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## EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does Substantially Limits Mean

Carol J. Miller

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# EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does “Substantially Limits” Mean?

Carol J. Miller\*

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## I. INTRODUCTION

What does it mean for an impairment to “substantially limit” a major life activity under the 2008 Americans with Disabilities Act Amendments Act (ADAAA)?<sup>1</sup> Suppose you are an employee who struggles with a learning

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1. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

disability, but, through persistence, completed a college degree. Imagine you are able to perform daily functions at home but have difficulty performing repetitive motions at work. What if you are an insulin-dependent diabetic or have epilepsy, which, through medication, seems to be currently under control. Under court decisions interpreting the Americans with Disabilities Act (ADA) during the decade prior to the passage of the ADAAA, it became increasingly unlikely that these conditions would qualify for disability protection.<sup>2</sup> In the ADAAA, Congress emphasized that the legislative purpose was to assure broad construction of what constitutes a qualified disability.<sup>3</sup> Under the broad coverage mandated by the ADAAA and the Equal Employment Opportunity Commission's (EEOC) proposed regulations and implementing guidelines, these conditions would qualify as impairments that substantially limit a major life activity.<sup>4</sup>

Part I of this Article recognizes the difficulty in calculating how many workers are disabled. Such difficulties have been used by the courts to justify differing interpretations of what constitutes a disability. This Part also discusses the origin of the ADA and provides a brief overview of the 2008 ADAAA. Part II of the Article examines the United States Supreme Court's interpretations that narrowed the construction of what is a "substantial limitation" and what is an ADA disability. This Part highlights the lack of consensus between the courts, Congress, and the EEOC, as well as the courts' apparent disregard of the congressional intent that the ADA serve as a vehicle for meaningful protection of disabled workers. Part III discusses the 2008 amendments and the 2009 proposed EEOC regulations with particular focus on (a) the broad scope of disability protection; (b) the expansion of what qualifies as major life activities; (c) the broad construction of "substantially limits"; and (d) the role of mitigating measures. Part IV examines limitations and ambiguities in the ADAAA, including the criteria for being "regarded as having such an impairment," and identifies future disability-related challenges. The conclusion supports congressional intent to provide broader protection for disabled employees and addresses the inherent contradictions posed by the new EEOC definition of "substantially limits." It also recognizes the difficulty in applying a definition that explains what the phrase does *not* mean rather than defining what it does mean. Finally, the conclusion recommends an alternate definition of a "substantial limitation" of a major life activity.

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2. See *infra* Part II, discussing court cases narrowing ADA coverage.

3. ADA Amendments Act of 2008, sec. 2, § 12102(4)(A)-(B), 122 Stat. at 3553 (amending Americans with Disabilities Act of 1990, 42 U.S.C. §12102 (2006)).

4. *Id.*; see 74 Fed. Reg. 48431, 48442 (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(C)) (learning disability); *id.* (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(F)) (repetitive motion/carpel tunnel syndrome); *id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(5)(i)(D)) (diabetes); *id.* (to be codified at 29 C.F.R. § 1630.2(j)(5)(i)(E)) (epilepsy).

The number of people with a work-related disability is difficult to estimate, as definitions of disabilities vary among congressional findings, disability studies, and court interpretations. In surveys about work-related disabilities, results and conclusions vary due to the number and nature of questions used, sample size, and response rate, all of which skew results. In 1990, the ADA congressional findings estimated that 43 million individuals were physically disabled, which is about 17% of the population.<sup>5</sup> The 1997 Survey of Income and Program Participation (SIPP) data estimated that 19.7% of the total noninstitutionalized U.S. population (or 52.6 million) were disabled Americans, of which 12.3% (or 33 million) had severe disabilities.<sup>6</sup> The 2007 American Community Survey (ACS) estimated that 12.4% of the adult population ages 18-64 had an employment-related disability, with a slight decline in the percentage in 2008.<sup>7</sup> U.S. Census personnel, however, cautioned against use of generalizations regarding the differences in census disability estimates for 2007 and 2008:

Because of the conceptual differences between the 2007 and 2008 ACS disability questions, the Census Bureau does not encourage data users to make comparisons between the 2008 disability estimates and prior ACS disability estimates. Differences between the estimates from 2007 and 2008 are reflective of both the real change in disability status and the difference in measurement. The combination of these two factors can be cumulative . . . .<sup>8</sup>

More recently, in September 2009, the Current Population Survey of the United States Bureau of Labor Statistics estimated that 18.4% of the U.S. workforce had a disability and 16.2% of disabled Americans were unemployed, compared to 9.2% of nondisabled Americans who were unemployed.<sup>9</sup>

Recognizing the rights of disabled individuals to seek employment and the need to better facilitate their ability to work, Congress passed the Rehabilitation Act in 1973 (covering federal employees and federally funded pro-

5. See H.R. REP. NO. 101-485(IV), at 24 (1990).

6. JACK MCNEIL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: AMERICANS WITH DISABILITIES: HOUSEHOLD ECONOMIC STUDIES 1997, 1 (2001), available at <http://www.census.gov/prod/2001pubs/p70-73.pdf>; see also U.S. Census Bureau, Americans With Disabilities: 1997, [www.census.gov/hhes/www/disability/sipp/disab97/asc97.html](http://www.census.gov/hhes/www/disability/sipp/disab97/asc97.html) (last visited Jan. 17, 2011).

7. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, REVIEW OF CHANGES TO THE MEASUREMENT OF DISABILITY IN THE 2008 AMERICAN COMMUNITY SURVEY 15 (2009), available at [http://www.census.gov/hhes/www/disability/2008ACS\\_disability.pdf](http://www.census.gov/hhes/www/disability/2008ACS_disability.pdf).

8. *Id.* at 12.

9. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY DISABILITY DATA TABLE FOR AUG.-SEPT. 2009 (2009), available at [http://www.bls.gov/cps/cpsdisability\\_092009.pdf](http://www.bls.gov/cps/cpsdisability_092009.pdf).

grams)<sup>10</sup> and the ADA (applying to the private sector) in 1990.<sup>11</sup> Title I of the ADA provides protections for disabled workers, and Titles II and III relate to public services and public accommodations, allowing disabled individuals to access public facilities.<sup>12</sup> Despite specific congressional language directing that states shall not be immune from actions for violations of the ADA,<sup>13</sup> the U.S. Supreme Court has significantly limited the ADA's application by providing state government employers sovereign immunity under the Tenth and Eleventh Amendments of the United States Constitution, as applied to the states through the Fourteenth Amendment.<sup>14</sup> Congress enacted the Rehabilitation Act to protect individuals with disabilities and fulfill its goal of "providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration in society, em-

10. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797 (2006)).

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006 & Supp. 2009)).

12. See 42 U.S.C. §§ 12101-12189 (2006 & Supp. 2009); see also *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (finding that a disabled litigant's access to court facilities was a due process issue and applying Title II to state and county government). The U.S. Department of Justice is working on regulations that will require websites to be ADA-accessible. Press Release, Dep't of Justice, Department of Justice Announces Plans to Prepare New ADA Regulations (July 23, 2010), available at <http://www.justice.gov/opa/pr/2010/July/10-crt-850.html>.

13. 42 U.S.C. § 12202.

14. See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (taking away state employees' remedies for violations of the ADA and invoking sovereign immunity protection for states against such suits in federal and state courts, even though the language of the Eleventh Amendment to the U.S. Constitution only directly limits the kinds of cases that can be heard in federal court and does not include cases brought by citizens against their own state in that limitation). A nurse suffering from breast cancer and an asthmatic security officer were not allowed to pursue monetary damages for ADA discrimination under Title I, as the Court refused to use the Fourteenth Amendment's equal protection guarantees to abrogate state sovereign immunity. *Id.* at 362, 374 n.9. The Court found that, under the first prong of the abrogation doctrine, congressional intent to apply Title I of ADA to the states as employers was not in dispute. *Id.* at 363-64. Nevertheless, the Court found that Congress had exceeded its Fourteenth Amendment authority to enforce the Equal Protection Clause and thereby failed prong two of the Court's abrogation doctrine. *Id.* at 374. The court concluded that ADA monetary remedies failed the "congruent and proportional" test; consequently, states retained Eleventh Amendment immunity. *Id.* The Tenth Amendment has also been used to accomplish this purpose. See *Alden v. Maine*, 527 U.S. 706, 729-30 (1999) (referencing the Tenth Amendment for sovereign immunity from abrogation of state remedies under FLSA); see also Carol J. Miller, *The Rise to New Federalism and the Demise of the Public Employee Remedies*, 13 J. LEGAL STUD. BUS. 29 (2007) (criticizing the conclusion that the combined interpretation of the Tenth, Eleventh, and Fourteenth Amendments bar ADA remedies for state employees).

