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Several U.S. Supreme Court rulings have substantially narrowed the coverage of the Americans with Disabilities Act (ADA) since its passage in 1990. Congress amended the ADA in 2008 to restore the original congressional intent of providing broad coverage for people with disabilities. This article seeks to determine whether the 2008 amendments are a mere technical adjustment of the ADA, or constitute significant legislation in their own right. A review of existing law, resulting regulations, and federal cases reveals that the amendments may promise much but deliver more of the same. Nevertheless, employers are well-advised to renew their efforts to cooperate with applicants and employees with disabilities, if for no other reason than to avoid a costly lawsuit that employers are perhaps now more likely to lose.

Keywords

legal/constitutional issues, affirmative action and equal employment opportunity, discrimination, diversity, health issues and personnel

> Congress acknowledged that society's accumulated myths and fears about dis ability and disease are as handicapping as are the physical limitations that flow from actual impairment.
>
> *School Board of Nassau County v. Arline* (1987, p. 284)

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In 2008, the Americans with Disabilities Act (ADA) was amended to reinstate "a broad scope of protection" that, since its passage in 1990, had been narrowed through a series of U.S. Supreme Court decisions (42 U.S.C. § 12101 [b] [1]). While the reform was meant to loosen the definition of disability generally, the 2008 ADA Amendments Act (ADAAA) also specifically addresses the Court's interpretations of the third prong of the definition—the "regarded as" disabled clause. This definition protects individuals who are subjected to discrimination based on an employer's perceptions and assumptions that they are limited by a physical or mental impairment.

This article analyzes the potential impact on public human resource practices of the ADAAA. In doing so, the article provides a needed focus on the "regarded as" disabled prong of the ADA. The data for this article are Fourth Circuit federal court cases decided before the passage of the ADAAA, the ADAAA itself, regulations developed as a result of the ADAAA, and federal cases decided in the short time since the passage of the 2008 amendments. The analysis concludes that the ADAAA brought renewed attention to the workplace-related challenges faced by those with a disability, enhanced legal protections, and may tilt the balance toward a more pro-employee implementation of measures addressing disability discrimination. The extent of this tilt, and its implications for human resource management practitioners, is less clear.

This article first provides a brief overview of the Americans with Disabilities Act of 1990, including related scholarly work on this topic and an introduction to the "regarded as" definition of disabled. Next is a review of how "regarded as" disabled has been interpreted and impacted by key Supreme Court decisions. A discussion of the ADAAA as a congressional response to the decisions of the Supreme Court fol lows. The article then explores how an analysis of pre-ADAAA cases can inform the impact the 2008 amendments will have on employer practices. Specifically, the analysis explores which cases would likely result in the same outcome pre and post-ADAAA and which may have an alternate outcome. The article concludes by highlighting implications of the ADAAA on practitioners.

The Americans with Disabilities Act of 1990

The 2008 amendments (ADAAA) were intended to reassert the original intent of the ADA, not to significantly redefine or alter the fundamentals of the law. Thus, any analysis of the ADAAA must begin with a discussion of the ADA itself.[1]

As it relates to employment, the ADA provides that:

> no covered entity shall discriminate against a qualified individual with a dis ability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. (42 U.S.C. § 12112[a])

Under the ADAAA, individuals must be qualified for the position for which they applied or are employed in; employers are not required to overhaul the job description or essential duties to suit an individual with actual or perceived impairments; and individuals claiming ADA coverage must produce medical evidence verifying their impairment and associated limitations. And when making a claim of disability-related discrimination, the individual bears the burden of making a prima facie case that discrimination has occurred.[2]

Since it passage, the ADA has rightly been considered a landmark piece of legislation because of its wide-reaching protections for people with disabilities. Accordingly, scholarly analysis has focused on numerous aspects of the ADA (see Mezey, 2005; Switzer, 2003). A consistent stream of research focused on individuals with disabilities in the workplace has demonstrated that, while significant progress has been made, alleviating barriers to nondiscriminatory employment opportunities remains an elusive goal (Kim, 2007; Lee, 1999; Lewis & Allee, 1992). Others have focused on the challenges of providing reasonable accommodations (Crampton & Hodge, 2003) and accounting for the relevance of mitigating measures in the determination of disability (Massengill, 2004). The extent to which the ADA impacts state and local government has received the bulk of attention in Public Administration scholarship (Condrey & Brudney, 1998; Cozzetto, 1994; Kellough, 2000; Koenig, 1998; Kuykendall & Lindquist, 2001; Riccucci, 2003; Slack, 1996).[3] While there is still a need for additional research on all aspects of the ADA, there is little public human resources management literature about the "regarded as" definition of disability (Bradbury, 2007; Jenero & Schreiber, 2000; Rush, 2012).

