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Title I of the Americans with Disabilities Act (ADA): Employment Discrimination

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January 5, 2015

Congressional Research Service
7-....
www.crs.gov
R43845

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Title I of the Americans with Disabilities Act of 1990 and the ADA Amendments Act of 2008 (together, ADA) prohibit discrimination in employment against qualified individuals on the basis of disability. The ADA defines the term *disability* broadly to include individuals with disabilities, individuals with a history of a disability, and individuals regarded as having disabilities whether they have one or not. The ADA protects alcoholics and drug addicts who are in recovery, but does not protect individuals who are actively abusing drugs or alcohol.

The ADA requires "covered entities"—including labor unions, employment contractors, and private companies and state and local governments with 15 or more employees—to provide reasonable accommodations to qualified individuals with disabilities so that they can perform the essential functions of their jobs. Employers need not provide whatever accommodations individuals with disabilities identify. Rather, employers need to negotiate with individuals with disabilities to settle on reasonable accommodations. They do not need to provide accommodations that would impose undue burdens. The ADA limits the types of questions that employers can ask of individuals with disabilities, and governs employers' requirement and use of medical and other tests.

Individuals with disabilities who believe they have been unlawfully discriminated against can bring claims against their employers with the Equal Employment Opportunity Commission (EEOC) or the state counterpart. In addition, the Attorney General may enforce the ADA by bringing lawsuits when there is a pattern or practice of unlawful discrimination. Under the ADA, plaintiffs may seek a variety of remedies including injunctions, damages, and even compensatory and punitive damages in cases of intentional discrimination.

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Introduction

The Americans with Disabilities Act of 1990 and the ADA Amendments Act of 2008 (together, ADA)[1] have often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. The ADA provides broad nondiscrimination protection in employment, public services, public accommodations and services operated by private entities, transportation, and telecommunications for individuals with disabilities. The ADA states that its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] In 2008, in response to Supreme Court and lower court decisions that narrowly interpreted the term *disability*, Congress passed the ADA Amendments Act to, among other things, "carry out the ADA's objectives 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."[3]

This report focuses on Title I of the ADA, which prohibits discrimination on the basis of disability in employment. Section 12112 provides that no "covered entity shall discriminate against a qualified individual on the basis of disability in regard to job applications or procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[4]

Definitions of ADA Terms

The definition of terms used in the ADA is the starting point for determining the rights granted and legal duties imposed by the ADA.

Definition of the Term *Disability*

In order to be protected by the ADA, a qualified individual must have a disability. The ADA defines the term *disability* with respect to an individual as:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.[5]

[1] 42 U.S.C. §§12101 *et seq.*

[2] 42 U.S.C. §12102(b)(1).

[3] P.L. 110-325, §2(b)(1).

[4] 42 U.S.C. §12112(a).

[5] 42 U.S.C. §12102(1).

"Substantially Limits"

Prior to the ADA Amendments Act, the Supreme Court interpreted the term *substantially limits* to require that a claimant's impairment "severely restricts" the individual.[6] Many claimants with disabilities whom Congress intended to be covered by the Americans with Disabilities Act lost their cases because they could not establish that they had disabilities under this standard.[7] The ADA Amendments Act rejected the "severely restricts" standard as too demanding, but did not specify another interpretation in its place.[8] After the ADA Amendments Act, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing Title I of the ADA, issued regulations that provide the following guidance on interpreting the term *substantially limits*:

> The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.[9]

"Major Life Activities"

The ADA Amendments Act clarified the sorts of activities included within the term *major life activities*: "Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[10]

The act makes clear that the term *major life activities* includes "major bodily functions": "A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[11]

"Regarded as Having" a Disability

The ADA also expands on the "regarded as having" a disability definition: "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."[12]

The EEOC regulations explain that the "regarded as having" a disability definition applies to individuals who have:

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[6] *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 198 (2002).

[7] P.L. 110-325, §2(6).

[8] *Id*., at §§2(a)(7), 2(b)(5).

[9] 29 C.F.R. §1630.2(j)(3).

[10] 42 U.S.C. §12102(2)(A).

[11] 42 U.S.C. §12102(2)(B).

[12] 42 U.S.C. §12103(3)(A).

