

# THE ADA AND THE BAR EXAM

*by Judith A. Gundersen*

**O**n September 25, 2008, President Bush signed the ADA Amendments Act of 2008 (ADAAA) into law, with an effective date of January 1, 2009. The ADAAA amends the Americans with Disabilities Act of 1990 (ADA) and expands the number of people covered by ADA protections.

This article provides a brief overview of the original ADA and two major cases that interpreted the ADA prior to its recent amendment to put the ADAAA's changes in context. It also compares the two versions of the act, discusses how the ADAAA may affect bar exam accommodations requests and procedures, and offers suggestions for boards of bar examiners to ensure that their procedures for determining whether to grant testing accommodations comply with the new law.

## WHY THE PERCEIVED NEED FOR CHANGES TO THE ADA?

The short answer regarding the perceived need for changes to the ADA is that the disability rights community and many members of Congress believed that the U.S. Supreme Court had interpreted the ADA too narrowly in a series of cases that involved the ADA's employment-related provisions. As noted in Congress's introductory language to the ADAAA, these narrow interpretations resulted in excluding

many more people from the act's protection than Congress had intended. The ADAAA is intended to override those Supreme Court and lower court decisions and to restore what was purportedly the original intent of Congress in enacting the ADA; with the ADAAA, Congress has sought to "reinstat[e] a broad scope of protection to be available under the ADA."<sup>1</sup> The ADAAA reflects this not by significantly rewriting the act but by clarifying how the act is to be interpreted and applied, thereby effectively expanding the scope of the ADA's coverage to more people.

When it enacted the ADA in 1990, Congress sought "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>2</sup> The ADA prohibits disability-based discrimination in employment (Title I); state and local government activities (Title II); public transportation (Title IIB); public accommodations, including those afforded by businesses and nonprofit service providers (Title III); entities providing courses and examinations (Title III); and telecommunications (Title IV). Title I is enforced by the Equal Employment Opportunity Commission (EEOC), Title II by the Department of Transportation and the Department of Justice (DOJ), Title III by the DOJ, and Title IV by the Federal Communications Commission.<sup>3</sup> Licensing examinations such as the bar exam are subject to the ADA under Titles II and III.<sup>4</sup>

## DEFINITION OF DISABILITY

Under the ADA and the ADAAA, a disability is “(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment....”<sup>5</sup> This article will focus on portion (A) of the definition, as it is under that definition that bar examiners make decisions about granting testing accommodations. Many court decisions have parsed this definition and applied it to a range of impairments (both physical and mental) in employment, testing, and other contexts. Of particular interest to many bar examiners is its application to learning disabilities and attention deficit disorders, which frequently provide the basis for accommodations requests on bar exams.

## EARLIER DECISIONS INVOLVING INTERPRETATION OF THE TERM “DISABILITY”

In *Toyota Manufacturing Co., Kentucky, Inc. v. Williams*,<sup>6</sup> the Supreme Court held that the term “disability” had to be “interpreted strictly to create a demanding standard.” Applying this approach, the Court held that to be substantially limited in performing manual tasks, a person “must have an impairment that prevents or severely restricts [him or her] from doing activities that are of central importance to most people’s daily lives.”<sup>7</sup> Thus, in *Toyota*, because the plaintiff could perform basic household tasks and attend to personal hygiene notwithstanding carpal tunnel syndrome and tendinitis, the Court concluded that she was not “disabled” under the ADA, even though her conditions made her unable to work in the Toyota assembly line.<sup>8</sup>

In *Sutton v. United Air Lines, Inc.*,<sup>9</sup> the Supreme Court held that a determination of whether a person had a disability under the ADA had to take into

account mitigating measures: “A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity.”<sup>10</sup>

