

A Complex Recipe: Food Allergies and the Law

The myriad disability laws and regulations potentially applicable to people with allergies have made it difficult to determine if food allergy sufferers are entitled to protection and accommodations in public places, including schools and workplaces. The 2008 Americans with Disabilities Act Amendments Act, which expands the class of individuals entitled to protections, should help clarify the recipe of rights for allergic individuals.

by **Tess O'Brien-Heinzen**

Twelve million Americans are afflicted with food allergies, and 100 die each year because of them.¹ Allergic individuals experience a range of reactions including hives, swelling, vomiting, difficulty breathing, and loss of consciousness. A handful of foods cause 90 percent of the reactions, with tree nuts and peanuts being the most well-known triggers.²

Food allergies and the legal rights of people with them are being discussed in schools and daycare centers, in offices, on airplanes, in courtrooms, on Internet blogs, and in countless other venues. But the myriad disability laws and regulations potentially applicable to people with allergies have made it difficult to determine whether food allergy sufferers are entitled to protection and accommodation in public places. This question is especially pressing in schools, where peanut butter sandwiches abound and the youngest members of the population spend their day.

For more than 30 years, individuals with physical and mental impairments have been able to seek protection from discrimination using two federal laws: the Rehabilitation Act of 1973 (the Rehabilitation Act)³ and the Americans with Disabilities Act (ADA).⁴ But food allergy sufferers have not had a clear pathway for help under either act. The seminal decision on the food allergy issue held that a person with a peanut allergy does not qualify for protection under either law.⁵ Likewise, schools and employers have not been quick to accommodate food allergy sufferers.

Now, though, the fate of people with food allergies might be changing. In 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA), which amends certain provisions of the ADA and the Rehabilitation Act and expands the class of individuals entitled to protection under both laws.⁶ While courts have had few opportunities to apply the new law, a look at the original Rehabilitation Act, the ADA, and case law gives insight as to how the ADAAA might provide greater protection for these individuals.

The Rehabilitation Act of 1973

Food allergy sufferers rely most frequently on section 504 of the Rehabilitation Act for protection in programs and activities that receive federal funds, including public schools.⁷ The regulations implementing section 504 provide that "no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity which receives Federal financial assistance."⁸ The regulations define *handicap* as a physical or mental impairment that substantially limits one or more major life activities including (but not limited to) caring for oneself, walking, seeing, breathing, and learning.⁹ An individual's handicap must fit within this definition to trigger protection under this law.

School-age children in particular can benefit from the Rehabilitation Act, which requires school districts to provide qualified elementary and secondary children a "free appropriate public education" (FAPE),¹⁰ which means that schools must educate students with handicaps with the general population when possible and must provide them with an equal opportunity to participate in nonacademic and extracurricular activities.¹¹ Schools also must establish meaningful evaluation and placement procedures to determine whether a student has a handicap. Every school must designate a "504 coordinator" to conduct evaluations and develop the plans.¹²



In elementary and secondary schools, parents often collaborate with administrators to develop individualized 504 plans that identify students' disabilities and specify the services the school will provide to ensure that the particular child has a safe school environment.¹³ A 504 plan works well for children with food allergies because it can address lunchroom and classroom policies, general food and hand-washing policies, field trip protocol, and emergency procedures if there is an allergic reaction. Unfortunately, many schools do not regularly evaluate food allergy sufferers under the rubric of the Rehabilitation Act but rather attempt to deal with food allergies on a more informal case-by-case basis. Accordingly, schools often do not use 504 plans when such plans are appropriate.

Section 504 also applies to the employment setting, requiring employers who receive federal funds to make reasonable accommodations for qualified job applicants and employees with handicaps unless the accommodation would impose an undue hardship on the business.¹⁴ Reasonable accommodations may include making facilities fully accessible, restructuring jobs, providing part-time or modified work schedules, acquiring or modifying equipment or devices, providing readers or interpreters, or taking other similar actions.¹⁵ But many employees with food allergies have not been offered these accommodations.

Employees in Wisconsin, however, fare better than employees in other states. That is because the Wisconsin Fair Employment Act (WFEA), which applies to all employers in the state with at least one employee, defines disability broadly and generally requires greater accommodations for employees than does the Rehabilitation Act and the ADA. But no cases exist to shed light on whether the more liberal provisions of state law have been applied to individuals with food allergies.