The "regarded as" prong is one of three prongs in the ADA's definition of disability: the first protects individuals who have a physical or mental impairment that substantially limits one or more major life activities; the second applies to those who have a history or record of such an impairment; and the third prong applies to individuals who are "regarded as" having such an impairment. While all three prongs suffer from a lack of definitional clarity (Rush, 2012), the "regarded as" definition is particularly complex in concept and application. In the context of the workplace, the "regarded as" prong protects workers who have been subject to an adverse employment action because the employer assumed that the employee suffered from a disability that prevented him or her from fulfilling required job responsibilities. The third prong protects against discrimination based on an unsubstantiated assumption made by the employer as to the employee's capabilities, and assumed limitations; consequently, the employee need not actually suffer from a condition that would otherwise be covered by the first or second prong of the ADA's definition of disability. Formally stated, the ADA defines "regarded as" disabled as:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. (42 U.S.C. § 12102 [3] [a])

One of the primary purposes of the ADAAA was to expand the coverage afforded by the "regarded as" prong of the ADA's definition of disability.

"Regarded as" Disabled and the Supreme Court

In light of the original intent of the ADA to provide broad coverage and "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," the prevailing judicial interpretation of the "regarded as" definition had become increasingly at odds with the initial congressional intent (42 U.S.C. § 12101 [b] [1]). In the two decades since passage of the ADA, Congress concluded that "courts have incorrectly found . . . that people with a range of substantially limiting impairments are not people with disabilities" (42 U.S.C. § 12101 note [a] [6]).

The Supreme Court first articulated its interpretation of "regarded as" disabled in *School Board of Nassau County v. Arline* (1987). The Court noted "an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment" (p. 282). This characterization of disability was designed to protect individuals who either are not substantially limited by their condition or do not have any condition, but are subjected to discrimination based on the perception that they are limited by a physical or mental impairment (p. 279). "Regarded as" disabled hinges on the perceptions and stereotypes of the employer in relation to a person's ability to work.

The Court narrowed the interpretation of "regarded as" in two subsequent cases. In *Sutton v. United Air Lines* (1999) much of the dispute focused on the definition of "regarded as" as stated in the Equal Employment Opportunity Commission's (EEOC) Implementing Guidelines of the ADA:

> 1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; 2) has a(n) . . . impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or 3) has none of the impairments defined in . . . this section but is treated . . . as having a substantially limiting impairment. (29 C.F.R. § 1630.2[1])

The majority opinion of the Court stated that the determination of whether an impairment substantially limits a major life activity (e.g., working) must be considered in light of measures taken that mitigate the effects of the impairment (e.g., medication). In addition, the decision clarified the extent to which a disability has to affect "working" to be covered under the ADA. The Court affirmed the EEOC Guideline (29 C.F.R. § 1630.2 [j] [3]) that an individual must be unable to work in a broad range of jobs, rather than a single, particular job, when making a work-based claim. This would mean that a person would not find coverage under the ADA if they were excluded

from working in their preferred job but could hold other positions within the same profession or organization.

The second case that notably narrowed the definition of "regarded as" was *Toyota Motor Manufacturing v. Williams* (2001). Ella William's carpal tunnel syndrome made it difficult for her to perform manual tasks, particularly those associated with her assembly line job. To create a "demanding standard for qualifying as disabled," the Court insisted that merely suffering from an impairment does not make one disabled under the ADA (p. 197). In a unanimous opinion, the Court emphasized that the limitation on a major life activity must be substantial. To be considered a substantial limitation, the performance of the manual tasks at issue must also be considered on a case-by-case basis, be permanent or long-term, and be "of central importance to most people's daily lives" (p. 198).

The *Sutton* and *Toyota* rulings made it difficult for individuals to succeed with a "regarded as" claim; the Court created standards that could be described as promanagement or proemployer (Crampton & Hodge, 2003). As a result, the burden fell on the individual to demonstrate (a) that the employer believed, however erroneously, that the plaintiff suffered from an impairment that, if it truly existed, would be covered under the statutes and (b) that the employer discriminated against the plaintiff on the basis of that perceived impairment. Thus, the applicant or employee had to demonstrate conclusively that the employer perceived that a disability existed and that the employer's actions toward the impairment had the effect of substantially limiting the major life activity of working. Furthermore, the *Sutton* decision's requirement that the consequences of mitigating measures be considered when making a disability determination made it even more difficult for individuals to succeed in an ADA claim (Jenero & Schreiber, 2000). Mezey (2005) argued that the effects of these cases made the ADA "a nullity for many individuals" and led to pressure from disability rights advocates on Congress to reassert the ADA's coverage (p. 55, 58).