ployment, independent living, and economic and social self-sufficiency, for such individuals.”<sup>15</sup> Despite Congress’ express instruction in the original ADA that the courts should not “apply a lesser standard than the standards applied under title V of the Rehabilitation Act”<sup>16</sup> in determining what constitutes a disability, courts indeed have more narrowly interpreted the ADA.<sup>17</sup> The U.S. Supreme Court also significantly narrowed the interpretation of what constitutes a “substantial limitation” of a major life activity for the private sector employer.<sup>18</sup> In congressional hearings before the Committee on Education and Labor, Representative Andrews (presiding) expressed the belief that these “tortured judicial interpretations of the definition of ‘disability’ . . . severely undercut the effectiveness of this act [ADA] and severely excluded a lot of worthy Americans from the act’s protection.”<sup>19</sup> The House Committee on the Judiciary reinforced that sentiment, stating that “Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage,” a sentiment echoed by House Majority Leader Hoyer.<sup>20</sup> The ADAAA responds to such constricted coverage by emphasizing congressional intent to interpret more broadly workplace-related disabilities “to the maximum extent permitted by the terms of this Act.”<sup>21</sup>

Both physical and mental disabilities constitute “impairments” under the ADA. From bad backs<sup>22</sup> and knee strains<sup>23</sup> to migraine headaches<sup>24</sup> and erec-

15. Rehabilitation Act of 1973, 29 U.S.C. § 701(6)(B).

16. 42 U.S.C. § 12201(a); see also *Roundtable Discussion: Determining the Proper Scope of Coverage for the Americans with Disability Act: Hearing of the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 47-48 (2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_senate\\_hearings&docid=f:43702.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:43702.pdf) (legislative history of the 1990 ADA and the 2008 ADA amendments).

17. See *infra* Part II.

18. See *infra* Part II.

19. *H.R. 3195, ADA Restoration Act of 2007: Hearing Before the H. Comm. on Education and Labor*, 110th Cong. 2 (2008), available at [http://findarticles.com/p/news-articles/political-transcript-wire/mi\\_8167/is\\_20080131/rep-george-miller-holds-hearing/ai\\_n50714151/](http://findarticles.com/p/news-articles/political-transcript-wire/mi_8167/is_20080131/rep-george-miller-holds-hearing/ai_n50714151/) [hereinafter *Hearing*] (statement of Rep. Andrews, Presiding Member, H. Comm. on Education and Labor).

20. *ADA Amendments Act of 2008*, H.R. REP. NO. 110-730, pt. 2, at 5 (2008), available at <http://www.law.georgetown.edu/archiveada/documents/HRRep110-730Part2.pdf> (statement of Majority Leader Steny Hoyer); *Hearing, supra* note 19, at 5-8; see also Steny H. Hoyer, *Not Exactly What We Intended*, *Justice O’Connor*, WASH. POST, Jan. 20, 2002, at B01.

21. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 12102(4)(A), 122 Stat. 3553, 3555 (2008) (amending Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(4)(A)).

22. See, e.g., *Agnew v. Heat Treating Servs. of Am.*, No. 04-2531, 2005 U.S. App. LEXIS 27884, at \*12-14 (6th Cir. Dec. 14, 2005) (recognizing a bad back as an impairment but denying disability coverage on these facts since it did not substantially limit employee’s major life activities of walking or working); *Piascyk v. City of*

tile dysfunction,<sup>25</sup> courts have recognized a wide range of physical ailments as impairments. Additionally, courts have also recognized mental disorders ranging from bi-polar disorder<sup>26</sup> to somatoform disorder<sup>27</sup> as impairments or disabilities.<sup>28</sup> The fact that an impairment exists, however, does not assure the individual that he or she will be protected under the ADA. The impairment also must substantially limit a major life activity.<sup>29</sup>

The legislative purpose of the 2008 ADA Amendments Act emphasizes congressional intent for a “broad” interpretation of what constitutes a substantial limitation for a qualified disability.<sup>30</sup> Under the ADA Amendments Act rules of construction, a disability needs to substantially limit *only one* major life activity, and that activity can be *work*.<sup>31</sup> Broad construction should be afforded to what constitutes such an impairment, and an impairment generally shall be assessed in its pre-corrected state.<sup>32</sup> As then House Majority Leader Steny Hoyer emphasized, the issue should be whether the discrimination was based on a disability, not

New Haven Police Dep’t, 64 F. Supp. 2d 19, 26 (D. Conn. 1999) (“Running, jumping, climbing stairs and ladders, and crawling were not sufficiently significant or essential functions” to qualify as major life activities under the ADA.”), *aff’d*, 216 F.3d 1072 (2d Cir. 2000).

23. *See, e.g.,* Benoit v. Technical Mfg. Corp., 331 F.3d 166, 176 (1st Cir. 2003) (recognizing that back pain and knee strain were impairments but that they did not rise to the level of a disability).

24. *See, e.g.,* Williams v. Stark County Bd. of County Comm’rs, 7 Fed. App’x 441, 446-47 (6th Cir. 2001) (recognizing hypertension and migraine headaches as impairments but concluding that they were not substantially limiting even though the court recognized them as severe enough to necessitate missing three months of work).

25. *See, e.g.,* Arrieta-Colon v. Wal-Mart P.R., Inc., 434 F.3d 75, 79 (1st Cir. 2006) (affirming award of damages for hostile work environment where a penile implant to correct erectile impotency from Peyronie’s Disease left a man with a constant semi-erection).

26. *See, e.g.,* Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1081 (10th Cir. 1997) (affirming EEOC characterization of “bipolar affective disorder” as a disability).

27. *See, e.g.,* McAlindin v. County of San Diego, 192 F.3d 1226, 1230 (9th Cir. 1999) (holding that an employee diagnosed with anxiety, panic, and somatoform disorders could be substantially impaired in the major life activity of interacting with others).

28. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), available at <http://www.eeoc.gov/policy/docs/psych.html>.

29. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2006).

30. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (2008).

31. *Id.* § 4, 122 Stat. at 3555 (codified as amended at 42 U.S.C. § 12102(3)(1)(A), (2)(A) (Supp. 2009)).

32. *Id.* § 4, 122 Stat. at 3555-56 (codified as amended at 42 U.S.C. § 12102(4)(A), (E)).

on whether there were measures that could mitigate the disability.<sup>33</sup> The ADAAA clarifying amendments reject the more restrictive interpretations by the U.S. Supreme Court during the previous decade.<sup>34</sup>

The ADAAA provides that employers shall not “discriminate against a qualified individual on the basis of disability.”<sup>35</sup> An individual<sup>36</sup> has a qualified disability under the Americans with Disabilities Act (ADA) if he or she:

- (1) has “a physical or mental impairment that substantially limits one or more major life activities”; or
- (2) has “a record of such an impairment;” or
- (3) is “regarded as having such an impairment.”<sup>37</sup>

The ADAAA expressly delegates authority to the EEOC, the Attorney General, and the Secretary of Transportation to create regulations consistent with these amendments and, most importantly, to implement ADA sections 12102 and 12103.<sup>38</sup> Congress vested the EEOC with authority to define “substantially limits” in response to Supreme Court cases questioning whether the EEOC had authority under “generally applicable provisions of the [original] ADA” to issue regulations defining “disability” and “major life activities.”<sup>39</sup> The original 1990 ADA enabling legislation did not contain such a specific directive.<sup>40</sup> Pursuant to the 2008 ADAAA-enabling clauses, the EEOC exercised its delegated authority by publishing its proposed regulations and guidelines on September 23, 2009.<sup>41</sup> These regulations adopt a

33. *Hearing, supra* note 19, at 6 (statement of House Majority Leader Hoyer).

34. ADA Amendments Act of 2008, § 2, 122 Stat. at 3553-54; *see also infra* Part III.

35. 42 U.S.C. § 12112(a). The ADAAA replaced the prior ADA language prohibiting discrimination against an individual “with a disability because of the disability of such individual” with “on the basis of disability.” *See ADA Amendments Act of 2008*, § 5(a), 122 Stat. at 3557.

36. “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C.A. § 12111.

37. 42 U.S.C. § 12102(1).

38. 42 U.S.C. § 12205a. The ADAAA does not address the potential conflict in definitions or criteria to be developed by these three government bodies.

39. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (explaining some of the previous reluctance of the Court to give the EEOC deference with regard to regulatory ADA definitions).

40. *See id.*

41. 74 Fed. Reg. 48431 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630). The EEOC issued its notice of proposed rulemaking to revise its ADA regulations and noted that the purpose of the ADAAA was “to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.” *Id.* at 48432. The notice instructed that the definition of disability was to be “construed in favor of broad coverage to the maximum extent permitted by



broad approach to identify which workers qualify for ADA disabilities protection.<sup>42</sup> Despite the broad construction intended by Congress, the EEOC's proposed definition of "substantial limitation" does not adequately establish affirmative criteria for making that determination.