- a physical or mental impairment that does not substantially limit major life activities but is treated as constituting such a limitation,
- a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or
- none of the identified impairments but are treated as having an impairment.[13]

However, the definition does not apply to "impairments that are transitory and minor." A transitory impairment is "an impairment with an actual or expected duration of 6 months or less."[14]

Rules of Construction Regarding the Definition of Disability

The ADA provides the following rules for interpreting the term *disability*:

- the definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent allowed;
- the term *substantially limits* should be interpreted to impose a less demanding standard than "significantly limits" and "severely restricts";
- an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability;
- an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and
- the determination of whether an impairment substantially limits a major life activity must be made without regard to effects of mitigating measures.[15]

Definition of the Term *Covered Entity*

The ADA governs the employment practices of "covered entities." The ADA defines the term *covered entity* to mean an employer, employment agency, labor organization, or joint labor-management committee,[16] and defines the term *employer* to mean "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year" and any agent of such a person.[17] The ADA exempts the federal government,[18] wholly owned corporations of the U.S.

[13] 29 C.F.R. §1615.03(4).

[14] 42 U.S.C. §12102(3)(B).

[15] 42 U.S.C §12102(4). However, the ameliorative effects of eyeglasses and contact lenses shall be considered.

[16] 42 U.S.C. §12111(2).

[17] 42 U.S.C. §12111(5)(A). This definition parallels the definition of "employer" in the Civil Rights Act of 1964. In *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500 (2006), the Supreme Court held that the 15-employee threshold in the Civil Rights Act was an element of the plaintiff's discrimination claim, and does not go to the court's jurisdiction to hear the claim. Therefore, a defendant would waive a defense based on not meeting the 15-employee threshold if it did not timely raise it. Jurisdictional requirements, in contrast, cannot be waived. Because the ADA parallels the Civil Rights Act's requirement of 15 employees, it is likely that a court would apply the reasoning from *Arbaugh* to an ADA claim and conclude that the 15-employee threshold is not jurisdictional.

[18] The federal government is covered by the Rehabilitation Act of 1973, 29 U.S.C. §§701 *et seq*.

government, Indian tribes, and bona fide tax-exempt private membership clubs (except labor organizations).[19] It does not exempt state and local governments.

"Employee"

The ADA defines the term *employee* to mean "an individual employed by an employer,"[20] a definition that, the Supreme Court wrote, is "completely circular and explains nothing."[21]

In *Clackamas Gastroenterology Assoc. v. Wells*, the Supreme Court considered the meaning of the term *employee* in a case in which the employer, a medical professional corporation, argued that the four doctors who owned the corporation did not qualify as employees, putting the total number of employees below the minimum of 15.

The Court first explained that, in previous cases, when Congress used the term *employee* without defining it, the Court has turned to the common law definition of the term.[22] Given that conclusion, the Court considered the guidance provided by the EEOC Compliance Manual[23] in light of the common law, and concluded the EEOC guidance was valid.[24] The Compliance Manual focuses on the amount of control that the organization exercises over the individual by looking at the following factors:

- the authority to hire and fire and set rules governing the individual's work;
- the degree to which the organization supervises the individual;
- whether the individual reports to someone within the organization;
- the extent to which the individual can influence the organization;
- whether there are any written documents indicating that the parties intended the individual to be an employee; and
- whether the individual shares in the profits, losses, and liabilities of the organization.[25]

The Court commented that whether an individual is an employee "depends on all the incidents of the relationship with no one factor being decisive."[26] Ultimately, although the Court acknowledged that several factors tended to indicate that the four doctors were not employees, it remanded the case to the district court for consideration of all the factors.

[19] 42 U.S.C. §12111(5)(B).

[20] 42 U.S.C. §12111(4).

[21] *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S 440, 444 (2003) (internal quotation marks and citation omitted).

[22] *Id.*, at 445.

[23] The Compliance Manual is not a regulation and does not establish legally enforceable standards. Rather, it provides guidance, based on the agency's experience, with employment discrimination statutes. *Id*., at 448 n. 9.

[24] *Id.*, at 449.

[25] *Id*., at 449-450, citing EEOC Compliance Manual §605:0009.

[26] *Id*., at 451 (internal quotation marks, alterations, and citation omitted).

