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The Americans with Disabilities Act Amendments Act and Polygraph Compliance Issues

Stanley M. Slowik

Abstract

The Americans with Disabilities Act Amendments Act, which became effective January 1, 2009, fundamentally changes the focus of disabilities laws. It does this by refocusing the law from the previous determinations of who qualifies to the employer's responsibilities to participate in the interactive process with the applicant to find a reasonable accommodation for claimed (e.g., pre-employment) or "should have known" (e.g., current employees) disabilities. Polygraph examiners, particularly those affiliated with public employers who were largely unaffected by the 1990 Americans with Disabilities Act (ADA), should now expect numerous and frequent challenges under the ADAAA. Accordingly, they should prepare for these challenges. In this article the provisions of the ADAAA and its effect on how employers and their agents will have to adjust are described.

Effective January 1, 2009 all employers and agents of employers, including polygraph examiners conducting polygraph examinations for many public employers, must comply with the new Americans with Disabilities Act Amendments Act (ADAAA). This law, as is the case with most federal employment laws, excludes all federal and a few other types of employers. However, since many federal law enforcement agencies have adopted the federal employment laws as internal policies, polygraph examiners working for such agencies will need to familiarize themselves with the new requirements that are likely to influence polygraph procedures and practices under the ADAAA.

Most of the requirements of the original Americans with Disabilities Act (ADA), effective 1991, and the case law applicable to polygraph that is just now beginning to evolve, remain the same under the new ADAAA. Therefore, the confusion generated by the Buchanan (Buchanan, 1996) and Leonel decisions (Leonel, 2005), still remain unresolved. Specifically, the Appellate Courts

in the 5th Circuit (Buchanan) cited polygraph as one of the excessive conditions to the Conditional Offer of Employment (COE) leading to the conclusion that offers with too many conditions are not "real" and therefore improper. Subsequently, the 9th Circuit (Leonel) reaffirmed this opinion so that both decisions indicate that polygraph examinations should be given before the Conditional Offer of Employment (COE). Unfortunately, the Equal Employment Opportunity Commission (EEOC), the federal agency that investigates complaints concerning violations of federal employment laws, has indicated that polygraph examinations conducted prior to the COE should not include any pre-test questions regarding the subject's physical or mental health even if the responses are only used to evaluate suitability for testing and are never reported to hiring decision makers (APA Newsletter, 1992). An evaluation of physical/mental health is required by both the American Polygraph Association's (APA) Standards of Practice and the procedures taught by all sanctioned polygraph schools (APA By-laws). Polygraph examiners,

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Correspondence may be directed to Stanley M. Slowik, Stanley M. Slowik, Inc., 28164 Tresine Drive, Evergreen, Colorado, 80439, www.stanleyslowik.com or slowik@att.net

therefore, must decide whether to ignore the courts and conduct polygraph examinations after the COE where the EEOC says "health" questions are permissible or whether they must ignore the EEOC and conduct the polygraph examination before the COE and ask the required "health" questions in violation of the EEOC's directive.

Further exacerbating the situation, California Police Officers Standards and Training (POST) very recently requested EEOC legal counsel to provide them with an opinion letter allowing police agencies to extend the Conditional Offer prior to the background investigation, which, in effect, would allow some "health" questions pre-offer (California POST, 2008). Even if the EEOC offered such an opinion, however, it is the courts and not the EEOC, whether in its opinion letters or Technical Assistance Manuals, that ultimately interpret the ADA and ADAAA. Therefore, it is recommended that polygraph examiners consider the following guideline:

If what you want to do, the EEOC says you can do, then do it, since it's the EEOC that brings actions against employers. They are not going to take you to court if you are doing what they say you should do. If, however, what you want to do, the EEOC says you can't do, then you have to decide if it's worth the chance of becoming a test case (Slowik, 2005).

