The ADA Amendments Act: Judicial Decisions Relating to Testing Accommodation

Nancy Lee Jones
Legislative Attorney

June 3, 2010

Congressional Research Service
7-5700
www.crs.gov
R41280

CRS Report for Congress
Prepared for Members and Committees of Congress
c11173008

Summary

The Americans with Disabilities Act (ADA) is a broad civil rights act prohibiting discrimination against individuals with disabilities and has as its purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The ADA was amended in 2008 by the ADA Amendments Act (ADAAA), P.L. 110-325, to expand the definition of disability from the manner in which it had been interpreted by the Supreme Court, an expansion which could effect whether accommodations are provided for certain tests such as bar examinations. This report will examine the statutory change in the definition particularly as it relates to the concept of "substantially limits," as well as judicial decisions and commentary relating to testing accommodation.

Contents

Contacts

Introduction

The Americans with Disabilities Act (ADA)[1] is a broad civil rights act prohibiting discrimination against individuals with disabilities. As stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] The ADA was amended in 2008 by the ADA Amendments Act (ADAAA), P.L. 110-325, to expand the definition of disability from the manner in which it had been interpreted by the Supreme Court,[3] an expansion which could effect whether accommodations are provided for certain tests such as bar examinations. The Equal Employment Opportunity Commission (EEOC) issued proposed regulations on the ADAAA definition of disability but did not directly address the issue of testing.[4] This report will examine the statutory change in the definition particularly as it relates to the concept of "substantially limits," as well as judicial decisions and commentary relating to testing accommodation.

Statutory Language

The ADA Amendments Act (ADAAA) defines the term disability with respect to an individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."[5] Although this is essentially the same statutory language as was in the original ADA, P.L. 110-325 contains new rules of construction regarding the definition of disability, including, among others, that

- the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the act;

[1] 42 U.S.C. §§12101 et seq. For a more detailed discussion of the ADA, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

[2] 42 U.S.C. §12101(b)(1).

[3] See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, Inc., 527 U.S. 516 (1999); *Kirkingburg v. Albertson's Inc.*, 527 U.S. 555 (1999); *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). For a more detailed discussion of the ADA Amendments Act see CRS Report RL34691, *The ADA Amendments Act: P.L. 110-325*, by Nancy Lee Jones.

[4] 74 FED. REG. 48431 (September 23, 2009).

[5] P.L. 110-325, §4(a), amending 42 U.S.C. §12102(3). The ADA Amendments Act does not specifically list covered disabilities, and final regulations have not yet been promulgated. However, the EEOC proposed regulations do provide examples of impairments that will consistently meet the definition of disability, including autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(5); 74 FED. REG. 48441 (September 23, 2009). The EEOC proposed regulations also noted some impairments that are usually not considered to be disabilities, stating the following: "[t]emporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity." EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(8); 74 FED. REG. 48443 (September 23, 2009). An intermediate category, where an impairment may be disabling for some individuals but not for others, was also included. This category includes learning disabilities, one of the most common disabilities for which testing accommodations are requested. EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(6); 74 FED. REG. 48442 (September 23, 2009).

- the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act; and
- the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, except that the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered.

The findings of the ADA Amendments Act include statements indicating that the Supreme Court decisions in *Sutton* and *Toyota* as well as lower court cases have narrowed and limited the ADA from what was intended by Congress. P.L. 110-325 specifically states that the then current Equal Employment Opportunity Commission (EEOC) regulations defining the term "substantially limits" as "significantly restricted" are "inconsistent with congressional intent, by expressing too high a standard." The codified findings in the original ADA are also amended to delete the finding that "43,000,000 Americans have one or more physical or mental disabilities...." This finding was used in *Sutton* to support limiting the reach of the definition of disability.

