Wimberly Lawson
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Briefly
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WHAT THE COURTS NARROW, THE LEGISLATURE AND PRESIDENT EXPANDS: "THE NEW ADA LAW"

Suzanne Roten

"Many in Congress believed the Court in these cases interpreted "disability" too restrictively, effectively preventing individuals that Congress intended to cover from ever getting a chance to prove their case.'"

Congress has passed and on September 25, 2008 the President signed the "ADA Amendments Act of 2008" ("ADAAA"). The ADAAA, which is scheduled to take effect January 1, 2009, was intended to reverse Supreme Court and lower court decisions interpreting and limiting the reach of the ADA and it does so in many significant and important ways.

First, the ADAAA reverses the Supreme Court's narrow interpretation of the definition of "disability" as set forth in cases such as *Sutton v. United Airlines, Inc., Murphy v. United Parcel Service, Inc., Albertson's, Inc. v. Kirkinburg*, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.* Many in Congress believed the Court in these cases interpreted "disability" too restrictively, effectively preventing individuals that Congress intended to cover from ever getting a chance to prove their case. While it remains to be seen just how courts will interpret the ADAAA, what is clear is that in an effort to rectify what Congress felt was an incorrect interpretation of its original intent in passing the ADA, the ADAAA has now changed the landscape considerably.

Definition of "Disability". The ADAAA retains the three prong definition of a disability, which protects individuals with actual and current, past, or perceived disabilities, including the requirement that to be disabling a condition must "substantially limit" a major life activity. While the ADAAA does not define the term "substantially limit," it does reject the Court's interpretation of the phrase, making clear that the term is to be read expansively and consistently with the interpretation of the term under the Rehabilitation Act of 1973. In other words, it is to be interpreted in favor of broad coverage of individuals.

"Major Life Activities". The ADAAA further amends the ADA definition of disability by providing an illustrative list of "major life activities" to exemplify the types of activities that are of central importance to most people's daily lives. The illustrative list of "major life activities" includes many common daily activities like eating, sleeping, walking, and thinking, and clarifies that "major bodily functions" should also be considered major life activities under the ADA. This clarification is deemed necessary to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside the definition of "major life activities" under the ADA. Since it would be impossible to guarantee comprehensiveness in a finite list, however, the examples of major life activities and major bodily functions are illustrative and non-exhaustive.

Mitigating Measures. Reversing Supreme Court interpretations under the ADA, the ADAAA now prohibits consideration of mitigating measures that help control or lessen the impact of an impairment when determining the threshold question of whether an impairment is sufficiently limiting to qualify as a disability. Mitigating measures include medicine, equipment, hearing aids, and adaptive or learned behaviors undertaken by the body (e.g., neurological adjustments made by individuals to cope with visual impairments, as was the case in *Albertson's*, where the court required consideration of the `body's own systems' as a mitigating measure). Mitigating measures that may not be considered in determining the existence of a disability include low vision devices, which are devices that magnify, enhance, or otherwise augment a visual image, such as magnifiers, closed circuit television, larger-print items, and instruments that provide voice instructions. Low vision devices do not include ordinary eyeglasses or contact lenses, which are lenses that are intended to fully correct visual acuity or eliminate refractive error. The ameliorative effects of these two mitigating measures can be considered in determining

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WILLIAM R. SEALE is *Of Counsel* with the firm of Wimberly Lawson Seale Wright & Daves, PLLC, which he joined in 1982. He received his Bachelor of Science Degree in Industrial Engineering with *High Honors* from the University of Tennessee and his law degree from the University of Tennessee. He practices in the areas of labor and employment law, with a particular emphasis on NLRB defense work, union avoidance, collective bargaining, contract administration, Equal Employment Opportunity, employee relations, wage and hour, affirmative action, ERISA, workers' compensation, occupational safety, and arbitration law. He has served as an Editor of the Tennessee Bar Association, Labor Law Section Newsletter, and is a member of the Labor and Employment Law Sections of the Tennessee Bar Association and the American Bar Association. Prior to entering private practice, Mr. Seale was Judge Advocate in the United States Marine Corps from 1977 to 1981 and a Special Assistant U.S. Attorney from 1979 to 1981. Mr. Seale is Vice President of Management Resources, Inc. and is a member of Honorary Societies of *Tau Beta Pi* and *Alpha Pi Mu*. He served on the Board of Directors of K.C. Home of Morristown, Inc. and is currently on the Board of Directors of Young Life and Fellowship of Christian Athletes. Bill is a member of the University of Tennessee Letterman's Club. He has also been selected for Best Lawyers in America.

