

# ADAAA & Mental Impairments

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*\*Any opinions expressed herein do not constitute legal advice and do not represent the position of the Budget and Control Board.*



# ADAAA General Overview

# Americans with Disabilities Act

- Enacted 1990
- Title I prohibits private employers, state & local governments, etc. from discriminating against qualified individuals with a disability in all aspects of employment

# Amendments Act (“ADAAA”)

- Enacted in 2008 & made significant changes to broaden coverage
- Took effect January 1, 2009
- EEOC regulations implementing ADAAA took effect March 25, 2011

# Qualified Individual

- The individual must be able to perform the essential functions of the job with or without a reasonable accommodation.
  - \*Key requirement to consider when analyzing any ADA/ADAAA issue

# Essential Functions of the Job

- Those required in order for the job to be accomplished
  - Advertised Job Description
  - Job/Position Description
    - Important that essential functions match position description
  - Job as it has been performed in the past
  - How others in the position perform it

# Definition of Disability

- A physical or mental impairment that substantially limits one or more major life activities (actual disability);
- A record of such impairment; or
- Being regarded as having such an impairment

# Impairment

- What is an impairment?
  - A physiological disorder or condition
  - A mental or psychological disorder

# “Old” ADA vs. ADAAA - Overview

- “Old” ADA fundamental question = “Is it a disability?”
- “New” ADAAA makes the analysis of whether the employee is disabled less important and instead places the focus on if employer complied with its obligations.
  - Likely presume it is a disability & have accommodation dialogue
  - Likely results:
    - More employees are considered disabled
    - More accommodations required

# What's Changed?

- ADAAA retained the basic definition of disability BUT ALSO broadened it by:
  - Stating “[t]he definition of disability in this Act shall be construed in favor of broad coverage...”
  - Modifying the regulatory definition of “substantially limits”;
  - Prohibiting consideration of “mitigating measures” when assessing if impairment substantially limits major life activities, with one exception;
  - Expanding definition of “major life activities”;
  - Specifying “disability” includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active; &
  - Redefining who is “regarded as” having disability.

# ADAAA – What Hasn't Changed?

- Meaning of “impairment”
- “Essential function” analysis
- “Reasonable accommodation”
- “Undue hardship” analysis
- Individualized inquiry? Possibly.

# Categories of Protected Status

- Actual Disability
- Record of Disability
- Regarded as Disabled

# Actual Disability

- ADAAA provided the definition of disability is to be construed broadly
- Also, “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act.”
  - Means it will be interpreted broadly.

# Mitigating Measures

- Mitigating measures may no longer be considered in determining whether an employee is disabled
- “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”
  - May still be disabled even if controlled by medicine
  - Exception – ordinary eyeglasses/contact lenses that fully correct vision

# ADAAA – Expanded List of “Major Life Activities”

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working
- AND Major Bodily Functions

# ADAAA – “Major Bodily Functions”

- Functions of the immune system
- Normal cell growth
- Digestive
- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Endocrine
- Reproductive functions

# Some Impairments That Should Easily Be Found to be Disabilities

- Deafness
- Blindness
- Intellectual Disability
- Partially or completely missing limbs
- Mobility impairments
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV infection
- Multiple sclerosis
- Muscular dystrophy

# Some Impairments That Should Easily Be Found to be Disabilities

- Mental impairments such as:
  - Major depressive disorder
  - Bipolar disorder
  - Post-traumatic stress disorder
  - Schizophrenia

# Episodic or in Remission

- Impairment can be disability even if episodic or in remission if it would substantially limit a major life activity when active.

# “Record of” a Disability

- An individual does not currently have a substantially limiting impairment but had one in the past
- May also meet the “record of” definition of disability if was once misclassified as having a substantially limiting impairment
- Same expanded definition of disability applies
- Individuals with “record of” a disability may be entitled to reasonable accommodation

# “Regarded As” Disabled

- “Regarded as” prong further defined by ADAAA and its Final Regulations
  - ADAAA protects an individual from discrimination because of an actual or perceived physical or mental impairment *regardless* of if the impairment limits or is perceived to limit a major life activity.
  - No longer requires a showing that employer believed the impairment substantially limited a major life activity
- Employers not required to provide a reasonable accommodation to an individual who is only regarded as disabled

# “Transitory and Minor” Exception

- With respect to “regarded as” status, the ADAAA provides an individual will **not** be disabled if the impairment is “transitory and minor” (adopted in Final Regulations)
  - Transitory = actual or expected duration of 6 months or less
  - Objective determination
  - Note: “Actual disability” status does not contain a similar durational requirement. Thus, a temporary impairment, if severe, can constitute an actual disability; the duration of the impairment is just 1 factor relevant to if the impairment substantially limits a major life activity. Summers v. Altarum Institute, Corp., 740 F.3d 325 (4<sup>th</sup> Cir. 2014).

