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## **DISABILITY EMPLOYMENT LAW CONFERENCE**

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*25<sup>TH</sup> Anniversary of the Americans with Disabilities Act*

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*10.20.2015*

*A charitable event benefiting Oklahomans with disabilities and Oklahoma employers by offering practical strategies for successfully employing people with disabilities in compliance with disability employment laws.*

**[What is an ADA/OADA Covered "Disability"?)**

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**DISABILITIES UNDER THE AMERICANS WITH DISABILITIES  
AMENDMENTS ACT & THE OKLAHOMA ANTI-DISCRIMINATION ACT**  
**Know Your Rights**  
**Know Your Responsibilities**

By

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As a plaintiff's attorney, I've had the opportunity to witness, first hand, how assumptions and miscommunications can lead, at best, to work hostilities and, at worst, to litigation. Many employers, employees and attorneys continue to misunderstand the rights and responsibilities provided for under federal and state anti-discrimination laws. This paper focuses on how to determine whether an employee has a covered disability under the ADAAA and provides tips to facilitate communication between the disabled employee and their employer.

**WHAT IS A DISABILITY?**

The Americans with Disabilities Act was amended in 2008 and became effective January 1, 2009. For the first couple of years after the amendments went into effect, many employees and former employees suing for violation of the ADA still fell under the pre-amendments definition of a disability. By now, though, the vast majority of plaintiffs will have been terminated or otherwise discriminated against after January 1, 2009 and, as a consequence, the determination of whether these employees are disabled will be reviewed under the Americans with Disabilities Amendments Act (ADAAA).

For Plaintiff's attorneys, this is particularly important as many defense counsel (and some courts) still attempt to obtain dismissal of disability claims under pre-amendment definitions and legal authority.

The ADAAA greatly expanded the definition of disability and, as a result, significantly more people are protected under the Act.

(1) Disability. The term "disability" means, with respect to an individual--

(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 (as described in paragraph (3)).<sup>1</sup>

## **I – ACTUAL DISABILITY**

Let's look at the first part of the definition – whether the employee has a substantially limiting physical or mental impairment. It's important to remember that not all physical or mental impairments are disabilities. Only an impairment that substantially limits a major life activity is covered under the “actual disability” prong.

### **Physical Impairment:**

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss (that is)
- affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.”<sup>2</sup>

**Mental Impairment:** “Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>3</sup>

**Question 1: Does the Employee have a physical and/or mental impairment?** Yes \_\_\_\_\_ No \_\_\_\_\_

If the answer is “yes”, you should analyze whether the employee's impairment “substantially limits a major life activity”. Here is where things get tricky. The ADAAA redefined “major life activity” and made this definition substantially broader than it was in the past. “Major life activity” is now defined as:

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<sup>1</sup> 42 U.S.C. § 12102.

<sup>2</sup> 29 C.F.R. § 1630.2(h)(1).

<sup>3</sup> 29 C.F.R. § 1630.2(h)(2).

## Major life activities:

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>4</sup>

### Takeaways from the definition:

- Major life activity includes major bodily functions. If a person has an impairment that substantially limits a major bodily function such as cell growth (think cancer), they need not also have difficulty performing a “major life activity” listed in part (A) of the definition, above (seeing, hearing, breathing, etc.).
- The examples in subparagraphs (A) and (B), above, are not exhaustive. Courts have also found the following (non-exhaustive) constitute major life activities:
  - Interacting with others (think anxiety conditions)<sup>5</sup>
  - Thermoregulation (regulation of body temperature)<sup>6</sup>
  - Running/Jumping<sup>7</sup>
  - Elimination of bodily waste<sup>8</sup>
  - Driving<sup>9</sup>

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<sup>4</sup> 42 U.S.C. § 12102(2).

<sup>5</sup> *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. N.C. 2015)(reversing district court determination that employee was not disabled by suffering from social anxiety disorder).

