THE LAY OF THE LAW (AN OCCASIONAL NOTE)

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The ADA Undergoes Some Critical Fine-Tuning: Amendments effective in January 2009 Should Correct the Too-Narrow Interpretations of the Courts

I. The ADA's original purposes:

The Americans With Disabilities Act (the "ADA"), enacted by Congress in 1990, was greeted with great celebration by persons with disabilities, their families and advocates. The idea was broadminded and straightforward: Congress intended that the ADA protect those with disabilities (including those who were simply perceived as having a disability) against discrimination because of their disabilities in access to jobs, education, commerce, entertainment and other benefits of public life. If a person was "otherwise able" to engage in the activity in question – with the help of whatever "reasonable accommodations" were necessary – s/he could not legally be prevented from participating because of his or her disability or perceived disability.

Under a key provision of the ADA, a person was deemed to be entitled to protection under the Act if s/he had a "disability" – an impairment that "substantially limits" a "major life activity."

II. Restrictive Interpretations by the Courts:

Unfortunately, the initial celebration over the ADA's passage turned to disappointment and frustration in many quarters as courts began to interpret and apply its provisions as narrowly as possible. Courts needed to interpret the ADA's provisions defining what a covered "disability" is; the extent to which a "disability" must interfere with one's "major life activities" to warrant protection; the definition of "major life activities" for these purposes, and so on. One by one, the courts' pronouncements reduced the scope of protection afforded under the ADA and the categories of people who could seek that protection.

This judicial narrowing came to a head in two Supreme Court cases. In *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court held that "mitigating measures" – such as medications or medical devices that ease the effects of an impairment – must be taken into account in determining whether a person is "substantially limited in a major life activity." Under this interpretation, even if a person suffers discrimination because s/he has an impairment, the court would treat him or her as outside of the ADA's protection because medications or other "mitigating measures" enable the person to function well despite the impairment.

In another case, *Toyota Motor Mfg. of Kentucky* v. *Williams*, 534 U.S. 184 (2002),

1 I much appreciate the assistance provided by our Northeastern University School of Law student clerk, Sarah Burns, who ably researched some of the issues discussed in this piece and tossed around some ideas about the burden-shifting implications of the new amendments. I am also very grateful for the creative thinking and solid analytical sense of my partner, Nick Kelley, whose insights from his growing practice in disability law have proven very helpful in this examination of the amended ADA.

the Supreme Court considered what a "major life activity" is and narrowed that concept to include only those activities that are "of central importance to most people's daily lives."

Some federal courts have effectively required that more than one "major life activity" be affected by an impairment before a person falls within the ADA's protection. (*See*, e.g., Stein v. Ashcroft, 284 F.3d 721 (7th Cir. 2002) where the court found that an inability to lift and to carry objects did not constitute a disability because those impaired activities were only part of the tasks required by the person's employment and did not, therefore, impair the major life activity of working.)

Others have said that impairments whose effects are only episodic or intermittent, such as epilepsy or a peanut allergy, do not fall under the ADA because their effects are only temporary. (*See*, e.g., Land v. Baptist Medical Center, 164 F.3d 423 (8th Cir. 1999), finding that a child's peanut allergy did not substantially limit major life activities of eating or breathing because the child's physical ability to eat was not restricted and his ability to breathe was unrestricted when he was not experiencing an allergic reaction).

III. The ADA Amendments of 2008:

This year Congress rejected the courts' narrowing of the ADA's scope of protection and amended the Act to correct what it considered to be misinterpretations. The amendments take effect on January 1, 2009.

In a section stating the purposes of these amendments, Congress declared that its original intent in the ADA had been to eliminate discrimination against persons with disabilities and to "provide broad coverage." The purpose section goes on to indicate that Congress had expected the courts to interpret the definition of disability liberally in keeping with that intent, but "that expectation has not been fulfilled."