## THE ADAAA VERSUS THE ADA

Although the ADAAA has not changed the ADA’s core definition of disability as a “physical or mental impairment that substantially limits one or more major life activities,”<sup>11</sup> in response to *Sutton*, *Toyota*, and other U.S. Supreme Court and lower court decisions, Congress has changed how this definition is to be interpreted and applied. With the amendments, Congress has made it clear that it is setting a new standard for construing the term “disability” and that establishing a qualifying disability should not be as onerous a burden. “[D]isability’ . . . shall be construed in favor of broad coverage of individuals under this chapter....”;<sup>12</sup> “the primary object of attention in cases . . . under the ADA should be whether entities . . . have complied with their obligations, and . . . whether an individual’s impairment is a disability under the ADA should not demand extensive analysis....”<sup>13</sup> In its findings and purposes section introducing the ADAAA, Congress explicitly rejects the Supreme Court’s focus on the word “substantially” in “substantially limits” and its view of “major life activity” as set forth in *Toyota*.<sup>14</sup> The ADAAA also dispenses with the *Sutton* directive regarding mitigating measures and now instructs that whether an impairment substantially limits a major life activity is to be determined without regard to the ameliorative effects of mitigating measures.<sup>15</sup>

Not only has Congress rejected judicial interpretation of these extensively litigated ADA terms, but it has also added language to the ADAAA to effect broader coverage. For example, the ADAAA now

**Comparison of Key Terms  
as Applied by the ADA versus the ADAAA**

Terms	ADA and Case Law	ADAAA
Disability	– “(A) a physical or mental impairment that substantially limits one or more major life activities...”	– Same language, but to be more broadly interpreted
Substantially Limits	Per <i>Toyota</i> : – Strictly interpreted to create a demanding standard for qualifying as disabled – Impairment must prevent or severely restrict an individual from doing activities central to most people’s daily lives	– Current EEOC definition of “substantially limits” as “significantly restricting” sets too high a standard; must be revised to be consistent with the ADAAA – Clarifies that an impairment that substantially limits one major life activity need not limit other major life activities to qualify as a disability
Major Life Activities	– Code of Federal Regulations nonexhaustive list of 9 major life activities – <i>Toyota</i> defined major life activities as “of central importance to most people’s daily lives”	– Statutory nonexhaustive list of 18 major life activities, including reading, concentrating, communicating, and thinking – Added statutory nonexhaustive list of major bodily functions
Ameliorative Effects of Mitigating Measures	Per <i>Sutton</i> : – Must be considered in determining whether an impairment substantially limits a major life activity	– <i>May not</i> be considered in determining whether an impairment substantially limits a major life activity
Impairments That Are Episodic or in Remission	– Some courts held that unless a condition was active, no accommodation was warranted	– Clarifies that a condition must be considered as if active

includes a nonexhaustive list of 18 major life activities. Under the ADA, the only list of examples of major life activities was found in the accompanying regulations, and it was a narrower list.<sup>16</sup> The now statutory list includes reading, concentrating, communicating, and thinking as examples of major life activities.<sup>17</sup> It also adds as major life activities “major bodily functions,” including digestive, bowel, bladder, neurological, and brain functions.<sup>18</sup> The ADAAA also clarifies that an episodic impairment or one in remission qualifies as a disability “if it would substantially limit a major life activity when active.”<sup>19</sup> Under the new law, mitigating measures (other than contact lenses or glasses), such as medication or devices or “learned behavioral or adaptive neurological modifications,” are *not* to be considered in determining whether someone has an impairment that substantially limits a major life activity.<sup>20</sup> Congress has also ordered the EEOC to amend its regulations to comport with the new law, stating that current EEOC enforcement regulations interpreting “substantially limits” as “significantly restricting” set too high a standard.<sup>21</sup> Finally, the ADAAA clarifies that an impairment need only substantially limit one—not more than one—major life activity.<sup>22</sup>

*Toyota* and *Sutton* and their progeny were employment cases, and the ADAAA was enacted in response to these cases. However, the ADAAA is not limited to the employment context and will impact all entities and activities covered under the ADA, which include the review of accommodations requests for the bar exam.

Source: 42 U.S.C. § 12101–12102 note: Findings and Purposes of ADA Amendments Act of 2008 (2008) (effective January 1, 2009).

