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DISABILITIES

As U.S. Supreme Court decisions continued to diminish protections afforded under the Americans with Disabilities Act, Congress took action to amend and clarify the law's reach, extending protections to workers with less-visible and temporary disabilities. In this BNA Insights article, attorneys David Scher and R. Scott Oswald discuss the impact of the ADA Amendments Act's specific language instructing the courts to construe the law as broadly as possible.

The authors review recent decisions showing that courts across the country are taking Congress's repudiation seriously and are applying the law broadly, as Congress intended, to ensure that all workers with disabilities are protected. These decisions will smooth the path of workplace reentry to millions of Americans recovering from non-permanent physical and physiological impairments, the authors conclude.

After Five Years, Some Authoritative Case Law on the ADAAA's Broad Sweep

BY DAVID SCHER AND R. SCOTT OSWALD

Until 2008, when Congress finally stepped in, the U.S. Supreme Court seemed determined to hobble the Americans with Disabilities Act, repeatedly limiting the statute's reach so that only narrow categories of conditions counted as "disabilities."

In major cases such as *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 9 AD Cases 673 (1999) (120 DLR AA-1, 6/23/99), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 12 AD Cases 993 (2002) (6 DLR AA-1, 1/9/02), the court left many people without recourse after being fired for having conditions that their employers could, and should, have accommodated.

David Scher, a principal at The Employment Law Group, P.C., is a specialist in discrimination, retaliation, whistle-blower protection, and qui tam claims. R. Scott Oswald is managing principal of TELG and the immediate past president of the Metropolitan Washington Employment Lawyers Association.

In *Toyota*, for instance, the Supreme Court adopted an overly strict construction of the term "disability" and suggested that the ADA did not cover temporary impairments. In *Sutton*, the court asked lower courts to consider, in determining whether certain conditions "substantially limit" a major life activity, whether plaintiffs could mitigate the effect themselves (via eyeglasses, for instance, or drugs)—even if, as in *Sutton*, the employer treated such mitigating measures as a job disqualification.

Sutton also required "regarded as" plaintiffs to show that their employers believed them to be substantially impaired in a major life activity—or unable to work in a broad class of jobs, not just the job from which they were actually excluded.

With the ADA Amendments Act, Congress repudiated these decisions and rewrote the ADA in language that was impossible to misunderstand. When the act became effective on January 1, 2009, a new day dawned for workers with less-visible and temporary disabilities: Now they were shielded from discrimination by specific language in a statute that Congress had instructed the courts—in the law itself—to construe as broadly as possible.

Still, the changes have been slow to filter into federal jurisprudence. A good example is the area of non-permanent impairments, which the act explicitly says may be a basis for illegal workplace discrimination. Not until 2014 had a federal appellate court applied this expanded definition of “disability”—and it did so to reverse a lower court, which mistakenly had applied the Supreme Court’s pre-2008 precedents.

Appeals Court Reinstated Bias Complaints.

In *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 29 AD Cases 1 (4th Cir. 2014) (16 DLR AA-1, 1/24/14), the U.S. Court of Appeals for the Fourth Circuit reinstated the discrimination complaint of Carl Summers, whose employer fired him after he broke both legs while traveling to a work assignment. The district court had dismissed Summers’s claims, holding that even though he had “suffered a very serious injury,” his injury was not a disability under the ADA because it was expected to heal within a year.

The Fourth Circuit called this an error, holding that Summers’s complaint “unquestionably” alleged that he had a disability under the ADA as amended by the act. This decision by a notably conservative court illustrates the clarity of the new law—but its necessity shows that the ADA’s new breadth hasn’t yet sunk in everywhere.

Luckily, *Summers* and a handful of recent cases in U.S. district courts are beginning to fill the gap.

In October 2011, Summers suffered a severe tibia plateau fracture in his left leg, a meniscus tear to his left knee, a ruptured quadriceps-patellar tendon in his right leg, and a simple fracture to his right ankle. Summers was unable to walk for seven months to a year if he underwent mitigating measures of physical therapy and surgery. Summers was substantially limited in “functioning of his musculoskeletal system” and “his ability to walk, run, drive, climb stairs, and work.”

After his injury, Summers e-mailed his employer while he was on leave, numerous times, and inquired about his options, which included, perhaps, briefly working from home. Altarum never discussed any options with Summers at all, didn’t engage in any interactive discussions, and in response to his e-mails, while he was on leave and before he could even attempt to return to work, fired him.

The Fourth Circuit reversed the district court’s dismissal of Summers’s claims. The court noted that with the ADAAA, Congress intended to “liberalize” the ADA’s coverage and found that the “text and purpose of the ADAAA and its implementing regulations make clear that” an impairment like Summers’s “can constitute a disability.”

Decisions’ Broad Impact for Workers.

The *Summers* court also made several specific rulings as to ADA coverage that will have a broad impact on Americans with disabilities. The court held that a person who cannot walk for up to a year is de jure disabled (in fact, such an impairment “falls comfortably within the amended Act’s expanded definition of disability”); one need only be substantially limited in one major life activity—such as walking; and impairments and injuries are viewed the same under the ADAAA.

Similarly, on Jan. 30, 2014, the U.S. District Court for the Eastern District of Pennsylvania issued its decision

in *Butler v. BTC Foods, Inc.*, 29 AD Cases 705, 2014 BL 25711 (E.D. Pa. 2014).