If you, the polygraph examiner, as an employer's agent, do become the test case, from the employer's perspective there's an excellent chance that you will prevail. The EEOC loses the vast majority of cases it brings against employers regarding the ADA. However, even when the employer prevails, there are still significant costs that should be considered both financially (legal expenses) and with regard to adverse media attention (being sued by the EEOC) with the resulting negative impact such litigation has on recruiting and affirmative action programs particularly those concerning traditional minorities and these issues should be considered. Finally, employers and their agents must first be sure that what they think the EEOC says is allowed regarding "health" questions in the pre-offer phase is what the EEOC in fact means is allowed and not just a

hopeful interpretation. At the present time the EEOC has yet to reverse its original opinion letter to the APA prohibiting "health" questions to determine suitability for polygraph testing prior to Conditional Offer.

The Evolution of the ADAAA

The legislative evolution of the ADAAA appears to be unusually non-partisan (110th Congress, 2008). In the House of Representatives it was enrolled as H.R. 3195 and it passed the House 402-17. In the Senate, S.3406 was introduced by Senators Harlan (D-IA) and Hatch (R-UT) and included such politically diverse co-sponsors as Senators Kennedy, Dole, Obama, McCain and Clinton. The total number of sponsors was 72 Senators (SHRM News, 2008). The ADAAA was written specifically to refute several Supreme Court decisions that focused on the definition of who was disabled under the ADA. In other words, the ADAAA expresses Congressional dissatisfaction with how the Courts have ruled on the provisions of the original ADA. For example, in *Sutton v. United Airlines, Inc.* (Sutton, 1999) the court ruled that disabilities should be considered after "mitigating measures", i.e., after the applicant or employee had made some attempt to correct or overcome the disability. Therefore, if a person who had difficulty hearing could hear fine while wearing a hearing aide, the person was not considered disabled under the ADA. The ADAAA reverses this approach. It requires employers to evaluate the disability in the uncorrected state. In addition to disabilities that can be corrected by medication or devices, with the notable exception of glasses and contact lenses, disabilities that have been overcome by "learned behaviors" (dyslexia) or that are in remission must now under the ADAAA be evaluated in their active state. The ADAAA goes further; it reverses the Court's ruling in *Toyota v. Williams* (Toyota, 2002) stating that the EEOC's guidelines applying to the term "substantially limits" (a major life function) means (that an activity is) "significantly restricted" is itself too restricted. Ironically, the ADAAA directs the EEOC to redefine "substantially limits" in the broadest possible terms so that it will now include millions and millions of potential plaintiffs previously determined not to be disabled under the previous Court ADA rulings. The idea that the

EEOC is being too restricted against applicants and employees is even more astonishing in light of the very recent *EEOC v. Agro Distribution* (2009) case in which the Federal Appellate Court, in reversing the EEOC, found that the EEOC was "insulting in interviews...tried to distort the facts (and)...misrepresented the truth in reports." In short, the EEOC has been traditionally viewed as the advocate for the applicant or employee and the employer has been presumed to be "guilty until proven innocent." As a result of all of this some experts already instruct employers to consider everyone over 50 years old to be disabled since virtually everyone over 50 has some infirmity that now qualifies as a disability under the ADAAA (Legal Report, 2009). Finally, the ADAAA greatly expands the suggested list of activities that qualify as impairments when restricted from such obvious things as eating and standing to now include "learning, concentrating and thinking." At the very least, employers such as law enforcement agencies that previously considered themselves more or less exempt from the ADA's provisions because of the physical requirements of the job must now be prepared to engage in the interactive accommodation process. With regard to polygraph testing, this means developing policies and contingencies in two broad polygraph applications: pre-employment testing and examinations involving current employees.

Suitability for Testing Issues

It is recommended that the APA again approach the EEOC and seek reversal of the EEOC's previous opinion letter prohibiting pre-offer "health" questions to determine suitability for polygraph testing (Slowik, 2005). This is particularly important in light of California POST's request to the EEOC for an opinion letter on these same matters. In addition, polygraph examiners working for federal agencies that have adopted the federal employment laws as policies should also obtain internal clarification of such policies with regard to the ADAAA. In light of Congressional dissatisfaction with previous ADA Court decisions, polygraph examiners might anticipate that the current political administration will require more federal employers to adopt the federal employment laws, including the ADA and ADAAA, as

required policies without considering the special needs of federal law enforcement. All other law enforcement agencies except perhaps those affiliated with Tribal Police, must already comply with the federal disability laws.

