

**An Overview of the Americans
with Disabilities Amendments Act of 2008
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In 1990 when the Americans with Disabilities Act (ADA) was signed, many heralded it as the end to barriers in the workforce for those with disabilities. While filled with initial hope, disability advocates soon became disillusioned as a result of what they perceived to be a judicially driven narrowing of the ADA's reach. Congress responded to this frustration by enacting the Americans with Disabilities Amendments Act (ADAAA), effective January 1, 2009.¹

This article provides an overview of the changes brought about by the ADAAA, which changed how the fundamental determination should be made of whether an individual has a disability. In addition to understanding what the ADAAA *did* address, law enforcement managers also should be aware of what has not changed. To this end, the article clarifies that the ADA continues to protect only those able to perform the essential functions of the job and allows for employers to impose hiring and employment standards that are job related and consistent with business necessity.

Overview of the ADA

The ADA prohibits employers from discriminating “against a qualified individual with a disability 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.”² The ADA exists to ensure that individuals with a disability have access to equal employment opportunities and are judged based on their ability to do the job, not their disability. A “qualified individual” meets the prerequisites for the job, such as education and work experience and, despite a qualifying disability, can perform the essential functions of the position with or without a reasonable accommodation.³

The threshold inquiry is whether the individual has a disability within the meaning of the ADA. Disability is defined as a physical or mental impairment that substantially limits one or more major life activities, a record of having such a disability, or being “regarded as” having a disability.⁴ The definition and interpretation of what constitutes a disability was the focus of Congress' efforts to reinvigorate the ADA. In enacting the ADAAA, Congress expressly overruled several Supreme Court rulings that narrowed the definition of disability and rejected a provision within the regulations enacted by the Equal Employment Opportunity Commission (EEOC) implementing the ADA, finding that it restricted the definition of disability contrary to the original intent of the act.⁵

Congress' efforts focused on the Supreme Court's rulings in *Sutton v. United Air Lines, Inc.*⁶ and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*⁷ These cases focused on the interpretation of the definition of disability with the Court stating that the definition must be “interpreted strictly to create a demanding standard for qualifying as disabled.”⁸ The Court held that the key terms of the definition, including major life activity and substantial limitation,

should be interpreted narrowly. Major life activity should only mean those activities of “central importance to most peoples’ daily lives.”⁹ The Supreme Court interpreted the substantial “limitation prong” as requiring a showing that the disability “prevents or severely restricts” an individual from performing a major life activity.¹⁰ The Court also read the ADA to require consideration of the effects of corrective measures in determining whether someone is disabled. In *Sutton*, the Court held that “a person whose physical or mental impairment is corrected by medication or other measures (eyeglasses in this case) does not have an impairment that presently ‘substantially limits’ a major life activity.”¹¹ Thus, the use of corrective measures that effectively overcame the limitations caused by the impairment led to a lack of protection under the ADA. These decisions narrowed the pool of individuals who could seek protection in federal court under the ADA.

Major Life Activity Expanded

The ADAAA rejects the Supreme Court’s assessment that a major life activity is one of “central importance to most peoples’ daily lives”¹² in favor of a less stringent standard. In addition, the ADAAA provides for a more expansive view of what constitutes a major life activity. The definition includes not only the traditional activities of “caring for oneself, performing manual tasks, seeing, hearing, walking...” but also major bodily functions, such as the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”¹³ No longer will plaintiffs have to demonstrate how a hidden intrinsic condition impacts the level at which they function with respect to traditional tasks. For example, an individual who suffers from Parkinson’s disease will not have to demonstrate what traditional activity is impacted by the condition but rather the impact of the condition on neurological and brain functioning.

Determination of Substantial Limits

In an effort to expand the reach of the ADA, Congress clarified that the word substantially should be interpreted more generously and not require a showing of “prevents or severely restricts.” Rather, as described in the regulations implementing the ADA, the term substantially limits should allow for “expansive coverage, to the maximum extent permitted by the terms of the ADA.”¹⁴ The regulations continue by stating “[a]n impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.”¹⁵

The ADAAA also rejected the perspective that in assessing whether someone is disabled, consideration of whether routine, mitigating measures alleviate the effects of the disability is appropriate in favor of an interpretation that states consideration of the existence of the disability must be made without regard to corrective measures except in the case of ordinary eyeglasses and contact lenses.¹⁶ For example, hearing-impaired individuals who with the use of a hearing aid can hear at a level comparable with the rest of the general population are considered disabled within the meaning of the ADA if their unaided hearing is substantially impaired.¹⁷