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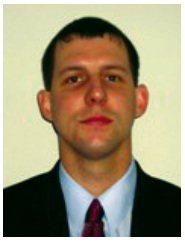
DOES WORKER'S COMP APPLY TO TELECOMMUTERS WORKING AT HOME?



Andrew Hebar

"Remember that the Tennessee Workers' Compensation Law requires both to be satisfied before an injury is deemed compensable."

In light of the trend toward telecommuting, a case involving the question of whether injuries incurred by telecommuting employees while within the home office was destined to arise. The Tennessee Supreme Court has decided such a case in *Wait v. Travelers Indemnity Company of Illinois*, 240 S.W.3d 200 (Tenn. 2007). Because of limited office space, the employee was allowed to convert a spare bedroom in her home into an office. Her employer supplied the necessary office equipment and a budget for supplies. There were no designated hours or conditions of employment, nature of her work space, or work rules. She was not required to open her house to the public, although she did, on occasion, conduct work meetings at her home with other employees. The employee was injured when she answered her door to invite a neighbor into the home while preparing her lunch. She was brutally assaulted and subsequently filed a claim for workers' compensation benefits.

The Tennessee Supreme Court ultimately held that the injury did not "arise out of" her employment. There was no causal connection found between the assault and her employment. However, the Court did clearly state that the injury occurred "in the course of employment." Remember that the Tennessee Workers' Compensation Law requires both to be satisfied before an injury is deemed compensable. In finding the "in the course of" requirement to be satisfied, the Court considered (1) injuries during personal breaks (such as smoke or bathroom breaks) can be compensable at the home if such breaks would be reasonable in a more formal office setting; (2) the employer was aware of and implicitly approved of the work site arrangement at the employee's home, and; (3) at the time of the assault, the employee was at a place she was supposed to be where her employer could reasonably expect to find her. Based upon the Court's evaluations, employers are encouraged to carefully examine the working arrangements of telecommuting employees. As the concept of "the office" expands, the Court has given fair warning that the time and space boundaries of what will be deemed to be a compensable injury will likewise expand.

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whether an impairment substantially limits a major life activity.

As it would be impossible to guarantee comprehensiveness in a finite list, the list of mitigating measures is non-exhaustive and the absence of a mitigating measure from the list is not intended to convey a negative implication as to whether that measure is a mitigating measure under the ADA.

"Regarded As Having Such an Impairment". The ADAAA also clarifies and modifies judicial interpretations of the meaning of the phrase "regarded as having such an impairment." While retaining the basic language contained in existing law, the ADAAA provides that an individual meets the requirement of "being regarded as having such an impairment" if the individual shows that a prohibited action was taken based on an actual or perceived impairment, whether or not that impairment limits or is perceived to limit a major life activity. In other words, this change clarifies that an individual who is "regarded as" having an impairment need not meet the functional limitation, or severity, requirement contained in the first and second prongs of the definition (i.e., the individual is not required to show that the perceived impairment limits performance of a major life activity).

This change to judicial interpretation of the phrase "regarded as," was meant to express Congress's understanding that unfounded concerns, mistaken beliefs, fear, or prejudice about disabilities are just as disabling as actual impairments and its corresponding desire to prohibit discrimination founded on such concerns or fears. While early decisions under the ADA reflected this understanding, as did guidance from Federal agencies like the Department of Justice, later cases abandoned this position.

While the ADAAA significantly broadens the reach of the "regarded as" prong of the statute, it also makes clear that the "regarded as" prong is not available where the impairment that an individual is regarded as having is a transitory and minor impairment. This makes clear that the third prong of the definition does not cover individuals who are regarded as having common ailments like the cold or flu. This clarification of the "regarded as" prong was necessary, whereas similar clarification was not necessary for the first and second prongs, those protecting individuals with an actual and current disability and those with a record of a disability since the functional limitation test in the first two prongs, i.e., the requirement that the condition at issue "substantially limits" a major life activity, adequately prevents claims by individuals with common ailments. Congress did note, however, that as an exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly.