ADAAA—Reasserting Congressional Intent

The ADAAA, and the corresponding regulations promulgated in 2012, explicitly intends to make it easier for individuals to have their impairments meet the definitions of "disabled" and, in doing so, rejects much of the Supreme Court's reasoning in *Sutton* and *Toyota*.[4] This is accomplished by expanding the definition of "major life activities" beyond traditional activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, and working, to now include the operation of major bodily functions, such as the functioning of the immune, respiratory, and neurological systems. The ADAAA also relaxes the legal definition of what constitutes an impairment that is "substantially limiting" to any of these activities or bodily functions. Furthermore, the ADAAA explicitly overturns critical parts of the *Sutton* ruling by directing that the positive effects mitigating measures be ignored in the determination of whether an impairment constitutes a disability. However, the negative effects of such mitigating measures can be

considered when assessing whether a condition would substantially limit the performance of a major life activity. Thus, a "regarded as" claim can be based on the use of a mitigating measure, such as the taking of medicine to control a condition, even if the employer is not knowledgeable of the underlying impairment. Lastly, the ADAAA clarifies that those impairments that are episodic or in remission may meet the definition of disability, though temporary or nonchronic conditions are explicitly prohibited from coverage under the "regarded as" definition but can be used to justify a claim under the first two prongs.

In addition, the ADAAA pointedly modifies the "regarded as" definition of disability by restoring the reasoning set forth in the *Arline* decision. Now, an applicant or employee seeking "regarded as" coverage need only show that the employer viewed the individual as having an impairment. Individuals no longer have the burden of demonstrating that the employer believed that the impairment, or perceived impairment, substantially limited the performance of a major life activity (EEOC, 2009). A qualified individual must only show that the employer engaged in a prohibited action, such as a discriminatory failure to hire, promote, or terminate, based on a real or perceived impairment.[5]

The ADAAA also addresses the major life activity of "working." Individuals must still show that their condition limits their ability to perform a class or range of jobs to gain ADA coverage related to "working." The regulations make clear, however, the following:

> The determination of coverage under the laws should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including . . . working, than they applied prior to the Amendments Act. (Regulations, Sections 1630.2(j)(5) and (6))

While this guidance falls short of overturning the relevant aspects of the *Sutton* and *Toyota* decisions, the regulations echo the stated purpose of the ADAAA.

It is important to note that the ADAAA did not alter, in any way, the employer's opportunity to rebut an individual's claim of disability discrimination. The employer may still offer a legitimate, nondiscriminatory explanation for the adverse personnel action taken that is being presented as discriminatory. Although the individual may, in turn, refute the employer's explanation as being merely a pretext for disability discrimination, this remains a high hurdle for an individual to make a successful claim of discrimination.

The ADAAA intends to shift the balance from a decidedly proemployer position to one that will make it easier for individuals to meet the definitions of disability, thereby increasing the likelihood that they will be afforded relief from the ADA. Ideally, the ADAAA will result in proactive actions by public human resource managers to show a greater sensitivity toward individuals with disabilities; such a managerial disposition will, hopefully, trigger fewer accusations of disability-related discrimination.

Analysis of Pre-ADAAA Cases

As with all reforms, it is difficult to predict the impact of the ADAAA on future "regarded as" cases. It is important, nevertheless, to consider the potential impact on the behavior of employers. Reforms can require an entirely new process of management or simply reinforce current practices. Congress's intent for the ADAAA to redirect judicial disposition may, or may not, come to fruition (see Bishop & Jones, 1993). The ADAAA went into effect on January 1, 2009, and covers personnel actions from that date forward. Since the modified protections afforded by the ADAAA cannot be applied retroactively, only a small number of related federal court decisions have been issued at the time of this writing. Some years must pass before a critical mass of federal case law develops. This case law can then be analyzed to definitively ascertain the reform's impact on disability cases and on associated human resource practices and policies. In the meantime, a systematic analysis of past "regarded as" cases viewed through the lens of the new ADAAA standards can reveal the manner in which Congress intends outcomes in such cases to change. The analysis can determine the degree to which the ADAAA may, or may not, affect future disability-related cases in the federal system. Indeed, such a "past as prologue" approach was used in the ADAAA's regulations to demonstrate the intended impact of the reform (Regulations to Implement, 2012).

To understand how the reform is likely to impact employers, employees, and the courts, all cases argued before the U.S. Court of Appeals for the Fourth Circuit, and district courts within, since the passage of the ADA that included actual judicial deliberation on the issue of "regarded as" disabled were identified.[6] The Fourth Circuit has a reputation for being comparatively conservative, or promanagement, in employment-related cases (Weiss, 2009). Colker (2001) compares the courts on ADA rulings and finds the Fourth Circuit to be significantly more likely to produce prodefendant (employer) results. Thus, it is likely that a relatively high number of Fourth Circuit cases that were decided in favor of the employer may be viewed differently post-ADAAA.

