

EEOC's New ADA Regulation: What Does it Mean for People with HIV?

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On March 25, 2011, the Equal Employment Opportunity Commission issued a new regulation implementing the Americans with Disabilities Act, as amended in 2008. According to the EEOC, this new regulation is "intended to add to the predictability and consistency of judicial interpretations and executive enforcement of the ADA as now amended by Congress."

What does this new regulation mean for individuals with HIV in the workplace? Not very much, given that statutory protection for HIV as a disability is so clearly stated in the amended ADA itself. But keep in mind that the EEOC's regulation was authorized by Congress in the 2008 amendments to the ADA, and thus the EEOC's views on the ADA should be deferred to by the courts. This should reduce any risk that the ADA will be subject to judicial misinterpretation, as was so often the case with the ADA prior to its amendment in 2008.

Before I review the EEOC's new regulation, I have a few comments on its appearance in the [Federal Register](#) ^[1], where the new language for the regulation itself takes up a mere four pages (just the amended language of Part 1630 of Title 29 of the *Code of Federal Regulations*, not all of Part 1630, is included). It's accompanied by an eight-page Preamble in which the EEOC explains its consideration and acceptance or rejection of public comments received on the regulation in draft form. (Noteworthy is the [EEOC's acceptance](#) ^[2] of a comment asking that it refer to "HIV infection," not to "HIV and AIDS" – a change in nomenclature that reflects the concept of HIV infection as a disability, thus rendering the concept of AIDS superfluous in this context.) The regulation is accompanied by a Regulatory Procedures statement (another 13 pages) that explains the cost/benefit impact of the regulation, after which the EEOC presents its amended Interpretive Guidance (yet 14 more pages).

Appropriately enough, the EEOC makes this publication available in a large print, Braille, audio tape, and electronic file on computer disk. On the *Federal Register* web site, there's a web page that contains the entire 40-page publication, with internal links for each paragraph (which I used to link from this essay) and internal links from a table of contents. Nevertheless, I found that navigating this lengthy document is far from easy.

The *Federal Register* page also provides links to several electronic formats. In analyzing the regulation, I worked from the PDF version, and that too is a long and wearying slog. My favorite moment with the *Code of Federal Regulation* section and subsection numbering system is when the alphabetically labeled subsection with the lower case letter "i" bumps into the typographically identical lower case roman numeral one ("i") label. And the 8-point font, the three-column format that doesn't allow for indentation reflecting the sectional hierarchy of the document, the C.F.R. section and subsection labeling system – simply put, it's a typographical disaster area.

But I digress.

Returning now to the significance of the EEOC regulation, the ADA, as amended in 2008, very clearly covers HIV infection as a disability.

The logic that arrives at this conclusion can be expressed as this syllogism:

The ADA defines disability as an impairment that substantially limits major life activities such as the function of the immune system;

HIV is an impairment that substantially limits the immune system;

Therefore, HIV infection is a disability under the ADA.

Of course, there are other routes to finding that HIV infection is a disability under the ADA, but I

think this is the most direct and compelling one.

If anyone has any doubt that HIV substantially limits the functioning of the immune system – even for people with HIV who have low or non-detectable viral load – remember that the ADA requires that we assess this limitation without regard to the ameliorative effects of mitigating measures such as currently available medical treatments. Someone whose HIV disease is “controlled” through anti-retroviral meds, for example, must be considered as if she were not taking those meds – which of course would likely result in a devastating impact on immune system function resulting in severe symptoms of HIV disease and reduced life expectancy.

So although the ADA is clear that HIV is a disability, even without any interpretation by the EEOC, the EEOC does make three points that are valuable in understanding HIV as a disability under the ADA.

