A Change in Focus — Mediation of Claims Under the ADA Amendments Act

By Mark C. Travis

The Americans with Disabilities Act (ADA) was signed into law in 1990 with the stated purpose to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[1] The law prohibited discrimination by, among other things, failing to make reasonable accommodations to the known physical or mental limitations of applicants and employees. However, in the years following the ADA's enactment, the Supreme Court began to erode the class of individuals that qualified as having a disability under the ADA to the point that it became increasingly difficult for many individuals to meet a prima facie case for a "disability" necessary to bring a claim under the Act. Accordingly, discrimination cases focused on the threshold question of whether the claimant could prove the existence of a disability, often resulting in summary disposition before an analysis of reasonable accommodation was ever addressed.[2] Similarly, this analysis frequently presented itself in the mediation of claims under the ADA.

The ADA Amendments Act (ADAAA) became effective on Jan. 1, 2009, and the Equal Employment Opportunity Commission's (EEOC) Final Regulations became effective on May 24, 2011. The primary purpose of the ADAAA is to "make it easier" for people with disabilities to obtain protection under the law, and the regulations provide that the primary focus should be on whether discrimination has occurred, and not whether the individual meets the definition of a disability, which should not demand "extensive analysis."[3] As a result, both advocates and neutrals in the practice of employment law see this as a potential sea change.

Perhaps the best indicator of this comes from the federal government's gatekeeper — the EEOC. In the first full fiscal year since the new law's effective date ending on Sept. 30, 2010, the EEOC's statistics indicate that charges for disability discrimination increased by more than 3,700 and exceeded the increase in percentage terms over all other forms of discrimination.[4] This article provides ADR professionals with a summary of how the law has changed and some tools on how to effectively utilize these changes in future mediation of claims arising under the ADA.

The Background

To understand the impetus behind these changes, it is necessary to briefly outline the statutory framework and two significant Supreme Court cases. An individual with a "disability" has always been defined under the act as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[5]

In *Sutton v. United Air Lines, Inc.*,[6] the two Sutton sisters attempted to qualify to become pilots but did not meet the airline's vision standards without corrective lenses. Because their eyesight was 20/20 with corrective lenses, the court ruled they did not have a disability.[7] The *Sutton* decision also held that where the individual alleges discrimination under the "regarded as" definition, the individual must show that the employer actually believed that the individual had an impairment that was substantially limiting.

In *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams,*[8] Ms. Williams developed carpal tunnel syndrome, and after various failed attempts to accommodate her medical restrictions by transfer to alternative positions, she was terminated from her employment. Although she had difficulty performing certain repetitive activities at work, she was nevertheless capable of performing personal care tasks and household duties.

The court held that the determination of whether an impairment rises to the level of a disability is not limited to activities in the workplace. Instead, the determination also includes an analysis of whether the individual is limited in the performance of daily activities that are central to the person's daily life. Additionally, the court construed the phrase "substantially limits" to mean that the condition "prevents or severely restricts" the performance of the activity and that the ADA's definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled."[9]

The Changes

In the ADAAA, Congress stated that both *Sutton* and *Toyota* had narrowed the scope of protection Congress had originally intended and that the intent of the Act was to reject the standards enunciated in both cases.[10] The following is a summary of the statutory and regulatory changes.

Major Life Activities: The act now provides two major categories of "major life activities," The first, which contains many of the activities which the EEOC had incorporated in its regulations under the 1990 Act, deal with social or vocational activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The new second category of activities focuses on medical factors, or major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The regulations go on to specifically provide that the term "major" is not to be determined by reference to whether it is of "central importance to daily life."[11]

Substantially Limits: The regulations state that an impairment is considered to be a disability if it substantially limits the ability of the individual to perform the major life activity "as compared to most people in the general population," and an impairment does not have to prevent, or even significantly or severely restrict the individual from performing a major life activity in order to be substantially limiting. The regulations contemplate that this determination will generally be made without reference to scientific, medical, or statistical analysis. Rather, the regulations suggest that this determination will include an analysis of the difficulty the individual encounters in performing the activity; the effort required; the pain experienced; how long the activity can be performed and its effect on the operation of a major bodily function; as well as the negative side effects of medication intended to address the condition. The regulations also state that an impairment that is episodic or in remission is still considered a disability if it would substantially limit a major life activity when active and that the effects of an impairment lasting fewer than six months can nevertheless be substantially limiting.[12]

Perhaps most significant with respect to the "substantially limits" terminology is some strong regulatory language regarding the emphasis (or lack thereof) the courts are to place on this standard. The regulations state, "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."[13]