# Also – Association

- The ADAAA also prohibits discrimination against an individual based on their relationship or “association” with a person who has a disability (e.g. family member).
  - Employer is not required to provide a reasonable accommodation to an employee based on that employee’s association



# Mental Impairments

# 2012 Statistics

- An estimated 43.7 million adults aged 18 or older in the U.S. experienced any mental illness (AMI) in the past year – This represents 18.6 percent of all U.S. adults.
- Approximately 9.6 million U.S. adults aged 18 or order had serious mental illness (SMI) – This represents 4.1% of all U.S. adults.
  - See *National Institute of Mental Health*

# How can you recognize a mental health impairment?

- No one answer fits all - requires case by case analysis
- The ADA defines mental disability as a “mental impairment that substantially limits one or more major life activities.”
  - The ADAAA & EEOC regulations define mental impairment broadly to cover “any mental or psychological disorders, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

# Post-ADAAA in South Carolina

- Mental impairments, including anxiety & depression, can constitute a disability if they affect thinking and concentration. Wright v. Stark Truss Co., 2012 WL 3029638 (D.S.C. 2012)

# What are not impairments?

- Personality traits, such as poor judgment or quick temper, unless are symptoms of a mental or psychological disorder
- Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record
- Advanced age, in and of itself, although various medical conditions commonly associated with age may constitute

# Reasonable Accommodation

## General Rule

- Employer must provide a reasonable accommodation to an individual with a disability if requested and if doing so does not pose an undue hardship
  - Another exception – where employer can demonstrate the individual would pose a “direct threat” in the workplace

# Reasonable Accommodations – Mental Impairments

- Some possible reasonable accommodations may include:
  - Leave for doctors' appointments
  - Permission to use work phone to call doctors
  - Periodic breaks or a private area to rest or take medications
  - Adjustments to work schedule or flexible scheduling or leave
  - Permission to work from home
  - Reduce distractions in the work area, such as space enclosures, sound machines, music, etc.
  - Increased natural lighting
  - Redistribution of marginal tasks to another employee

# Not Reasonable Accommodations

- Employer is not required to:
  - Eliminate essential job functions
  - Lower quality standards
  - Reassign the qualified employee to a position occupied by another employee
  - Create a new position when none exists
  - Promote an employee with a disability as an accommodation
  - Excuse bad behavior
  - Monitor medications
  - Provide a new supervisor
    - The inability to work with a particular supervisor does not constitute a substantial limitation on a major activity as a matter of law. See, e.g., Larson v. Commonwealth of Virginia, Department of Transp., 2011 WL 1296510 (W.D. Va, April 5, 2011)

# Reasonable Accommodation

- While given preference, the employee does not decide the exact accommodation.
  - In McKane v. UBS Financial Services, Inc., 363 F.App'x 679 (11<sup>th</sup> Cir. 2010), the court ruled employer did not violate ADA for failure to accommodate its employee's inability to get along with coworkers when it refused to move his office away from other employees so he would not have to interact with them. Maintaining peaceful relations with coworkers was an essential function of the job.

# “Undue Hardship” Exception

- An action requiring *significant* difficulty or expense
- Factors to consider:
  - Nature and cost of accommodation needed;
  - Overall financial resources of the covered entity
  - Number of persons employed at such facility
  - Type of operations of the covered entity

# Direct Threat Exception

- Direct threat exists when:
  - An individual poses a significant risk of substantial harm to the health or safety of him/herself or others because of the disability and
  - The risk cannot be reduced or eliminated with a reasonable accommodation
- Requires individualized assessment
- Be careful not to stereotype

# Direct Threat (cont...)

- Factors to consider:
  - Nature & severity of risk
  - Severity of potential harm
  - Imminence of potential harm
  - Likelihood the harm will occur
  - Whether the risk can be eliminated or reduced with a reasonable accommodation

# When Does Duty Start?

- When a qualified individual with a disability makes a request
- When the need for an accommodation is readily apparent

# What Constitutes a Request?

- No magic words required
- Orally or in writing
- May come from the employee, a family member, friend, or other representative

# What Constitutes a Request?

## (cont...)

- Example: An employee asking for time off because he is “stressed & depressed” probably is enough to put employer on notice that employee is requesting an accommodation under the ADAAA.
  - However, if employee merely asks for a few days off to rest after a big project, it typically would not put employer on notice that the need for time off is due to a mental condition.

