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DISABILITY DISCRIMINATION LAW IN EMPLOYMENT

BY PROF. ANN C. MCGINLEY, WILLIAM S. BOYD PROFESSOR OF LAW

INTRODUCTION AND OVERVIEW

The Americans with Disabilities Act (ADA) was enacted in 1990. Although the Rehabilitation Act prohibited discrimination against persons with disabilities by federal agencies, federal contractors and recipients of federal financial assistance,[1] there was virtually no coverage of private organizations (such as employers or public accommodations) before passage of the ADA. The ADA was, therefore, extremely important, because it broadly expanded coverage of anti-discrimination provisions.

Prohibitions

The ADA prohibits discrimination on the basis of disability in both public (except by the federal government) and private employment (Title I),[2] in public services by state and local governments (Title II), in public accommodations provided by private parties (Title III) and transportation (Title IV). Due to space constraints, this article is limited to Title I.

The ADA and the Rehabilitation Act Amended

Although Congress intended to provide broad protection to persons with disabilities when it enacted the ADA, the U.S. Supreme Court and lower federal courts interpreted the definition of "disability" narrowly, finding that many persons with severe disabilities were not covered by the act. In response, Congress passed the Americans with Disabilities Amendments Act of 2008 (ADAAA); the ADAAA expressly overturned the Supreme Court and directed lower courts to construe the definition of "disability" in favor of broad coverage.[3] Behaviors occurring after January 2009 are governed by the new amendments. Many of the cases decided before the effective date of the ADAAA are no longer good law for analyzing coverage under the ADA.

Coverage Post-ADAAA

A person has a disability if he or she has a physical or mental impairment that substantially limits a major life activity, has a record of an impairment or is regarded as having an impairment.[4] Major life activities include a long non-exclusive list of activities such as caring for oneself, seeing, walking, talking and breathing. It also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, cell growth, digestive, brain and reproductive functions. Determining if a person has a disability is an individualized process.

ADAAA Changes

The ADAAA expanded the definition of major life activities to include major bodily functions. Now, HIV positivity is ordinarily a major life activity even if it is asymptomatic, because HIV is a physical impairment that substantially limits the functioning of the immune system. Cancer, even if in remission, is usually a disability under the ADAAA, because it substantially limits the functioning of the immune system and normal cell growth. Moreover, the act specifically states that an illness in remission substantially limits a major life activity if it would do so while active.

The ADAAA also changed the definition of "regarded as" in response to U.S. Supreme Court decisions. Now, a person is regarded as having a disability by demonstrating that he or she "has been subjected to" a prohibited action "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" (emphasis added).[5] The "regarded as" prong does not apply, however, to impairments that are transitory (lasting six months or fewer) and minor. Finally, the ADAAA specifies that when determining whether a person's impairment "substantially limits" a major life activity, the court should not consider the ameliorative effects of mitigating measures, such as medications, artificial limbs, wheelchairs and other medical devices. This rule does not apply to ordinary eyeglasses, but a defendant may not use qualification standards, tests or selection criteria based on an individual's uncorrected vision unless it proves that the criteria is job-related and consistent with business necessity.

Title I of the Americans with Disabilities Act

Title I makes it illegal for a public or private employer of 15 or more employees to discriminate against a qualified individual on the basis of an applicant's or an employee's disability. A qualified individual is one who can perform the essential functions of the job either with or without reasonable accommodations. In order to determine what the essential functions of the job are, the court considers not only the employer's testimony and job description, but also how the job is performed within the organization. An employee is not qualified for the position if the individual poses a direct threat to the health or safety of himself or others.

Reasonable Accommodation and Undue Hardship

It is illegal discrimination to fail to grant a reasonable accommodation to a qualified applicant or employee with a disability, unless the employer proves that doing so would create an undue hardship. Reasonable accommodation can include "making existing facilities … readily accessible to and usable by individuals with disabilities" 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 examination, training materials or policies, the provision of qualified readers or interpreters," etc. An undue hardship exists if, considering the employer's circumstances, the accommodation requires "significant difficulty or expense."[6] Although normal pregnancies are not ordinarily considered disabilities, the U.S. Supreme Court in *Young v. United Parcel Service, Inc.*[7] noted that new regulations and guidance after the enactment of the ADAAA may create a duty to reasonably accommodate pregnant women, at least when it comes to lifting restrictions.