This analysis examines how employer responsibility and managerial actions may be impacted by the new ADAAA changes. By evaluating a circuit that has more traditionally had a more proemployer stance, the implications for change and impact are maximized. While interpretations of the ADAAA will likely vary across the federal circuits (see BBI 2006a, 2006b; Colker, 2001; Stanley, 2006), this research does not intend to predict changes in judicial temperament or interpretation. Case facts and an observed typology of decisions illustrate the potential impacts of the reforms and reflect on the impact on needed managerial behavior. Thus, the importance of this case review lies not in the rate or ratio of cases from the Fourth Circuit that may be decided differently in the future, but rather to ascertain whether a critical mass of federal ADA cases might be viewed differently per the ADAAA.

The cases examined in this study were selected through a four-part process. First, using Shepard's Citations Service, ADA-related cases were identified (5,611). This pool

was narrowed to cases in which the issue of "regarded as having such an impairment" was raised (2,000 cases remained), and then further narrowed to cases within the Fourth Circuit (196 cases). Of these 196 cases, 88 were identified has having considered the issue of "regarded as" disabled.[7] Cases were reviewed to collect the facts of the original cases, the findings by the original courts, and the judicial reasoning. Each fact pattern was evaluated to determine how changes embodied in the ADAAA would likely impact the results in future cases with similar fact patterns. The analysis was informed by the ADAAA's statutory language, legislative intent (evident in committee reports and the Congressional Record), and insights from secondary sources (academic and law journal articles). This review allows for an evaluation of how the outcomes of previous cases might change as the ADAAA is applied to future controversies with similar fact patterns across the federal court system, assuming that congressional intent is reflected in judicial interpretation.[8] Where appropriate, the small number of post-ADAAA decisions are referenced; these provide an initial indication of judicial interpretation and application of the ADAAA.[9]

The review of the 88 pre-ADAAA cases revealed a two-category scheme whereby the results of some cases would likely remain the same in the aftermath of the ADAAA and the outcome of others might change.[10] The first category consists of cases in which the projected outcome would not change for one of two primary reasons: either inadequate evidence was presented to support the individual's claim and the amendments would not sufficiently loosen evidentiary standards to alter a proemployer determination, or the individual's claim succeeded under the previously narrow context of the original ADA would not change under the ADAAA. The second category consists of cases that may see an alternative, post-ADAAA interpretation; as concluded by Rush (2012), the enduring uncertainty over the definition of "disability" in the ADAAA means that it will ultimately be left to the courts to resolve. These two categories of cases will be discussed in turn.

Same Outcome

The reform to the ADA is not intended to change the outcome of weak cases or strong cases, nor is it intended to change the standard for frivolous lawsuits. Similarly, cases that were successful under the previous standards, because of the strength of the evidence and the nature of the violation, would likely result in the same outcomes.

Insufficient evidence. Twenty-five of the 88 cases from the Fourth Circuit would likely have the same outcome post-ADAAA because the evidence presented by the complainant was not strong enough to survive summary judgment and progress to trial (i.e., this lack of evidence was not enough in previous cases and would still remain inadequate). Under the ADAAA, the plaintiff must present evidence that the employer believed the employee had an impairment, and that this impairment was the reason for the adverse employment action. In many of the cases in this category, the plaintiff asserted claims that he or she was both disabled and that he or she was 'regarded as' disabled, but failed to provide adequate evidence to support either claim.

Scott v. Montgomery County Government (2001) epitomizes such cases. Here, the employee was hired as a part-time messenger/clerk and his duties entailed driving. The employee was diagnosed with sleep apnea and it was determined that he was not able to drive in a safe manner. The employer was not under an obligation to accommodate the employee by assigning him to permanent light duty, and a part-time schedule would not reduce the risk that the employee would experience somnolence while driving since it was unpredictable and unaffected by how much sleep he had the previous night. The court ruled that the employer's policy of restricting priority reconsideration for positions at or below current grade level was reasonable, and the accommodations provided by the employer were reasonable and met the good faith standard of the claim of reasonable accommodation. The fact that the employee could not reasonably perform the job for which he applied was an acceptable reason for termination. Under the ADAAA, employers are not required to hire or continue employees not capable of safely performing the job in question.

A post-ADAAA decision affirms the expectation that relatively weak cases will still not prevail under the newly loosened standards. A decision from the First Circuit Court of Appeals, *Thornton v. United Parcel Service, Inc.* (2009) states:

> We note that the ADA Amendments Act of 2008 . . . became effective on January 1, 2009. That Act expanded the definition of "disability" from the strict requirements laid out in *Toyota*. Our conclusion here, however, is unaffected, as (1) the Act is not retroactive; and (2) even under a broader definition of disability, Mr. Thornton has not presented sufficient evidence to survive summary judgment.

A second post-ADAAA decision exemplifies the enduring proemployer aspects of disability discrimination litigation. In *Cohen v. CHLN* (2011), the district court of the East District of Pennsylvania found that the plaintiff did satisfy the newly loosened definition of disabled. However, the employer was able to demonstrate a nondiscriminatory justification for the plaintiff's termination, and thereby won the case. This decision indicates both what has changed, and what has not, in the post-ADAAA context.