<sup>6</sup> *Ball v. LeBlanc*, 792 F.3d 584, 597 (5th Cir. La. 2015)(assuming without deciding that thermoregulation is a major life activity).

<sup>7</sup> *Moore v. Chilton County Bd. of Educ.*, 1 F. Supp. 3d 1281, 1296 (M.D. Ala. 2014)(assuming running and jumping are major life activities).

<sup>8</sup> *Heiko v. Colombo Sav. Bank*, F.S.B., 434 F.3d 249, 251 (4th Cir. Md. 2006)(holding that elimination of bodily waste is a major life activity).

<sup>9</sup> *Anderson v. North Dakota State Hosp.*, 232 F.3d 634, 636 (8th Cir. N.D. 2000)(assuming driving is a major life activity).

First, a major life activity includes major bodily functions. Major bodily functions likely include any significant function of the body, even those not explicitly identified in the definition, above.

Second, nothing in the definition requires a diagnosis of a particular condition. All that is required is that the person is impaired, even if they have not been diagnosed with a particular condition.

When determining whether an employee's impairment affects a major life activity, keep the following in mind:

- **Broadly Defined.** The definition of disability must be interpreted in favor of broad coverage of the person. If you are on the fence about whether the person is disabled, fall on the side of "yes".<sup>10</sup>
- **Only One Impairment Required.** An impairment that substantially limits a major bodily activity need not also limit other major life activities. So long as there exists one impairment that limits one major life activity (including bodily function), the person has an actual disability under the ADA. See 42 U.S.C. § 12102(4)(C). Remember that the impairment need not be job related.
- **Look at the active state.** An impairment that is episodic, such as a seizure disorder, is still impairments if they limit a major life activity when active. For instance, an employee who suffers from seizures would have an impairment limiting a major life activity because they would be impaired during the seizure. This is true even if they have never suffered a seizure at work. Other examples include hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, schizophrenia.<sup>11</sup>
- **Remission doesn't count.** An impairment in remission are still a disability if, when active (prior to remission) the impairment limited a major life activity (and would do so again if the condition returned). See 42 U.S.C. § 12102(4)(D). For instance, cancer may be in remission, but because has the chance of possibly returning, the person would still be disabled because, in its active state, cancer limits at least the major life activity/major bodily activity of cell function.

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<sup>10</sup> See 42 U.S.C. § 12102(4)(A)-(B).

<sup>11</sup> See 42 U.S.C. § 12102(4)(D).

➤ **Don't include mitigating measures.** Whether an impairment substantially limits a major life activity shall be determined "without regard to the ameliorative effects of mitigating measures". Mitigating measures includes (but is not necessarily limited to):

- Medications
- Medical supplies or equipment
- Low vision devices (except ordinary glasses or contacts)
- Prosthetics
- Hearing aids/cochlear implants/hearing devices
- Mobility devices (walkers, wheelchairs, etc.)
- Oxygen therapy & equipment
- Use of assistive technology
- Reasonable accommodations
- Auxiliary aids/services (e.g. interpreters, taped texts, modification equipment, etc. See 42 U.S.C. § 12103)
- Learned behavior/adaptive neurological modifications<sup>12</sup>

**Question 2: Does the impairment substantially limit the major life activity?**

Yes \_\_\_ No \_\_\_\_\_

**The following is a list of questions (thought not exhaustive) you should ask when determining whether a person has an actual disability:**

- Does the person have an impairment? Yes \_\_\_\_\_ No \_\_\_\_\_
- What is the impairment (a diagnosis is not required)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- **When active**, does the impairment limit a major life activity (remember this includes a major bodily function)? Yes \_\_\_\_\_ No \_\_\_\_\_

\_\_\_\_\_

<sup>12</sup> See 42 U.S.C. § 12102(4)(E).

