestingly, the ADAAA explicitly identifies a number of mitigating measures such as medication, medical supplies, hearing devices, oxygen, low-vision devices, and others. Some of these obviously would have been applicable to the *Sutton* and *Murphy* cases. It also includes “learned behavioral or adaptive neurological modifications” as in *Kirkingburg*. However, “low-vision devices” do *not* include “ordinary eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error.”

2. Manual Tasks

The ADAAA explicitly overturns the Supreme Court’s ruling in *Toyota v. Williams* (2002), a case discussed in the April 2002 issue of this column (Gutman 2002). The case involves an interesting side issue in *Sutton*, where Justice O’Connor noted that working as a major life activity was not written in ADA statutory language, but instead, in an EEOC regulation. In *Sutton*, Justice O’Connor seemed prepared to strike down working as a major life activity but did not do so because the defendant did not challenge the regulation. Accordingly:

Because the parties accept that the term “major life activities” includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining “major life activities” to include work, for it seems “to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others]...then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.”

The opportunity to address working as a major life activity presented itself again in *Toyota v. Williams* (2002). Ella Williams suffered from carpal tunnel syndrome. In prior carpal tunnel cases, plaintiffs generally cited working as the major life activity, but as in *McKay v. Toyota* (1997), they generally could not prove exclusion from a broad range of jobs. Ella Williams took a different route, claiming that her impairments substantially limited her ability to perform routine *manual tasks* such as lifting, housework, gardening, and so forth. Those impairments also prevented her from performing two out of four essential job functions required in her job, and Williams requested that she be excused from performing those tasks. Williams won at the 6th Circuit Court, but that ruling was overturned in a ruling written by O’Connor.

O’Connor accepted that manual tasks are a major life activity, but limited them to manual tasks “*central to most peoples daily lives.*” Accordingly:

While the Court of Appeals in this case addressed the different major life activity of performing manual tasks, its analysis circumvented *Sutton* by focusing on respondents inability to perform manual tasks associated only with her job. This was error. When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform a variety of tasks central to most peoples

daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. Otherwise, Sutton's restriction on claims of disability based on substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a class of tasks associated with that specific job.

O'Connor's list of acceptable manual tasks included performing household chores, bathing, and brushing teeth, each of which Williams admittedly could perform.

In overturning *Toyota v. Williams*, the ADAAA provides an extensive list of major life activities, including bending, learning, reading, concentrating, thinking and major bodily functions of the immune, digestive, respiratory, and reproductive systems. Also included are caring for oneself, manual tasks, and working.

3. Substantial Limitations

The ADAAA's explicit rejection of the EEOC regulation defining "substantial limitation" as "significant restriction" is a surgical provision that relates to cases such as *McDonald v. Pennsylvania* (1998) on major surgery and *Katz v. City Metal* (1996) on major heart attacks by defining a "transitory impairment" as involving an expected duration of 6 months or less. Thus, victims of heart attacks, strokes, accidents, and so on who are not expected to recover within 6 months are considered substantially limited within the meaning of the ADA.

4. Regarded as Being Disabled

This amendment is a bit more vague than the other three, if only because it cites *Sutton* as the basis. There are two possible connections.

First, the airline had an exclusionary rule that exceeded the Federal Aviation Agency (FAA) rule. The FAA rule permits airline pilots with corrective lenses as long as they correct to 20-20 visual acuity. The airline also required that uncorrected vision is no worse than 20-100. The plaintiffs satisfied the FAA rule but not the airline rule. Thus, the plaintiffs had a potential claim under the third prong that the airline rule effectively regarded them as being disabled.

Second, in *Sutton*, the dissent (by Stevens and Breyer) provided the following example of the implications of the majority ruling.

If the Court is correct that "[a] 'disability' exists only where" a person's "present" or "actual" condition is substantially impaired, ante, at 9-10, there would be no reason to include in the protected class those who were once disabled but who are now fully recovered. Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impairment that has since been completely cured. See *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 281 (1987). Still, if I correctly understand the Court's opinion, it holds that one who continues to wear a hearing aid that she has worn all her life might not be covered—fully cured impairments are covered, but merely treatable ones are not. The text of the Act surely does not require such a bizarre result.