Sufficient evidence. A second category of cases would likely retain the previous outcome because the complainant presented a strong evidentiary case that survived summary judgment and proceeded to a jury trial under the more narrow, pre-ADAAA standards. In such cases employers' discriminatory actions or motivations were clear. The employers' behavior in these cases involved clear violations of the narrow standards for the ADA as set by previous courts and would be unaffected by the broader standards of the ADAAA. Nineteen of the cases fit into this category. These cases consistently involved the employer clearly stating why he or she did not hire or promote the employee, and this reason was prohibited by the ADA.

For example, in *Wilson v. Phoenix Specialty Mfg. Co.* (2008), the employee had Parkinson's disease but was still able to perform the essential functions of his job as a

shipping supervisor. The employee was terminated after disclosure of his condition. In this case, the employee was terminated and was able to provide evidence that the employer's president had stated that the employee qualified for ADA designation; the employer discounted a specialist's medical opinion that the employee was capable of returning to work; management shunned the employee; and the employer inaccurately believed that the employee was unable to adequately key information into a computer, write, count washers, or use information on a computer screen. In response to the lawsuit, the employer claimed that the employee was terminated as part of a company-wide work force reduction. The district court found this reason to be pretextual based on evidence that the only other worker affected by a purported workforce reduction was transferred to another job and that another worker who was promoted to a newly created position of shipping foreman performed the same duties as the employee bringing the suit. Thus, the court found the employer's reasons for termination to be excuses rather than permissible justifications under the ADA.

A post-ADAAA case supports the conclusions in this grouping of cases. In *Rorh v. Salt River Project Agricultural Improvement and Power District* (2009), the Ninth Circuit noted that claims that succeeded under the pre-ADAAA standards would only be strengthened by the reform:

> At the outset, we note that on September 25, 2008, while this decision was pending, the ADA Amendments Act of 2008 ("ADAAA") was signed into law in order . . . Although the ADAAA, if applicable, would provide additional support for Rohr's claims in this case, we hold that, even under our pre-ADAAA case law, Rohr provided sufficient evidence that he was a "qualified individual" with a "disability" under the ADA to survive summary judgment.

Uncertain Outcome

The ADAAA clearly establishes that "regarded as" disabled now only requires that the employee show that the employer viewed him or her as having an impairment. The employee no longer needs to show that he or she was regarded as having an impairment that substantially limited a major life activity. The analysis of cases found almost half (40 of 88) [11] of the employees bringing suit lost their case even though they produced evidence that they were regarded as impaired; they were not, however, sufficiently impaired to qualify for protection under the previous ADA requirements. These cases were mostly decided under the reasoning of the *Sutton* and *Toyota* decisions; the employer believed that the employee was impaired but not substantially limited in the major life activity of working. The employer in these cases regarded the employee as unable to perform the job in question but not necessarily limited in his or her ability to work in a class, or broad range, of jobs as required by the previous ADA case law. Future "regarded as" cases would be evaluated under the ADAAA's revised standard that exempts the employee from needing to demonstrate any degree of limitation of a major

life activity. Thus, a number of "regarded as" cases with similar fact patterns may be more likely to receive a proemployee judgment under the ADAAA. Importantly, the ADAAA makes clear that the individuals bringing suit under either of the first two prongs of "disability" need only be considered to be substantially limited in any major life activity to be considered disabled in the context of working.

Foore v. Richmond (2001) is a compelling example of this category. Here, a police officer who had worked for more than 14 years was placed on disability retirement when the department discovered that the vision in his right eye fell below requirements. At trial, the city maintained that Foore was not disabled because his visual impairment did not substantially limit any major life activity. The appellate court held that the employee did not have a disability within the meaning of the ADA. The record demonstrated that the employee had overcome his impairment, and the only job he had been precluded from undertaking was the position of police officer. The court held that because the employer believed him to be capable of performing other duties, he was not substantially limited in the major life activity of working. Under the ADAAA, this line of reasoning is less likely to prevail, as the police officer's disability claim must be evaluated both without regard to the positive effects of mitigating measures and in light of other major life activities, beyond working, from which the individual may be limited in performing.

With regard to the effects of mitigating measures, the Court of Appeals for the Ninth Circuit in the post-ADAAA case of *Rorh v. Salt River Project Agricultural Improvement and Power District* (2009) states this logic clearly:

> The ADAAA rejects the requirement enunciated in *Sutton* that whether an impairment substantially limits a major life activity is to be determined with reference to mitigating measures. *Id.* The ADAAA makes explicit that the "substantially limits" inquiry "shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication, medical supplies, equipment, or appliances . . . ; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications."