Even if the present situation becomes fixed - that pre-employment polygraph examinations must be administered prior to COE and no "health" questions asked, there will still be situations where examiners can either physically observe an impairment (physical or psychological) during the pre-test interview or, once the recordings are initiated, recognize artifacts in the recordings indicating a less obvious impairment. Keeping in mind that the ADAAA adopts language from the Family and Medical Leave Act (FMLA) and now excludes impairments lasting less than six months from the definition of disability, examiners need to develop different protocols for dealing with subjects whose impairments significantly affect testing on both a temporary and permanent basis. In many pre-employment situations serious impairments affecting polygraph testing would presumably have also significantly affected the outcome of earlier tests in the background process such as written knowledge and physical agility tests. In this case the applicant would have likely been disqualified well before the polygraph examination or, for temporary impairments, the process postponed until the impairment has been overcome making such situations a non-issue for the polygraph examiner. It is therefore strongly recommended that as many of the ADAAA's expanded list of impairments be correlated to performance on the tests and procedures that precede the polygraph examination. In effect, try to resolve or at least anticipate polygraph suitability for testing issues before the polygraph examination. Unfortunately, what may be a "reasonable accommodation" for a test preceding the polygraph examination may not be reasonable for polygraph testing. Examiners should be careful to develop a process during which accommodations agreed to by others don't have a negative effect on subsequent procedures. Also, suitability problems become much more serious in dealing with current employees both regarding periodic screening and internal affairs investigations.

Countermeasures and Accommodation Issues

The intentions of the ADA and ADAAA may be honorable – that people with real or perceived disabilities should at least be allowed to prove that they could perform the essential functions of a given job. Employers, however, must be prepared, as has been the case with Workers Compensation, Welfare and Family and Medical Leave fraud, to deal with people who will manipulate the disabilities laws for personal advantage. Law enforcement agencies should fully expect to soon see advice on websites detailing how both applicants and employees can avoid polygraph examinations by claiming some impairment. Whether real or concocted, should the polygraph examination then be waived? Postponed? Should Computer Voice Stress Analysis and other approaches now be considered a reasonable accommodation to polygraph testing? What now is recognized as examinee attempts at countermeasures may soon become a ruse for an ADAAA covered impairment that, if not accommodated, at the very least would require examiners and employers to engage in the interactive process of accommodation. While it seems simple enough to establish a policy that makes it a non-negotiable requirement that applicants and employees take and successfully pass polygraph examinations to obtain or keep jobs and clearances, in light of changing attitudes regarding unions, employers (public and private) and political agendas, law enforcement agencies should prepare for a far less favorable environment regarding polygraph examinations. They should now create polygraph accommodation policies and protocols. Waiting until there is a challenge under the ADAAA may be too late to create accommodation procedures that adequately consider polygraph testing. As was learned from the enforcement of the Employee Polygraph Protection Act even public employers may not understand or care to appreciate issues involving polygraph until it's too late to do anything meaningful. Finally, as described in *EEOC v. Federal Express Corporation* (2008), simply creating policies is not sufficient if the policies are not included in training and periodic compliance audits. Therefore, quality assurance procedures and practices should be adapted to incorporate ADAAA issues.