Definition of the Term *Qualified Individual*

The ADA prohibits discrimination against "qualified individuals." It defines the term *qualified individual* to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[27] Therefore, if an individual could perform the essential functions of a job with a reasonable accommodation, an employer may not discriminate against him or her on the basis of disability.

"Qualified"

The ADA prohibits employers from discriminating on the basis of disability only if the individual with a disability is "qualified" for the position he or she is seeking. An individual with a disability is "qualified" if he or she has the basic skills, education, and experience necessary to perform the job.[28] Therefore, a court or the EEOC will determine the qualification of an individual with a disability for a job apparently without reference to the disability.

"Reasonable Accommodation"

If a qualified individual with a disability could perform the job he or she is seeking with reasonable accommodation by the employer, the employer may not discriminate against the individual on the basis of disability. The ADA provides that the term *reasonable accommodation* may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities"[29] and "job-restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations with disabilities."[30]

"Essential Functions"

The EEOC regulations define "essential functions" to mean "the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position."[31] The regulations provide the following guidance for determining "essential functions": The position exists to perform the duty; there are a limited number of employees who could perform the function; or the function is highly specialized.[32] Evidence of essential functions includes

- the employer's judgment;
- written job descriptions;

[27] 42 U.S.C. §12111(8).

[28] *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 171 (2d Cir. 2006).

[29] 42 U.S.C. §12111(9)(A).

[30] 42 U.S.C. §12111(9)(B).

[31] 29 C.F.R. §1630.2(n)(1).

[32] 29 C.F.R. §1630.2(n)(2).

- the amount of time spent performing the functions;
- the consequence of not requiring the incumbent to perform the functions;
- the terms of collective bargaining agreements;
- the work experience of past incumbents; and
- the current work experience of incumbents in similar jobs.[33]

Prohibited Discrimination

Prohibited Practices and Actions

The ADA provides that prohibited discrimination includes the following practices and actions.

Adverse Treatment

Section 12112(b)(1) prohibits covered entities from "limiting, segregating, or classifying" applicants or employees in a way that negatively affects their opportunities or status because of a disability.[34]

Contractual Arrangements

Section 12112(b)(2) prohibits covered entities from entering into contractual arrangements or other relationships that have the effect of subjecting employees or applicants with disabilities to prohibited discrimination.[35] Such prohibited relationships include those with employment agencies, labor unions, and organizations providing employee benefits, apprenticeships, or training.[36]

Practices That Have a Discriminatory Effect

Section 12112(b)(3) prohibits covered entities from using standards, criteria, or "methods of administration" that have the effect of discriminating on the basis of disability, or such practices that "perpetuate the discrimination of others who are subject to common administrative control."[37] This section provides for "disparate impact" claims against practices that are facially neutral but have a negative impact on one group—in the case of the ADA, individuals with disabilities—and are not justified by business necessity.[38]

[33] 29 C.F.R. §1630.2(n)(3).

[34] 42 U.S.C. §12112(b)(1).

[35] 42 U.S.C. §12112(b)(2).

[36] *Id*.

[37] 42 U.S.C. §12112(b)(3).

[38] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

Discrimination Based on Relationship with an Individual with a Disability

Section 12112(b)(4) prohibits covered entities from discriminating against individuals because they have known relationships with individuals who have known disabilities.[39] This section protects, for example, parents of children with disabilities from discrimination solely because they have children with disabilities.[40] However, the employer must know of the relationship and the disability in order to be liable under the ADA.

Reasonable Accommodations and "Undue Hardship"

Under Section 12112(b)(5)(A), a covered entity's failure to provide reasonable accommodation for a qualified individual with a disability constitutes discrimination on the basis of disability, and is prohibited.[41] However, if the covered entity can establish that the accommodation would impose an "undue hardship" on its operations, it will not be held liable for discrimination.[42] Therefore, it appears that a reasonable accommodation is anything that does not constitute an undue hardship.[43]

The ADA defines the term *undue hardship* as "an action requiring significant difficulty or expense."[44] The ADA directs that the following factors should be considered in determining "undue hardship":

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility, the number of employees at the facility, and the expenses and resources of and the impact on the operation of the facility;
- the overall financial resources of the covered entity, the number of employees, and the number, type, and location of the covered entity's facilities;
- the type of operation of the covered entity—including the composition, structure, and functions of the workforce—the geographic separateness, and the administrative or fiscal relationship of the facility involved to the covered entity.[45]

The EEOC regulations measure undue hardship in terms of the cost of the accommodation against the entire operations of the employer, rather than the operations of the department involved.[46] The Supreme Court has not considered the issue.[47]

[39] 42 U.S.C. §12112(b)(4).

