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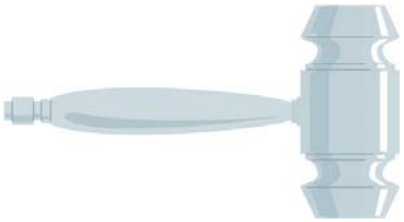

By Michael I. Levin, Esq., PAESSP General Counsel

Congress Expands Protections for Employees with Health Conditions

On Sept. 5, 2008, President Bush signed into law the ADA Amendments Act of 2008 ("ADA Amendments"). The ADA Amendments significantly expand the number of employees[1] protected by the ADA. Fundamentally, the thing for principals and other school administrators to keep in mind is that ameliorating factors that may overcome disabling conditions, such as medication or hearing aids, cannot be taken into account in determining whether an individual is disabled as defined in the law. Moreover, it is not clear whether employers may continue to require employees to present a doctor's note before returning to work.

To place the ADA Amendments in proper context, the Americans with Disabilities Act was enacted in 1990 after Congress found that there were "some 43,000,000 Americans [who] have one or more physical or mental disabilities" and that these individuals faced discrimination that Congress described as a "pervasive social problem." 42 U.S.C.A. §12101. Congress defined the term "disability" in 1990 as follows:

> "The term "disability" means, with respect to an individual—
> **(A)** a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> **(B)** a record of such an impairment; or
> **(C)** being regarded as having such an impairment." 42 U.S.C.A. §12102.

An issue that arose under this definition was whether ameliorating factors should be taken into account when determining whether an individual had a physical or mental impairment that substantially limited a major life activity. For example, in *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), severely myopic job applicants brought a disability discrimination action against an airline under ADA challenging the airline's minimum vision requirement for global pilots. The Supreme Court held that: **(1)** corrective and mitigating measures should be considered in determining whether individual is disabled under ADA; **(2)** the applicants were not disabled under ADA when taking corrective or mitigating measures into account; and **(3)** the applicants failed to state claim that the airline regarded them as disabled in violation of ADA. In reaching these conclusions, the court said:

> "Three separate provisions of the ADA, read in concert, lead us to this conclusion. The Act defines a "disability" as "a physical or mental impairment that *substantially limits* one or more of the major life activities" of an individual. § 12102(2)(A) (emphasis added). Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently - not potentially or hypothetically - substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could" or "would" be substantially limiting if mitigating measures were not taken. 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. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.
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> The definition of disability also requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the "major life activities of such individual." § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott,* 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA); 29 CFR pt. 1630, App.§ 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the per-

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son has, but rather on the effect of that impairment on the life of the individual").

The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

The guidelines approach could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe. See, *e.g.,* Johnson, Antipsychotics: Pros and Cons of Antipsychotics, RN (Aug. 1997) (noting that antipsychotic drugs can cause a variety of adverse effects, including **neuroleptic malignant syndrome** and painful seizures); Liver Risk Warning Added to Parkinson's Drug, FDA Consumer (Mar. 1, 1999) (warning that a drug for treating **Parkinson's disease** can cause **liver damage**); Curry & Kulling, Newer Antiepileptic Drugs, American Family Physician (Feb. 1, 1998) (cataloging serious negative side effects of new antiepileptic drugs). This result is also inconsistent with the individualized approach of the ADA.

Finally, and critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." § 12101(a)(1). This figure is inconsistent with the definition of disability pressed by petitioners." *Id.* at 484.

A second major decision by the United States Supreme Court under the ADA as originally enacted was *Toyota Motor*

Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), where the court held that: **(1)** to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives; **(2)** it is insufficient for individuals attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment; **(3)** it is not required that a class of manual activities be implicated for an impairment to substantially limit the major life activity of performing manual tasks; **(4)** the Court of Appeals applied wrong standard in determining whether employee's carpal tunnel syndrome caused her to be substantially limited in major life activity of performing manual tasks, when it focused on her inability to perform manual tasks associated only with her job; **(5)** the employee's inability to do repetitive work with hands and arms extended at or above shoulder levels was not sufficient proof that she was substantially limited in major life activity of performing manual tasks; and **(6)** medical conditions that caused employee to restrict certain activities did not constitute manual-task disability under ADA. In reaching these decisions, the Supreme Court stated:

The Court of Appeals' analysis of respondent's claimed disability suggested that in order to prove a substantial limitation in the major life activity of performing manual tasks, a "plaintiff must show that her manual disability involves a 'class' of manual activities," and that those activities "affec[t] the ability to perform tasks at work." See 224 F.3d, at 843. Both of these ideas lack support.