The Americans with Disabilities Act

The ADA was passed in 1990 as the first comprehensive civil rights law for people with disabilities. It has a broad reach and applies to private employers with 15 or more employees; all state and local government programs, including public schools; and all places of public accommodation. Because the definition of *disability* under the ADA is materially identical to the definition of *handicapped individual* under the Rehabilitation Act, the two acts generally are treated as synonymous for purposes of identifying the protected individual.¹⁶

Like the Rehabilitation Act, the ADA prohibits discrimination on the basis of disability (the Rehabilitation Act uses the term *handicap*).¹⁷ To be protected under the law, an individual must prove that he or she is disabled. This has not been an easy task. Courts have tended to interpret the term narrowly; indeed, individuals with such serious illnesses as AIDS, cancer, and diabetes have been among those found not to have disabilities under the ADA and therefore to not be covered by its protections. As discussed below, food allergy sufferers have experienced the same fate.

Case Law Interpreting the Rehabilitation Act and Original ADA

Before the ADA amendments were enacted, courts narrowly interpreted the ADA and section 504 and set high thresholds for individuals to qualify as disabled. And while few cases decided under these Acts involved food allergies, the two most notable cases that did failed to extend the Acts' protections to the plaintiffs.

The 1999 Eighth Circuit decision in *Land v. Baptist Medical Center* has stood for many years as the seminal case regarding the civil rights of people with food allergies. In *Land*, Baptist Medical Center refused to provide daycare to Megan Land, a preschooler who twice had an allergic reaction when she came in contact with peanuts at her daycare center. In denying Land's claim under the ADA, the Eighth Circuit found that her allergy did not rise to the level of a disability because 1) her eating was not substantially limited (she could eat other foods without a reaction), and 2) her impairment was episodic in nature (her breathing was restricted only on the occasions when she ate peanuts or peanut derivatives).¹⁸ The *Land* court determined the impairment's episodic and infrequent nature disqualified it from ADA protection.

The U.S. District Court for the Eastern District of California arrived at the same conclusion in *Bohacek v. City of Stockton*.¹⁹ In *Bohacek*, a woman brought suit under the Rehabilitation Act and the ADA against the city of Stockton for failing to make reasonable accommodations for her son's peanut allergy at a camp sponsored by the city. The district court rejected Bohacek's claim. The court engaged in a lengthy and strained analysis of the allergy and ultimately based its decision on how restricted the child was in his diet and how the allergy affected his social life. The court concluded that the ADA did not protect a child's right to enjoy the full panoply of foods available to other people (it found that the child was able to eat foods other than peanuts) and that the child's ability to socialize with others was not often affected by the allergy.²⁰

The courts' strict reading of the Rehabilitation Act and the ADA in *Land* and *Bohacek* is not uncommon in disability discrimination jurisprudence; courts have demanded extraordinarily high degrees of physical limitation before finding a person disabled. Two cases – later rejected by the ADAAA – made the ADA particularly unfriendly to all plaintiffs. In *Sutton v. United Airlines*, the U.S. Supreme Court limited the class of people who qualified as disabled by holding that the remedial effects of mitigating measures should be considered in determining whether an individual is disabled.²¹ For food allergy sufferers, this meant that the availability of epinephrine (adrenalin) as a treatment for allergic reactions would weigh against them in an ADA analysis.

In *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, the U.S. Supreme Court further narrowed the class of qualifying persons as a result of strictly interpreting the terms *substantially* and *major* in the definition of disability under the ADA. The Court held that for a person to be considered substantially limited in a major life activity, an individual's impairment had to "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives."²² This heightened threshold would be particularly difficult to reach for food allergy sufferers, who are affected by an allergy only when exposed to an offending food.

In sum, the Rehabilitation Act and the ADA, as interpreted by the courts, were not providing broad protections to individuals with disabilities. In 2008, Congress stepped in to change that.

