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# A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act

**National Council on Disability**

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## EXECUTIVE SUMMARY

The ADA Amendments Act (ADAAA) was enacted in 2008 and took effect on January 1, 2009. Since that time, the judicial system has begun to hear and decide disability discrimination lawsuits raising questions under the new law. This report grew out of NCD’s recognition of the emerging need for review and analysis of the court decisions that have developed under the ADAAA to ascertain whether the Amendments Act has thus far achieved its intended goals. Accordingly, NCD conducted a review and analysis of the case law that has developed under the ADAAA and prepared a report on the findings as to whether the ADAAA has achieved its intended goals. The report provides recommendations for improvements or corrective action, as necessary.” From the project’s inception, NCD recognized that not enough time has elapsed since the ADAAA took effect for the drawing of firm and definitive conclusions, but was convinced that present analysis of court decisions rendered to date would produce a sense of the law’s current status and provide a preliminary bellwether of trends and directions in which the law is heading.

This report presents 23 findings providing both a summary of the overall results of the court decisions and a detailed legal analysis of how the courts have responded to major revisions made by the ADAAA. The decisions of the United States Courts of Appeals are discussed first, followed by the decisions of the United States District Courts. The findings in the report address the judicial landscape with regard to many important aspects of how a person who claims to have been subjected to discrimination on the basis of disability demonstrates that she or he has a disability under the standards established by Congress in the ADAAA. The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits. In six of the seven Circuit Court decisions in which the provisions of the ADAAA were applied, the plaintiff prevailed on the issue of establishing a disability; and in the district court decisions analyzed in cases under the ADAAA, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a substantial improvement over pre-ADAAA decisions in achieving the broad scope of ADA coverage that Congress intended.

Listed below are NCD’s findings, followed by three recommendations regarding ongoing monitoring and analysis of cases applying the ADAAA and educational and training initiatives for judges, attorneys and other advocates.

## NCD FINDINGS:

Finding 1:The decisions of the United States Courts of Appeals reflect a strong consensus that the ADAAA does not apply to ADA claims in which the alleged acts of discrimination occurred prior to January 1, 2009, when the ADAAA took effect; a few courts have recognized narrow exceptions to this general rule for situations in which: (A) a plaintiff is seeking prospective injunctive relief, such as compelling a covered entity to provide an accommodation in the future; or (B) a court considers provisions of the ADAAA for the purpose of shedding light on the original intent of Congress when it enacted the ADA.

Finding 2: In regard to cases raising ADAAA, issues that are making their way through the courts, it is still the early days: in only 10 percent of Courts of Appeals’ decisions mentioning the ADAAA to date the court has found that the ADAAA was in effect when the alleged discriminatory actions took place, and in one-third of the cases in which the court found the ADAAA was in effect, the court did not apply the ADAAA.

Finding 3: Many of the Courts of Appeals’ decisions in which the courts found that the ADAAA was not in effect have nevertheless included descriptions of the Act’s purpose, content, and implications in a manner that conveys awareness and understanding of, and receptivity toward, the changes in the law that the ADAAA entails.

Finding 4: Research disclosed only seven decisions so far in which Courts of Appeals have both found the ADAAA to be in effect and had occasion to apply it. These included three cases involving employment discrimination claims, one addressing a requested accommodation on a medical licensing examination, two dealing with prisoners’ claims of deficient medical treatment in state prisons, and one claim of discrimination in a volunteer program at a county rehabilitation center.

Finding 5: The numbers of pertinent circuit court decisions remain too small to draw any broad or authoritative conclusions. The most striking revelation about the seven cases, however, was that in six out of the seven the plaintiff prevailed on the issue of having a disability at the stage of the proceedings before the appellate court. This can be viewed as an early indication of a positive turnaround in outcomes on the definition-of-disability issue attributable to the ADAAA.

Finding 6: In *Allen v. SouthCrest Hosp*., the one case out of seven in which the plaintiff did not prevail on the showing of disability, the Tenth Circuit took a more exacting and critical look at the plaintiff’s showing of a disability – an approach that, in disregarding the ADAAA’s guidance supporting a broader, less restrictive approach to the elements of “disability” and the avoidance of “extensive analysis,” harkened back to pre-ADAAA scrutiny of a plaintiff’s claim of having a disability. Whether this decision will have a regressive effect on future decisions is a matter of concern to which close attention will should to be paid.