Such analysis suggests that judges are respecting the intent of the ADAAA to make it easier for individuals to meet the definitions of disability, and thereby tilt the balance toward a proemployee interpretation. One interesting example is *Broderick v. The Research Foundation of SUNY* (2010) where the court allowed the plaintiff to replead her case with a clarified justification for her claim of disability because the court felt it was "flying blind" with regard to the proper application of the newly enacted ADAAA (p. 5). In both *Norton v. Assisted Living Concepts* (2011) and *Hoffman v. Carefirst of Fort Wayne* (2010), the district courts in Texas and Indiana, respectively, affirmed that impairments that are in remission meet the ADAAA's definition of disability if they would constitute a disability when active. Lastly, in *Rumbin v. AAMC* (2011), a district court in Connecticut decided that requests for accommodation

sought after the implementation of the ADAAA are covered by the reform, even though the preponderance of case facts occurred prior to its implementation. However, a district court in New Jersey rejected the same argument in *Riley v. Potter* (2011) because the conduct in question occurred prior to the ADAAA even though the failure to accommodate continued after the law's implementation.

On the question of the major life activity of "working," however, the impact of the ADAAA is similarly uncertain. In the post-ADAAA case of *Azzam v. Baptist Healthcare Affiliates* (2012), the district court reaffirmed that the plaintiff must be limited in performing a class of jobs, and not merely one particular job. While this disposition is in keeping with the letter of the ADAAA and its corresponding regulations, such a decision reminds that the impact of the reform may be modest.

Findings

This evaluation of past cases in light of the ADAAA leads to a number of conclusions. First, although the reform is meant to expand the prevailing definition of disability, a notable proportion of claims will still fail to meet the definition and will be dismissed on summary judgment for the employer. Similarly, claims that were strong enough to meet the prereform standards will fare no worse under the ADAAA. The effect of the ADAAA is expected to be observed between these two extremes as the broadened definition of disability, and other elements of the law, may result in more "regarded as" claims being recognized by federal courts and proceeding to trial.

Optimism over the expanded impact of the ADAAA must be tempered by the recognition that the federal district courts may reach contradictory conclusions regarding the applicability and interpretation of the reform. It seems likely that key aspects of the ADAAA will require review and clarification from the Supreme Court. Most notably, the definition of disability remains unclear in the wake of the ADAAA (Rush, 2012). Further, although the ADAAA may make it easier for individuals to meet the definitions of disabled, employers still reserve the opportunity to rebut allegations of discrimination by providing a nondiscriminatory justification for any adverse personnel actions taken against that individual. And the ADAAA did not, in any way, make it more difficult for employers to make such justifications. For this reason primarily, one must exercise cautious optimism, at best, with regard to the impact of the ADAAA on the outcome of future cases. Similarly, the implications of the ADAAA for the practice of public human resource management are uncertain, but require close scrutiny nonetheless. The results may signal a new reality for human resource management—a reality in which practices and attitudes that were previously permissible under the ADA may be more problematic under the ADAAA.

Implications for Practice

Increasing employment opportunities for individuals with disabilities has reemerged as a national priority in the two decades since the passage of the original ADA (GAO, 2010). The ADAAA can be seen as intending to alter managerial behavior that may

have become lax. From a practical perspective, the ADAAA represents an important shift in employee–employer relations as it relates to disabilities. More employees will now have impairments that meet the ADA's definitions of disability. And lawsuits are intended to focus less on whether an individual meets one of the definitions of disability, and more on whether there was discrimination or reasonable accommodation was provided. Indeed, one of the stated purposes of the reform is that:

> The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. (42 U.S.C. § 12101 note [b] [5])

The basic motivation for, and consequence of, the ADAAA must be understood plainly by managers and supervisors: Congress intends for more individuals to meet the definitions of disability. This will increase the number of individuals that qualify as having disabilities in the workforce and likely will lead to a greater number of disability-related discrimination lawsuits. While a discussion of how to prevail in the face of such a proceeding would be valuable, the purpose here is to provide practical advice for how to proactively avoid litigation in the first place. Simply put, "it is more desirable to avoid litigious behavior than to emerge victorious in court" (Bradbury, 2007, p. 87). Thus, public human resource managers are well advised to adopt a proactive strategy that reduces the likelihood of disability-related discrimination. A first step is to make employment decisions that are based on valid employment practices and standards and are in the best interest of both employees and the organization.

Avoiding a full-blown conflict over the ADA will likely require a sense of urgency and a revisiting of policies and training modules to account for the loosened definitions of disability in the ADAAA. Since the Supreme Court's ruling in *Sutton*, subsequent cases have raised the bar in terms of what constitutes an impairment that "substantially limits" a major life activity. The ADAAA rejects these interpretations and reinstates a more relaxed notion of this criterion, making it easier for individuals to demonstrate such a limitation. Related, individuals bringing a "regarded as" compliant no longer must demonstrate a "substantial" limitation at all; they must merely demonstrate that the employer believed that they had an impairment. Thus, a far greater number and variety of complaints will meet the reformed "regarded as" definition of disability. Despite the lack of 'regarded as' coverage for transitory or minor ailments, an increased number of cases may be based on impairments that are in remission or are episodic in nature, as these are explicitly covered under the ADAAA.