The Americans with Disabilities Act Amendments Act

The class of people eligible for protection under federal law expanded greatly when, in September 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments Act. The amendments in the ADAAA significantly expanded the scope of the term *disability* under the original ADA and directed that *disability* be "construed in favor of broad coverage of individuals...."²³ In passing the ADAAA, Congress expressed its dissatisfaction with the courts' narrow interpretation of the protections afforded by the ADA.²⁴ Indeed, Congress expressly rejected several U.S. Supreme Court decisions (including *Toyota* and *Sutton*) that defined disability more restrictively than intended by the proponents of the original ADA.²⁵ In rejecting these cases, Congress eased the burden on individuals seeking protection and reinstated broad coverage.²⁶ The ADAAA "is intended to repudiate the inappropriate high level of limitation necessary to obtain coverage under the ADA...."²⁷ The changes made by the ADAAA likewise apply to the Rehabilitation Act.²⁸

Key Amendments. Certain key amendments in the ADAAA are particularly important for individuals with disabilities, including those with food allergies. First, Congress changed the concept of *major life activities*, reinforcing the rule that one major life activity need not limit others and broadening the scope of protection by expanding the list of activities.²⁹ Second, Congress rejected the requirement the U.S. Supreme Court established in *Sutton* that courts should consider the ameliorative effects of mitigating measures in determining whether an impairment substantially limits a major life activity.³⁰ Third, Congress rejected the "inappropriately high level of limitation" necessary to obtain coverage under the ADA and emphasized that determining whether an individual is disabled should not demand extensive analysis.³¹ Fourth, Congress directed that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.³² Finally, Congress directed the Equal Employment Opportunity Commission (EEOC) to revise its regulations to make it easier for an employee seeking protection under the ADA to establish that he or she is disabled under the ADA.³³

Caselaw Applying the ADAAA

Few courts (none in Wisconsin or the Seventh Circuit) have interpreted the scope of the ADAAA, because most courts have refused to apply the law retroactively to claims filed before 2009. The judicial and quasijudicial bodies that have considered the law confirm the importance of the key amendments mentioned above. For example, the Office of Civil Rights (OCR) applied the ADAAA directly to a food allergy in ruling that an Ohio school district violated section 504 and the ADAAA when it failed to accommodate a child with food allergies.³⁴ The parents of a nine-year-old boy informed the district that the child had a peanut allergy and an anxiety disorder related to the allergy. The school had provided the child an individual health plan and had evaluated the student for section 504 services but nonetheless found him ineligible because he was doing well academically as a result of the health plan.

The OCR ruled that the district violated section 504 and the ADAAA when it based its evaluation only on whether the impairment affected the child's learning. The OCR pointed out that learning is only one of several major life activities to be considered under the ADAAA. As part of a resolution agreement, the district agreed to revise its policies to consider a broader range of major life activities and agreed not to include mitigating measures, such as services provided in an individual health plan, in its analysis

In *Franchi v. New Hampton School*, the New Hampshire District Court applied the ADA to an eating disorder. The court concluded that the facts alleged in the complaint established that the plaintiff's eating disorder substantially limited the plaintiff's eating so as to constitute a disability and that the factual allegations were sufficient to defeat a motion to dismiss the complaint.³⁵ In reaching its conclusion, the court recognized the ADA's broad reach of protection.³⁶

A More Palatable Future

The addition of the ADA to the complex mix of ingredients at play in the rights of children and adults with food allergies could make the menu of remedies available to more allergic individuals in schools and workplaces.

It should be of no consequence to determining if a person is "disabled," and thus entitled to accommodations, that a food allergy sufferer's disabilities are episodic, infrequent, and triggered only when the person is exposed to an offending food. Indeed, Congress specifically stated that "an impairment that is episodic ... is a disability if it would substantially limit a major life activity when active." When a reaction occurs, breathing is substantially limited. Nor should mitigating measures, like epinephrine, be considered in determining whether the food allergy substantially limits the major life activities of eating and breathing.

Further, courts should no longer have to engage in the strained types of analyses used by the *Land* and *Bohacek* courts. It should be obvious that because a severe food allergy can substantially affect eating and breathing, such an allergy falls within the definition of disability under both the Rehabilitation Act and the ADA. Food allergy sufferers not only have to endlessly scour ingredient labels and menus to avoid the offending food and hope that no mistakes were made in labeling, but also have to hope that other students and employees have washed their hands after eating and before shaking hands, touching common computers, desks, playground equipment, door handles, and lunch tables. The risks of exposure to a triggering food are great and the potential results deadly. If an allergic individual is exposed to an allergen, the results can range from hives to death. Under the ADA, these potential results should be enough to trigger protection.