## II. THE U.S. SUPREME COURT'S NARROWING INTERPRETATION OF ADA DISABILITIES AND WHAT "SUBSTANTIALLY LIMITS" MAJOR LIFE ACTIVITIES

To understand the need for the changes adopted by the ADAAA, one needs to examine key U.S. Supreme Court cases that significantly narrowed the scope of what constitutes a *qualified disability* and what it means to be *substantially limited* in a major life activity.<sup>43</sup> The Court's 1999 decisions of *Sutton v. United Air Lines, Inc.*,<sup>44</sup> *Murphy v. United Parcel Service, Inc.*,<sup>45</sup> and *Albertson's, Inc. v. Kirkingburg*<sup>46</sup> and the 2002 *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* case<sup>47</sup> so restricted a person's ability to qualify for ADA protection that they essentially gutted the purpose of the Act. The trilogy of the Court's 1999 rulings "drastically curtailed the number of persons who may seek protection from discrimination on the basis of disa-

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the terms of the ADA as amended, and the determination of whether an individual has a disability should not demand extensive analysis." *Id.* According to the National Employment Law Institute, the EEOC received only 28 public comments during the 60-day "notice and comment" period but has not finalized the regulations, in part because there are only two Commissioners – insufficient for a quorum – and the United States Senate has not voted on three nominees whose hearings have been held. David K. Fram, *Update on the EEOC's Proposed ADAAA Regulations*, AMERICANS WITH DISABILITIES ACT NEWSLETTER (Nat'l Employment Law Inst., Denver, CO), Feb. 2010, at 1, available at <http://www.neli.org/downloads/ADA-2010-02.pdf>. On March 27, 2010, President Obama made interim appointments of three individuals during congressional recess to serve until the end of the Senate's next session. Press Release, The White House, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

42. See 74 Fed. Reg. 48431.

43. See Am. Civil Liberties Union, *ADA Restoration Act (S. 1881/H.R. 3195) A Civil Rights Promise to Fulfill*, [http://www.aclu.org/images/asset\\_upload\\_file833\\_33633.pdf](http://www.aclu.org/images/asset_upload_file833_33633.pdf) (last visited Jan. 17, 2011) (indicating that 97% of the plaintiffs lost their ADA claims in 2006 due primarily to the courts' narrow interpretation of what constituted an ADA disability).

44. 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

45. 527 U.S. 516 (1999).

46. 527 U.S. 555 (1999).

47. 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

bility under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination.”<sup>48</sup> In cases decided on the merits in accord with these 1999 rulings, defendant employers prevailed in more than 93% of reported ADA employment discrimination cases at the trial court level.<sup>49</sup> The 2008 ADAAA findings specifically concluded that these key Supreme Court decisions “eliminat[ed] protection for many individuals whom Congress intended to protect” and “interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress.”<sup>50</sup>

#### A. *Sutton v. United Air Lines, Inc.*

In the 1999 *Sutton* case and its two companion cases, the Supreme Court created standards that significantly narrowed the scope of ADA eligibility. First, one’s degree of disability or amount of “substantial limitation” was to be assessed only after applying mitigating measures that may help one function better.<sup>51</sup> The Court rejected previous EEOC guidelines that required the disability to be assessed in its pre-corrected state.<sup>52</sup> Second, the Court concluded that an employer has the right to determine whether “physical characteristics or medical conditions that do not rise to the level of an impairment . . . [or that] some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.”<sup>53</sup> Third, the Court held that the disability had to significantly limit one’s ability to perform “a broad class of jobs,” not merely one specific job, in order to satisfy the “substantially limited” requirement.<sup>54</sup> In this regard, the Court accepted the EEOC’s then-existing requirement that the impairment “significantly restrict one’s ability to perform either a class of jobs or a broad range of jobs.”<sup>55</sup>

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48. Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000); see also Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 20 (2000).

49. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

50. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4),(7), 122 Stat. 3553, 3553-54 (2008).

51. See *Albertson’s*, 527 U.S. at 556 (noting that these mitigating measures could be equipment, such as glasses, medications, or even brain compensation to try to overcome impairments); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

52. *Sutton*, 527 U.S. at 482 (rejecting 29 C.F.R. § 1630.2(j) (1998), which assessed disabilities without regard to mitigating measures).

53. See *id.* at 490-91.

54. *Id.* at 491.

55. *Id.* (citing 29 C.F.R. § 1630.2(j)(3)(i)).

The Court applied these standards in the *Sutton* case to disqualify two twin sisters as commercial airline pilots because of their uncorrected sight limitation, while simultaneously concluding that they were not disabled under the ADA because of their corrected vision.<sup>56</sup> The Sutton twins were severely myopic (with uncorrected visual acuity of 20/200 or worse) but could function normally while wearing glasses.<sup>57</sup> However, their applications to be commercial airline pilots were rejected because they did not meet the airline's minimum requirement of uncorrected visual acuity of 20/100 or better.<sup>58</sup>

In *Sutton*, the Court decided that a person's ADA disability status should be evaluated only *after* mitigating measures (such as eyeglasses) were applied, leading to the conclusion that the women were not disabled.<sup>59</sup> Qualification for industry standards regarding vision, however, were determined in the *pre-corrected* state.<sup>60</sup> Consequently, the litigants could not meet the preliminary bona fide occupational qualification (BFOQ) sight requirement because of their sight disability, but were *not* considered disabled under the ADA because that determination was made after glasses were in place. Such an incongruity results in a definite Catch-22.

Because the sisters arguably still could give private flying lessons, where they were not bound by commercial pilot sight restrictions, the Court also concluded that they were not "substantially limited" in a "broad range of jobs."<sup>61</sup> No specific language in the original ADA required a disabled individual to be precluded from a broad spectrum of jobs, but EEOC regulations at the time included this parameter.<sup>62</sup> From this author's perspective, the Court should have considered these women as disabled due to severe near-sightedness, but should have allowed the employer to reject them based on a safety defense or the business necessity that a pilot needs to be able to read the instrument panel if his or her glasses fall off during turbulence.

The ADAAA rejects part of the *Sutton* holding.<sup>63</sup> Under these amendments, ADA disabilities are to be determined in the pre-corrective state, with one exception: "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."<sup>64</sup> In other words, the

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56. *Id.* at 475-76, 494.

57. *Id.* at 475.

58. *Id.* at 476.

59. *Id.* at 482, 488-89.

60. *See id.* at 476.

61. *Id.* at 492-93.

62. 29 C.F.R. § 1630.2(j)(3)(i) (1999).

63. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4),(b)(2)-(3), 122 Stat. 3553, 3553-54 (2008).

64. 42 U.S.C. § 12102(4)(E)(ii) (Supp. 2009).

degree to which visual acuity is limited is still assessed while the individual is wearing ordinary glasses or contacts.<sup>65</sup>

*B. Murphy v. United Parcel Service, Inc. and  
Albertson's, Inc. v. Kirkingburg*

In the two 1999 Supreme Court cases, *Murphy* and *Albertson's, Inc.*, handed down contemporaneously with the *Sutton* case, the Court applied BFOQs or government standards to preclude otherwise qualified individuals with certain physical conditions from employment in commercial jobs. In *Murphy v. United Parcel Service, Inc.*, Vaughn Murphy applied for a mechanic's job to repair motor vehicles, including commercial vehicles.<sup>66</sup> Murphy could not satisfy Department of Transportation (DOT) blood pressure requirements for a commercial driver's license due to his hypertension.<sup>67</sup> His failure to satisfy DOT standards for a commercial driver's license was a sufficient basis for his employer to dismiss him.<sup>68</sup> Murphy's degree of hypertension was reduced through medication, so the Court refused to classify him as disabled, even though his blood pressure was still too high to satisfy DOT standards for blood pressure of a commercial driver<sup>69</sup> – another no-win situation.

In *Albertson's, Inc. v. Kirkingburg*, Albertson's food chain discharged Hallie Kirkingburg, a monocular truck driver, because he could not meet DOT's basic vision test for a commercial driver's license.<sup>70</sup> Although Kirkingburg's condition in his left eye was uncorrectable, the Supreme Court concluded that his brain was undertaking mitigating measures to compensate, so he was not disabled.<sup>71</sup> In response to this type of reasoning, the ADA states that disability status will be determined without regard to "learned behavioral or adaptive neurological modifications."<sup>72</sup> Under the ADA, **a person with monocular vision should be considered disabled.**<sup>73</sup> **The business**

65. Disability status, however, is determined before use of "low-vision devices" intended to magnify, enhance, or augment a visual image and auxiliary devices. 42 U.S.C. § 12102(4)(E)(ii).

66. 527 U.S. 516, 519 (1999).

67. *Id.* (noting that petitioner's blood pressure was 250/160 uncorrected and 186/124 on the date he was hired).

68. *Id.*

69. *Id.* at 521.

70. 527 U.S. 555, 558-60 (1999) (requiring 20/40 vision in each eye).

71. *See id.* at 565-66.

72. 42 U.S.C. § 12102 (4)(E)(i)(IV) (Supp. 2009).