# Interactive Process

- Communicate with the employee
  - What is needed? What ways can it be accomplished?
- If not obvious, employer can require employee to provide medical documentation in support of the disability & requested accommodation.
  - Per EEOC, a broad range of professionals can provide the necessary medical documentation, such as doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, & licensed mental health professionals.
- Document discussions about accommodations and alternatives reviewed

# What if employee fails to provide info?

- Courts are split on employer's duties when employee alleges a mental disability but fails to provide required information.
- The Fourth Circuit Court of Appeals favorably cited a case from the Third Circuit for the proposition that the employer's duty to engage in the interactive process and obtain any missing information is triggered when the employee provides enough information for the employer to understand the employee has a mental health impairment and expresses a desire for an accommodation. Wilson v. Dollar General Corp., 717 F.3d 337 (4<sup>th</sup> Cir. 2013)

# Reasonable Accommodation?

- An employee requests “indefinite leave” to accommodate his bipolar disorder
- An employee requests six to eight weeks to accommodate his bipolar disorder

# Indefinite Leave

- In Santandreu v. Miami Dade County, 13 Fed.Appx. 902 (11<sup>th</sup> Cir. 2013), Court ruled that a leave of absence for an indefinite period of time did not constitute a reasonable accommodation. Employee had requested and received 3 months leave for stress-related disorders, which was reasonable, but the leave was repeatedly extended first to 4 months then to 6 and became unreasonable.

# Hypothetical

- Joe works mostly at his computer all day and has been employed by the State for 3 months. Today he tells you he needs to work at home at least 2 days a week because of his mental health problems. What do you say?

# Disability-Related Questions & Medical Exams

- General Principles:
  - Pre-offer - no questions or exams about the impairment
  - Post-offer – questions about if can do essential functions/non-medical exams OK as long as required of all applicants in same job category
  - During employment – any medical exam or inquiry must be job-related & consistent with business necessity
  - To process reasonable accommodation request – If disability &/or need for accommodation not obvious or already known
  - GINA – Cannot ask about genetic information/family medical history

# Employment Stage

- Situations where medical exams may be job-related and consistent with business necessity:
  - Employee has difficulty performing job & employer has reasonable belief, based on objective evidence, that it is due to a medical condition.
  - Employee suffers an injury on or off the job and the exam is needed to determine if the employee can perform the essential functions of the job without posing a direct threat to the health or safety of himself or others
  - Employee is disabled and may need a reasonable accommodation
  - Medical screening or monitoring is required by law
  - Employer has a *voluntary* wellness or health screening program

# Performance

- Employer may apply the same production standards as a non-disabled employee in the same job. However, a reasonable accommodation may be required to assist employee in meeting a specific production standard.
- Employer should use the same evaluation criteria to evaluate the job performance of an employee with a disability as for employees without disabilities.

# Hypothetical

- Mary works for a state agency. She did not disclose her bipolar disorder, even when she begins having performance problems that she believes are disability-related.
- Supervisor Sally counsels her about the performance problems, but they persist. Sally states that if her work does not show improvement within the next month, she will receive a written warning of substandard performance.
- Mary says she has a disability and asks for reasonable accommodation. What should Sally do?

# Performance (cont...)

- If an employee does not request an accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:
  - Raise the performance rating or
  - Give an evaluation that does not reflect the employee's actual performance
- However, employer must engage in interactive process.

# Attendance & Misconduct Issues

- Employers may be able to terminate an employee for excessive absenteeism even when absences are due to a disability *if* regular attendance is an essential function of the position, such as when employee must perform a job on-site. See Tyndall v. Nat'l Educ. Ctrs, Inc., 31 F.3d 209 (4th Cir. 1994).
  - **Discuss with legal counsel**
- Employer may be able to discipline an employee with a disability for violating a workplace conduct rule even if the misconduct resulted from the disability, *provided* the rule is job-related for the particular position & consistent with business necessity & other employees are held to same standard.
  - **Discuss with legal counsel**

# Summary

- Determine if employee is a “qualified individual with a disability”
  - Determine if employee can do “essential functions of the position” with or without a reasonable accommodation
- Proceed to interactive process
- Provide reasonable accommodation unless exceptions met