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Certainly, the new legislation gives legs to the agency regulations that already support section 504 protection in schools. Of course, parents of school-age children with food allergies should keep an open dialogue with school administrators and should work together to determine the best accommodations for their child. To obtain formal protections under the law, parents also should make a written request for an evaluation under the Rehabilitation Act and the ADA and should insist on a formal section 504 plan. Parents who previously have encountered resistance should now find strong support in the law.

In addition, the required amendments to the EEOC regulations should broaden the scope of protection for employees with disabilities, including those with food allergies.³⁷ Accordingly, employees who suffer life-threatening allergies should ask employers to evaluate their allergies and to accommodate them in the workplace under the Rehabilitation Act, the ADA, and in Wisconsin, the WFEA.

A clearer path now should be paved for food-allergic individuals in schools and in places of employment. The legal recipe, once complicated by strict interpretations and strained analysis, appears to have been simplified and should lead to a more palatable result.

Endnotes

¹American Academy of Allergy, Asthma & Immunology, Position Statement: Anaphylaxis in Schools and Other Child-Care Settings, www.aaaai.org/media/resources/academy_statements/position_statements_pos34.asp; The Food Allergy and Anaphylaxis Network

²The Food Allergy and Anaphylaxis Network

³29 U.S.C. § 794. The regulations implementing section 504 appear at 34 C.F.R. part 104.

⁴Codified at scattered sections of 42 U.S.C. If a severe food allergy is accompanied by a disability that affects learning, a student also may seek protection under the Individuals with Disabilities Education Act (IDEA). Because food allergies alone, however, do not appear to be enough to trigger the protections under the IDEA, the IDEA is not discussed in this article.

⁵See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *Harv. C.R.-C.L. Rev.* 99, 100 (1999); see *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999).

⁶See ADA § 3406 (2008).

⁷See 29 U.S.C. § 794.

⁸34 C.F.R. § 104.4(a).

⁹34 C.F.R. § 104.33(2)(i).

¹⁰34 C.F.R. § 104.33(a).

¹¹34 C.F.R. §§ 104.34, 35, 37.

¹²34 C.F.R. § 104.7.

¹³⁴ 34 C.F.R. § 104.33(b)(2).

¹⁴³ 34 C.F.R. § 104.12(a).

¹⁵³ 34 C.F.R. § 104.12(b).

¹⁶⁴ *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1078 (W.D. Wis. 1998).

¹⁷⁴ 2 U.S.C. § 12182(a).

¹⁸⁴ *Land*, 164 F.3d at 425.

¹⁹⁸ *Bohacek v. City of Stockton*, Case No. CIV S-04-0939 GGH, 2005 WL 2810536 (E.D. Cal. Oct. 26, 2005).

²⁰ *Id.* at 6-9.

²¹ *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482 (1999).

²² *Toyota Motor Mfg., Kentucky Inc. v. Williams*, 534 U.S. 184, 198 (2002).

²³ See Pub. L. No. 110-325, § 3(4)(A).

²⁴ *Id.* § 2(a), (b).

²⁵ See *id.* § 2(5), 122 Stat. 3553, 3559, *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 861 (9th Cir. 2009).

²⁶ Pub. L. No. 110-325, § 2(b).

²⁷ *Harvey v. Wal-Mart Louisiana*, 3:06-cv-02389 (D. Ct. W.D. Louisiana 9/30/09), Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3559 (2008) (codified as amended at 42 U.S.C. § 12101).

²⁸ Pub. L. No. 110-325, § 7(2), 122 Stat. at 3558 (codified at 29 U.S.C. § 705 (20)(B)).

²⁹ Pub. L. No. 110-325, §§ 2(b)(1), 4(a).

³⁰ *Id.* § 2(b)(2).

³¹ *Id.* § 2(b)(5).

³² *Id.* § 4(a).

³³ *Id.* § 2(a)(8), (b)(6).

³⁴ *North Royalton City Sch. Dist.*, 52 IDELR 203, 109 LRP 32541 (2009).

³⁵ *Franchi v. New Hampton School*, 656 F. Supp. 2d 252 (D. N.H. 2009).

³⁶ *Id.* at 258-59.

³⁷ Other laws, both state and federal, may affect employee rights in the workplace. Those laws should be consulted in analyzing a discrimination claim.