Congress also clarified that conditions in remission or episodic in nature constitute disabilities if the condition would substantially limit a major life activity when active.¹⁸ This was designed to

reject judicial rulings concluding that certain conditions are not disabilities within the meaning of the ADA because the individuals were only impaired during infrequent episodes. For example, in a case involving an epileptic, the court found that the condition did not constitute a disability because the individual was only sporadically affected by short seizures in which he experienced tremors and could not speak.¹⁹

“Regarded As” Prong

Congress also lessened the threshold needed to satisfy the regarded as prong in the definition of disability. Previously, to satisfy this component of the definition of disability, individuals had to establish that the employer regarded them as having a disability that substantially limited a major life activity.²⁰ With the enactment of the ADAAA, persons now meet the definition of having a disability if they establish that they have been the victim of unlawful discrimination because of an actual or perceived disability “whether or not the impairment limits or is perceived to limit a major life activity.”²¹

What Remains the Same

While the pool of individuals who may claim the existence of a disability certainly has expanded with the recent changes brought about by the ADAAA and its regulations, **what remains unchanged is that if an individual cannot perform an essential function the job requires, that individual is not shielded from adverse employment-related consequences.** For example, in *Hennagir v. Utah Department of Corrections*,²² a physician’s assistant employed by the Utah Department of Corrections (DOC) lost her job when as a result of numerous physical impairments she could not complete a mandatory safety training requirement. *While this case predates the effective date of the ADAAA, it is insightful in that it interprets the second requirement of the ADA, that individuals seeking protection under the ADA must establish that they are qualified individuals with a disability, meaning they can perform the essential functions of the job with or without a reasonable accommodation.*²³

In *Hennagir*, the DOC began requiring all medical and clinical staff members at its Central Utah Correctional Facility to take and pass Peace Officer Standards Training (POST) certification. This decision followed a lengthy period of review and consideration by management after an attack on a medical technician by an inmate in the clinic. *POST certification included an assessment of physical strength, flexibility, and endurance. Initially, the DOC explored the idea of exempting existing staff from this requirement but decided against that approach.*

In 2002, medical staff at this facility began participating in the training. Hennagir attended the training *but, due to various physical impairments, did not participate in the physical components.* Because she did not obtain the POST certification, Hennagir was informed that she had to transfer to another facility in a location in the state where the certification was not required or she would be fired. Hennagir refused the transfer, took medical leave, and, eventually, went on long-term disability to have hip and shoulder surgery. *During her absence, she pursued a claim of unlawful discrimination on account of her disability. This led to attempts by the EEOC and DOC to resolve her employment situation, culminating in the DOC’s offer of a position at her current facility that entailed reviewing and auditing patient care but did not include her*

providing care.²⁴ She refused this offer and, subsequently, was terminated, leading her to sue under the ADA.

The Court of Appeals dismissed her claim, concluding that she failed to establish that she was a qualified individual with a disability.²⁵ It found that her physical condition did constitute a disability within the meaning of the ADA.²⁶ The court then focused on whether the POST certification was an essential function of the job and if any reasonable accommodation existed that would enable her to perform this necessary function, recognizing that she held the burden of proof to establish her ability to perform the essential functions of the job.²⁷ The court began its analysis by deciding “whether [DOC] actually requires all employees in the particular position to satisfy the alleged job-related requirement.”²⁸ The evidence clearly established that all physician’s assistants at the facility in question must be POST certified; the court found that no exceptions should be made. The court also rejected Hennagir’s argument that because she was hired under a policy that did not require the certification and she successfully performed her duties for many years, it must not be essential. The court rejected this argument, stating:

[T]he essential function inquiry is not conducted as of an individual’s hire date. The ADA does not limit an employer’s ability to establish or change the content, nature, or functions of a job. We must look instead to whether a job function was essential at the time it was imposed on Hennagir.²⁹

The court then considered the DOC’s position that the requirement constituted an essential job function at the time it was imposed, concluding that it is and rejecting Hennagir’s claim of unlawful discrimination. *In reaching this decision, the court recognized that it must “weigh heavily the employer’s judgment regarding whether a job function is essential.”*³⁰ In this regard, the court referenced the statements by DOC executives regarding the daily risks to medical personnel that exist when interacting with patients and rejected Hennagir’s argument that because she had worked for many years in this capacity and never had an altercation that it must not be essential. In rejecting Hennagir’s argument, the court referred to a similar situation in which a deputy sheriff had argued that because an altercation seldom occurred, that weighed against its critical nature. In that case, the court concluded:

*Although a deputy [sheriff] may be required to physically restrain inmates only infrequently, the potential for physical confrontation with inmates exists on a daily basis, and the consequences of failing to require a deputy to perform this function when the occasion arises could be a serious threat to security.*³¹

As Hennagir’s position required regular contact with inmates, the court accepted the DOC’s determination that the certification requirement is essential. **Hennagir then argued that a reasonable accommodation to her condition would be for the DOC to enable her to remain in her position.** However, the court rejected this argument, recognizing that the theory behind a reasonable accommodation “is to enable an employee to perform the essential functions of h[er] job; an employer is not required to accommodate a disabled worker by modifying or eliminating an essential function of the job.”³²

The DOC is not required to eliminate an identified essential function, and no reasonable accommodation was found that would enable her to perform this job requirement. Accordingly, her termination did not violate the ADA.

The defensibility of identifying and enforcing job requirements determined to be essential is illustrated in *Allmond v. AKAL Security, Inc.*³³ In this case, a court security officer employed by a private contractor providing court security for the U.S. Marshals Service was fired after he could not pass a newly instituted hearing test developed after a study by Dr. Richard Miller, Director of Law Enforcement Medical Programs for the Office of Federal Occupational Health. In his findings, Dr. Miller identified several hearing-related tasks deemed essential to the court security officer position and recommended changes to the medical standards for the position. These changes included a recommendation that court security officers pass a hearing test without the use of a hearing aid to qualify for the position.³⁴

The court security officer position required passing preemployment and annual medical examinations. Allmond was employed by the contractor and worked at a courthouse, but he failed the medical examination with the new hearing test. His employer subsequently fired him, consistent with the contractual requirement with the Marshals Service.³⁵ He sued, claiming unlawful discrimination based on his disability.

Rather than assessing whether Allmond had a protected disability, choosing to assume that he did, *the court ruled against him on the basis that passing the hearing test without a hearing aid is job related and consistent with business necessity.* The court recognized that qualification standards, such as the hearing standard in this case, which exclude individuals with a disability are generally prohibited. **However, disability laws provide employers with an affirmative defense for claims of unlawful discrimination if the employer can show that the standard or test is job related and consistent with business necessity.**³⁶ In describing the reach of this defense, the court stated:

Job-relatedness is used in analyzing the questions or subject matter contained in a test or criteria used by an employer in making hiring or promotional decisions. Business necessity, in contrast, is larger in scope and analyzes whether there is a business reason that makes necessary the use by an employer of a test or criteria in hiring or promotional decision making.³⁷

Applying these standards, the court held that the hearing-aid ban at issue is job related as it assessed a medical qualification—a level of unaided hearing—necessary to perform the essential functions of the job of court security officer. In addition, the hearing aid ban is consistent with business necessity as it was adopted “to ensure that all officers can perform their job safely and effectively in the event they must rely on their unaided hearing.”³⁸ Accordingly, the business necessity defense bars Allmond’s claim of unlawful discrimination.

Conclusion

As a result of several Supreme Court cases interpreting the ADA, Congress intervened and enacted the ADAAA with its stated purpose “to carry out the ADA’s objective of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear,

strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA.”³⁹ What also must be factored into employment decision making in this context is not just the threshold inquiry of the existence of a disability but also the need to assess what aspects of the job are essential as opposed to marginal job functions, whether the individual can perform those essential functions with or without a reasonable accommodation, and defending employment standards that may have an adverse impact on an individual otherwise protected by the law.

Endnotes

¹ ADA Amendments Act of 2008, Pub.L.No. 110-325 (2008). **On March 25, 2011, the Equal Employment Opportunity Commission (EEOC), responsible for overseeing the implementation of the Americans with Disabilities Act (ADA), published regulations and interpretative guidance. These regulations became effective May 24, 2011.**

² 42 U.S.C. § 12101, *et seq.*

³ 42 U.S.C. § 1211(8).

⁴ 42 U.S.C. § 12102(1).

⁵ *See* ADA Amendments Act of 2008, Pub.L.No. 110-325, § 2 (2008).