If “yes”, what is the activity/bodily function? Only one of the following is required:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Working
- *Other*

#### Major Bodily Functions:

- Immune system functions
- Normal cell growth
- Digestive functions
- Bowel functions
- Bladder functions
- Neurological functions
- Brain function
- Respiratory function
- Circulatory function
- Endocrine function
- Reproductive function
- *Other*

#### A – Current Illegal Drug Use

➤ **Current illegal use of drugs.** The current, illegal use of drugs is not protected under the ADA. However, if any of the following occurs, the employee/potential employee may be considered a “qualified individual with a disability”:

- He/she has successfully completed a supervised a drug rehabilitation program and is no longer engaging in the illegal use of drugs; or
- He/she is currently participating in a supervised rehabilitation program and is no longer engaging in illegal drug use; or
- He/she has “otherwise been rehabilitated successfully” and is no longer engaging in illegal drug use; or
- He/she is erroneously regarded as engaging in drug use, but is not actually engaging in such use<sup>13</sup>

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<sup>13</sup> 42 U.S.C. § 12114.

## **The ADA allows employers to:**

- Prohibit illegal drug/alcohol use at work
- Prohibit employees from being “under the influence” of drugs/alcohol
- Comply with laws requiring a drug-free workplace
- Not accommodate current drug/alcohol use as a disability
- Hold employees who engage in illegal drug use or “who is an alcoholic” to the same standards as other employees, even though the poor performance may be drug/alcohol related
- Drug test employees (must follow state/federal laws in doing so)<sup>14</sup>

## **B – Pregnancy**

Pregnancy, itself, is not a disability. However, pregnancy-related medical conditions may be. The EEOC guidelines identify the following medical conditions that may be protected. As with all of the examples, the list is not exhaustive.

- Pregnancy-related anemia may be impairment because it substantially limits the major life activity of cell function.
- Pregnancy-related sciatica substantially limits the major life activity of musculoskeletal function.
- Carpal tunnel syndrome substantially limits neurological function.
- Gestational diabetes limits endocrine function
- Nausea induced “severe” dehydration substantially limits digestive and genitourinary functions
- Abnormal heart rhythms substantially limit cardiovascular function
- Swelling may substantially limit circulatory function
- Depression may substantially limit brain function.

## **II - RECORD OF IMPAIRMENT**

The ADAAA also protect people who have a record of an impairment, even if they no longer impaired.<sup>15</sup> Examples include people whose physical or mental impairment is cured, controlled or in remission.

This is where having an “actual disability” and a “record of a disability” overlap. For instance, a person with heart disease may have an “actually

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<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. § 12102(1)(B).

disability” because, without mitigating measures such as medication, surgery, etc., and in its active state, heart disease substantially affects the major life activity/bodily function of circulation. At the same time, someone with heart disease may have a record of a disability because, as a result of the treatment, the individual is not currently substantially impaired.

Under either an actual disability or a record of a disability, however, the employer may be required to provide reasonable accommodations. As a practical matter, an employer should spend less time differentiating between the two kinds of disabilities and focus on whether a reasonable accommodation can be made.

The exception to this advice is when illegal drug use is part of the impairment. Recall that the ADAAA explicitly excludes current illegal drug use from protection. However, an individual who has a record of illegal drug addiction, but was successfully rehabilitated, is protected under the ADAAA as having a record of a disability. Thus, it would be unlawful to make an employment decision based on a record of unlawful drug use if the individual had been successfully rehabilitated.

### **III - REGARDED AS HAVING AN IMPAIRMENT**

Finally, the ADAAA protects individuals who have been discriminated against because their employer regards them as having a disability.<sup>16</sup>

3) To be “regarded as” having an impairment, the individual must establish that the prohibited employment action was taken because of an actual or perceived physical or mental impairment. Individual are protected on this definition even if the physical or mental impairment does not substantially limit a major life activity.<sup>17</sup>

#### **A – Accommodation Not Required**

An employer is not required to make an accommodation for an individual who is merely regarded as having a disability. This is one of the few changes to the ADAAA that relieves employers of particular obligations as prior to the amendments many courts held that employers must accommodate people who were regarded as having a disability, even though they were not substantially

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<sup>16</sup> 42 U.S.C. § 12102(1)(C).