[40] *See, e.g.*, *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001).

[41] 42 U.S.C. §12112(b)(5)(A).

[42] *Id*.

[43] William D. Goren, Understanding the ADA (4th ed.) 27 (American Bar Association 2013).

[44] 42 U.S.C. §12111(10)(A).

[45] 42 U.S.C. §12111(10)(B).

[46] Understanding the ADA at 29.

[47] *Id*.

Undue hardship is not strictly a matter of cost. An accommodation can be unreasonable if it imposes an undue hardship on business operations.[48] One example of such an unreasonable accommodation could be a job reassignment of the employee with a disability that violates a well-established seniority system.[49]

Section 12112(b)(5)(B) prohibits covered entities from refusing to hire qualified applicants or afford employment opportunities to qualified employees because the covered entities would need to provide reasonable accommodations.[50]

The requirement that a covered entity provide reasonable accommodations for a qualified individual with a disability does not mean that the covered entity must provide whatever accommodation the individual with a disability identifies. Instead, the covered entity should negotiate with the individual in order to determine a *reasonable* accommodation.[51] A covered entity's outright rejection of a request for reasonable accommodation without negotiation is grounds for finding that the covered entity failed to provide reasonable accommodation.[52]

Discriminatory Qualification Standards, Tests, and Criteria and "Direct Threat"

Section 12112(b)(6) prohibits covered entities from using qualification standards, tests, or criteria that screen out or tend to screen out individuals with disabilities or classes of individuals with disabilities, unless the covered entity can demonstrate that the standard, test, or criterion is job-related for the particular position at issue and is a business necessity,[53] and that the performance required cannot be accomplished by reasonable accommodation.[54] A covered entity may use qualification standards and tests based on an individual's uncorrected vision if they are shown to be job-related and consistent with business necessity.[55]

A discriminatory qualification standard that "an individual shall not provide a direct threat to the health or safety of other individuals in the workplace"[56] does not violate the ADA. The term *direct threat* means "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[57] The Supreme Court upheld a standard that discriminated against an individual with a disability because the standard protected him against direct threat of harm.[58] In *Chevron USA v. Echazabal*, the Court upheld an employer's decision not to hire a qualified individual with hepatitis C for a position that would expose him to chemicals that could

[48] *Id*.

[49] *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).

[50] 42 U.S.C. §12112(b)(5)(B).

[51] Understanding the ADA at 29.

[52] *Id*., at 30-33.

[53] 42 U.S.C. §12112(b)(6).

[54] 42 U.S.C. §12113(a).

[55] 42 U.S.C. §12113(c).

[56] 42 U.S.C. §12113(b).

[57] 42 U.S.C. §12111(3).

[58] *Chevron USA v. Echazabal*, 536 U.S. 73 (2002).

harm his liver. Therefore, it appears that direct threat can refer to a threat that the individual with a disability presents to others as well as a threat that a desired job presents to the individual.[59]

The EEOC regulations set forth the following factors for determining whether an individual with a disability presents a direct threat, based on reasonable medical judgment that relies on the most current medical knowledge and/or the best objective evidence:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood the potential harm will occur; and
- the imminence of the potential harm.[60]

In most federal courts of appeals that have considered the issue, direct threat is an affirmative defense that the defendant must raise.[61]

Selection and Administration of Tests

Section 12112(b)(7) requires covered entities to select and administer tests in a way that reflects the actual skills and aptitudes of individuals with disabilities that impair sensory, manual, or speaking skills and not the impairment.[62] For example, this section would appear to prohibit a covered entity from administering a written test to test the knowledge of an applicant with a disability that impairs manual skills.

Medical Exams and Inquiries

Section 12112(d)(1) provides: "The prohibition against discrimination [on the basis of disability] shall include medical examinations and inquiries."[63] The ADA treats prehiring, preemployment, and postemployment medical exams and inquiries differently.