The Court of Appeals relied on our opinion in *Sutton v. United Air Lines, Inc.,* for the idea that a "class" of manual activities must be implicated for an impairment to substantially limit the major life activity of performing manual tasks. 224 F.3d, at 843. But *Sutton* said only that " *[w]hen the major life activity under consideration is that of working,* the statutory phrase 'substantially limits' requires ... that plaintiffs allege they are unable to work in a broad class of jobs." 527 U.S., at 491, 119 S.Ct. 2139 (emphasis added). Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been

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hesitant to hold as much, and we need not decide this difficult question today. In *Sutton,* we noted that even assuming that working is a major life activity, a claimant would be required to show an inability to work in a "broad range of jobs," rather than a specific job. *Id.,* at 492, 119 S.Ct. 2139. But *Sutton* did not suggest that a class-based analysis should be applied to any major life activity other than working. Nor do the Equal Employment Opportunity Commission (EEOC) regulations. In defining "substantially limits," the EEOC regulations only mention the "class" concept in the context of the major life activity of working. 29 CFR § 1630.2(j)(3) (2001) ("With respect to the major life activity of *working[,]* [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities"). Nothing in the text of the Act, our previous opinions or the regulations suggests that a class-based framework should apply outside the context of the major life activity of working.

While the Court of Appeals in this case addressed the different major life activity of performing manual tasks, its analysis circumvented *Sutton* by focusing on respondent's inability to perform manual tasks associated only with her job. This was an error. When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. Otherwise, *Sutton*'s restriction on claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a "class" of tasks associated with that specific job.

There is also no support in the Act, our previous opinions or the regulations for the Court of Appeals' idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace. Indeed, the fact that the Act's definition of "disability" applies not only to Title I of the Act, 42 U.S.C. §§ 12111-12117 (1994 ed.), which deals with employment, but also to the other portions of the Act, which deal with subjects such as public transportation, §§ 12141-12150, 42 U.S.C. §§ 12161-12165 (1994 ed. and Supp. V), and privately provided public accommodations, §§ 12181-12189, demonstrates that the definition is intended to cover individuals with disabling impairments regardless of whether the individuals have any connection to a workplace.

Even more critically, the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry. In this case, "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time," 224 F.3d, at 843, the manual task on which the Court of Appeals relied, is not an important part of most people's daily lives. The court, therefore, should not have considered respondent's inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks.

At the same time, the Court of Appeals appears to have disregarded the very type of evidence that it should have focused upon. It treated as irrelevant "[t]he fact that [respondent] can ... ten[d] to her personal hygiene [and] carr[y] out personal or household chores." *Ibid.* Yet household chores, bathing and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent was substantially limited in performing manual tasks." *Id.* at 199-200.

These holdings were significant, clear and helpful to employers. I suggest that they gave a reasoned interpretation to the ADA. However, for reasons that are not readily apparent and that did not receive much attention in the main stream media, Congress elected to overrule these decisions and to expand greatly the number of people protected by the ADA.

In enacting the ADA Amendments, Congress stated that its purpose in enacting the amendments are as follows:

> **(1)** to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;
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> **(2)** to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
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> **(3)** to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme

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Court in *School Board of Nassau County, Florida v. Airline,* 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';
(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and *to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis*; and
(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act." (italics added)

Congress added the following rule of construction to make it clear that it was intending to greatly expand the scope of those who are considered to have disabilities under the ADA. Congress said: "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." Congress also told the federal judiciary that it should not spend much time determining whether a person actually has a disability that meets the standards of the new definitions. Congress said: "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

The major change is to state that with one exception, whether a person has a disability is to be determined without consideration of ameliorative measures. The amendments also change the definition of a disability to make it clear that almost anything except perfect health will be considered to be a disability. The applicable definitions are as follows:

As used in this 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)).

(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.

