

# The Role of Law

The Americans with Disabilities Act now protects more people with neurological conditions.

BY GINA SHAW

In 1992, Vanessa Turpin, a production line worker at a Sara Lee plant in Virginia, began experiencing seizures in her sleep. She was eventually diagnosed with epilepsy—primarily “uncontrolled nighttime seizures,” which occurred once or twice a week and caused severe sleep loss. She also had periodic daytime seizures.

A few years later, then working at another Sara Lee plant in South Carolina, Turpin was asked to switch shifts to accommodate a newly transferred worker who had more seniority. Turpin gave her employer a letter from her neurologist stating that switching from a fixed schedule with day shifts would worsen the seizures by disrupting her sleep patterns. Sara Lee refused to accommodate her request to remain on the first shift, and eventually Turpin was forced to take a severance package.

When she sued for discrimination under the Americans with Disabilities Act (ADA), the courts ruled that Turpin was not “disabled” under the law. The reason? Despite her epilepsy, the court ruled, she did not have a “substantial limitation in a major life activity.” But recent changes to the law mean that people like Turpin might qualify for protection in ways they didn’t before.

## THE OLD LAW

Since the ADA was signed into law in 1990, nearly two decades of court decisions have weakened its intended protections and narrowed the definition of “disabled.” For example, a 1999 Supreme Court decision, *Sutton v. United Air Lines*, ruled that “mitigating measures”—medication, prosthetics, hearing aids, diet and exercise must be



## REDEFINING DISABILITY

- ▶ An impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability.
- ▶ An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- ▶ The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified mitigating measures.

considered in determining whether an individual has a disability under the ADA.

For people with chronic or episodic conditions such as epilepsy, multiple sclerosis (MS), Parkinson’s disease, and many other neurological disorders, the 1999 ruling was the worst of both worlds. On the one hand, these people had to live and work with a disabling condition on a daily basis, competing for jobs and promotions with non-disabled candidates. On the oth-

er hand, they weren’t considered “disabled” enough to be protected by the law. Employers could fire them or refuse to accommodate their requests for reasonable job accommodations.

“You had this catch-22: People were making decisions [about hiring, promotions, and accommodations] based on your disability, and then turning around and arguing that you weren’t disabled enough to be protected by the law,” says Robert Silverstein, director of the Center for the Study and Advancement of Disability Policy.

As one of the behind-the-scenes architects of the ADA, Silverstein knew that the decisions of the courts were directly at odds with Congress’ intent in passing the bill. “Congress originally wanted to focus on discrimination on the basis of disability, as opposed to whether or not you were a person with a disability,” he says. “The idea was to prohibit discrimination based on fear, ignorance, misinformation, or myths.”

But in many cases, that wasn’t happening. A woman with MS was denied the right to return to work as a flight nurse, despite a letter from her neurologist confirming that she could perform her duties. Why? The court ruled that

the ADA did not protect her. A teacher’s assistant with epilepsy, who alleged she was fired because of her condition, was denied the right even to sue under the ADA because she was taking medication to alleviate the symptoms of her condition. Even a mentally retarded man who had the reading ability of a third-grader was found not to be impaired enough in major life activities to be protected under the law.

According to the Epilepsy Foundation,

studies show that plaintiffs lose more than 90 percent of ADA claims, mostly on the grounds that they do not meet the definition of “disability” and are therefore not protected by the ADA.

### THE NEW LAW

But all that changed when the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) took effect on January 1, 2009. The Act defines “disability” much more broadly than the courts had previously done. (See “Defining Disability” box.)

The original ADA actually did not list what it meant by “major life activities” in the law itself. But the ADAAA remedies that error, providing what it calls a “non-exhaustive” list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, and thinking. Previously, courts were split on whether many of these activities constituted “major life activities.”

The ADAAA also states that any impairment that interferes with the “major bodily systems or organs” (neurological, reproductive, digestive, respiratory, circulatory) is a covered disability. This means that people

with these conditions—such as people with epilepsy or MS—no longer have to “prove” they are sufficiently disabled before they can file a claim under the ADAAA.

“When they talked about major life activities in the ADAAA, Congress used words that hadn’t been used before: learning, concentrating, thinking. That’s really helpful for people with neurological conditions,” says Charles Goldman, an attorney in Washington, D.C., with expertise in disability law. “It’s going to make filing discrimination claims much easier for a person with a neurological condition.”

“It can be very frustrating with disorders that are under episodic control, like epilepsy. Many individuals are not ‘disabled’ when they’re not having their seizures,” says Gregory Bergey, M.D., professor of neurology and director of the Johns Hopkins Epilepsy Center in Baltimore, MD. “It’s not like being in a wheelchair—you aren’t disabled 24-7. But medication doesn’t cure epilepsy, it controls it. There are many disabling conditions in neurology where that’s the case, and the ADAAA recognizes that.”

“It’s going to make filing discrimination claims easier for a person with a neurological condition.”

The new law—which Silverstein calls a “restoration”—passed overwhelmingly, with 77 cosponsors in the Senate and 255 in the House of Representatives. “Even

the business community and others were on board,” Silverstein says. “A lot of them were at the table with us in 1990, and they recognized that even if the courts were ruling in their favor, it was not what Congress originally intended.”

Goldman stresses that the ADAAA is not a “hire the disability community act,” but a civil rights act. “The one thing that did not change in the law that’s real important to bear in mind is the standard that you still have to be qualified, based on your experience or education, to do a job that you’re seeking. It’s not lowering the standard for employment.”

If you have epilepsy, MS, migraines, or another neurological condition and want to ask for specific accommodations from your employer, Goldman recommends doing your homework first. “Talk to your neurologist. Bring him your job description and say, ‘Here are the problems I’m having. I’m going to be asking for accommodations. Can you be supportive?’ You’re trying to create documentation, a medical record to give to your employer.”

The ADAAA’s passage comes about a decade too late to help Vanessa Turpin, but most legal experts expect that a lot more employees like her will be able to successfully seek accommodation and protection under the new law. One employment law firm, Lehr Middlebrooks & Vreeland, sums it up this way: “After years of increasingly tougher burdens for ADA plaintiffs to make a case, the express intent of the ADAAA is to make it easier for employees to qualify for legal protections, which will in turn make it harder for employers to kick their lawsuits out of court.”

NN

## Know Your Rights

For more information about your rights under the ADAAA, visit the Job Accommodation Network (JAN) online at [jan.wvu.edu](http://jan.wvu.edu), or call (800) 526-7234. The JAN provides free consulting services, including one-on-one consultation about job accommodation ideas and requesting accommodations. Here are some other resources:

- ▶ The National Disability Rights Network, a national network of legally based advocacy services for people with disabilities: [napas.org](http://napas.org) or 202-408-9514.
- ▶ The Office of Disability Employment Policy at the Department of Labor: [dol.gov/odep/](http://dol.gov/odep/) or 1-866-ODEP-DOL (633-7365).
- ▶ Does your employer need guidance in implementing the ADAAA’s requirements? Steer them to the Employment and Disability Institute at Cornell University: [ilr.cornell.edu/EDI/index.cfm](http://ilr.cornell.edu/EDI/index.cfm) or 607-255-7727.