Persons Associated with an Individual with a Disability

It is also illegal to discriminate against a person who has an association with a person with a disability. For example, if the employer refuses to hire a woman because it is concerned that she would miss too much work or her insurance costs would be high

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because her husband is HIV-positive, the employer illegally discriminates under the ADA.

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Reasonable Accommodations: Exceptions

Two exceptions to the reasonable accommodation requirement in the employment context exist:

- An employer need not reasonably accommodate an employee who is covered by the statute only because he is regarded as having a disability, and;
- An employer need not reasonably accommodate a person who is protected by the statute only because of his or her association with a person with a disability.

For example, although the act would prohibit the employer from intentionally refusing to hire the mother of a son with paraplegia, the employer would not be required by the ADA to give her a special schedule to care for her son. Employers should also be aware that the Family Medical Leave Act (FMLA)[8] requires that employers grant up to 12 weeks of leave a year to covered employees to care for sick family members. While granting 12 weeks leave to an employee comports with the FMLA, doing so may not satisfy the reasonable accommodation requirement under the ADA; the ADA may require a longer leave in some situations if it is reasonable and not an undue hardship for the employer. Moreover, an employee may be protected by the Genetic Information Nondiscrimination Act[9] (GINA), which prohibits employers from discriminating against an employee on the basis of genetic information about the individual or family members, or manifestation of disease or disorder of family members.

Duty to Engage in Interactive Process

When an employee seeks a reasonable accommodation to his disability, his employer has a duty to engage in an interactive process with the employee to determine if a reasonable accommodation exists. The employer does not have to adopt the first accommodation requested by the employee, but the employer and the employee should attempt to find a reasonable accommodation that would work for both. If an employer engages in an interactive process in good faith, and later the employer and employee cannot agree upon a reasonable accommodation, the employer may be subject to injunctive relief, but will not be liable for monetary damages.

Medical Examinations and Inquiries

The ADA regulates the medical inquiries an employer may make of its applicants and employees. Specifically, employers may not ask a job applicant questions about whether he or she has a disability. Once a job offer is made, the employer may require a medical examination as a condition of getting the job, if it does so of all employees and if the results are kept confidential. An employer may ask for a medical examination of an employee only if the tests are job-related and consistent with business necessity. Drug tests are not considered medical tests for purposes of the ADA, and, therefore, may be administered.

Remedies for Violations of Title I

Prevailing plaintiffs in employment discrimination under Title I have a right to back-pay, front pay, or reinstatement, along with other equitable relief as well as compensatory and punitive damages, which are capped by the statute. Back-pay is not subject to the caps for compensatory and punitive damages, but is limited to two years before the filing of the Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) until the date of judgment. The combined permissible compensatory and punitive damages depend on the size of the employer, and range from $50,000 to $300,000. Plaintiffs may also recover attorneys' fees and costs.

For further information about the ADA and other disability statutes, see Laura Rothstein & Ann C. McGinley, Disability Law: Cases, Materials, Problems (5th ed. 2010) (6th ed., forthcoming 2017); Laura Rothstein & Julia Irzyk, Disabilities and the Law (4th edition and cumulative supplements). NL

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1. 29 U.S.C. § 791 (a), 793, and 794.
2. A public employee who sues the state employer, however, may not collect money damages because of the 11th Amendment immunity. See *Board of Trustees v. Garrett,* 531 U.S. 356 (2001).
3. 42 U.S.C. § 12102 (4) (A).
4. 42 U.S.C. § 12102.
5. 42 U.S.C. 12102 (3) (A).
6. 42 U.S.C. § 12111 (9) and (10).
7. 135 S. Ct. 1338 (2015).
8. 29 U.S.C. §§ 2601-2654.
9. 42 U.S.C. § 2000ff.

ANN C. MCGINLEY is the William S. Boyd Professor of Law at the Boyd School of Law of the University of Nevada, Las Vegas, where she has taught since 1999. McGinley is an internationally recognized scholar in the area of employment and disability law, whose most recent book is Masculinity at Work: Employment Discrimination through a Different Lens (New York University Press 2016). She is co-author of Disability Law: Cases, Materials, Problems, Fifth Edition (LexisNexis 2010); Sixth Edition (forthcoming Carolina Academic Press 2017). She has also published nearly 50 law review articles and book chapters, and is co-editor of Masculinities and the Law: A Multidimensional Approach (New York University Press 2012).