First – but perhaps least important – the [EEOC defines the term “impairment,”](#) ^[3] which is used, but not defined, by the ADA. I think this is the least important issue for people with HIV because the Supreme Court has already held, in [Bragdon v. Abbott](#) ^[4], that HIV is an impairment. Nevertheless, the EEOC regulation defines impairment to include any physiological disorder or condition affecting one of more body systems, such as the reproductive, immune, hemic, or lymphatic systems. HIV infection affects those body systems, and thus it is an impairment under the regulation.

Second, the EEOC explains that [individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage](#) ^[5] under the ‘actual disability’ prong or the ‘record of’ prong of the ADA. The EEOC then gives [this example](#) ^[6]: “Human Immunodeficiency Infection (HIV) substantially limits immune function.” The ADA itself does not refer to HIV – or any other health condition, for that matter. So what the EEOC has done is to show precisely how HIV should be analyzed as a disability. Also, in explaining that only *one* major life activity need be substantially limited in to establish disability, the [EEOC describes](#) ^[7] how “an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction.” The EEOC notes that there are no “per se” disabilities, yet I cannot think of how someone with HIV could *not* be found to have a disability under the ADA.

Third, the EEOC’s Interpretive Guidance (the appendix to 29 C.F.R. Part 1630) provides a good explanation of the 2008 ADA amendments to the “regarded as” disabled statutory prong. This provision is not specific to HIV in any way, but it is nonetheless very important for people with HIV – or any other disability. When Congress amended the “regarded as” prong, it required that an individual need only establish that he or she has been subjected to a discriminatory action 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, in order to state a claim. So when proceeding under the “regarded as” prong, the [EEOC explains](#) ^[8] that “it would not be necessary to determine whether the individual is substantially limited in a major life activity.” In short, [there is no “functional test”](#) ^[9] to determine limitation; to show that you were regarded as disabled, you only need show that you were regarded as having an impairment. As noted above, HIV infection is an impairment under the ADA. Of course, this protects people who are perceived to be HIV positive from discrimination, even if they do not in fact have HIV infection.

Note, however, that there is no right to reasonable accommodation under the “regarded as” prong; but for a discrimination claim that does not involve reasonable accommodation, this should be the preferred claim under the ADA. Because the amended ADA relies simply on the employer’s actions based on an actual or perceived impairment, the language – certainly familiar to most HIV advocates – in the 1991 version of the Interpretive Guidance that referred to “myths, fears, and stereotypes” as motivating an employer’s decision [has now been deleted](#) ^[10] as irrelevant.

So that you don’t need to slog through the entire new EEOC regulation and match its provisions to the parallel provisions in the ADA, I’ve prepared a [Reference Guide to HIV as an ADA Disability](#) ^[11] that covers the provisions covering HIV as a disability, with citations for each provision, which I hope is useful to practitioners.

While we can now rely not just on the ADA, but also the EEOC interpretation of it on the question of HIV as a disability, we should expect that employment discrimination disputes involving HIV will shift to other questions: Did the employer have a non-discriminatory reason for its action? Was the employer aware of the employee or applicant's HIV infection? Is the employee or applicant for employment qualified for the job? Is the accommodation requested by an employee a reasonable one?

Because the ADA and EEOC regulations convey so clearly that discrimination based on HIV status is unlawful, I hope that not only will employers be deterred from taking discriminatory actions, but that widespread acceptance of people with HIV in the workplace will become the norm.

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URL to article: http://aidsandthelaw.com/wp/?page_id=219

URLs in this post:

[1] Federal Register: <http://federalregister.gov/a/2011-6056>

[2] EEOC's acceptance: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-27>

[3] EEOC defines the term "impairment,":

<http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-305>

[4] Bragdon v. Abbott: <http://www.law.cornell.edu/supct/html/97-156.ZO.html>

[5] individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-325>

[6] this example: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-326>

[7] EEOC describes: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-459>

[8] EEOC explains: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-409>

[9] there is no "functional test": <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-499>

[10] has now been deleted: <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as#p-74>

[11] Reference Guide to HIV as an ADA Disability: http://aidsandthelaw.com/wp/?page_id=223