73. *See id.* (providing that "learned behavior or adaptive neurological modifications" shall not be considered in determining whether someone has an impairment substantially limiting a major life activity); 74 Fed. Reg. 48431, 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(ii)(B)) (recognizing that "[s]omeone with monocular vision whose depth perception or field of vision [is] substantially limited" is substantial-

necessity standard must be satisfied before job-related uncorrected vision standards may be imposed against that individual.<sup>74</sup>

### C. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

The 2002 case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* involved an assembly line worker who could work with reasonable accommodation.<sup>75</sup> For two years, Ella Williams was assigned modified job duties and allowed to work only two of four lines because of carpal tunnel syndrome.<sup>76</sup> New management, however, required employees to alternate between all of the lines.<sup>77</sup> She began to experience nerve compression pain and myotendinitis bilateral periscapular inflammation with these new tasks.<sup>78</sup> When she requested to return to her two-task rotation, she was fired rather than accommodated.<sup>79</sup> The district court granted summary judgment in favor of the employer on Williams' ADA claim, but the Sixth Circuit reversed in part, finding that her impairments substantially limited her major life activity of performing manual tasks.<sup>80</sup> The Supreme Court reversed, concluding that the ADA should be construed "strictly to create a demanding standard for qualifying as disabled" and that the worker must be so substantially limited in major activities that the impairment "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives," such as manual tasks essential to basic care and hygiene.<sup>81</sup>

The Supreme Court created a nearly impossible standard in *Toyota* – a standard that the ADAAA now specifically deems to be "an inappropriately high level of limitation."<sup>82</sup> Under the *Toyota* standard, if an employee had to demonstrate that his or her ability to grip a toothbrush was substantially impaired in order to qualify as disabled, it is unlikely that the individual, even if accommodated, could perform many manual labor tasks at work. If the manual task performed at work was not a task common to daily living, such as repetitive work with arms extended above shoulder level, that manual task would not be protected under the Court's 2002 interpretation of the ADA in

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ly limited in seeing without further proof that he is unable to perform activities of central importance to daily life).

74. See 42 U.S.C. § 12113(c).

75. 534 U.S. 184, 188-89 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

76. *Id.* at 187-88.

77. *Id.* at 189.

78. *Id.*

79. *Id.* at 188-90.

80. *Id.* at 187.

81. *Id.* at 197-98.

82. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008).

*Toyota*.<sup>83</sup> Coupled with the Court's reluctance in *Sutton* to see *working* as a major life activity,<sup>84</sup> it became nearly impossible for the Court to find anyone who was sufficiently disabled and still able to perform essential job functions. In rejecting this overly narrow view, the ADA specifically recognizes *working* as a major life activity<sup>85</sup> and clearly rejects the notion that the disability must substantially limit other daily activities in addition to the major activity of work.<sup>86</sup>

### III. THE ADA AND EEOC'S BROAD CONSTRUCTION OF A QUALIFYING DISABILITY AND WHAT "SUBSTANTIALLY LIMITS" MAJOR LIFE ACTIVITIES

#### A. Broad Scope of "Disability" Protection

Employers shall not "discriminate against a qualified individual on the basis of disability."<sup>87</sup> One can qualify as having a disability through one of the following three tests: (1) "a physical or mental impairment that substantially limits one or more major life activities"; (2) "a record of such an impairment; or" (3) "being regarded as having such an impairment."<sup>88</sup>

While the ADA does not elaborate on what constitutes a record of impairment,<sup>89</sup> it does address the first and third ways that one can be considered "disabled."<sup>90</sup> The ADA provides significant detail regarding what constitutes a "major life activity" and emphasizes that an impairment should

83. See *Toyota*, 534 U.S. at 201; see also Cheryl L. Anderson, *Comparative Evidence or Common Experience: When Does 'Substantial Limitation' Require Substantial Proof Under the Americans with Disabilities Act?*, 57 AM. U. L. REV. 409, 413 (2007).

84. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

85. 42 U.S.C. § 12102(2)(A), (4)(C) (Supp. 2009).

86. 42 U.S.C. § 12102(4)(C).

87. 42 U.S.C. § 12112(a). The ADA replaced the prior ADA language prohibiting discrimination against an individual "with a disability because of the disability of such individual" with "on the basis of disability." See ADA Amendments Act of 2008 sec. 5(a), 122 Stat. at 3557.

88. 42 U.S.C. § 12102(1).

89. See David K. Fram, *The ADA Amendments Act: Dramatic Changes in Coverage*, 26 HOFSTRA LAB. & EMP. L.J. 193, 217 (2008) (predicting that the number of "record of cases" will decrease now that it will be easier to demonstrate a current disability but that it will also be easier to show a record of a "substantial limitation" because of the reduced level of severity required).

90. 42 U.S.C. § 12102(3)-(4).

be recognized as a disability without extensive analysis.<sup>91</sup> Furthermore, the ADAAA directs the EEOC to consider the broad congressional intent to cover disabled individuals in setting the standard for what is to be considered “substantially limited.”<sup>92</sup> The existence of an impairment under the ADAAA is generally determined before mitigating measures are employed.<sup>93</sup> Furthermore, a discriminatory act “on the basis of disability” can result in an employee “being regarded as having such impairment,” whether or not the employer subjectively thought the disability existed.<sup>94</sup> The focus under the ADA amendments shifts the emphasis to the act of discrimination rather than the subjective perception that a disability exists.<sup>95</sup>

The stated purpose of the ADAAA is to carry out the ADA’s objectives of providing “clear, strong, consistent, enforceable standards addressing discrimination” and “a clear and comprehensive national mandate for the elimination of discrimination” by reinstating a broad scope of protection under the ADA.<sup>96</sup> This broad intent is reiterated numerous times in the ADAAA. The ADAAA Findings and Purposes section emphasizes that congressional intent in 1990 was that the ADA “provide broad coverage,”<sup>97</sup> but “that expectation has not been fulfilled”<sup>98</sup> because the courts and EEOC set “an inappropriately high level of limitation,”<sup>99</sup> a standard that was “eliminating protection for many individuals whom Congress intended to protect.”<sup>100</sup>

### *B. Expansion of Qualifying “Major Life Activities”*

To qualify for ADAAA protection for an actual disability, the physical or mental impairment must “substantially limit[] one or more major life activities.”<sup>101</sup> The ADAAA now broadly defines “major life activities” in two categories: (1) general activities and (2) bodily functions.<sup>102</sup> General activities include the major life activities of walking and standing, as well as the manual tasks of lifting and bending.<sup>103</sup> Also considered general major life

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91. 42 U.S.C. § 12102(2); ADA Amendments Act of 2008 § 2(b)(5), 122 Stat. at 3554.

92. ADA Amendments Act of 2008 § 2(b)(6), 122 Stat. at 3554.

93. 42 U.S.C. § 12102(4)(E)(i).

94. *Id.* § 12102(3)(A).

95. *See* ADA Amendments Act of 2008 § 7, 122 Stat. at 3558 (also amending the Rehabilitation Act to ensure a broad definition of disability consistent with section 3 amendments to the ADA).

96. *Id.* § 2(b)(1), 122 Stat. at 3553.

97. *Id.* § 2(a)(1).

98. *Id.* § 2(a)(3).

99. *Id.* § 2(b)(5); *see also id.* § 2(a)(8).

100. *Id.* § 2(a)(4).

101. 42 U.S.C. § 12102(1)(A).

102. *Id.* § 12102(2).

103. *Id.* § 12102(2)(A).

activities are seeing, hearing, breathing, eating, and sleeping.<sup>104</sup> Activities related to thinking, learning, concentrating, communicating, speaking, and reading also qualify as general major life activities.<sup>105</sup> Working is listed as a general activity that qualifies as a major life activity.<sup>106</sup> Case law also recognizes interacting with others as an additional example of a major life activity.<sup>107</sup>

The listing of major life activities in the ADAAA legislation and the broader list of qualified activities in the proposed EEOC regulations is a significant evolution. The term “major life activities” was not defined in the original ADA. Prior to the ADAAA, EEOC regulations and court interpretations fleshed out what constituted “major life activities.” EEOC regulations include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,”<sup>108</sup> all of which remain in the new proposed EEOC list.<sup>109</sup> The new ADAAA statutory list of major life activities includes the previous EEOC list, while adding such areas as reading, communicating, and bending.<sup>110</sup> Both the ADAAA statute and the proposed EEOC regulations also include eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating as examples of major life activities.<sup>111</sup> Sitting, reaching, and interacting with others are also added to the proposed EEOC list.<sup>112</sup> Modern activities, such as using a computer or driving a car, are not specifically listed but may be included based on their incorporation of underlying manual tasks, such as reading, communicating, and concentrating. Such applications will be subject to future court interpretations.

The ADAAA also provides a separate list of “bodily functions” as major life activities, including reproduction; normal cell growth; and respiratory, neurological, circulatory, brain, endocrine, immune system, digestive, bowel,

104. *Id.*

105. *Id.*

106. *Id.*

107. *See, e.g.,* *McAlindin v. County of San Diego*, 192 F.3d 1226, 1230 (9th Cir. 1999) (holding that an employee diagnosed with anxiety, panic, and somatoform disorders could be substantially impaired in the major life activity of interacting with others).