Additional Accommodation Issues: Reasonableness

The ADA and EEOC's ADA Technical Assistance Manual both agree that the responsibility to initiate the interactive process at the pre-employment stage is incumbent upon the applicant. If the applicant is disqualified or not selected for consideration early in the process, e.g. upon review of the written application or personal history statement, then the applicant cannot use the ADA or ADAAA to challenge the decision (*Adeyemi v. District of Columbia*, 2008). Unfortunately, many Human Resource professionals and others misinterpret the accommodation requirements to mean that they should indicate to applicants – even in the job announcement or on agency websites – that the applicants should request accommodation, virtually encouraging people to challenge and litigate all adverse hiring decisions. Just as is the case with other Title VII and employment laws, there are numerous situations by which employers can innocently become aware of variables including gender, race, age and possible disabilities before the employer is supposed to know. For example, all applications require applicants to reveal their names so applicants who never get past the application review could claim gender discrimination and force employers into the "guilty until proven innocent" position. In the same vein, conducting a credit record check, reference checking (talking to parents, spouses, past employers and co-workers) and pre-employment interviewing can all reveal a disability in the pre-offer stage, before the employer is allowed to evaluate the applicants' ability to perform the essential functions of the job. Since the ADAAA virtually mandates employers spend time and money to engage in the interactive process to find reasonable accommodation, it is counterproductive for employers to initiate the interactive process before the applicant even applies. While ignorance may be bliss very early in the pre-employment process, the same cannot be said regarding current employees. While poor job performance itself is not *prima facie* proof of having a disability, since in most cases the employer sees or otherwise interacts with current employees, it would be difficult, if not impossible, to use the "not know" defense as to why the employer failed to participate in the interactive accommodation process (*Brady v.*

Wal-Mart, 2008). The ADAAA further mandates that even if the employee's disability has been in remission for a lengthy period, the employee should still be considered disabled (*School Board v. Arline*, 1987). Also, if an applicant or employee is only perceived to have a disability but doesn't actually have a disability, the reasonable accommodation requirements do not apply since there isn't actually anything to accommodate. Finally, under the legal concept of judicial espousal, people seeking redress under the ADAAA can't have it both ways. Applicants and employees receiving disability compensation under Social Security or Military Disability laws cannot deny having the same disability under the ADAAA if the disability would prevent them from performing any of the essential functions of the job and no reasonable accommodation was possible (*Cleveland v. Policy Management*, 1999).

The interactive process seeking reasonable accommodation is, of course, a two-way street. Employers who try to claim that all work is "full duty" or all job tasks are essential would probably lose such arguments (Legal Report). Likewise, failing to provide reasons for denying an ADAAA applicant a job or failing to offer any alternatives to a request for accommodation would probably be interpreted as evidence that the employer failed to engage in the interactive process as required by the ADAAA (*Branson v. West*, 1999). Conversely, applicants or employees who refuse to produce medical or psychological records or participate in such evaluations would probably be denied claims under the ADAAA. With these concerns in mind, it is suggested that employers not only develop policies and protocols for the interactive process toward reasonable accommodation but carefully review job announcements, descriptions, written applications, personal history statements, pre-polygraph forms and especially examination question sheets to precisely identify which information needs (questions) are truly essential and which – no matter how desirable or traditional – are not (Slowik, 2009). As is the case with critical (not just any) omissions on job applications, inability to perform

essential job functions after an attempt to discover a reasonable accommodation should be grounds for employment denial. Examiners should assume that with ADAAA claims, they and their employers will face far more juries than judges in summary judgment proceedings under the ADA since the ADAAA provides many more challenges to issues of fact than points of law. Employers and examiners should also assume that jurors who are neither polygraph examiners nor medical experts would interpret claims far more favorably from the claimant's perspective than what examiners and their employers would prefer.

New Defenses

Law enforcement, wisely, has always tried to invoke the "direct threat to health and safety" defense in justifying both the need to evaluate a wide range of counterproductive behaviors and the necessity of using polygraph testing as a screening methodology. In light of *EEOC v. Exxon* (2000), public employers should seriously consider the Business Necessity defense. This approach does not require the employer to be a "business" in the sense that private profit-driven activity is necessary. Rather, if the employer's action is necessary in a fundamental operational sense, public employers can prevail using the same argument as private employers. Since under certain conditions "successfully rehabilitating" alcoholics and drug addicts can qualify as Disabled Americans and since, with few exceptions, the ADAAA does not allow for law enforcement exemptions, public employers can only exclude such candidates if they can show, as did Exxon, there is a reasonable probability of relapse and, should relapse occur, there would be a serious harm. While Exxon was able to use this argument with regard to the environment and the "Valdez" incident, law enforcement agencies should consider defining such job functions as critical thinking under stress, high-speed pursuit and required use of deadly force as essential and incorporate these into their appropriate job descriptions.

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