## WHAT THESE CHANGES MEAN FOR BAR EXAM ACCOMMODATIONS

Not everything changes under the ADAAA. Under both the old and the new laws, to determine if an individual is disabled under the first prong (“substantially limits”) of the ADA, the inquiry is (1) is there a physical or mental impairment? and (2) does the impairment “substantially limit” a major life activity? The fact that an individual has been diagnosed with an impairment doesn’t necessarily mean that he or she has a disability within the meaning of the act. And nothing in the ADAAA changes the requirement that accommodations must be “reasonable” in light of the nature of the disability.<sup>23</sup>

Further, the ADAAA contains nothing in its findings and purposes or rules of construction changing the comparison group—the average person—for determining whether someone is “substantially limited.” Indeed, in the Statement of the Managers to Accompany S. 3406, “[a] person is considered an individual with a disability . . . when [one or more of] the individual’s important life activities are restricted as to the condition, manner, or duration under which they can be performed *in comparison to most people*.”<sup>24</sup> (emphasis added) With respect to learning disabilities, the Report of the House Committee on Education and Labor states that “. . . the comparison of individuals with specific learning disabilities to ‘most people’ is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual’s impairment limits a major life activity.”<sup>25</sup>

Thus, in the frequently encountered context of requests based upon diagnosis of a learning disability or attention deficit disorder, it still seems reasonable to conclude, for example, that an applicant

who achieved average scores on standardized tests without receiving extra testing time or other accommodations and whose supporting documentation generally shows average performance compared to the average person in the general population is not disabled under the ADA even as amended by the ADAAA.

At the same time, a greater number of individuals will probably be able to show that they are disabled under the ADAAA given Congress’s intent of making it easier to establish a qualifying disability. Thus, for boards of bar examiners, the focus will shift in some cases from whether an applicant has a disability within the meaning of the ADAAA to whether an applicant with a qualifying disability is entitled to accommodations and, if so, which accommodations are appropriate. And the addition of reading, concentrating, communicating, and thinking—some of the very skills that are tested in a licensing examination—to the list of major life activities will likely mean that more applicants will seek accommodations such as added time, off-the-clock breaks, and private testing rooms. Whether such accommodations are reasonable depends on each individual situation and on whether providing such accommodations would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden.”<sup>26</sup>

There are still many unanswered questions about how to apply the ADAAA and what impact it will have on licensing examinations. For example, the extent to which mitigating measures or devices, which *cannot* be considered in determining whether a person has a disability, may be considered in determining whether accommodations are warranted has not yet been expressly addressed by a

court. For example, diabetes may be a disability under the ADAAA even if its effects are mitigated, but if a diabetic applicant uses an insulin pump and does not need food or blood sugar testing breaks, is an accommodation of additional testing time required? Presumably not, as the entire purpose of an accommodation is to address the functional limitation(s) that result from the applicable impairment. If a medication already addresses those limitations, an accommodation should not be required. It is also unclear just what “learned behavior or adaptive neurological modifications” means as used in the ADAAA’s examples of mitigating measures. Also, how does one reconcile Congress’s emphasis that there be less inquiry about whether someone has a qualifying disability with the continued need to confirm that someone indeed has a substantial limitation in a major life activity, particularly in the learning disability/ADHD context? Some guidance may come from DOJ and/or EEOC regulations, particularly 28 C.F.R. § 36.309, Examinations and Courses, but it is not known when the regulations will be updated in response to the ADAAA.<sup>27</sup>

For boards in some states, the ADAAA may not have much of an impact on the evaluation of requests for testing accommodations if their state disability laws are already consistent with the standards of the ADAAA, and if the boards process their accommodations requests according to such state disability laws.<sup>28</sup>

## WHAT SHOULD BAR EXAMINERS DO IN RESPONSE TO THE ADAAA?


The first thing a board might want to do is review its current accommodations rules, forms, and procedures to see if they need to be updated to comport with the changes in the law, particularly as

to how key terms are defined. For example, the Pennsylvania Board of Law Examiners’ accommodations application and instructions had defined a “substantial limitation” as “significantly restricting,” tracking Supreme Court and EEOC language. Under the ADAAA, that definition was viewed as arguably being too restrictive, so the Pennsylvania Board has changed the language to simply track the actual language of the ADA. The Board has also eliminated language concerning consideration of mitigating measures in determining the existence of a disability.<sup>29</sup>

Second, a board should designate someone as its ADA point person to keep it informed about court decisions interpreting the significance of the ADAAA and other ADA news. Such updates can be obtained from Westlaw and Lexis and also from the DOJ, either by viewing the automatic updates that the DOJ provides on its ADA home page ([www.ada.gov](http://www.ada.gov)) or by signing up for its e-mail alerts. Of particular interest is whether new regulations will be adopted, including possible changes to 28 C.F.R. § 36.309(b) pertaining to requirements for private entities offering examinations or courses. As discussed above, there are many unresolved issues, and keeping track of developments will be helpful.