Related, employers ought not to make premature or unsupported conclusions or interpretations of the results of medical examinations; few managers have the necessary medical expertise to make valid, independent assessments of these exams and ought not to try. Employers create trouble for themselves when they presume to be able to make medical diagnoses of impairments and limitations, and then make personnel decisions based on those presumptions. Employers in the Fourth Circuit cases of *Dean v. Philip*

Morris USA Inc. (2003), *Overstreet v. Calvert County Health Dep't* (2002), and *Wilson v. Phoenix Specialty Mfg. Co.* (2008) erred by acting independently on medical information rather than relying on medical experts. In doing so, employers face an increased risk of triggering a "regarded as" disabled claim under the newly loosened standards in the ADAAA. Such a risk is magnified in light the requirement that impairments, and resulting limitations, be assessed without regard to the positive effects that the use of mitigating measures may have.

This leads to the all-too-familiar admonition for employers to keep comprehensive and precise records and documentation for all personnel actions. For ADA-related cases in particular, employers should keep documentation of all disability claims, accommodation requests, accommodations provided and denied, and the rationale for these decisions.[12] Familiar examples of reasonable accommodations include the acquisition and/or modification of equipment, job restructuring, modified work schedules, reassignment, alternate modes of job-related examinations or assessments, and offering varying methods of training (Crampton & Hodge, 2003). A reviewing court is likely to evaluate the consistency and equity of an employer's prior conduct in terms of leaves granted, schedules altered, specialized equipment acquired, and other accommodations made for individuals with, and without, disabilities. The surest strategy is to bias oneself towards making a reasonable accommodation, and keeping careful records of those decisions. It is important to note that although the ADAAA exempts employers from making reasonable accommodation in "regarded as" contexts, sound managerial practices suggest a flexible, magnanimous, and good faith approach to accommodations in and of the workplace.

Overall, the ADAAA justifies a wholesale revisiting of organizational practices, procedures, and policies with regard to individuals with disabilities to ensure compliance. Similar to the issues of sexual harassment and other forms of discrimination, employers should adopt a zero-tolerance stance. But, of course, the adoption of a rigorous policy accomplishes little if it is not implemented in an organization that demands vigilant enforcement. Employers are encouraged to reassess their ADA training modules in light of emerging evidence that different strategies are more, or less, successful depending on the content and audience (U.S. MSPB, 2011). At the very least, the 2008 reforms likely justify refresher training for all human resource personnel and other managers with personnel responsibilities. While some may balk at the expense of such training, the costs are likely to be dwarfed by those associated with defending the organization in even one full-blown ADA lawsuit.

A critical caveat, however, is in order. The ADAAA's application to state and local government employees, officials, and organizations is complex. Here, concerned parties are advised to compare the reformed ADA to their state-level disabilities legislation to ascertain whether the state version is more or less restrictive, and whether the federal ADA applies at all.[13] Nevertheless, employers at all levels of government should to engage in a conversation with applicants and employees whenever disability-related issues arise. Such a "disability conversation" should focus on the skills and abilities that are indicated in the job description and are essential for the performance

of the job. Employers are advised to refrain from overexplaining to an applicant why they were not hired or to an employee why they were terminated, and one should never couch such news in terms of the real or perceived disability of the individual.

Overall, attitudes and predispositions of employers are critical to the impact of the ADAAA on the workplace. Employers who view the discussion of disabilities and limitations with disdain, and requests for accommodation with suspicion, are more likely to be faced with legal complaints in light of the expanded definitions of, and loosened standards for, demonstrating a disability under the ADAAA. A reviewing court, if a case gets that far, will look to assess the employer's consistency across cases involving individuals with and without disabilities. Thus, employers would do well to be consistent across cases, while acknowledging the irony that employers are also advised to make individualized assessments.[14] The ADAAA will certainly create a far greater number and variety of disability concerns in the workplace; employers are strongly encouraged to adopt a proactive, collaborative, and accommodating mindset consistent with the letter and spirit of the reformed ADA.

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Notes

1. The purpose of the ADA was to continue and expand employment-related protections for people with disabilities as had been established in the Rehabilitation Act of 1973; thus, the legal rationales and histories of the two acts are intertwined. See Mezey (2005) and Switzer (2003) for descriptions of the ways in which the ADA expanded the Rehabilitation Act, especially in non-employment related contexts.
2. The Supreme Court's ruling in *McDonnell Douglas Corp. v. Green* (1973) established that the plaintiff (i.e. the individual bringing the claim) bears the burden of demonstrating that discrimination has likely occurred. This so-called prima facie case is one in which the evidence produced is sufficient to support a decision or verdict unless the evidence can be rebutted. As the prima facie requirement pertains to the ADA, the plaintiff must show that he or she (a) suffers from a disability as defined by at least one of the prongs in the ADA, (b) is otherwise qualified to perform the job, and (c) was subject to an adverse employment action because of the disability (see Bradbury, 2007). If the court finds that the plaintiff has failed to make a successful argument, then the case can be decided in favor of the employer

through a device known as summary judgment (i.e. a determination by a court without a full trial). If a prima facie case is made, however, the employer may offer legitimate, nondiscriminatory reasons for their actions. Finally, the plaintiff may introduce sufficient evidence that the employer's stated reason is merely a pretext, or cover story, for actual disability discrimination.