Regarded as Having a Disability: Considering the interpretation placed on this term by the Supreme Court in *Sutton*, few claims were successful in raising this theory as grounds for a discrimination claim. Under the act and regulations, an individual meets this requirement if he or she has been subjected to discrimination because of an actual or perceived impairment, regardless of whether or not the impairment limits or is perceived to limit a major life activity, and the term "substantially limits" is not relevant under this prong of the disability definition. Prohibited actions include such things as refusal to hire, demotion, placement on involuntary leave, termination, or exclusion from a position for failure to meet a qualification standard. The only real limitation on this definition of disability is that it cannot be utilized if the impairment is transitory and minor with an expected duration of six months or less, but the employer must objectively demonstrate that the impairment is both transitory and minor.[14]

Corrective Measures: In response to the holding in *Sutton* dealing with corrective devices and measures, the act provides that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. Examples of mitigating measures include medication, equipment, low vision devices (other than ordinary eyeglasses and contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment, assistive technology, auxiliary aids, as well as learned behavioral or adaptive neurological modifications and psychotherapy. Conversely, the

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corrective effect of ordinary eyeglasses or contact lenses that fully correct vision *is* to be considered in determining whether an impairment limits a major life activity.[15]

Practical Strategies in Mediation of Future ADA Claims

With the definition of disability broadened, summary judgment for the employer will be less likely. Now, the mediator's task is to focus the parties' and counsels' attention on whether the disabled individual can perform the *essential functions* of the job, with or without a *reasonable accommodation*.[16]

Essential Functions: In addressing the first part of that issue, the employee will often acknowledge that while there are certain functions of the job he or she clearly will not be able to perform, those functions are marginal or non-essential, and that the employer cannot use that inability to exclude the employee from the job. Obviously, the employer will disagree. Typical arguments are that the function has always been performed by individuals holding the position in question; that there are an insufficient number of employees to whom the function can be transferred; or perhaps the employee fails to possess some intangible quality the employer feels is important to job performance. In this situation, the mediator must be prepared to facilitate a process of reality testing with the parties, focusing on the objective criteria set out in the statute. Those factors include an analysis of what is stated in the employer's job description (if one exists), the number of employees among whom the function can be distributed, whether the function is highly specialized or the employee was hired to perform that function, the consequences of not performing the function, and the amount of time spent performing the function.[17]

Even with this analysis, there will obviously be disagreement among the parties and counsel. Consequently, the mediator may suggest an adjournment and ask the parties to agree to retain an independent third party to conduct a job analysis assessment on these factors, then reconvene the mediation to discuss these issues in more depth. While one or both counsel may balk at the expense involved, it is probable that such an expert will otherwise be retained for the case, if not already retained.

Reasonable Accommodation: Of course, the issue of essential functions does not exist in a vacuum, but must be considered in tandem with reasonable accommodation. If a reasonable accommodation exists which will enable the employee to perform the job, the issue of whether a function is "essential" becomes almost irrelevant. Thus, if the parties reach impasse on the issue of whether a particular function is truly essential, the mediator may suggest shifting the discussion and begin to brainstorm potential reasonable accommodations that might enable the employee to perform the disputed function. This can possibly generate some momentum toward resolution without remaining mired down in the argument over essential job functions.

A discussion of reasonable accommodation may include restructuring the job by removing marginal functions, part-time or modified work schedules, reassignment to a vacant position, as well as acquisition or modification of equipment, among other things. The duty to reasonably accommodate an individual's disability also encompasses the duty of both the employer and employee to engage in an "interactive process" to determine the appropriate reasonable accommodation for an individual with a disability. Generally, this requires the employer to initiate a process with the employee whereby they jointly evaluate essential job functions, identify the employee's needs and limitations, brainstorm potential accommodations, and select an effective accommodation, if one exists.[18]

Often, the employer will assert that the employee never requested an accommodation (which the employee will deny), so the interactive process was never engaged; or that it was otherwise clearly evident that there was no way the employee could continue in the job, with or without a reasonable accommodation, thereby rendering moot the interactive process. The employer may also argue that a reasonable accommodation would appear to provide a preference to the disabled employee and therefore unfair to others. In these situations, the mediator must work to impress upon the employer that while an employee is required to request an accommodation before the interactive process is required, there is a factual dispute over that issue, the employee is now seeking an accommodation, and the mediation is the most appropriate forum for that discussion. The mediator must also impress upon the employer that the question of reasonable accommodation calls for an objective individualized assessment, and neither the employer's unilateral determination nor the attitudes of other employees are valid legal considerations.

On the other hand, it is not unusual for employees to take the position that they offered an accommodation which they felt best fit their individual needs and desires; however, the employer refused to implement the proposed accommodation, offering instead another accommodation which best fit the employer's objectives. While the regulatory guidance and case law are relatively clear that an employer's preference for a particular effective accommodation is entitled to deference, the mediator may wish to reinitiate the interactive process and have the parties walk through their respective positions on this issue in an attempt to find some common ground in a neutral setting.