The House debate contains a colloquy between Representatives Pete Stark and George Miller on the subject of the meaning of "substantially limits" in the context of learning, reading, writing, thinking, or speaking. The colloquy finds that an individual who has performed well academically may still be considered an individual with a disability. Representative Stark stated the following:

> Specific learning disabilities, such as dyslexia, are neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities often referred to as the condition, manner, or duration. This legislation will reestablish coverage for these individuals by ensuring that the definition of this ability is broadly construed and the determination does not consider the use of mitigating measures.[6]

The colloquy continued with Representative Miller indicating that the ADAAA supported the finding in *Bartlett v. New York State Board of Bar Examiners*,[7] that an individual should not be penalized due to adaptive strategies that may lessen the impact of the disability.[8]

The EEOC's proposed ADAAA regulations echo this colloquy, specifically stating that

> An individual with a learning disability who is substantially limited in reading, learning, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experiences in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.[9]

---

[6] 154 CONG. REC. H. 8291 (daily ed. September 17, 2008).

[7] *Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001). See discussion infra.

[8] Id. One Senator stated during Senate debate that standardized testing organizations should "not be required to fundamentally alter key performance measurements when providing reasonable accommodations to students with disabilities." 154 CONG. REC. S8355 (daily ed. September 11, 2008) (Remarks of Senator Barrasso).

[9] EEOC Proposed Regulations, to be codified at 29 C.F.R. § 1630.2(j)(6)(C); 74 FED. REG. 48442 (September 23, 2009.)

The ADAAA also defines the term "major life activities" and adds reading, concentrating, thinking, and communicating to the list of included activities.[10] However, the ADAAA also specifically states that

> Nothing in this Act alters the provisions of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.[11]

Judicial Decisions

Pre-ADAAA Judicial Decisions

Prior to the enactment of the ADAAA, courts took two main approaches to plaintiffs alleging discrimination in testing accommodations. In *Price v. National Board of Medical Examiners*,[12] the court found that since the students had a history of "significant scholastic achievement" they could learn "at least as well as the average person" and, therefore, did not have a disability.[13] However, the court in *Bartlett v. New York State Board of Bar Examiners*,[14] took another approach and, despite the plaintiff's academic achievements which included a Ph.D. and law degree, held that the plaintiff was substantially limited in the major life activity of reading. In the last of several opinions in this case, the court noted that although the plaintiff used certain self accommodations or coping strategies, these "merely help plaintiff function, but do not affect her ability to read" and, therefore, were not relevant in a determination of whether the plaintiff has a reading disability. The court further observed the following:

> A definition of disability based on outcomes alone, particularly in the context of learning disabilities, would prevent a court from finding a disability in the case of any individual like Dr. Bartlett who is extremely bright and hardworking, and who uses alternative routes to achieve academic success.[15]

Post-ADAAA Judicial Decisions

The ADA Amendments Act was enacted on September 25, 2008, and became effective on January 1, 2009. Generally, courts do not apply a new statute to cases already pending since "retroactivity is not favored in the law…."[16] Since many of the decisions currently being rendered by the courts concern factual situations that occurred prior to the ADAAA's effective date, courts most often

[10] 42 U.S.C. §12102.

[11] 42 U.S.C. §12201.

[12] 966 F.Supp. 419 (S.D. W. Va. 1997).

[13] Id. at 427-428.

[14] *Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001).

[15] Id.

[16] *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

have declined to apply the ADAAA.[17] However, where the claim is for prospective relief, one court has found the ADAAA to be applicable.

In *Jenkins v. National Board of Medical Examiners*[18] the plaintiff, who had been diagnosed with a reading disorder at a young age, sought additional time on the U.S. Medical Licensing Examination. He had previously received 50% additional time on the ACT and MCAT examinations. The Sixth Circuit held that the ADAAA did apply, reasoning that since the plaintiff was seeking prospective relief (i.e., accommodations for an examination in the future), there was no injustice to the defendant. Finding that the lower court had relied on the "very language from *Toyota* that Congress repudiated in the ADA Amendments Act," the case was remanded to determine whether the plaintiff was an individual with a disability as defined by the ADAAA, and, if so, what accommodations were required. The court of appeals did not attempt to interpret the ADAAA stating that "[t]he fact-bound nature of the question whether Jenkins is disabled under the revised Act counsels a remand without an appellate attempt to give more precise definition in the abstract to the revised Congressional language."