108. 29 C.F.R. § 1630.2(i) (2010).

109. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(h)(2)(i)(1)).

110. 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(i); 74 Fed. Reg. at 48440; U.S. Equal Employment Opportunity Comm’n, Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008, *available at* [http://www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html) (last visited Nov. 22, 2010).

111. 42 U.S.C. § 12102 (2)(A); 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(i)(1)).

112. 74 Fed. Reg. at 48440.



and bladder functions.<sup>113</sup> Proposed EEOC regulations add to the list of “bodily functions” both functions of systems and (incongruently) organs, including speech organs and skin and cardiovascular, hemic, lymphatic, musculoskeletal, and genitourinary functions,<sup>114</sup> while emphasizing that the list is not exhaustive.<sup>115</sup> EEOC illustrations include the following explanations of conditions that affect bodily functions: HIV affects the immune system and reproductive functions; sickle cell disease affects functions of the hemic system; and rheumatoid arthritis affects the musculoskeletal functions.<sup>116</sup> These regulations list HIV, AIDS, autism, cancer, diabetes, and schizophrenia as impairments that will consistently meet the definition of disability.<sup>117</sup>

Pressuring an employee into disclosing that he is HIV positive is an improper inquiry.<sup>118</sup> Kenneth Horgan was dismissed in 2009 after making the compelled disclosure that he was HIV positive, even though his T-cell count was in the acceptable range and Horgan maintained that he was capable of performing the essential job functions as General Manager of the Chicago facility of Morgan Services, Inc., a linen and uniform rental service.<sup>119</sup> For the past eight years he had performed as a sales manager and was more recently promoted to general manager, but Morgan’s president (who compelled the disclosure) said that he did not know if Horgan could lead if employees knew about his condition.<sup>120</sup> Citing both ADA and the proposed EEOC regulations, an Illinois district court recognized HIV as a qualified disability that compromises the immune system and held that Horgan should be allowed to prove his dismissal was improper.<sup>121</sup>

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113. 42 U.S.C. § 12102(2)(B); see Fram, *supra* note 89, at 202 (arguing that Congress’ inclusion of these bodily functions “mixes up the issue of ‘impairment’ and ‘major life activity’”).

114. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. pt. 1630.2(i)(2)) (blending together traditional bodily functions and organs under the heading of bodily functions).

115. *Id.* (to be codified at 29 C.F.R. § 1630.2(i)(3)(i)).

116. *Id.* (to be codified at 29 C.F.R. § 1630.2(i)(2)).

117. *Id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(5)).

118. See *Horgan v. Simmons*, 704 F. Supp. 2d 814, 820-21 (N.D. Ill. 2010) (citing 42 U.S.C. § 12112(d)(4), which prohibits inquiry into whether an individual has a disability or the nature and severity of the disability unless the employer can prove the inquiry is job-related or business necessity); see also Genetic Information and Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (prohibiting employment discrimination based on genetic information and significantly limiting the ability of an employer to require or acquire genetic testing information about an employee’s family or ancestors (that could be improperly used for predicting potential disabilities)).

119. *Horgan*, 704 F. Supp. 2d at 816-17.

120. *Id.*

121. *Id.* at 818-19.

In addition, the ADAAA covers conditions which are “episodic or in remission.”<sup>122</sup> Individuals with episodic conditions such as epilepsy, severe asthma, or multiple sclerosis should qualify if these conditions (when active) would substantially limit one or more of the above major life activities.<sup>123</sup>

Similarly, normal cell growth that is substantially limited due to cancer now qualifies under the ADAAA as a disability without showing an impairment of another major life activity.<sup>124</sup> Even when the cancer is in remission, the individual affected has an ADAAA disability.<sup>125</sup> In applying this portion of ADAAA, an Illinois district court recognized renal cell carcinoma (in remission when Stephen Hoffman was terminated) as a basis for a qualified disability and granted Hoffman’s request for an expedited trial because he was now suffering from other types of advanced cancer.<sup>126</sup>

Only *one* major life activity has to be substantially limited for an individual to be eligible for Qualified Individual with a Disability (QID) status.<sup>127</sup> For example, proposed EEOC regulations emphasize that a diabetic automatically will meet the definition of a disability because the endocrine function is substantially limited and that the individual need not show a limitation on another major life activity.<sup>128</sup> Before the ADAAA became effective, courts often concluded that diabetes had to limit other major life activities, such as eating, seeing, or walking, or that the diabetic had to withstand a complex analysis of the degree of insulin administered, activity level, and nature of food intake to establish that a substantial limitation existed.<sup>129</sup> Furthermore, case analysis did not consider diabetes as substantially limiting if it could be controlled by insulin shots or frequent eating.<sup>130</sup>

Persons with psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder also qualify as disabled under the proposed

122. 42 U.S.C. § 12102(4)(D).

123. *See id.*

124. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iii)(B)).

125. *Id.* at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(5)(i)(B)).

126. *See Hoffman v. Carefirst of Fort Wayne, Inc.*, 2010 U.S. Dist. LEXIS 107493 (N.D. Ind. Oct. 6, 2010) (ordering an expedited trial due to the declining health of the plaintiff and denying the defendant an interlocutory appeal of its August 31, 2010 ruling in which the court held that the plaintiff, who had renal cancer in remission, was a qualified individual with a disability under ADAAA § 12102(4)(D) and proposed EEOC regulations, 29 C.F.R. § 1630.2(g)(4) and 29 C.F.R. 1630.2(g)(5)).

127. 42 U.S.C. § 12102(4)(C).

128. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iii)(A), (iv)(B)).

129. *See, e.g., Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 34-35 (1st Cir. 2010); *Scheerer v. Potter*, 443 F.3d 916, 920 (7th Cir. 2006); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001); *Sepulveda v. Glickman*, 167 F. Supp. 2d 186, 191 (D. P.R. 2001).

130. *Sepulveda*, 167 F. Supp. 2d at 190-91.

EEOC regulations.<sup>131</sup> Because the examples are not intended to be exhaustive, food allergies that affect bodily functions or result in life-threatening allergic reactions arguably should qualify as well.

It is noteworthy that the ADAAA specifically lists “working” as a type of general activity that is recognized as a major life activity.<sup>132</sup> In contrast, the *Toyota* case had refused to defer to prior EEOC regulations and instead questioned whether work itself was a major life activity or just a setting in which some major life activities (such as manual tasks) take place.<sup>133</sup> The legislative findings accompanying the ADAAA specifically reject the rationale of the *Toyota* case that activities central to daily living had to be compromised in addition to one’s work-related substantial limitation.<sup>134</sup> Proposed EEOC regulations emphasize that the ADAAA mandates “broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis” regarding who is substantially limited in the major life activity of working.<sup>135</sup> These changes should reinvigorate the requirement that people who are able to work, despite their disabilities, be given an opportunity to do so.

### C. Broad Construction of “Substantially Limits”

Prior to the ADAAA, the Supreme Court had very stringently construed what was necessary to establish a *substantial* limitation on a major life activity. The Supreme Court in *Toyota* defined “substantially limits” as “prevents or severely restricts”<sup>136</sup> and in *Sutton* defined it as “considerable” or “specified to a large degree” and “unable to work in a broad class of jobs.”<sup>137</sup> In the ADAAA, Congress rejected such case law interpretations as setting too high a

131. 74 Fed. Reg. at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(4)).

132. 42 U.S.C. § 12102(2)(A).

133. *Toyota Motor Mfg., Kentucky, Inc. v Williams*, 534 U.S. 184, 200 (2002) (recognizing “the conceptual difficulties inherent in the argument that working could be a major life activity” but deciding that the determination of that issue was not necessary to the outcome of the case), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

134. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008).

135. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. pt. 1630.2(j)(2)(i)); *see also* ADA Amendments Act of 2008 § 2(a)(1), 122 Stat. at 3553.

136. *Toyota*, 534 U.S. at 198.

137. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976) for the notion that “substantially” suggests “considerable” or “specified to a large degree”), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

standard<sup>138</sup> and also rejected the following pre-ADAAA EEOC regulations,<sup>139</sup> which defined “substantially limits” to mean (1) “[u]nable to perform a major life activity that the average person in the general population can perform,” or (2) “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population.”<sup>140</sup>

The criteria for what does constitute a *substantial limitation* of a major life activity is ambiguous, however, in both the ADAAA and the proposed EEOC regulations. Although the ADAAA does not define what it means to be substantially limited in a major life activity, Congress delegated to the EEOC, Attorney General, and Secretary of Transportation specific authority to develop a new definition.<sup>141</sup> Rules of construction under the ADAAA require that “[t]he term ‘substantially limits’ shall be interpreted consistently with the findings and [broad] purposes of the ADA Amendments Act of 2008.”<sup>142</sup> In other words, the standard should be set at a reasonably attainable level to be in accord with congressional intent to provide broad coverage to individuals with disabilities, and the limitation generally should be determined before one considers the effects of mitigating measures.