Based on statutory ADA language, the reference to *School Board v. Arline* (1987) could be due to either of these connections. What is clear is that in *Arline*, the plaintiff suffered from tuberculosis and was fired after an episode of infectiousness. The ADA makes it clear that if impairments that are “episodic or in remission” must be evaluated for substantial limitations when they are “active.”

More generally, Congress expects the EEOC to revise enforcement policies to be consistent with the ADA. Therefore, whatever ambiguities do exist in the ADA should be ironed out when these enforcement policies are written.

Potential Consequences of the ADA

It is obvious that more people will be considered disabled after the ADA becomes active. Will this lead to substantially more ADA claims? Our speculation, based in part on recent employment discrimination issues that received exposure in the popular press, is that yes, claims will likely rise. More people will be protected under the ADA, and even if for some reason that number isn't substantial, lawyers will want to test the boundaries and see how the ADA is interpreted by agencies and courts.

Because more claimants will likely meet the definition of being disabled, this necessarily means that more cases will end on issues of qualifications for the job and reasonable accommodation; the ADA does not amend these issues. For this reason we can't say for certain that ADA claims will be “easier” to win post ADA, particularly because demonstrating/refuting qualification and reasonable accommodations usually aren't light burdens. It may be reasonable to expect more plaintiff-friendly rulings post ADA if there are more ADA claims and different issues being considered in rulings. Regardless, understanding and measuring the essential functions of a job and developing and offering reasonable accommodations are likely more relevant post ADA simply because they will be evaluated more often in ADA investigation and litigation.

As described by McFadden-Papinchock (2005), I-O psychology expertise can play an important role in ADA work. Specifically, job analysis can play a central role in understanding job qualifications and what differentiates a reasonable accommodation from one that is unreasonable. I-O psychologists in employment and educational testing settings should be ready to reconsider their accommodation policies given that more and different disabilities will require accommodation, both in selection processes and on the job. Having standardized internal policies that allow for quick and reasonable responses to disabled applicants will be an important factor in determining essential qualifications and developing reasonable accommodations.

In addition, it will be important to develop measures of the knowledge, skill, and ability related to essential functions, in both traditional and accom-

modated formats. Understanding how traditional and accommodated KSA measures predict performance will also be an interesting issue in differentiating reasonable from unreasonable. I-O psychologists may also need to work closely with experts from other areas (e.g., biomechanics, clinical psychology, ergonomics, etc.) to develop ADA policies.

Unfortunately, it will be some time before the immediate consequences of the ADAAA are known. Although the amendments become active in January 2009, corresponding EEOC policy revisions aren't expected until much later in the year. Once those revisions are made and enforced, expect more time for a body of case law to develop that further clarifies what is a covered disability under the ADA and what isn't.

References

- Gutman, A. (2000a). *EEO law and personnel practices* (2nd ed.). Thousand Oaks, CA: Sage.
- Gutman, A. (2000b). Recent Supreme Court ADA rulings: Mixed messages from the Court. *The Industrial-Organizational Psychologist*, 37, 31–41.
- Gutman, A. (2002). Supreme Court Rulings: *Toyota v. Williams* and *EEOC v. Waffle House*. *The Industrial-Organizational Psychologist*, 39, 58–65.
- McFadden-Papinchock, J. (2005). Title I of the Americans with Disabilities Act: The short but active history of ADA enforcement and litigation. In F. J. Landy (Ed.), *Employment discrimination litigation: Behavioral, quantitative, and legal perspectives*. San Francisco: Jossey Bass.

Cases Cited

- Albertsons v. Kirkingburg (1999) WL 407456 (No. 98-591).
- Katz v. City Metal (CA1 1996) 87 F.3d 426.
- McDonald v. Pennsylvania (CA3 1998) 62 F.3d 62.
- McKay v. Toyota (CA6 1997) 110 F.3d 369.
- Murphy v. United Parcel Service (1999) 119 S.Ct. 1331.
- Penny v. UPS (CA6 1997) 128 F.3d 408.
- School Board of Nassau County v. Arline (1987) 480 US 273.
- Sutton v. United Air Lines (1999) WL 407488 (No. 97-1943).
- Toyota Motor Mfg. Ky., Inc. v. Williams (00-1089) 534 U.S. 184 (2002) 224 F.3d 840.
- Williams v. Channel Master (CA6 1996) 101 F.3d 346.