<sup>17</sup> 42 U.S.C. § 12102(2)(A).

impaired. This twist made absolutely no sense and, thankfully, was resolved as part of the amendments process.

## **B – “Transitory and Minor” Exception**

An individual is not “regarded as” having a disability if the impairment is “transitory and minor”. A transitory impairment is an impairment with an actual or expected duration of less than six months.<sup>18</sup> A minor impairment is one considered trivial, such as the common cold, minor aches and pains, or a minor infection (think cold sores or infected fingernails).

To qualify for this exception, the impairment must be both transitory and minor. Severe impairments are not exceptions, even if their duration is less than six months.

## **IV – COMMUNICATING EFFECTIVELY**

Employees with a disability must still be considered “qualified” under the ADA. The ADA defines “qualified individual” as: “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>19</sup> At the least, the employee/potential employee must, with or without reasonable accommodation:

- meet the minimum (and legitimate) education, experience, licensure and skill requirements of the job, and
- be able to perform the essential function of the job, with or without reasonable accommodations.<sup>20</sup>

The interactive process is essential to determine whether the individual is qualified with (or without) reasonable accommodations. Below is a list of “tips” to help the communication process.

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<sup>18</sup> 42 U.S.C. § 12102(3)(B).

<sup>19</sup> 42 U.S.C. § 12111(8).

<sup>20</sup> *Id.*

## **A – Essential Functions**

Essential functions are those “fundamental job duties” of the employment position.<sup>21</sup>

### **Non-Exhaustive Factors to Consider:**

- Does the position exist to perform that function?
- Are there a limited number of employees available to perform that function?
- Is the function highly specialized such that the employee/applicant is hired for his/her expertise in performing the function?<sup>22</sup>

### **Non-Exhaustive Evidence to Consider:**

- The employer’s judgment
- Written job descriptions
- Amount of time spent performing the function
- The consequences of not requiring the incumbent to perform the function
- The terms of a collective bargaining agreement
- Past work experience of incumbents in the job
- Current work experience of incumbents in similar jobs<sup>23</sup>

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<sup>21</sup> 29 C.F.R. § 1630.2(n).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

## **V - HELPING YOUR EMPLOYER KNOW WHEN & HOW TO HELP**

**Engage in a dialogue.** Employers cannot (nor are they required to) provide an accommodation if they do not know one is needed. Generally it is the employee who is responsible for initiating the interactive process and resulting dialogue.<sup>24</sup>

**Be specific.** It is not enough for you to notify your employer that you need “assistance” or “help”. You should tell your employer why you need assistance (how you are medically impaired and how this impairment affects your ability to perform your job) and identify ways you could be reasonably accommodated. Your request for accommodation must be “clear and specific”.<sup>25</sup> Request must make it clear that (1) you need assistance; and (2) that the assistance is related to your disability.<sup>26</sup>

**Be Proactive.** Provide medical records/doctor’s notes supporting your request. For instance, let’s say that you have been sick in the morning because of treatment for lung cancer. Instead of telling your employer “I’m going to be late because I’ve been tired”, say, “I’m suffering from lung cancer. As a result of the cancer and treatment, I’ve been very sick in the morning. I would like an accommodation of being able to report to work at 10 a.m., instead of my usual time of 9 a.m.” This may (or may not) be a reasonable accommodation, depending on your job. However, the more specific you provide, the better. The point is to put your employer on notice that (1) you have a disability, (2) need an accommodation, and (3) the accommodation is reasonable. An employer has no duty to engage in an interactive process unless it knows (not merely suspects) an accommodation is necessary.<sup>27</sup>

**Follow-up.** Don’t leave the accommodation process to a single conversation. Follow up with your employer. Did they look into the accommodation you suggested? Will that accommodation work or do you need to discuss alternative accommodations? What accommodations does your employer suggest? Does your employer have all the paperwork they need to determine if you can be accommodated? What else does your employer need? When is the deadline to provide that paperwork/information? These are the kinds of questions you should ask.