Accordingly, the *significantly restricted* language is replaced in the 2009 proposed EEOC regulations by an explanation that to be substantially limited, an “impairment *need not prevent, or significantly or severely restrict*, the individual from performing a major life activity in order to be considered a disability.”<sup>143</sup> While the new EEOC definition appears to fulfill the congressional mandate for a broad interpretation of qualifying disabilities, it is counterintuitive to the common sense meaning of “substantially limits” and is likely to be seen as such by some courts. How can an impairment “substantially limit” a major life activity and simultaneously “not significantly or severely restrict” the same activity? Congress should have changed the word “substantially” in the ADAAA statute rather than charging the EEOC with the task of defining “substantially limits” in a way that does not include “significantly restricted.”

The EEOC’s 2009 proposed regulations make a comparison “to most people in the general population” – rather than to the “average person” – in determining whether an impairment substantially limits the ability of an individual to perform a major life activity.<sup>144</sup> Such a comparison to the general population should use “a common-sense standard, without resorting to scien-

138. ADA Amendments Act of 2008 § 2(a)(4), (7), 122 Stat. at 3553 (rejecting by name the *Toyota* and *Sutton* rationales).

139. *Id.* § 2(a)(8), 122 Stat. at 3554.

140. 29 C.F.R. § 1630.2(j) (2010) (emphasis added).

141. 42 U.S.C. § 12205a (Supp. 2009).

142. 42 U.S.C. § 12102(4)(B).

143. *Compare* 29 C.F.R. § 1630.2(j)(1) (2010), with 74 Fed. Reg. 48431, 48440 (Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630.2(j)(1)) (emphasis added).

144. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. pt. 1630.2(j)(1)).

tific or medical evidence.”<sup>145</sup> For example, the extent to which one’s respiratory function and breathing is impaired when the person is subject to tobacco smoke, perfumes, or cleaning products must be assessed in comparison to most people.<sup>146</sup> Similarly, if one suffers from carpal tunnel syndrome, the amount of pain or length of time one can write, use a computer keyboard, or perform repetitive manual tasks compared to most people should be examined in determining whether the individual is disabled.<sup>147</sup>

In deciding “whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment.”<sup>148</sup> EEOC guidelines, for example, indicate that even someone who has achieved a high level of academic success, such as graduating from college, may still have a reading disability.<sup>149</sup> The disability determination for this individual “does not depend on what the individual is able to do in spite of an impairment.”<sup>150</sup> With autism, for example, employers and courts should consider the time and effort required for a person to learn, as well as the difficulty experienced in concentrating or thinking, in comparison to most people in the general population, in determining the existence of a disability and in providing a reasonable accommodation.<sup>151</sup> Accordingly, a medical student who suffers from a reading disability may be entitled to additional time on medical exams under the ADAAA standards.<sup>152</sup>

If someone develops a disability that substantially limits his or her ability to perform his or her job, that person is considered disabled, even if he or she is qualified to perform a different line of work.<sup>153</sup> The focus is on the disability. Accordingly, an employee’s ability to perform a different type of work should not be used by employers or courts to disqualify the individual from claiming disability status. Furthermore, requiring someone’s disability to preclude the person from a broad class of jobs, as mandated in *Sutton*, would be inconsistent with the broad scope of the ADAAA disability protection. According to the EEOC’s interpretative guidance, the terms “broad range of jobs” and “class of jobs” have been eliminated and replaced with “type of work.”<sup>154</sup> “The type of work . . . includes the job the individual has been performing, or for which the individual is applying” and “job-related

145. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(2)(iv)).

146. *Id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(A)).

147. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(F)).

148. *Id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(vi)).

149. *Id.* at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(6)(i)(C)).

150. *Id.*

151. *See id.*

152. *See Jenkins v. Nat’l Bd. of Med. Exam’rs*, No. 08-5371, 2009 U.S. App. LEXIS 2660 (6th Cir. Feb. 11, 2009) (remanding the case for consideration of injunctive relief).

153. 74 Fed. Reg. at 48443 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iv)).

154. *Compare* 29 C.F.R. § 1630.2(j) (2010), *with* 74 Fed. Reg. at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)).

requirements that an individual is substantially limited in meeting because of an impairment” as compared to most people performing those jobs.<sup>155</sup>

The proposed EEOC guidelines provide examples of job-related requirements that may be substantially impaired. They include “bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; . . . working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; and work rotating, irregular, or excessively long shifts.”<sup>156</sup>

#### *D. Role of Mitigating Measures*

Generally, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”<sup>157</sup> If the “impairment would be substantially limiting without the mitigating measure,” the individual has an ADA disability, even if the medication or other mitigating measure allows him or her to function with minor limitations or even without limitations.<sup>158</sup> In addition, a person is disabled even if he or she follows a careful regimen of medicine, exercise, and diet to control a disabling disease or condition.<sup>159</sup> Proposed EEOC regulations set forth several examples, emphasizing that “[a]n individual who is taking a psychiatric medication for depression, or insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that the mental impairment, the diabetes, or the seizure disorder, if left untreated, would substantially limit a major life activity.”<sup>160</sup> Thus, use of medications to control frequency and intensity of epileptic seizures, as well as diet and exercise to control diabetes, do not preclude an employee from qualifying as disabled; similarly, an employee with muscular dystrophy can use adaptations to compensate for manual task difficulties without losing disability status.<sup>161</sup> According to the EEOC, courts and employers should not consider mitigating measures such as oxygen therapy equipment, hearing aids, cochlear implants, prosthetics, and other mobility devices in determining whether someone has a disability.<sup>162</sup> Instead, the disability determination should examine the pre-corrective condition.<sup>163</sup>

155. 74 Fed. Reg. at 48442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)).

156. *Id.* at 48447 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)).

157. 42 U.S.C. § 12102(4)(E)(i) (Supp. 2009).

158. 74 Fed. Reg. at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(3)(iii)).

159. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)).

160. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(3)(iii)(A)).

161. *Id.* at 48440-41 (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)) (citing *McClure v. Gen. Motors Corp.*, 75 Fed. App’x 983 (5th Cir. 2003), *Orr v. Wal-Mart Stores, Inc.*, 297 F. 3d 720 (8th Cir. 2002), and *Todd v. Acad. Corp.*, 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999), as contrary to the ADA).

162. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(3)(ii)(A)).

163. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)).

These clarifications are significant in light of pre-ADAAA cases that refused to even consider whether an individual was substantially limited in his or her ability to do work if the individual discontinued his or her medication. Individuals who stopped taking medications to control a seizure disorder,<sup>164</sup> panic attacks and acute depression,<sup>165</sup> or asthma<sup>166</sup> were not considered disabled when the *Murphy* and *Sutton* cases were controlling because “if a disorder can be controlled by medication or other corrective measures, it does not substantially limit a major life activity.”<sup>167</sup> In 2000, a federal district court in Maryland took the *Murphy* and *Sutton* reasoning a step further in *Tangires v. Johns Hopkins Hospital*.<sup>168</sup> In that case, Tangires suffered from acute asthma and sought a determination that she was disabled.<sup>169</sup> The court, however, ruled that her asthma did not substantially limit her in any major life activity because she was not utilizing medication.<sup>170</sup> The court concluded that if the condition is correctable by medication, then “[a] plaintiff who does not avail herself of proper treatment is not a ‘qualified individual’ under the ADA.”<sup>171</sup> Under this pre-ADAAA reasoning, a plaintiff could not win: if a patient took his or her medication, the limitation was reduced so that it was no longer substantial, but if the patient failed to use the medication, he or she also was precluded from being a qualified individual under the ADA. By returning the evaluation to the pre-medicated state, the ADAAA and the EEOC intended to clarify that individuals whose underlying ailment substantially limits a major life activity are considered to have ADA disabilities, whether or not they are taking medications which reduce the severity of the limitation.

Disability status under the ADAAA is also to be determined “without regard to the ameliorative effects of . . . learned behavioral or adaptive neurological modifications”<sup>172</sup> and “[t]o the extent [that] cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended.”<sup>173</sup> This change was made in response to the *Albertson’s* case, where the monocular driver was simultaneously denied employment because of his visual limitation but was not considered disabled because of his suc-

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164. *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225, 1232-33 (D. Kan. 1999) (also raising health and safety defenses to failure to take medications regularly).

165. *Matuska v. Hinckley Twp.*, 56 F. Supp. 2d 906, 910, 916 (N.D. Ohio 1999).

166. *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 596 (D. Md. 2000).

167. *Spradley*, 68 F. Supp. 2d at 1232-33 (citing *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999)).

168. 79 F. Supp. 2d 587.

169. *Id.* at 594.

170. *Id.* at 596 (plaintiff refused to take a medication because of fear of side effects).