Impact on Testing

The paucity of judicial decisions and the relatively short period of time that has elapsed since the enactment of the ADA AA does not allow for any definitive conclusions concerning the ADAAA's impact on testing accommodations. One commentator has observed that "[t]here are still many unanswered questions about how to apply the ADAAA and what impact it will have on licensing examinations."[19] This commentator also noted that, after the ADAAA, more individuals would probably be determined to have a disability, and the focus may shift "from whether an applicant has a disability within the meaning of the ADAAA to whether an applicant with a qualifying disability is entitled to accommodations and, if so, which accommodations are appropriate."[20] These comments were echoed by Erica Moeser, the President of the National Conference of Bar Examiners, who indicated that she feels the ADAAA may not change testing accommodations for bar examinations[21] significantly. Ms. Moeser stated,

> … the real watershed was the ADA itself. And in looking at the Amendments, while they may move things around a little bit, they really don't … fundamentally alter what we're doing in terms of testing. The question may shift from whether someone has a disability to the appropriate accommodation to a greater extent, but I don't know that—at least at this point, from my own observations, as the Amendments have taken effect—that we are looking at major changes to the way business is done.[22]

---

[17] See e.g., *EEOC v. Agro Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009); *Pinegar v. Shinseki*, 2010 U.S. Dist. LEXIS 22265 (M.D. Pa. March 10, 2010); *Britting v. Shineski*, 2010 U.S. Dist. LEXIS 10190 (M.D. Pa. Feb. 5, 2010); *Taylor v. Consolidated Products, Inc.*, 2009 U.S. Dist. LEXIS 53473 (E.D. Tenn. June 19, 2009); *Jones v. Wal-Mart Stores, East, L.P.*, 2009 U.S. Dist. LEXIS 47242 (E.D. Tenn. June 5, 2009); *Geiger v. Pfizer, Inc.*, 2009 U.S. Dist. LEXIS 126345 (S.D. Ohio April 10, 2009).

[18] 2009 U.S. App. LEXIS 2660 (6th Cir. February 11, 2009).

[19] Judith A. Gundersen, "The ADAAA and the Bar Exam," 78 THE BAR EXAMINER 40, 43 (May 2009) http://www.ncbex.org/uploads/user_docrepos/780209_Gundersen.pdf.

[20] *Id.*

[21] For information on testing accommodations for the bar examination see http://www.lsac.org/pdfs/GuidelinesCognitive.pdf.

[22] "Conference Panel: What the ADA Amendments and Higher Education Acts Mean for Law Schools," 18 AM.U.J. (continued...)

As is the situation generally with the ADA, the outcome of any case under the ADAAA will often rest on the specific fact situation presented. However, there are some unanswered questions concerning testing. For example, the ADAAA specifically states that mitigating measures or devices cannot be considered in determining whether an individual has a disability,[23] but is silent on whether mitigating measures may be used in determining whether to provide accommodations. This may be relevant in situations such as where an applicant who is diabetic and uses an insulin pump requests additional testing time, even though such time is not necessary for food or blood sugar testing breaks.[24] Guidance on this and other issues awaits final regulations and, perhaps, judicial decisions.

Author Contact Information

Nancy Lee Jones
Legislative Attorney
njones@crs.loc.gov, 7-6976

(...continued)

GENDER SOC. POL'Y & L 13, 30 (2009).

[23] 42 U.S.C. §12102.

[24] For a more extensive discussion of this issue see Judith A. Gundersen, "The ADAAA and the Bar Exam," 78 THE BAR EXAMINER 40, 43 (May 2009) http://www.ncbex.org/uploads/user_docrepos/780209_Gundersen.pdf.