- During the interview process, before an applicant has been hired, a covered entity may not conduct medical exams or inquire if an applicant is an individual with a disability or about the severity of a disability.[64] However, a covered entity may ask an applicant about his or her ability to perform job-related functions.[65]
- Once the applicant has been hired but before the applicant has started work, a covered entity may condition employment on the results of a medical exam if all employees are subject to the same condition, the results of the exam are kept

[59] Understanding the ADA at 12-13.

[60] 29 C.F.R. §1639.2(r).

[61] Understanding the ADA at 12.

[62] 42 U.S.C. §12112(b)(7).

[63] 42 U.S.C. §12112(d)(1).

[64] 42 U.S.C. §12112(d)(2)(A).

[65] 42 U.S.C. §12112(d)(2)(B).

private (with limited exceptions), and the results are used consistently with the ADA[66]—namely, they are job-related and consistent with business necessity.

- Once an individual is employed, a covered entity can require a medical exam and inquire about the existence or severity of a disability only if the exam or inquiry is demonstrated to be job-related and consistent with business necessity.[67] However, a covered entity may ask about an employee's ability to perform any job-related functions, and may conduct voluntary medical exams as part of an employee health program available at the work site.[68]

It is not always apparent what tests qualify as medical exams. In *Karraker v. Rent-a-Center, Inc.*,[69] the U.S. Court of Appeals for the Seventh Circuit considered whether an employer's consideration of an employee's performance on the Minnesota Multiphasic Personality Inventory (MMPI) in promotion decisions violated the ADA. The MMPI asks for responses to statements such as "I commonly hear voices without knowing where they are coming from" and "I see things or animals or people around me that others do not see." The court found that even though the test results were not interpreted by a medical professional, the MMPI was a medical exam because it was designed, in part, to reveal whether the test taker had a mental illness.

Illegal Drug and Alcohol Use

The ADA provides that "a qualified individual with a disability shall not include any employee or applicant who is currently engaged in the illegal use of drugs" when a covered entity acts on that basis.[70] The ADA covers drug addicts and alcoholics who are in recovery or in rehabilitation programs and are not using illegal drugs or alcohol—and any individual who is regarded as using illegal drugs and abusing alcohol but is not.[71] However, a covered entity may adopt policies or procedures, including drug testing, to ensure that an addict or alcoholic in recovery or in a rehabilitation program is not using illegal drugs or alcohol.[72] Drug testing does not constitute a medical exam.[73]

Exception for Religious Entities

Section 12113(d) provides that religious corporations, associations, educational institutions, and societies may give preference to individuals of a particular religion to "perform work connected with the carrying on" of their activities.[74] Furthermore, a religious organization may require that its applicants and employees adhere to its religious tenets.[75]

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[66] 42 U.S.C. §12112(d)(3).

[67] 42 U.S.C. §12112(d)(4)(A).

[68] 42 U.S.C. §12112(d)(4)(B).

[69] 411 F.3d 831 (7th Cir. 2005). For a more detailed discussion of this case, see Maureen E. Mulvihill, "*Karraker v. Rent-a-Center*: Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening," 37 Loy. U. Chi. L.J. 865 (2006).

[70] 42 U.S.C. §12114(a).

[71] 42 U.S.C. §12114(b).

[72] *Id*.

[73] 42 U.S.C. §12114(d).

[74] 42 U.S.C. §12113(d)(1). This exception mirrors the exception provided in Title VII of the Civil Rights Act of 1964, (continued...)

In addition, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[76] the Supreme Court considered whether a church school violated the ADA when it terminated a teacher after she took disability leave. The Court recognized the First Amendment's ministerial exception to discrimination laws, explaining that religious institutions must be permitted to select employees who are responsible for carrying out the institution's mission free from government interference.[77] As the Court explained, "The Establishment Clause [which prohibits the government from establishing a religion] prevents the Government from appointing ministers, and the Free Exercise Clause [which guarantees the freedom to practice religion without governmental interference] prevents it from interfering with the freedom of religious groups to select their own [ministers]."[78] This exception applies with respect to ministers and ministerial employees only.[79]

Remedies

Section 12117 of the ADA[80] provides that the powers, remedies, and procedures provided for in Sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964[81] are available to enforce Title I of the ADA. These sections provide for enforcement by the EEOC, a state counterpart, or private litigation—provided the complainant has received a right-to-sue letter from the EEOC or the counterpart state agency, and it allows suits by the Attorney General against employers engaging in a pattern or practice of discrimination. Injunctive relief is available, as are monetary damages in an amount intended to make the person discriminated against whole—that is, to put the person in the position he or she would have been in had the discrimination not occurred.