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<sup>24</sup> See *Dinse v. Carlisle Foodservice Prods.*, 541 Fed. Appx. 885, 889 (10th Cir. Okla. 2013)(“[B]efore [12] an employer’s duty to provide reasonable accommodations—or even to participate in the ‘interactive process’—is triggered under the ADA, the employee must make an adequate request, thereby putting the employer on notice.”)(quoting *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1049 (10th Cir. Utah 2011)).

<sup>25</sup> See *Dinse*, 541 Fed. Appx. at 889 (10th Cir. Okla. 2013).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## **VI - EMPLOYER COMPLIANCE WITH THE ADA/OADA**

As a plaintiff's attorney, I've witness first hand the notion that "hindsight is 20/20". Sometimes employers, often through lack of training, fail to take the steps necessary to comply with the ADA/OADA.

**Comply with the ADA's notice requirements.** ADA requires employers to post notices in an accessible format to applicants and employees. Notices must be either prepared or approved by the Equal Employment Opportunity Commission and contain information about the employee's rights, including where to file a charge of discrimination. The EEOC offers sample poster downloadable from its website: [www.eeoc.gov](http://www.eeoc.gov). Notices must be posted in locations accessible to employees and applicants with mobility-related disabilities.

**Do not retaliate.** This may seem like common sense, but if it were, this author (a plaintiff's attorney) would be out of work. Train supervisors what retaliation means (I bet many misunderstand) and how to avoid doing this.

Discrimination can take many forms, including discriminatory practices in:

- hiring
- recruiting
- termination (including reductions in force)
- training
- promotions/demotions
- insurance coverage
- job assignments (including transfers and delegation of duties)
- pay (including wages and benefits)
- leave (including sick and vacation leave)
- any other employment related activity

While a supervisor may not terminate an employee for requesting accommodation, they may not realize they cannot also deny leave or make other kinds of decisions in response to an accommodation request.

**There are, however, things you can do to ensure disabled employees are treated fairly. The following are few tips:**

- ✓ **Write, review, and then follow, anti-discrimination and accommodation policies.** Some companies have lengthy anti-discrimination and anti-harassment policies that, in reality, are rarely (if ever) followed. Don't be that company. Train your employees. Train your managers. Not just on what the policy contains, but how to follow,

and enforce, it. It's not enough to train the HR staff, but leave the front line supervisors in the dark about the accommodation process.

- ✓ **Don't insist on "magic words"**. Although the employee is required to first request an accommodation, they are **not** required to use magic words, such as "accommodation", "disability", "ADA" and the like. All that is required is that the request be reasonably specific and place the employer on notice that they need assistance and that the need is related to their disability. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. Kan. 1999)
- ✓ **Don't insist on a "diagnosis"**. The ADAAA protects persons with "impairments". Nothing in the statute requires a specific diagnosis, although a diagnosis may assist in determining the impairment, substantial limitation and major life activity. Being diagnosed with a medical condition does not mean that you are impaired in a major life activity. Conversely, one can be impaired without being given a particular diagnosis.
- ✓ **Be flexible**. While the employer is able to choose the accommodation, given the choice between reasonable accommodations, don't make the accommodation process adversarial in nature. Reach out to the employee. Empathize. Ask questions about the employee's limitations. This is part of the interactive process required.
- ✓ **Make your requirements clear & put them in writing**. If an essential function of a job is to lift 50 pounds, then say so in the job description. If your company requires a doctor's note to justify time off work for medical treatment, put that in the handbook (followed by training on this rule).
- ✓ **Document, Document, Document**. If you told the employee seeking accommodation to provide a medical document by January 1, 2015, then follow up your conversation with an email, letter, etc.