So what does all of this mean? It means that an employee will likely be able to claim coverage under the ADA if they can show that they were regarded as having a physical or mental impairment that (1) lasts for at least six months and (2) that is not minor. Of course the term "minor" will need to be defined by the courts.

Additional Rules of Construction of the Term "Disability". The ADAAA also provides several rules of construction for the definition of "disability." First is that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. This change responds to those court decisions that have required individuals to show that an impairment substantially limits more than one life activity or that, with regard to the major life activity of "performing manual tasks," have offset substantial limitation in the performance of some tasks with the ability to perform others.

Second is a provision that clearly states that an impairment that is episodic or in remission must be considered a disability if that impairment would be substantially limiting in its active state. Thus, for example, an individual with epilepsy who experiences seizures that result in the short-term loss of control over major life activities, including major bodily functions (e.g., uncontrollable shaking, loss of consciousness) or other major life activities (e.g., ability to communicate, walk, stand, think) is disabled under the ADA even if those seizures occur daily, weekly, monthly, or rarely. It is expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests itself (e.g., seizures) substantially limits a major life activity.

"On the Basis of Disability". Importantly, the ADAAA prohibits discrimination "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." This change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists.

The ADAAA also clarifies that an individual who suffers an adverse employment action as the result of an employer's use of qualification standards, employment tests, or other selection criteria that are based on uncorrected vision may challenge those visions requirements and that the covered entity must show that such requirements are job-related and consistent with business necessity. This provision was deemed

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necessary to ensure that vision requirements are job-related and consistent with business necessity in light of the provision requiring consideration of the ameliorative effects of ordinary eyeglasses and contact lenses in determining whether an individual has a disability.

Duty to Provide Reasonable Accommodation. Clearly, the number of people who may be entitled to a reasonable accommodation will increase with the ADAAA. One important change, however, is that the ADAAA now specifies that the duty to provide reasonable accommodations under Title I or the duty to modify policies, practices, or procedures under Titles II or III is not triggered where an individual qualifies for coverage under the ADA solely by being "regarded as" disabled under the third prong of the definition of disability. This amendment, which was necessitated by some court cases stating that persons who were regarded or perceived as disabled were entitled to reasonable accommodation, makes clear that the duty to accommodate or modify arises only when an individual establishes coverage under the first or second prong of the definition.

Miscellaneous Changes. The ADAAA clarifies that nothing in the ADA alters the standards for determining eligibility for benefits under State workers' compensation laws or under State and Federal disability benefits programs. In addition, the ADAAA also prohibits reverse discrimination claims by disallowing claims based on the lack of disability (e.g., a claim by someone without a disability that someone with a disability was treated more favorably by, for example, being granted a reasonable accommodation or modification to services or programs).

Conclusions and Implications for Employers. As noted above, the precise contours of the ADA as amended by the ADAAA will take time to determine, as courts confront and interpret the amendments. What is clear, however, is that many more people will now fall within the definition of "disability" and be entitled to reasonable accommodation and the other protections of the law. In all likelihood these changes will also result in a substantial increase in the number of cases brought under the ADA, as well as in the number of cases that will survive summary judgment, allowing plaintiffs to proceed to a jury trial. Thus, it is critical that employers take appropriate steps to minimize their exposure to such suits. Some such steps include:

- Training all managers and supervisors regarding the ADAAA, including and most importantly, the changes to who is "disabled" and entitled to a reasonable accommodation.
- Revising all existing policies and procedures to make certain that they are consistent with the requirements of the ADA as amended.
- Make certain that the broad protections of the ADAAA are considered in determining whether to provide a reasonable accommodation.
- Be especially careful when making any employment based decision based upon or relating in any way to a medical condition.
- Make certain that you can articulate a legitimate, nondiscriminatory reason before taking any adverse employment action.
- When in doubt for any reason, call competent employment law counsel.