Compensatory and Punitive Damages

The Civil Rights Act of 1991[82] expanded the remedies available in cases involving intentional discrimination, as opposed to cases involving facially neutral employment practices that have a disparate impact on individuals with disabilities. Compensatory damages are to compensate individuals for nonpecuniary damages including humiliation, pain and suffering, and the like. Punitive damages are available when the plaintiff can establish that the defendant engaged in discrimination with malice or reckless indifference to the rights of the plaintiff.

Compensatory and punitive damages are capped at amounts ranging from $50,000 to $300,000, depending on the defendant's number of employees. In addition, there is a "good faith" exception

(...continued)

which prohibits employment discrimination based on race, color, religion, national origin, or sex. See 42 U.S.C. §2000e *et seq*. For a legal analysis of the applicability of the exception, see CRS Report RS22745, *Religious Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, by (name redacted).

[75] 42 U.S.C. §12113(d)(2).

[76] 132 S.Ct. 694 (2012).

[77] *Id*., at 710.

[78] *Id*., at 703.

[79] For a thorough discussion of this case, see CRS Report R42464, *The Ministerial Exception of the First Amendment: Employment Discrimination and Religious Organizations*, by (name redacted).

[80] 42 U.S.C. §12117.

[81] 42 U.S.C. §§2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9.

[82] P.L. 102-166.

to the award of damages for defendants found to have failed to provide reasonable accommodation.

Claims for Pay Discrimination

The Lilly Ledbetter Fair Pay Act of 2009[83] (Fair Pay Act) amended the ADA regarding when actionable discrimination is considered to have occurred.[84] Congress enacted the Fair Pay Act in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,[85] in which the Court rejected a woman's claim for discrimination in her pay as outside the statute of limitations because she did not sue when the discrimination first occurred, even though the discrimination was ongoing and she did not learn about it until many years after it first occurred.

The Fair Pay Act states that unlawful discrimination in compensation occurs when a discriminatory compensation decision or practice is adopted, when an individual becomes subject to a discriminatory compensation decision or practice, or when an individual is affected by application of a discriminatory compensation decision or practice. Liability for discriminatory practices may accrue, and individuals may obtain back pay for up to two years preceding the filing of the charges. The Fair Pay Act applies to Title I and Section 503 of the Rehabilitation Act, which prohibits retaliation against, and coercion of, individuals who file charges.[86]

Claims Against State Government Employers and Eleventh Amendment Immunity

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Therefore, states are generally immune to lawsuits by individuals. Although Congress attempted to abrogate states' Eleventh Amendment immunity in the ADA,[87] there are constitutional limits on the circumstances under which Congress may effect such abrogation.[88] In *Garrett v. University of Alabama*,[89] the

[83] P.L. 111-2. For a discussion of this legislation, see CRS Report RL31867, *Pay Equity: Legislative and Legal Developments*, by (name redacted) and (name redacted).

[84] The Fair Pay Act also amended Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act of 1973.

[85] 550 U.S. 618 (2007). For a discussion of the *Ledbetter* decision, see CRS Report RS22686, *Pay Discrimination Claims Under Title VII of the Civil Rights Act: A Legal Analysis of the Supreme Court's Decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, by (name redacted).

[86] 42 U.S.C. §12203.

[87] 42 U.S.C. §12202.

[88] Section 1 of the Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 gives Congress "the power to enforce, by appropriate legislation, the provisions of this article." Therefore, in appropriate circumstances, Congress may abrogate Eleventh Amendment immunity in order to enforce the Fourteenth Amendment. Those circumstances are as follows: The legislation must be "appropriate," the legislation must be remedial in nature, and there must be a "congruence and proportionality" between the injury to be prevented and the means adopted. The Supreme Court established these principles in three Supreme Court cases: *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

Supreme Court held that Congress did not effectively abrogate states' Eleventh Amendment immunity to Title I employment discrimination cases. Therefore, Title I plaintiffs may not recover damages from states for Title I violations, but they may get injunctive relief.

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[89] 531 U.S. 356 (2001).