Jermaine Butler, the plaintiff, was a shipper and receiver in the food delivery arm of the defendant’s business. Butler sustained a double hernia in March 2010 and had surgery in May 2011, missing six weeks of work. After returning to work, Butler continued to have problems lifting, bending, squatting and walking and had some sharp pains when walking or bending down for long times.

In November 2010, a fire alarm went off in the work site, and Butler cut the fire alarm in the kitchen, which the defendant considered to be misconduct. Consequently, the defendant and Butler’s union agreed to transfer Butler to another site. However, for reasons not stated in the opinion, the transfer did not occur.

In January 2011, Butler told his supervisor that he was still suffering from pain and would probably need more time off. About a week later, the defendant fired the plaintiff. The court concluded that the plaintiff had created a question of fact as to whether he was disabled because the ADAAA demanded a broad interpretation of the definition of disability.

In January 2014, the U.S. District Court for the Southern District of New York issued its decision in *Glaser v. Gap, Inc.*, S.D.N.Y., No. 7:11-cv-06679, 1/31/2014, finding that a worker with autism could establish that he was disabled for purposes of the ADAAA. William Glaser, a man with autism, worked for Gap as a merchandise handler at a distribution center and was terminated from his position on Nov. 6, 2009. The day before his termination, Glaser requested a new knife from his supervisor to use in opening and cutting boxes. Glaser and his supervisor then had a discussion that turned into a disagreement. Glaser’s supervisor accused Glaser of threatening her, and his employment was terminated.

Courts have also applied the ADAAA’s more liberal provisions to employees who have been “perceived as” disabled by their employers and subject to discrimination.

Glaser argued that the defendant used his disability, autism, and his impairment in a major life activity, interacting with others, against him in terminating his employment. The defendants argued that Glaser was not disabled for purposes of the ADA because his difficulty in interacting with others did not constitute a disability.

However, the court criticized Gap’s argument, noting that it had previously counseled Glaser on several occasions regarding his interactions with his co-workers. The court chastised the defendant, stating “given the frequent ‘coaching’ on the subject, defendants cannot seriously argue that Glaser’s ability to ‘interact with others’ was not impaired. Instead, defendants contend that Glaser’s impairment does not rise to the level of a ‘substantial’ limitation. Defendants’ arguments, however, merely raise genuine issues of material fact.”

In holding that Glaser's difficulties could constitute a disability for purposes of the ADAAA, the Court noted that in amending the ADA, Congress specifically rejected the concept that, to qualify as disabled, an individual must have an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

Is Impairment a Disability? No Deep Analysis.

The court also reminded the parties that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

These decisions are just a few among many cases recently in which courts have extended ADAAA coverage to employees. In *Bonzani v. Shinseki*, 21 WH Cases2d 841, 28 AD Cases 1561, 2013 BL 266815 (E.D. Cal. 2013), a September 2013 case from California, the court held that squatting and running are major life activities. In *Bouard v. Ramtron International Corp.*, No. 1:12-cv-00494 (D. Colo. April 9, 2014), the federal district court in Colorado found that factual issues precluded the grant of summary judgment on the issue of whether the plaintiff's sensitivities constituted disabilities for purposes of the ADAAA. In *Huiner v. Arlington School District*, 28 AD Cases 962, 2013 BL 264886 (D.S.D. 2013) (192 DLR A-8, 10/2/13), a federal court in South Dakota found that the ADAAA's relaxed standards supported a finding that the plaintiff was disabled due to her anxiety.

Courts have also applied the ADAAA's more liberal provisions to employees who have been "perceived as" disabled by their employers and subject to discrimination. In February 2014, in *Sacks v. Gandhi Engineering, Inc.*, 29 AD Cases 840, 2014 BL 53949 (S.D.N.Y. 2014), the U.S. District Court for the Southern District of New

York permitted the plaintiff's case that the defendant, a contractor, discriminated against him because of a perceived disability to proceed to trial. The plaintiff was terminated after his supervisor told him that the contracting agency was unhappy with his "agility." Sacks did not have a disability and has not been told that he has any problems with his agility.

The *Sacks* court noted that under the ADA, a plaintiff could only present a "regarded as" case of discrimination if the defendant mistakenly believed that he had a disability that substantially limited a major life activity or that the defendant mistakenly believed that an actual impairment substantially limited a major life activity.

The court then explained that under the ADAAA's more lenient perceived disability standard, a plaintiff is "not required to show that the disability he is perceived as suffering from is one that actually limits, or is perceived to limit, a major life activity," but must provide evidence suggesting that the employer perceived the employee as having an impairment.

The court also noted that Congress intended the ADAAA to broadly cover individuals. The court ultimately concluded the plaintiff showed that the defendant believed he lacked "agility," which was a perceived "physiological condition affecting [the] musculoskeletal" system, and thus was a perceived "impairment" now covered by the ADA.

In light of these decisions, it is clear that courts across the country are taking Congress's admonishments to heart and are applying the ADA as Congress originally intended—broadly, to ensure that Americans with disabilities, and in particular Americans with non-permanent conditions—are protected in the workplace.

These decisions and more will help ensure fairness and equity in the workplace and will smooth the path of workplace reentry to millions of Americans recovering from non-permanent physical and physiological impairments.