Third, staff and board members should be trained to ensure that all participants in the accommodations review process know what the ADAAA changes are and how those changes may affect their procedures and decisions. This training should include advice on communicating with applicants regarding their accommodations requests and information about changes in how the act is to be applied to those requests.

The ADAAA has altered the general ADA landscape but may not result in significant changes in the

long run with regard to testing accommodations. Nonetheless, boards of bar examiners will need to keep informed and share information as the ADAAA is applied and interpreted. 

## ENDNOTES

1. 42 U.S.C. § 12101 note: Findings and Purposes of ADA Amendments Act of 2008 (b)(1) (2008) (effective January 1, 2009).
2. 42 U.S.C. § 12101(b)(2).
3. *Id.* §§ 12117, 12188; 47 U.S.C. 225(e); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999); U.S. DEPARTMENT OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (2005).
4. 42 U.S.C. §§ 12131(1)(A),(B), 12189 (2008) (effective January 1, 2009).
5. *Id.* § 12102(1)(A)–(C).
6. *Toyota Manufacturing Co., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
7. *Id.* at 198.
8. *Id.* at 202.
9. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).
10. *Id.* at 482–3.
11. 42 U.S.C. § 12102(1)(A) (2008) (effective January 1, 2009).
12. *Id.* § 12102(4)(A).
13. *Id.* § 12101 note: Findings and Purposes of ADA Amendments Act of 2008 (b)(5).
14. *Id.* § 12101 note: Findings and Purposes of ADA Amendments Act of 2008 (a)(7).
15. *Id.* § 12101 note: Findings and Purposes of ADA Amendments Act of 2008 (b)(2).
16. “The phrase major life activities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 28 C.F.R. § 35.104 (2008).
17. 42 U.S.C. § 12102(2)(A) (2008) (effective January 1, 2009).
18. *Id.* § 12102(2)(B).
19. *Id.* § 12102(4)(D).
20. *Id.* § 12012(4)(E)(i),(ii).
21. *Id.* § 12101 note: Findings and Purposes of ADA Amendments Act of 2008 (b)(6).
22. *Id.* § 12102(4)(C).
23. *Id.* § 12111(9).
24. Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008, 110 CONG. REC. S8842 (2008).
25. REPORT ON THE ADA AMENDMENTS ACT OF 2008 OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, CONG. REP. NO. 110-730, pt. 1, at 10 (2008). *See also* *Singh v. George Washington University School of Medicine and Health*, 508 F.3d 1097 (2007).
26. 28 C.F.R. § 36.309(b)(3).
27. The EEOC will be evaluating the impact of the ADAAA on its enforcement guidances and other policy documents addressing the ADA. The U.S. Equal Employment Opportunity Commission, Selected Enforcement Guidances and Other Policy Documents on the ADA, <http://www.eeoc.gov/ada/adadocs.html> (last visited April 29, 2009).
28. 42 U.S.C. § 12201(b) (2008) (effective January 1, 2009). *See, e.g.*, California and New Jersey disability laws: Cal. Civ. Code §§ 54–55.2.; New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-4.1, *see* New Jersey Division on Civil Rights, Fact Sheet, Visual Impairment and Discrimination: Your Rights Under the New Jersey Law Against Discrimination, <http://www.nj.gov/oag/dcr/downloads/visionfactsheet.pdf> (last visited April 29, 2009).
29. Pennsylvania Board of Law Examiners, Nonstandard Testing Accommodations Application and Instructions for the July 2009 Bar Examination, [http://www.pabarexam.org/Application\\_Information/Applications/PDFS/203-205/NTAapp.pdf](http://www.pabarexam.org/Application_Information/Applications/PDFS/203-205/NTAapp.pdf) (last visited April 1, 2009).



JUDITH A. GUNDERSEN is the Deputy Director of Testing for the National Conference of Bar Examiners. She joined the Conference in October of 2000, taking on primary responsibility for the Multistate Essay Examination and the Multistate Performance Test. Gundersen received her J.D. from the University of Wisconsin Law School.