

## MPLOYMENT & MMIGRATION LAW

# Courts Weigh In On Analysis Of Disabilities

DEFENSE COUNSEL CONTINUE TO CHALLENGE WHETHER PLAINTIFFS QUALIFY UNDER ADA

By **PETER J. MURPHY**

In 2008, Congress passed the Americans with Disabilities Amendment Act (ADAAA) after two U.S. Supreme Court decisions had narrowed the numbers of individuals who could qualify as disabled under the Americans with Disabilities Act.

With the passage of the ADAAA, Congress determined that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Although Congress did not want “extensive analysis” after the ADAAA, recent court opinions demonstrate that courts continue both to conduct analysis on this issue, and, more importantly, dismiss discrimination claims when a plaintiff cannot demonstrate that he or she is actually disabled. Moving forward, employers should continue to challenge alleged disabilities in appropriate cases, and plaintiffs must be prepared to establish the bona fides of their disability.

### Proof Of Disability

One recent appellate court opinion provided guidance on the proper way

to instruct a jury in post-ADAAA cases. In that case, the district court had instructed the jury that the predicate question for its consideration was whether the plaintiff was a “qualified individual with a disability.” After the jury answered that question in the negative, the plaintiff appealed to the U.S. Court of Appeals for the Fifth Circuit. In his appeal, the plaintiff contended that the jury instruction — which was based on the Fifth Circuit’s pre-ADAAA model instructions — conflicted with the ADAAA’s use of the more limited phrase “qualified individual.”

In a December 2013 opinion, the Fifth Circuit soundly rejected this argument. Despite congressional intent to increase the number of individuals considered disabled under the ADA, the Fifth Circuit noted that the changes made by the ADAAA “in no way eliminated the term [qualified individual with a disability] from the ADA or the need to prove a disability on a claim of disability discrimination.”

A key element of ADA claims continues to be that the plaintiff is a qualified individual with a disability.



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Or, as the Fifth Circuit aptly stated, “though the ADAAA makes it easier to prove a disability, it does not absolve a party from proving one.” Moving forward, therefore, employers must continue to challenge conclusory allegations of disability.

### Successful Challenge

Anticipating rulings such as this one issued by the Fifth Circuit, de-

fense lawyers have continued to file motions arguing that plaintiffs are not disabled since the passage of the ADAAA. Despite the broad language of the ADAAA, those motions continue to be successful.

For example, one district court judge in Kentucky recently dismissed a plaintiff's ADAAA claims based on her failure to allege facts that supported an actual disability. In that case, the plaintiff alleged that she had a host of medical conditions, such as arthritis, bursitis, and disabilities. Other than the mere fact that she had those conditions, however, she did not set forth any allegations about the nature of her alleged disability, or how it limited any of her major life activities. In other words, her allegation of being disabled was wholly conclusory, and subject to a motion to dismiss under the ADAAA.

A district court judge in Illinois reached a similar conclusion in a case brought by a pro se litigant who had been fired immediately after telling his boss he needed to leave work to get medical attention for a blood pressure problem that was causing a problem with his eye. The district court found that the plaintiff's allegations demonstrated only a transitory and suspect medical condition — not a disability.

On appeal, however, the U.S. Court of Appeals for the Seventh Circuit reversed, concluding that this episodic flare-up of the plaintiff's longstanding problem with blood pressure stated a plausible disability claim — especially since

the ameliorative effects of his medication could no longer be considered under the ADAAA's changes. Although this case survived on appeal, it nevertheless demonstrates that district courts remain receptive to motions to dismiss disability discrimination claims even after the passage of the ADAAA.

### Medical Issues

The same holds true for motions for summary judgment, where district courts have a full evidentiary record before them. In such cases, defendants continue to argue successfully that a plaintiff cannot demonstrate that he or she is disabled. In a recent Pennsylvania case, the plaintiff had a string of unfortunate medical issues and personal developments: she reported that she was treating for anxiety and depression; she took a leave of absence to care for her daughter, who had recently overdosed; she reported she had her own issues with drugs and alcohol; she was in a car accident and had surgery on her back.

During this time, the plaintiff also had ongoing, documented performance issues. After several significant mistakes, the employer decided to terminate her employment. That same day, the plaintiff called out sick, telling her supervisor she was going to make an appointment to see her doctor. Nevertheless, she was terminated.

The district court agreed that, as noted above, the plaintiff had a long history of medical issues. The only medical issues she contended

were disabilities, however, were her depression and her attention deficit disorder (ADD). The factual record did not support those allegations, as there was no evidence of an actual diagnosis of depression, or evidence that her employer was aware of such a diagnosis.

Although the plaintiff was diagnosed with ADD after her termination, there was no evidence that she had that diagnosis during her employment or that her ADD substantially limited any major life activity. In other words, even under the relaxed standard set forth in the ADAAA, the plaintiff's disability claims failed because it was based on "nothing other than her speculative and subjective belief[s]."

As these cases demonstrate, employers may still challenge whether an employee has a recognizable disability, and employees must be prepared to demonstrate that their condition meets even the more liberal definitions under the ADAAA. When employees cannot meet that burden, disability discrimination cases will continue to be dismissed by federal judges.

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