

***EEO LAWS  
A Refresher Course***

LULAC National Convention and Exposition  
Cincinnati, Ohio  
June 27- July 2, 2011

***Disability Discrimination***

Americans with Disabilities Act Amendments Act of  
2008 (ADAAA)

## **ADAAA of 2008**

---

- Went into effect on January 1, 2009
- Not retroactive
- All provisions of the Amendments Act apply to the Rehabilitation Act

## **EEOC REGULATIONS [29 C.F.R. part 1630]**

---

- Published in the Federal Register on March 25, 2011
- Effective Date: May 24, 2011
- Regulations closely track the statute
- Published along with revisions to interpretive guidance issued with the original regulations (“appendix”)
- EEOC revised only those portions of the regulations and appendix affected by ADAAA.

## **Why Did Congress Amend the ADA?**

- Congress intended the ADA definition of disability to be construed broadly but courts were finding too many people outside the ADA's protection
- Congress wanted to make it much easier for persons with a wide range of impairments to establish disability without much analysis

## **What the ADAAA Does Not Change**

- The terms "impairment" and "qualified"
- Reasonable accommodation (except that individuals covered only under the "regarded as" prong are not entitled to accommodation)
- Undue hardship
- "Direct threat" standard
- Rules concerning disability-related inquiries and medical exams and confidentiality

## **Definition of “Disability” [29 C.F.R. part 1630.2(g)]**

---

- Same basic three-part definition:
  - A physical or mental impairment that substantially limits a major life activity; or
  - A record of such impairment; or
  - Being regarded as having a disability
- However, Congress changed the meanings of key terms used in these definitions.

## **Changes on the Definition of Disability**

---

- Specifically reject high standards used by EEOC and Supreme Court to define “Substantially Limits”
- “Major Life Activities” expanded to include “major bodily functions”
- Positive effects of mitigating measures (except ordinary eyeglasses and contact lenses) cannot be considered in determining “substantial limitation”
- Impairment can be substantially limiting even if episodic or in remission
- “Regarded as” definition rewritten and expanded.

## **Substantially Limits**

### **[29 C.F.R. part 1630.2(j)(1)]**

---

- Substantial limitation shall be construed broadly in favor of expansive coverage.
- Impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting. Nonetheless, not every impairment will be a disability.
- Extensive analysis not required: Primary focus should be on a person's qualification for a job, need for reasonable accommodation, or whether discrimination occurred.

## **Substantially Limits II**

---

- Individualized assessment still required.
- Comparison of ability to perform major life activity to most people usually will not require scientific, medical or statistical evidence, though presentation of such evidence is not prohibited.
- Ameliorative effects of mitigating measures shall not be considered.

## **Substantially Limits III**

---

- Impairments that are episodic or in remission can be prong one disabilities if the individual is substantially limiting when the condition is active.
- Individual need only be substantially limited in one major life activity (either list) to have a prong one disability.
- No minimum duration requirement; impairment lasting six months or less may be substantially limiting.

## **Major Life Activities**

### **”[29 C.F.R. part 1630.2(i)]**

---

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.
- Functions of the immune system, special sense organs and skin, normal cell growth; digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.
- Also includes operations of an individual organ within a body system, such as the operation of kidney, liver, or pancreas.

## **Mitigating Measures**

### **[29 C.F.R. part 1630.2(j)(5)]**

---

- Medication (e.g. insulin, anti-depressants, anti-seizure medications, etc.);
- medical supplies, equipment, or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies;
- use of assistive technology (e.g. telephone audio device, computer screen reading program , etc.);
- reasonable accommodations or auxiliary aids or services; and
- learned behavioral or adaptive neurological modifications

## **Ordinary Eyeglasses or Contact Lenses**

### **[29 C.F.R. Part 1630.2(j)(6)]**

---

- Lenses that are “intended to fully correct visual acuity or eliminate refractive error” are considered when determining whether someone has a disability.
- Distinguished from low vision devices, which are devices that “magnify, enhance, or otherwise augment a visual image”

## **Episodic or In Remission**

---

- An impairment that is episodic or in remission is a disability if it would be substantially limiting when active.
- Impairments that may not affect a person 24/7 but which periodically flare up: multiple sclerosis, epilepsy, bipolar disorder and cancer.

## **Impairments that Usually Will Not Be Disabilities**

---

- Temporary, non-chronic impairments of short duration with little or no residual effects are usually not disabilities.
- Examples:
  - the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely.



## **“Record of” a Disability**

---

- Not changed under Amendments Act.
  - Protects an individual who may have had a physical or mental impairment that substantially limited a major life activity in the past but no longer does.
  - EEOC’s long-held position is that accommodation is available for “record of” if still needed.

## **“Regarded As”**

---

- *No longer requires* a showing that employer perceived the individual to be substantially limited in a major life activity.
- Covers anyone subjected to an action prohibited by the ADA based on an actual or perceived impairment that is not transitory (lasting or expected to last six months or less) and minor.
- No *accommodation* if only regarded as.

## **“Regarded As” Examples**

---

- Not hired due to broken leg or sprained wrist expected to heal normally – not “regarded as”
- Not hired due to carpal tunnel syndrome or Hepatitis C – regarded as.
- Terminated due to condition employer misperceives as heart disease – regarded as.