(3) REGARDED AS HAVING SUCH AN IMPAIRMENT- For purposes of paragraph (1)(C):
(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:
(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

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(i) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

Under these provisions, virtually anyone who is on maintenance medication—i.e., anti-depressants, blood pressure medication, H^2 blockers and proton pump inhibitors (perhaps even erectile dysfunction medication)—are probably now covered as individuals with disabilities.

What does all of this mean for a principal or other school district administrator?

First, if an individual asks for an accommodation because of a medical condition (physical or mental), it is much more likely that the individual will qualify as an individual with a disability and the "interactive process" will have to be engaged in and properly documented to determine if the individual is entitled to any accommodations.[2] Second, it is likely that there will be increased litigation. For example, although it is clear that mitigating factors cannot be taken into account when determining if an individual has a disability, can they be taken into account when determining what accommodations are necessary? That seems to be unknown at this time. Third, it is arguable that employers no longer have the ability to prohibit employees from returning to work in some instances unless they have a doctor's note that they can return to work.[3] Allow me to explain.

As indicated previously in this article, one of the new provisions provides that: "[a]n individual meets the requirement of `being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." It seems to me that an argument can easily be made that if an employer refuses to allow an individual back to work after an absence unless the individual has obtained a doctor's note, that the employer is certainly regarding the individual as having such an impairment. Why else would the employer not allow the employee back to work unless the employer believes that the employee cannot perform the essential functions of the job with or without accommodations?[4] I suggest that public school entities and their administrators should consider whether to continue requiring return-to-work notes and, if so, under what circumstances.

Footnotes

[1] The ADA Amendments Act of 2008 clearly expands the rights of employees. However, the ADA applies to others in addition to employees. However, it is not clear at this point whether the amendments will have any significant effect, if any, on others. Moreover, there are other laws that protect disabled or handicapped individuals, such as Section 504 of the Rehabilitation Act of 1973 and the Pennsylvania Human Relations Act. It is unclear how, if at all, the ADA Amendments Act of 2008 will affect these other laws. Moreover, it is outside the scope of this article to address if and how these Amendments will affect how school districts respond to children under Chapter 15 of the State Board of Education Regulations and Service Agreements

[2] Employers have a mandatory duty to provide reasonable accommodations to workers with disabilities whose disabilities require accommodations in order to perform the essential functions of the position. As a result of this fundamental requirement, other requirements come into play. First, it is important to know what the essential functions of the job are. Second, the applicable regulations require that the employer and the employee engage in an "interactive process" to determine such things as whether the individual qualifies as an individual with a disability, the nature of the impair- ments that needs to be accommodated, and the types of accommodations that may be necessary. The following guidelines are provided by the Equal Employment Opportunity Commission as to how employers are to respond to a request for accommodation: 'When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should: (1) Analyze the particular job involved and determine its purpose and essential function; (2) Consult with the individual with the disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.' 29 C.F.R., Part 1630, Appendix, Section 1630.9.

[3] There are two types of doctor's notes that school districts typically ask of employees—(1) a note establishing that an absence was for a legitimate cause (i.e., that the employee was actually sick, injured or disable); and (2) a note that the employee can return to work (i.e., a fitness for duty certificate, if you will). The first type of note is of critical importance to ensure that employees are utilizing leave properly. My comments in this article have nothing to do with the first type of medical note and I do not see that the ADA Amendments will affect how school districts utilize such notes.

[4] This is a new concept that has not received much attention in the professional literature. Moreover, it may not be a legitimate contention in the case of transitory or short absences in light of the distinctions made in the ADA Amendments between impairments that last less than six months and impairments that last more than six months. Further, the interplay between the ADA and the FMLA is unknown as the FMLA expressly authorizes employers to obtain fitness for duty certificates under certain limited circumstances. On a related issue, there is a significant question whether "return-to-work" notes from doctors are ever justified. It is too easy for a patient to obtain such a note from the doctor's office. If there are questions as to the validity of the note, why require them. Finally, it use to be fairly common for employers to require employees to obtain a "full and complete" release from a doctor before allowing an employee back to work. That is not heard of as much anymore, but employers cannot ask for a full and complete release. An employee has the right to return to work as long as the employee can perform the essential functions of the job with or without reasonable accommodations. That means that an employee has a right to return to work, even with significant restrictions, as long as the employee can perform the essential functions of the job, with or without reasonable accommodations.