

**Americans with  
Disabilities Act and Pregnancy  
Discrimination**

**Understanding how to accommodate  
individuals with physical and mental  
impairments**

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# **ADA Amendments Act of 2008: The Basics**

# RECAPPING THE BASICS

- Title I of the Americans with Disabilities Act (ADA) protects “qualified individuals with disabilities” from employment discrimination.
- Applies to employers with fifteen or more employees, including state and local governments.
- A “qualified individual” is someone who, with or without a reasonable accommodation, can perform the essential functions of the job.



# RECAPPING THE BASICS

- A disability is “an impairment that substantially limits one or more major life activities.”
- The ADA also protects individuals who are “regarded as” having an impairment or have a “record of” having a disability.
- Employers must provide reasonable accommodation of known disabilities.

# RECAPPING THE BASICS

- Unless it would impose an “undue hardship” on the employer.
- Whether a hardship is “undue” depends on factors like the employer’s size, financial resources, and the nature and structure of the operation.
- Generally, the employee must ask for an accommodation, at which point the employer must engage in interactive process to identify accommodations.

# OUT WITH THE OLD ...

- Previously, courts emphasized the ADA's definition of "disability."
- In *Sutton v. United Airlines* (1999), the Supreme Court held that a condition fixed by corrective measures was not a "disability."
- In *Toyota v. Williams* (2002), the Supreme Court unanimously held that the inability to perform specific manual tasks required for one's job is not a "substantial limitation" on a "major life activity."
- Following *Sutton* and *Williams*, groups began pressing Congress to amend the ADA.

# THE ADA AMENDMENTS ACT OF 2008

- Signed into law on September 25, 2008.
- Took effect on January 1, 2009. Does not apply retroactively.



# WHAT CHANGED?

- Specifically stated that the interpretations in Sutton and Toyota were incorrect.
- Added a general statement that the term “disability” shall be “construed in favor of broad coverage of individuals.”





# THE EEOC WEIGHS IN

- In March 2011, the EEOC published final regulations implementing the ADA Amendments.



# THE EEOC FINAL REGULATIONS

- “The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA.”
- “Disability” is construed “broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.”

# HIGHLIGHTS OF THE EEOC REGULATIONS

- Nine “rules of construction” for determining when something is a covered disability.
  - For example, to “substantially limit” an activity is not meant to be a demanding standard.
  - Individualized assessment for determining.
  - No scientific or medical analysis should be needed.
- Mitigating measures are not considered in determining an employee’s coverage, except normal eyeglasses and contact lenses.
- Reasonable accommodations are not required where an employee is merely “regarded as” having a disability.
- No “reverse discrimination” claims: The regulations clarify that the ADA does not permit claims by non-disabled employees alleging discrimination in favor of disabled employees.

# A 3-PRONGED APPROACH (TO DEFINING “DISABILITY”)



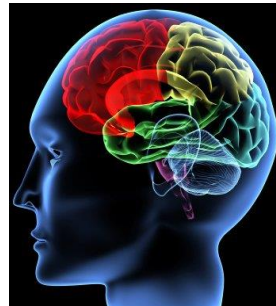
- (1) a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regs as an “actual disability”).
- (2) a record of a physical or mental impairment that substantially limited a major life activity (“record of”); or
- (3) an actual or perceived impairment (that is not both transitory and minor) for which the employer took an action prohibited by the ADA (“regarded as”).

# ADAAA AND FINAL REGS

- An individual need not use a particular prong when challenging an employer's actions, such as failure to hire or promote, termination, or harassment.
- However, a failure to reasonably accommodate claim can only be asserted under prongs #1 and #2 (actual disability or record of disability)

# Physical or Mental Impairment Defined:

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine.
- (2) Mental disability or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.



# ADAAA: MAJOR LIFE ACTIVITIES

## Non-Exhaustive List of Examples:

- Caring for Oneself
- Lifting
- Performing Manual Tasks
- Bending
- Seeing
- Speaking
- Hearing
- Breathing
- Eating
- Learning
- Sleeping
- Reading
- Walking
- Concentrating
- Standing
- Sitting
- Communicating
- Reaching
- Interacting with Others
- Working



# Additional “Major Life Activities”

- Operation of a “major bodily function”

## *Examples:*

Immune system

Circulatory function

Cardiovascular function\*

Digestive function

Genitourinary function\*

Bowel function

Bladder function

Neurological function

Special sense organs and skin\*

Respiratory function

Normal cell growth

Brain function

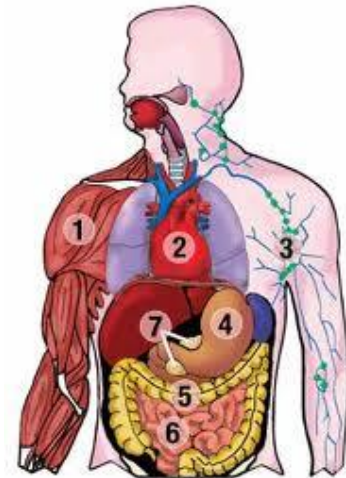
Endocrine function

Hemic function\*

Lymphatic function\*

Musculoskeletal function\*

Reproductive functions



\* Added in the final regulations.