⁶ 527 U.S. 471 (1999).

⁷ 534 U.S. 184 (2002).

⁸ *Toyota Motor Manufacturing, Kentucky, Inc. V. Williams*, 534 U.S. 184, 197 (2002).

⁹ *Id.* at 198.

¹⁰ *Id.*

¹¹ *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

¹² *Id.*

¹³ 42 U.S.C. § 12102(2)(B).

¹⁴ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 76 Fed.Reg. 58, 17000 (2011) (to be codified at 29 C.F.R. part 1630).

¹⁵ *Id.*

¹⁶ 42 U.S.C. 12102(4)(E)(i)-(iii). This subsection states:

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, appliances, or low-vision devices (which do not include ordinary eyeglasses or contact lenses, prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

¹⁷ In commentary to the regulations implementing the ADAPA, the U.S. Department of Labor cited the following examples of cases with outcomes now contrary to the law: Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (court held that in considering whether the plaintiff was disabled within the meaning of the ADA, it must consider the ameliorative effects of plaintiff's regime of medicine, exercise, and diet and refused to consider the effects of the plaintiff's uncontrolled diabetes on the major life activities of seeing, speaking, working, etc.); Gonzales v. National Bd. Of Med. Examiners, 225 F.3d 620 (6th Cir. 2000) (court found that an individual with a diagnosed learning disability was not substantially limited based on the individual's adaptive skill to overcome this condition enabling him to read and achieve academic success); and McMullen v. Ashcroft, 337 F.Supp.2d 1281 (D.Wyo. 2004) (employee fired because of clinical protection did not have a claim under the ADA because of the successful management of the condition with medication for 15 years). See source cited *infra* note 14 at 17010.

¹⁸ 42 U.S.C. § 12102 (4)(D).

¹⁹ See source cited *infra* note 14 at 17011, citing Todd v. Academy Corp., 57 F.Supp.2d 448 (S.D.Tex. 1999).

²⁰ Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). In addition to rejecting this ruling, Congress sought to reinstate the Supreme Court's ruling in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), which established a broad view of the "regarded as" prong within the definition of disability in the Rehabilitation Act of 1973. See ADA Amendments Act of 2008, Pub.L.No. 110-325, § 2(b)(3) (2008). In Nassau, the Supreme Court recognized that an individual who is discriminated against on account of "[s]ociety's accumulated myths and fears about disability and disease" is as adversely affected by discrimination as someone who in fact has an impairment and, thus, should not have to show anything other than discriminatory treatment based on this perception. Nassau at 284.

²¹ 42 U.S.C. § 12102(3)(A). The statute further provides that this definition does not apply to conditions that are transient and minor. See 42 U.S.C. § 12102 (3)(B).

²² 587 F.3d 1255 (10th Cir. 2009), amending and *superseding* Hennagir v. Utah Department of Corrections, 581 F.3d 1256 (10th Cir. 2009).

²³ 42 U.S.C. § 12111 (8).

²⁴ Hennagir at 1261-1262.

²⁵ *Id.* at 1263-1264.

²⁶ *Id.* at 1259-1260.

²⁷ *Id.* at 1262.

²⁸ *Id.* at 1262, quoting Davidson v. America Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2203).

²⁹ *Id.*, quoting, Milton v. Scrinver Inc., 53 F.3d 1118, 1124 (10th Cir. 1995).

³⁰ *Id.* at 1263.

³¹ *Id.* at 1263, quoting Hopkins v. Oakland County Sheriff's Department, 227 F.3d 719, 727 (6th Cir. 2000).

³² *Id.* at 1264, quoting Matthews v. Denver Post, 263 F.3d 1164, 1168-1169 (10th Cir. 2001).

³³ 558 F.3d 1312 (11th Cir. 2009). This case was litigated under the ADA, as well as the Rehabilitation Act of 1973, codified at 29 U.S.C. 701, governing disability discrimination in the federal workplace.

³⁴ *Id.* at 1315.

³⁵ *Id.*

³⁶ *Id.* at 1316. See 42 U.S.C. § 12113 (a). The ADAAA amended the qualifications standards and testing section of the ADA by adding the following language:

(C) Qualification Standards and Tests Related to Uncorrected Vision—Notwithstanding section 3(4)(E) (ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and consistent with business necessity.

³⁷ *Id.* at 1317 (citation omitted).

³⁸ *Id.*

³⁹ Pub.L.No. 110-325 (2008).