The amendments make it clear that the ADA is to be applied liberally and broadly when courts consider whether an individual's impairment affects a major life activity sufficiently to warrant protection against discrimination. The objective of a court, said Congress, should be to ensure that entities covered by the Act are complying with their obligation not to discriminate rather than to spend inordinate time and "extensive analysis" considering whether an individual's impairment qualifies him or her for protection. In effect, Congress's admonitions to the courts in the purpose section of these amendments may be to create a presumption that if an employer or other covered entity is discriminating against a person with an impairment, the force of law should be exercised to eliminate the discriminatory activity rather than to obsess over whether the person in question meets some artificially high set of criteria to prove s/he is entitled to protection under the ADA.

Specifically, the ADA amendments set aside the *Williams* holding that a "major life activity" must be "of central importance to most people's daily lives." The amended ADA will provide a list of examples of major life activities – not meant to be exhaustive – including such items as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." In addition, major life activities are to include bodily functions such as normal cell growth, digestive functions, the functioning of the immune system, endocrine functions, neurological, brain, and reproductive functions.

The amendments clarify that if an impairment substantially limits one major life activity, an individual need not show that it also limits other major life activities to be qualified for protection. Moreover, if an impairment affects a person only episodically or is in remission, it still qualifies as a disability so long as when it is active it substantially limits a major life activity.

The amendments address the issue of "mitigating measures" by declaring that the determination whether an impairment substantially limits a major life activity must be made "without regard to the ameliorative effects of mitigating measures" and lists several examples of such measures. The examples include: (1) the use of medications, prosthetics and the like (including "low-vision devices" such as magnifiers, but not including ordinary eyeglasses or contact lenses); (2) the use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications.

IV. How might these amendments affect persons with autism or others who benefit from behavioral interventions?:

Individuals with autism – particularly milder forms of autism – and others with impairments of affect, behavior and/or social navigation, have sometimes been considered not to be "disabled" within the protections of the ADA because their impairments do not, in the reasoning of courts, sufficiently affect major life activities. For example, In Jacques v. DiMarzio, Inc., 386 F.3d 192 (2nd. Cir. 2004), the court refused to find social interaction to be a major life activity. (In this holding the Second Circuit Court of Appeals rejected a contrary holding from the Ninth Circuit in McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (describing "interacting with others" as "an essential, regular function, like walking and breathing" that "easily falls within the definition of 'major life activity'" under the ADA).) Jacques held that establishing a *substantial* limitation in the ability to interact with others requires a showing that "the impairment *severely* limits the plaintiff's ability to… initiate contact with other people and respond to them, or to go among other people- at the most basic level of these activities." Jacques, 386 F.3d at 203. The Jacques court further elaborated that "the standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited," even if the plaintiff's "communication is inappropriate, ineffective, or unsuccessful." Id.

Ms. Jacques was a plaintiff with bipolar disorder, but the implications of the holding for persons with other disorders is clear. In fact, the court expressly anticipated application to plaintiffs with autism, stating that only the most acute or profound cases of autism could satisfy the standard. Jacques, 386 F.3d at 203-204.

In Comber v. Prologue, Inc., 2000 WL 1481300 (D.Md. Sept. 28, 2000), a district court in the Fourth Circuit Court of Appeals declined to find a plaintiff with autism spectrum disorder, anxiety, and depression as disabled under the ADA. Despite evidence that showed how autism directly affects her ability to form and maintain ordinary social relationships, the court's analysis relied on plaintiff's history of employment success. Plaintiff's trouble with co-workers was characterized as a personality conflict and not a manifestation of her disabilities.

In addition to these restrictive readings of the ADA that have limited access of those with impairments affecting social skills to the protections of the Act, one can also imagine an employer or a private school or other entity

arguing under the pre-amended ADA interpretations that in a case where a behavioral program has substantially minimized challenging behaviors for a person with autism, that person is not "disabled" in the definitions of the Act because the impairment has been "mitigated."

The 2008 amendments should go far in reducing the obstacles these overly-narrow readings of the ADA would have placed in the path of a person suffering discrimination because of behavior arising out of autism, bipolar disorder, depression, and other conditions that impair their social navigation skills or ability to maintain a steady emotional course through a day. The disability community and its advocates will watch closely as the courts examine cases under the amended law, in hopes that the newly clarified commitment of Congress to the protection of those made vulnerable by their disabilities will actually be enforced.