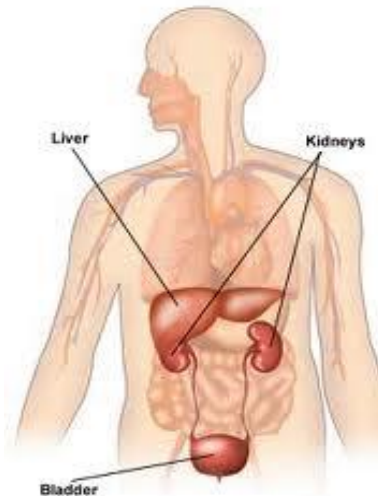


# Additional “Major Life Activities”

Operation of a “major bodily function” includes:

- Operation of an individual organ within a body system
  - (such as the operation of the kidney, liver, or pancreas)\*

\* Added in the final regulations.



# PARTICULAR CONDITIONS

- The regulations identify specific impairments that will be “easily found” to be disabilities in “virtually all cases:”

Deafness

Blindness

Intellectual disability

Partially or completely missing limbs

Major depressive disorder

Autism

Cancer

Diabetes

Mobility impairments requiring  
wheelchair

Epilepsy

HIV infection

Multiple sclerosis

Muscular dystrophy

Bipolar disorder

PTSD

Cerebral palsy

Schizophrenia

OCD



# PREGNANCY

- Pregnancy is not an impairment.
- However, certain impairments resulting from pregnancy may be a disability if they substantially limit a major life activity or meet the other prongs of a disability.



# SUBSTANTIALLY LIMITS

## Before:

This was a “demanding standard” that required an impairment to “prevent or severely restrict” an activity.

## After:

- The Amended ADA rejects these strict requirements.
- Question is whether the employee is significantly limited in comparison to the general population in their ability to perform activity
- Determination is made *without regard to corrective measures* like medication or prosthetics.
- Impairments that are *episodic or in remission* are covered if they would “substantially limit” when active.

# “REGARDED AS” HAVING A DISABILITY

## Before:

- An employee must show his employer regarded him as having a “disability”—that is, a substantial limitation on a major life activity.

## After:

- An employee need only show that his employer regarded him as having an impairment.
- The employer may argue that the impairment was both transitory and minor.

**REASONABLE ACCOMMODATION:**  
***Feist v. State of Louisiana, 730 F.3d 450 (5th Cir. 2013)***

- Employee was former asst. attorney general for State of Louisiana; alleged employer discriminated against her when declined to provide free on-site parking to accommodate disability (osteoarthritis in knee).
- Employer refused to provide requested accommodation
- District court granted summary judgment for employer because employee failed to demonstrate that accommodation request limited her ability to perform “essential functions of her job”, and therefore request was unreasonable
- Fifth Circuit overturned district court’s holding. Employee does not have to show connection between requested accommodation and essential job functions.
- EEOC guidance states that reserved parking spaces is reasonable accommodation in some circumstances.

**TEMPORARY IMPAIRMENT AS DISABILITY:  
*Summers v. Altarum Institute, 740 F.3d 325 (4th  
Cir. 2013)***

- Employee alleged discrimination based on wrongful discharge and failure to accommodate serious leg injuries that restricted employee from walking for several months
- District court granted employer summary judgment on grounds that temporary impairment not within the scope of ADA and that with assistance of wheelchair, employee was not “disabled”
- Fourth Circuit overturned district court decision, reasoning ADAAA broadened definition of “substantially limits” to impairments lasting or expected to last fewer than six months
- Under ADAAA, temporary impairments that are “substantially severe” may qualify as a disability

**MISCONDUCT RESULTING FROM DISABILITY:  
*EEOC v. Walgreen Co., 2014 WL 1410311 (N.D. Cal.  
2014)***

- Employee had hypoglycemic attack; took bag of potato chips and ate it; claimed she tried to pay for the bag but forgot. Employee subsequently terminated for violation of company policy.
- EEOC sued Walgreens, arguing that indiscriminate enforcement of policy with no exception was violation of ADA. Walgreens argued that employee theft not a reasonable accommodation.
- Court denied Walgreens motion for summary judgment, reasoning that misconduct resulting from disability is part and parcel of the actual disability itself.
- Reliance on “no exceptions” policy not a legitimate nondiscriminatory reason for termination