3. The U.S. Supreme Court's ruling in *Board of Trustees of the University of Alabama v. Garrett* in 2001, however, greatly diminished the ADA's subnational coverage. Thus, the applicability of the ADAAA to state and local government employers and employees varies depending on the state and its disability discrimination law (see Kuykendall & Lindquist, 2001; Riccucci, 2003). Further, the ADA does not apply to the federal government; the Rehabilitation Act of 1973 is the controlling legislation.
4. The EEOC's website has a detailed discussion of the changes to the ADA brought about by the ADAAA.
5. The ADAAA also addresses the issue of employers providing reasonable accommodation for impairments; this is one of the persistently challenging aspects of the ADA to implement and enforce. Under the reform, an employer who either asks if an employee needs a reasonable accommodation for an apparent impairment or requests medical information in an attempt to assess the need for accommodation would not, in and of itself, trigger a "regarded as" violation. This last reform is notable because it eliminates the requirement that employers provide reasonable accommodation for those applicants or employees who only meet the "regarded as" definition and not one of the other two prongs of the definition of disability (42 U.S.C. § 12201 [h]). In doing so, the ADAAA resolved a split that had occurred in the rulings from the federal appeals courts as to whether the ADA requires reasonable accommodation for individuals "regarded as" disabled (Andrews, 2006; Ring, 2006). Specifically, the Eighth and Ninth Circuits had ruled that employers are not required to reasonably accommodate employees who are "regarded as" while the Third and Eleventh Circuits required employers to provide reasonable accommodations. The ADAAA also has the effect of rendering moot much of the analyses of the "regarded as" definition in the nation's law reviews, as these tended to focus on the issues of reasonable accommodation (Andrews 2006; Crain 2005; Donovan, 2005; Dudley, 1999; McFarlin, 2005; Ozawa, 2007; Ring, 2006; Rosenthal, 2006), mitigating measures (Warren, 2000), and substantial limitation (Ray & Pennington, 2000). The analyses by Danaher (2006), Mayerson (1997), and Mish (1998), however, still have much to contribute to post-ADAAA understanding of the "regarded as" definition.
6. The reliance on cases from only one of the 13 federal appeals circuits should not prove problematic since they are used merely for illustrative purposes, and not to predict changes in judicial temperament or interpretation.
7. The cases used in our analysis were identified between November 2009 and February 2010 and are available upon request from the authors.
8. Thus, our intent is to use a future-oriented perspective to inform how to avoid ADA-related disputes. We note that this approach is unusual; law reviews tend to retrospectively analyze an existing body of case law. Nevertheless, we believe that our strategy provides an important

and valuable illustration of how the ADAAA reform is intended to affect judicial interpretation and disposition, and ultimately the practice of public human resource management.

9. Over four dozen post-ADAAA cases were identified and examined. The vast majority concerned case facts that occurred before January 1, 2009, and the decision merely reiterated that the reform is not retroactive. Only those few cases where the ADAAA was actually part of the decision are discussed herein.
10. Four cases out the 88 did not fit the classification scheme.
11. The point is not the precise number, or proportion, of cases for wich the implications of the ADAAA may be unclear, but that such a critical mass exists in the Fourth Circuit, and is likely to exist in all circuits, because fact patterns tend to be constant throughout the federal court system.
12. The concern over documentation is heightened when considering the discharge of an individual with disabilities. Crampton and Hodge (2003) suggest that medically-based discharges, in particular, be analyzed to ensure that an accurate assessment of the employee's ability to perform essential job functions is in place.
13. See Note 3.
14. Another irony emerges from the strategy of comprehensive documentation. Although all employees, including those with disabilities, have performance deficiencies, record-keeping is particularly important in contexts that implicate the ADA since therein lies the employer's defense. If, however, the employer is more vigilant in documenting performance deficiencies for employees with disabilities than for nondisabled employees, then a self-fulfilling prophesy is triggered whereby a file filled with evidence justifying an adverse personnel action exists for an employee with a disability but not for their colleagues. While the stereotype of discrimination may revolve around an underestimation of an individual's abilities, it is no less insidious to discriminate on the basis of imbalanced documentation. Thus, employers should be equally vigilant in documentation for all employees, regardless of the employee's characteristics or demographics.

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