## **Qualification Standards Based on Uncorrected Vision**

---

- Employers must demonstrate that a challenged qualification standard based on uncorrected vision is **job-related and consistent with business necessity.**(29 C.F.R. PART 1630.10(B))
- Although a person challenging such a standard does not need to establish that he/she meets the definition of disability, individual would likely be covered under the “regarded as” prong.

## **Other Provisions**

---

- The phrase “discriminate on the basis of a disability” replaces “discriminate against a qualified individual with a disability because of the disability of such individual.”
- Individual may not bring an ADA claim based on lack of disability.

## ***GENETIC DISCRIMINATION***

*Genetic Information  
Nondiscrimination Act  
of 2008*

## **REHABILITATION ACT AND GINA**

---

- Rehab Act prohibits discrimination on the basis of manifested conditions that meet the definition of disability.
- GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition.

## **Purposes**

---

- Enacted in response to:
  - Developments in the field of genetics and advances in genomic medicine.
  - Concerns that people were not taking advantage of genetic tests that could provide beneficial information because of concerns about discrimination by insurers or employers.

## **Basic Rules**

---

- Guarantees a workplace free of discrimination on the basis of genetic.
- Restricts the acquisition of genetic information by employers covered by GINA.
- Requires employers to keep genetic information confidential (with limited exceptions).

## **Coverage**

---

- GINA applies to:
  - Employers covered under Title VII
  - Federal executive branch agencies
  - State and local governments
  - Executive Office of the President
  - US House and Senate

## **Genetic Information Part I**

---

- **Genetic Information Is:**
  - Information about an individual's genetic tests.
  - Genetic test of family members.
  - The manifestation of a disease or disorder in family members (family medical history).

## **Genetic Information Part II**

---

- **Genetic Information also includes:**
  - Request for or receipt of genetic services by an individual family member (such as genetic tests, counseling and education).
  - Genetic information of a fetus carried by an individual or family member or embryo legally held by the individual or family member using assistive reproductive technology.

## **Genetic Information Does NOT Include**

---

- Information about an individual's or family member's age or gender.
- The fact that an individual currently has a condition (this would be covered by Rehabilitation Act).

## **Acquisition of Genetic Information Prohibited**

---

### **But There are Six Exceptions**

1. Employer is protected if it unwittingly receive prohibited genetic information.
2. Permissible to acquire genetic information through employer-sponsored health services.
3. Permissible to acquire family medical history under FMLA.

## **Acquisition of Genetic Information Prohibited**

---

### **But There are Six Exceptions**

4. Through commercially and publicly available documents.
5. Through genetic monitoring but stringent requirements must be met.
6. Through DNA testing for law enforcement purposes in forensic laboratories or human remains identification.

## **Confidentiality**

---

- Beginning on November 21, 2009, genetic information must be kept in confidential and separate medical file (such as Rehabilitation Act files).
- Limited disclosure, some similar to ADA rules, others unique to GINA.



## **Remedies**

---

- GINA's remedies are modeled on Title VII and provides:
  - Equitable relief (including injunctive and backpay).
  - Compensatory damages (up to \$300,000 for federal workers).
  - Punitive damages not available for federal employees.

## ***Federal EEOC CASE UPDATE***

Significant Appellant  
Decision

## Significant cases:

---

- **Wiggins v. USPS**, EEOC Appeal No. 0720100022 (January 13, 2011), the Commission affirmed an AJ's decision finding race and color discrimination when complainant was not selected for a promotion.
- **Bennett v. USPS**, EEOC Appeal No. 0120073097 (January 11, 2011), the Commission held that the Agency's release of Complainant's confidential medical information constituted a violation of the Rehabilitation Act.
- **Bustamante v. USPS**, EEOC Appeal No 0120080104 (December 10, 2010), the Commission found that the Agency discriminated against Complainant on the bases of his national origin (Hispanic) and sex when it terminated him during his probationary period.

## Significant Cases:

---

- **Robledo v. DHS**, EEOC Appeal No. 0120073884 (November 18, 2010), the Commission found that the Agency failed to provide Complainant with a reasonable accommodation for his religious beliefs..
- **Chastain v. Navy**, EEOC Appeal No. 0120102409 (November 17, 2010), Req. for Reconsideration Denied No. 0520110240 (March 31, 2011), an AJ found that Complainant was forced to resign *in lieu* of a termination based upon reprisal discrimination.
- **Padilla v. USPS**, EEOC Appeal No. 0120090062 (September 21, 2010), the Commission found that Complainant was entitled to the requested award of \$165,000 in light of the emotional distress suffered.
- **Mercedes v. DOJ**, EEOC Appeal No. 0120102127 (September 17, 2010), Req. for Reconsideration Denied No. 0520110053 (December 15, 2010), the Commission found the Agency failed to take prompt and corrective action on a claim of co-worker harassment.

## **Virginia Andreu**

---

Attorney Advisor  
Agency Oversight Division  
Equal Employment Opportunity Commission  
Tel (202) 663-4575  
[virginia.andreu-rosario@eeoc.gov](mailto:virginia.andreu-rosario@eeoc.gov)