171. *Id.*

172. 42 U.S.C. § 12102(4)(E)(i)(IV) (Supp. 2009); *see also* 74 Fed. Reg. 48431, 48441 (Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630.2(j)(3)(ii)(D)).

173. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(3)(i)).

cessful adaptation.<sup>174</sup> The EEOC proposed regulations emphasize that “[l]earned behavioral or adaptive neurological modifications” as mitigating measures should not be used to disqualify disabilities<sup>175</sup> and list as an example an individual with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies.<sup>176</sup> Under these EEOC regulations, the individual does not need to prove that he or she is unable to perform activities of central importance to daily life that require visual acuity in order to be considered “substantially limited in seeing” while working – a qualifying major life activity.<sup>177</sup>

There is one exception to the proclamation that disability is determined from the pre-corrective state. Under the ADA, the “ameliorative effects of . . . ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.”<sup>178</sup> Consequently, an individual who sees normally while wearing glasses or contacts is not considered disabled. This is the one explicit circumstance in which even the ADA standards examine a disability in the post-corrective state (in partial accord with the *Sutton* rationale). According to proposed EEOC regulations, outdated or wrong prescriptions are still considered “‘ordinary’ eyeglasses or contact lenses if there is evidence that a proper prescription would fully correct visual acuity or eliminate refractive error.”<sup>179</sup> In this way, the EEOC attempts to address a potential dilemma regarding how to handle a “correctable” but inadequately corrected visual problem. However, this approach may create a substantial burden on low-income wage earners if complex multi-focal lenses are needed to view objects at different distances and insurance does not cover such expenses. Also, it may be difficult to seamlessly correct vision as one ages, especially if the difference in correction needed for distance versus reading visual acuity is substantial and the corrective lens is too narrow to accommodate that variance. Such impairments can pose real and substantial difficulties in reading and should not be summarily dismissed.

Some visual acuity assistive devices, however, do not count against an individual who is seeking disability status. Use of “[l]ow-vision devices” intended to “magnify, enhance, or otherwise augment a visual image” shall not preclude a person from having a qualified ADA disability.<sup>180</sup> Disability status shall be determined before the accommodation of auxiliary aids and

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174. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 567; see *supra* notes 70-74 and accompanying text.

175. 74 Fed. Reg. at 48441 (to be codified at 29 C.F.R. § 1630.2(j)(3)(ii)(D)).

176. *Id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(ii)(B)).

177. *Id.*

178. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 12102(a)(4)(E)(ii), 122 Stat. 3553, 3556 (2008).

179. 74 Fed. Reg. at 48441 (to be codified at 29 C.F.R. § 1630(j)(3)(iv)(C)).

180. 42 U.S.C. § 12102(4)(E)(i)(I), (iii)(II) (Supp. 2009).



services (such as interpreters, readers, or taped text) are utilized.<sup>181</sup> Furthermore, the ADAAA specifies that job selection criteria, qualification standards, and tests related to uncorrected vision shall not be used unless the entity demonstrates that the qualification is “job-related for the position in question and consistent with business necessity.”<sup>182</sup>

#### IV. LIMITATIONS AND AMBIGUITIES IN THE ADAAA

##### A. Criteria for “Being Regarded as Having Such an Impairment”

The third way an employee can be protected under the ADAAA is if his or her employer takes discriminatory action because the person is “regarded as having such an impairment.”<sup>183</sup> This method of qualifying for ADA protection is available even if the individual does not satisfy either of the other two ADA qualifications for an “actual disability” or a “record of” a disability.<sup>184</sup>

A historic examination of court interpretations of pre-ADAAA EEOC regulations illustrates the need for the change in the interpretation of the “being regarded as having such an impairment” prong. Before the ADAAA, this disability criterion was intended to protect individuals who were (1) wrongly perceived by the employer to have a substantial limitation of a major life activity, or (2) treated by the employer as having a substantially limiting impairment even though they had a less limiting physical or mental impairment, or (3) viewed as substantially limited only because of attitudes of others.<sup>185</sup> Court decisions during the last dozen years, however, made it extremely difficult to satisfy the “being regarded as having such an impairment” requirement. Restrictive rules associated with the “actual disability” prong began to be applied to the “regarded as” prong as well.<sup>186</sup> It became insufficient to establish that an employer took adverse action based on stereotypes, myths,

181. *Id.* § 12102(E)(i)(III).

182. *Id.* § 12113(c). The amendments do not specifically address other types of government standards, except for the requirement that such standards be in accord with the amended ADA § 3 definition of disability. *See id.*

183. 42 U.S.C. § 12102(1) (providing that one can qualify as having an ADA disability by satisfying one of the following standards: “(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment”).

184. *Id.*

185. 29 C.F.R. § 1630.2(l).

186. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *see also* Thomas Simmons, “Working” with the ADA’s “Regarded As” Definition of Disability, 5 TEX. F. ON C.L. & C.R. 27, 63 (2000) (observing that the “‘regarded as’ prong is strained through the ‘major life activity of working’ sieve”).

fears, or general misconceptions concerning disabilities.<sup>187</sup> Instead, the plaintiff-employee faced the extremely difficult task of establishing that his or her employer subjectively believed that the employee had an impairment that substantially limited a major life activity.<sup>188</sup>

In *Murphy*, the employer's resource manager admitted that Murphy was fired due to his hypertension, but the Supreme Court concluded that the employer "does not regard petitioner as substantially limited in the major life activity of working but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification."<sup>189</sup> To be regarded as substantially limited in the major life activity of working, the Court reasoned, the individual must be precluded from more than one particular job.<sup>190</sup> Because Murphy could work as a mechanic where he was not required to drive a commercial vehicle, there were still other mechanic jobs available to him.<sup>191</sup> Nothing in the statutory language of the original ADA required a person to be precluded from a broad class of jobs in order to be "substantially limited," but in the three 1999 cases, the Supreme Court began imposing this restriction to narrow the class of potentially disabled workers.<sup>192</sup>

In the *Sutton* case, the Supreme Court concluded that a disability based on the "regarded as" prong cannot be established by merely alleging that the employer mistakenly believed the applicant's physical impairments substantially limited the applicant in the major life activity of working.<sup>193</sup> In addressing Sutton's eyesight limitations, the Court held:

an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment – such as one's height, build, or singing voice – are preferable to others, just as it is free to decide that some limiting, but not *substantially*

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187. See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 223-24 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/44/LRColl2008n44Long.pdf>.

188. *Id.*

189. *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 522 (1999); see also *supra* notes 66-69 and accompanying text.

190. *Id.* at 524.

191. *Id.* at 524-25.

192. See *id.*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), superseded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); see also *supra* notes 44-48 and accompanying text.

193. *Sutton*, 527 U.S. at 490-91.

limiting, impairments make individuals less than ideally suited for a job.<sup>194</sup>

Again, the Court maintained that a potential employee must be precluded from a broad class of jobs to seek ADA protection for both actual and “regarded as” disability impairments.<sup>195</sup> In rejecting the *Sutton* rationale in the ADAAA, Congress also reinstated the broader reasoning concerning whether an individual is “being regarded as having a disability,” citing the 1987 Supreme Court decision of *School Board of Nassau County v. Arline*.<sup>196</sup>

Under the ADAAA, an individual with a perceived physical or mental impairment can satisfy the “being regarded as having such an impairment” requirement by showing he or she is “subjected to an action prohibited under [the ADA]” such as termination, demotion, or failure to hire.<sup>197</sup> In light of clarifications in the EEOC proposed amendments, an employee should no longer have to demonstrate that the employer subjectively perceived the individual to be substantially limited in a major life activity to get past summary judgment.<sup>198</sup> Instead, the focus should be on the adverse action taken by the employer who perceived that there were non-transitory mental or physical impairments. The amendment does not address whether the burden of proof now shifts to the employer to prove it took this action for nondiscriminatory reasons. Nevertheless, the claimant must still state “enough facts to state a claim to relief that is plausible on its face.”<sup>199</sup>

There are two ADAAA statutory limitations that affect the “regarded as” prong. First, the law does not protect minor or transitory impairments of six months or less.<sup>200</sup> Arguably, this means that an employer could discriminate against someone it wrongly perceived to have a temporary disability, perhaps firing the individual because it needs someone presently who can perform a particular job-related task. However, if the employer fires an employee because of its mistaken belief that the individual has symptoms of a serious

194. *Id.*

195. *Id.* at 491-92.

196. ADA Amendments Act of 2008 § 2(b)(3), 122 Stat. at 3554; *see also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). In *Arline*, the Court went to great lengths to protect a teacher with tuberculosis from arbitrary discrimination, maintaining that individuals should not be denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others (under the Rehabilitation Act of 1973). *Id.* at 284-86. The Court focused more on whether the teacher was “otherwise qualified” because of the tuberculosis than on the “regarded as” component. *Id.* at 287-89.

197. 42 U.S.C. § 12102(3)(A) (Supp. 2009); *see also* 74 Fed. Reg. 48431, 48443 (Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630.2(l)(1)).