Finding 7: In approximately four out of five of the federal district court decisions analyzed methodically, the court found the ADAAA was in effect at the time the alleged discriminatory actions took place; this is in sharp contrast to the small percentage of cases that have made their way to the Courts of Appeals in which the courts have found that the ADAAA was in effect. Among the district court decisions in which the ADAAA was found to be in effect, about 90% involved claims of employment discrimination.

Finding 8: The decisions of the district courts under the ADAAA reflect widespread awareness of, and receptivity to, the statutory mandate for interpreting coverage of the ADA broadly. Many are replete with statements of judicial recognition and affirmation of the expansion-of-coverage first principle of the Act, and of a number of the elements established in the Act and the regulations for broad construction of “substantially limiting a major life activity.”

Finding 9: With occasional exceptions, the decisions of the district courts under the ADAAA have recognized and applied changes to the “major life activities” element of the definition of disability made by the Act in (1) decreasing the restrictiveness of standards for inclusion of an activity in the category, (2) providing a non-exhaustive list of example of major life activities, and (3) incorporating a new category of “major bodily functions.” The “major bodily functions” provision is a major addition to the ADA, and so far seems to be accomplishing much of what it was intended by Congress to do in engendering more expansive coverage.

Finding 10: The EEOC’s issuance in its ADAAA regulations of a non-exhaustive list of conditions that are virtually always disabilities, for which individualized assessment should be particularly simple and straightforward, has generally been embraced by the courts. To date, plaintiffs having, among a variety of other conditions, post-traumatic stress disorder (substantially limits the major bodily activity of brain function), cancer (substantially limits normal cell growth), multiple sclerosis (substantially limits neurological functions), and HIV-positive status (substantially limits immune system function) have successfully availed themselves of the “virtually always” status in court.

Finding 11: Revisions under the ADAAA relating to broadening the list of examples of major life activities, incorporating major bodily functions, and developing a non-exhaustive list of conditions for which there should be “predictable assessments” of disability are not self-evident, but somewhat challenging. Although the courts have made a good start, routine acceptance and mastery by courts and attorneys of these innovations will likely not occur easily or quickly. Additional judicial and professional education efforts devoted to these matters would greatly facilitate their broader dissemination and application.

Finding 12: The ADAAA statutory revision regarding consideration of mitigating measures is unequivocal and not particularly complicated, and the courts generally have had little trouble reincorporating into the legal framework for analyzing ADA claims the pre-Sutton principle that mitigating measures shall not be considered in determining disability. In a few cases, courts that have complied with the ADAAA requirement that mitigating measures are not to be taken into account in determining disability have clarified that it carries with it an obligation for plaintiffs to make some showing of the impact of major life activities on the plaintiff’s condition in the absence of mitigating measures.

Finding 13: The emerging case law regarding the ADAAA provision decreeing that an impairment that is episodic or in remission constitutes a disability if it would substantially limit a major life activity when active generally appears to have begun to have its desired effect in the courts. Of the few cases examined that addressed this issue under the ADAAA, most relied on the provision in allowing plaintiffs to prevail on the issue of pleading a disability when they had conditions with only intermittent effect upon activities.

Finding 14: The new EEOC regulatory provision recognizing that an impairment lasting fewer than six months might in some circumstances constitute a disability under the ADA did not take effect until May 24, 2011, with the result that there are insufficient court decisions to date from which to draw analytical conclusions. However, the decision of a federal district court in *Green v. DGG Properties Co., Inc.* raises a concern that some courts might blunt the effect of the provision and revive pre-ADAAA views about rejecting short-term impairments as disabilities. This issue should be closely monitored in future decisions to determine whether steps are needed to avoid a resurrection of overly exacting duration standards for substantially limiting impairments.

Finding 15: The ADAAA’s articulation of a general broadening of the third prong of the definition of disability, including rejecting the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, regarding it, and reinstating in its place the Court’s reasoning in *School Board of Nassau County v. Arline*, has not been the subject of much judicial commentary or elaboration, but the court decisions have referred to, quoted, and seemingly accepted that direction.

Finding 16: The ADAAA revision that changes the focus of being regarded as having an impairment to whether the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment represents a profound alteration of analysis under the ‘regarded as prong’, with major implications for pleading, evidence, argument, and judicial resolution. Perhaps because the revision replaced a thorny and complicated determination with a more straightforward one, the courts seem to have absorbed and applied it rather smoothly. The new standard has been applied to allow plaintiffs to successfully make a prima facie case that they have been regarded as having a disability in quite a number of court decisions.