**REASONABLE ACCOMMODATION UNDER  
LOUISIANA LAW : *McClain v. City of New Orleans*,  
137 So.3d 671 (La. App. 4 Cir. 3/5/14)**

- Employee worked for City Planning Commission. Claimed that frequent cleaning of facilities with Lysol triggered her allergies and caused her to need periodic medication. Requested accommodation from employer by not exposing her to Lysol.
- Under La. R.S. 23:2323, person must have “known physical limitation” to be entitled to reasonable accommodation. Employee could not state case because slight or marginal impairment does not qualify as a “disability.”
- Plaintiff did state proper claim for battery under Louisiana law.

# THE ADA AND FAMILY & MEDICAL LEAVE

- Say an employee has exhausted all available FMLA and other leave. Can you flatly deny additional leave?
- No. You must evaluate the circumstances. Additional leave may be necessary as a “reasonable accommodation.”
- Employers should consider revising FMLA policies to give the employee the burden of specifically requesting additional leave under the ADA.

# THE ADA AND PREGNANCY DISCRIMINATION

- Pregnancy discrimination guidance issued by the EEOC on July 14, 2014
- Pregnancy-related impairments may constitute “disabilities” within the meaning of the ADA

# THE ADA AND PREGNANCY DISCRIMINATION: EXAMPLE

- In fifth month of pregnancy, employee develops high blood pressure, severe headaches, abdominal pain and dizziness. Doctor diagnoses her with preeclampsia and orders her to remain on bed rest for remainder of pregnancy. Employee has disability within meaning of ADA. Employer may not take adverse action against her because of this impairment.

# THE ADA AND PREGNANCY DISCRIMINATION: EXAMPLE

- Police department offers applicant job. Asks officer to complete post-offer medical questionnaire and take medical examination. On questionnaire, employee indicates she had gestational diabetes during pregnancy three years ago, but conditioned now resolved. Department will violate ADA if withdraws offer based on past history.
- Could department withdraw offer if diabetes still affected applicant's ability to perform job?

# THE ADA AND PREGNANCY DISCRIMINATION: EXAMPLES OF REASONABLE ACCOMMODATIONS

- restrictions on lifting and other manual labor
- assistance with typing, filing, and other administrative duties
- more frequent breaks or longer breaks
- stools and other assistive measures
- granting leave/modified work schedules
- temporary reassignment

***See, Young v. United States Parcel Service, Inc., \_\_\_ S.Ct. \_\_\_, 2015 WL 1310745 (2015).***

On March 25, 2015, the United States Supreme Court sided 6-3 with a former driver for United Parcel Service, Peggy Young. The Court threw out the lower court rulings rejecting her lawsuit against UPS. Young alleged that UPS subjected her to pregnancy discrimination in violation of the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA) by refusing to accommodate her pregnancy-related lifting restriction. UPS maintained that it obeyed the law because it provided light-work duty in only limited situations and did not single out pregnant women.

Young's dispute with UPS arose after she became pregnant through in-vitro fertilization and gave her supervisor a doctor's note recommending that she not lift packages heavier than 20 pounds. Young, now 43, said she dealt almost exclusively with overnight letters, but UPS said its drivers must be able to lift packages weighing up to 70 pounds. She returned to work two months after her daughter was born. Young left the company in 2009.

In ordering the lower courts to look again at Young's claim, Justice Stephen Breyer said for the Court that one consideration should be, "Why, when the employer accommodated so many, could it not accommodate pregnant women as well?" UPS said it did not provide light-duty work to any employees unless they were injured on the job, had a condition that was covered by the Americans with Disabilities Act or lost their federal certificate to drive a commercial vehicle.

Pregnant workers in situations similar to Young's also may have additional protections under 2008 amendments to the Americans with Disabilities Act. Young's pregnancy occurred before Congress changed the disabilities law.



# WHAT CAN YOU DO?

- **Don't dwell on the definition of "disability."**
  - Prior to the ADA Amendments Act, there were many instances in which an employer could reliably determine that a condition was not a covered disability.
  - Now, employers generally should presume that any physical or psychological difficulty that manifests itself at work may be covered.
- **Document policies, problems and decisions.**
  - The focus in litigation is shifting away from whether an employee is "disabled," and toward whether the employer had good reasons for its action or inaction.
  - Decisions based on documented facts and policies will be easier to defend.
  - The "interactive process" is even more important now, so document your participation and the employee's response.
- **Train front line supervisors.**
  - Not to raise disability-related issues without consulting first with management.
  - To recognize requests for accommodation.
  - Not to retaliate or make hostile comments regarding accommodations.
  - To be consistent in applying rules.

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