Direct Threat: It is not unusual for an employer to assert that even if the employee could technically perform the job in question with an accommodation,

the employee's performance of that job may present a direct threat to the employee or others. In order to constitute a "direct threat," there must be a "significant risk of substantial harm" to the employee or others that cannot be reduced or eliminated through reasonable accommodation. This includes consideration of: (1) the duration of that risk; (2) the nature and severity of the potential harm; (3) the likelihood that harm will occur; and (4) the imminence of the potential harm. This determination must be based on an individualized assessment of the employee's present ability, considering objective medical evidence, and not on stereotypes. [19]

When a defense of direct threat is raised, the employer is often basing their position on an opinion that certain disabilities preclude a safe workplace, and/or that the employee's continuation in the job will present a risk of increased liability for injuries. Employers may also be basing their opinion of direct threat on prior experience with other employees with the same or similar condition or limitations. Conversely, the employee may argue that he or she should be able to assume the risk of harm by continuing in the job, if that is his or her desire. As is the case for any neutral, the resolution lies somewhere in the middle. On the employer's position, the mediator must be prepared to address with the employer that the determination of the employee's ability to perform essential functions must be an "individualized" assessment, and the law does not address the issue of increased exposure to liability costs for an injury as a defense. Similarly, the mediator should be prepared to address with the employee that the issue of direct threat is not confined to the disabled employee, but concerns the risk of harm to co-workers and others as well.

When addressing the issue of direct threat, the mediator would also be well-advised to conduct some background research on the condition at issue in the case in order to more accurately address the risk factors mentioned above. Additionally, it should be remembered that a reasonable accommodation may successfully overcome the direct threat. As always, moving the process to a discussion of reasonable accommodation may effectively bypass specific factual arguments over the level of direct threat.

Conclusion

While most of the issues cited above are not new to the framework of the ADA, it may have been some time since a neutral has found it necessary to analyze them at great length. Here, I point out the kind of factually-intensive analysis that will now come into play in the mediation of these cases. It can be expected that once the element of "disability" is now more readily satisfied, there will be increased contention over what job functions are essential, whether an accommodation is indeed reasonable, the depth to which the parties engaged in the interactive process, and to what extent the defense of direct threat is applicable. The 21st century mediator must be prepared to address the importance of these issues in the resolution of claims under the ADAAA. ◆

Endnotes

1 42 U.S.C. §12102(b)(1)-(2).

2 Amy L. Albright, *2006 Employment Decisions Under the ADA Title I — Survey Update*, 31 Mental and Physical Disability L. Rep. 328, 329 (2007) (finding that out of 272 ADA claims in 2006, employers prevailed in 97.2% of the cases); *see also*, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. Rev. 1405, 1407 ("By 1996…courts applying the language of the ADA had summarily dismissed numerous cases of alleged disability discrimination on the ground that the plaintiffs were not disabled….").

3 42 U.S.C §12102(4)(A); 29 C.F.R. §1630.1(a)(4).

4 http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

5 42 U.S.C. §12102(1).

6 527 U.S. 471 (1999).

7 *See also Murphy v. UPS, Inc*., 527 U.S. 471 (1999) (truck mechanic with high blood pressure that prevented him from obtaining Department of Transportation commercial license was not disabled since his condition was controlled by medication); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (truck driver with condition that could not be ameliorated by device but had come to compensate for it over the years, was not disabled under the Act.).

8 534 U.S. 184 (2002).

9 *Id*. at 197-198.

10 42 U.S.C. §12101(a),(b).

11 42 U.S.C. §12102(2)(A); 42 U.S.C. §12102(2)(B); 29 C.F.R. §1630.2(i)(1)(ii); 29 C.F.R. §1630.2(i)(2).

12 29 C.F.R. §1630.2(j)(1)(i),(ii),(v); 29 C.F.R. §1630.2(j)(4); 29 C.F.R. §1630.2(j)(1)(viii)(ix); 42 U.S.C.§12102(4)(D).

13 29 C.F.R. §1630.2(j)(1)(iii).

14 42 U.S.C. §12102(3)(A);29 C.F.R. §1630.2(g)(3),(j)(2); 29 C.F.R. §1630.2(l)(1); 42 U.S.C. §12102(3); 29 C.F.R. §1630.2(j)(1)(ix);29 C.F.R. §1630.15(f).

15 42 U.S.C. §12102(4)(E)(i); 29 C.F.R. §1630.2(j)(1)(vi);(j)(5); 42 U.S.C. §12102(4)(E)(ii)(iii); 29 C.F.R. §1630.2(j)(6).

16 42 U.S.C. §12111(8).

17 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(n).

18 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. §1630.2(o)(3).

19 29 C.F.R. § 1630.2(r).