Finding 17: The exclusion of “transitory and minor” impairments in analysis of allegations of disability under the regarded as prong of the definition of disability is an important ADAAA mandate. While the provision of the Act making this change is relatively clear and simple, the courts have not always interpreted and applied it in a manner consistent with its plain language. A worrisome line of cases has developed in which the courts have looked only to the issue of duration of the impairment in question, and have ignored the “and minor” words of the statute. The continuing development of case law in this area should be monitored closely to see how significant a problem this may portend.

Finding 18: The ADAAA’s elimination of the obligation of entities covered under the ADA to provide reasonable accommodations or reasonable modifications to people who meet the definition of disability only under the “regarded as” prong is a major change. The statutory change is straightforward and clear-cut, and, so far, the court decisions interpreting and applying it generally do so in an uncomplicated manner. In addition to describing and quoting the statutory elimination of the accommodation/modification obligation, some courts have noted that, because reasonable accommodation is not available to a plaintiff alleging disability exclusively under the regarded-as prong, if such a plaintiff cannot perform essential job duties without accommodation, she or he will be deemed not qualified for the job. As time goes by, such considerations can be expected to have a growing impact on legal pleading and litigation strategies.

Finding 19: Assessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiffs in establishing disability. In cases in which district courts applied provisions of the Act, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a significant improvement over pre-ADAAA decisions. This very positive development is tempered by the recognition that many plaintiffs who prevailed on establishing a disability still lost their cases on other grounds.

Finding 20:The courts have made progress in complying with ADAAA directives that determinations whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis,” although the progress is uneven and some decisions continue to reflect considerable analytical parsing. As to the related question of whether courts have shifted their analytical focus, particularly in employment discrimination cases, away from determining whether an individual has a disability, to determining whether disability discrimination occurred, the courts’ decisions evidence a shift in that direction, but some courts still spend considerable time and energy on the medical and other details and circumstances of an individual's impairment.

Finding 21:In making determinations of disability in ADA actions, the courts have fairly consistently based decisions on individualized assessments of substantial limitation of major life activities. Some ADAAA revisions have reduced the need for individualization to a degree by making it easier for some types of impairments to be recognized as disabilities.

Finding 22:In more than a few cases in which individuals who claimed to have been subject to discrimination on the basis of disability have not succeeded in establishing that they had a legally cognizable disability, or otherwise did not prevail in their legal actions, their chances for a favorable outcome were squandered by substandard, sometimes dismal, legal pleadings and briefs on their behalf. The likelihood of such plaintiffs having a fair “day in court” could be significantly enhanced by the development and proliferation of high quality continuing education and training programs for attorneys and other advocates for people with disabilities.

Finding 23:In addition to examining how well the courts are carrying out the spirit and applying the specific provisions of the ADAAA, it will be important to monitor certain additional issue areas, incident to the Act and its implementation, that, depending upon the direction the court decisions take, have the potential to cause significant problems. Three such issues are (1) how the factor of duration affects the determination of whether an impairment does or does not constitute a disability under the ADA; (2) application of the ADAAA provision freeing covered entities from the obligation to provide reasonable accommodations or reasonable modifications for individuals who meet the definition of disability only under the “regarded as” prong; and (3) the role of the major life activity of working and the application of the “class of jobs or broad range of jobs” standard in determining whether an impairment substantially limits it.

## RECOMMENDATIONS:

Recommendation 1:Led by the primary ADA enforcement agencies charged with implementing the requirements of the ADA – the Department of Justice, the Equal Employment Opportunity Commission, and the Department of Transportation – in conjunction with NCD, agencies of the federal government should maintain and systematize ongoing monitoring and analysis of court decisions interpreting and applying the changes in the law made by the ADAAA.

Recommendation 2:The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize programs for providing high quality information and training for judges regarding the content and implications of the revisions to ADA law made by the ADAAA.

Recommendation 3:The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize high quality continuing education and professional education programs for attorneys and other advocates regarding the content and implications of the revisions to ADA law made by the ADAAA.

**Full report available at:** [www.ncd.gov/publications/2013/07232013/](http://www.ncd.gov/publications/2013/07232013/)