198. *See* 74 Fed. Reg. at 48443 (to be codified as 29 C.F.R. § 1630.2(l)(1)) (“Evidence that the employer believed the individual was substantially limited in any major life activity is not required.”).

199. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

200. 42 U.S.C. § 12102(3)(B).

heart disease, the employer has discriminated improperly, even if the employee actually only had a mild intestinal virus.<sup>201</sup> This is because the “perceived impairment” that triggered the employer’s discriminatory action (termination) was not of a temporary or transitory nature.<sup>202</sup> Second, although discrimination against a person “regarded as having a disability” is prohibited, that individual is not entitled to accommodations under the ADAAA since no actual ADA-qualified impairment exists.<sup>203</sup> Generally, such accommodation should not be needed, since the perceived disability does not exist. Furthermore, transitory disabilities do not have to be accommodated under this “regarded as” prong.<sup>204</sup>

### B. Additional Limitations and Ambiguities

Despite clarifying numerous aspects of the ADA to afford individuals broader protection in employment, some additional ambiguities remain after the ADAAA. First, the degree to which a temporary or transitory actual disability may be covered by the ADAAA remains unclear. While the ADAAA clarifies that transitory impairments of six months or less do not qualify for ADA coverage under the “being regarded as having such an impairment” prong,<sup>205</sup> the ADAAA does not directly address whether *actual* impairments that are transitory are also excluded from coverage. Earlier ADA guidelines did not consider “minor, nonchronic condition[s] of short duration, such as a sprain, infection, or broken limb,” to be covered by the ADA.<sup>206</sup> Similarly, the EEOC proposed provisions specify that “[t]emporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, . . . gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity,” and thus such an impairment normally will not qualify as a disability.<sup>207</sup> In contrast, proposed EEOC regulations conclude that an actual impairment under 29 C.F.R. § 1630.2(g)(1) “may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months” and that there is not a “durational minimum” for an actual disability.<sup>208</sup> Even with the pro-

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201. 74 Fed. Reg. at 48443 (to be codified at 29 C.F.R. § 1630.2(l)(3)(v)).

202. *Id.*

203. 42 U.S.C. § 12201(h).

204. See *George v. TJX Cos., Inc.*, 2009 U.S. Dist. LEXIS 114940, at \*24-28 (E.D. N.Y. Dec. 7, 2009) (citing 42 U.S.C. § 12102(3)(B) for the proposition that a fractured arm that healed in two months was a transitory impairment, not protected under the ADAAA or ADA “regarded as” prong but concluding that ADAAA lacked clear retroactive application to this case).

205. 42 U.S.C. § 12102(3)(B).

206. The U.S. Equal Employment Opportunity Commission, *The ADA: Questions and Answers*, Jan. 15, 1997, <http://www.eeoc.gov/facts/adaqa1.html>.

207. 74 Fed. Reg. at 48443 (to be codified at 29 C.F.R. § 1630.2(j)(8)).

208. *Id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(v)).

posed EEOC regulations, the question of whether a temporary, *actual* disability is covered by the ADAAA remains ambiguous. In accord with the broad coverage purpose of the amendments, such discrimination is at least ethically questionable and also may be economically unwise if employers need to expend funds to search for, hire, and train a replacement when temporary accommodations would be in the better interest of both the employer and the temporarily limited employee.

Second, the ADAAA does not preempt medical standards or health and safety requirements established by other federal laws or regulations.<sup>209</sup> For example, an employer could still use DOT requirements for commercial drivers as a disqualifying requisite or defense. Some state and local laws related to safety or security may be preempted, however.<sup>210</sup> Although Title VII of the Civil Rights Act contains an exception for elected officials and their personal staff, the ADAAA does not, so even elected officials will have to comply with disability considerations in staffing their offices.<sup>211</sup>

Third, the ADAAA does not address the seniority issue. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court held that an accommodation for a disability was not reasonable if it conflicted with a bona fide seniority system, even if it resulted in preferring a nondisabled long-time employee over a disabled employee who has worked for the employer for a shorter period of time.<sup>212</sup> Presumably, court rulings such as *Barnett* still apply, so an employer does not have to make a disability-based exception to its seniority system when trying to reach a reasonable accommodation for a disabled individual who requests a transfer to a different available job assignment with the same employer.

Fourth, the ADA's "fundamental alteration" provision applied to higher education is not changed.<sup>213</sup> Colleges must still make reasonable modifications in policies, practices, or procedures to accommodate disabilities unless such modifications would fundamentally change the nature of goods, services, or advantages involved.<sup>214</sup> Fifth, the ADAAA does not intend to alter benefits or requirements under state worker's compensation laws and government-sponsored disability programs on the state or federal level.<sup>215</sup> Sixth, a person does not acquire a claim for discrimination based on one's lack of disability.<sup>216</sup>

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209. *Id.* at 48445 (proposed interpretive guidance for 29 C.F.R. § 1630.1(b) and (c)).

210. *Id.*

211. *Id.* (EEOC proposed interpretive guidance for 29 C.F.R. § 1630.2(a)-(f)).

212. 535 U.S. 391, 403 (2002). This case was not among the ADA cases singled out by Congress for criticism.

213. 42 U.S.C. § 12201(f) (2006).

214. *Id.*

215. 42 U.S.C. § 12201(e) (Supp. 2009).

216. *Id.* § 12201(g).

Finally, certain non-ADA cases may impact pleading requirements and a claimant's ability to bring an ADA claim or mixed-motive claims.<sup>217</sup> Traditionally, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>218</sup> After the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,<sup>219</sup> it is more difficult for a plaintiff to satisfy pleading requirements. In rejecting fifty years of pleading precedent, the Court now requires "enough facts to state a claim to relief that is plausible on its face."<sup>220</sup> Although *Twombly* was an antitrust case, the Court subsequently applied the new pleading standard to "all civil actions," thus including discrimination claims.<sup>221</sup> Because district courts have dismissed more discrimination claims since those rulings, the pleading requirement may somewhat undercut the "broad" support for disability claims mandated by Congress.<sup>222</sup>

In addition to the challenges posed by the new pleading standards, mixed-motive cases may also impact a claimant's ability to bring an ADA claim. The Supreme Court decided that the Age Discrimination in Employment Act (ADEA) did not specifically authorize "mixed-motive" claims; instead, it required that the discrimination be exclusively "because of" age.<sup>223</sup> In contrast, Title VII of the Civil Rights Act explicitly prohibited discrimination based on protected classes "even though other factors also motivated the practice,"<sup>224</sup> thus justifying a mixed-motive claim. Finding no such explicit language in the ADA authorizing a "mixed-motive" claim, the Seventh Circuit Court of Appeals denied an employee's ADA claim because the claimant had not established "her perceived disability was a but-for cause of her dis-

217. In a mixed-motive claim, there is more than one reason for the employer's job action, but only one of the reasons may justify a discrimination claim where an employee suffered an adverse employment action because of both permissible and impermissible considerations.

218. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

219. 550 U.S. 544.

220. *Id.* at 570.

221. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

222. *See generally* Joseph Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010).

223. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009). The Court held:

[A] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

*Id.*

224. 42 U.S.C. § 2000e-2(m) (2006).

charge.”<sup>225</sup> The court interpreted the ADA language before the 2008 amendments, concluding that the discrimination must be “because of” the disability and could not be a claim based on a mixed motive.<sup>226</sup> Under the ADAAA, the discrimination must be “on the basis of disability” instead of “because of” a disability, but the amendments do not specifically address the mixed-motive question.<sup>227</sup> Whether the ADAAA’s general declaration that Congress intended broad protection for disability claims will be sufficient to withstand narrow judicial construction is another ambiguity for future interpretation.

### C. No Retroactive Application of Broad Construction

Courts have not retroactively applied the broader construction of disabilities under the ADAAA.<sup>228</sup> Instead they have concluded that Congress mandated purely prospective application of the statutory clarification by delaying the effective date of the ADAAA until January 1, 2009, and by not otherwise specifically addressing the issue of retroactive application.<sup>229</sup> Consequently, courts continue to apply the more restrictive court interpretations of what qualified as an ADA disability to pre-2009 acts of discrimination,<sup>230</sup> despite the declaration in the 2008 congressional findings that Congress intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ and provide broad coverage” in enacting the original 1990 ADA.<sup>231</sup>

Although courts have refused to retroactively apply the ADAAA when the claimant is seeking damages for discrimination, the Sixth Circuit Court of Appeals did apply the ADAAA in remanding *Jenkins v. National Board of Medical Examiners* where the claimant sought prospective injunctive relief.<sup>232</sup> In *Jenkins*, Kirk Jenkins suffered from a reading disorder for which he

225. *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963 (7th Cir. 2010).

226. *Id.* at 962.

227. 42 U.S.C. § 12112(a) (Supp. 2009).

228. *E.g.*, *Carraras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33 (1st Cir. 2010); *Ragusa v. Malverne Union Free Sch. Dist.*, No. 08-537-cv, 2010 U.S. App. LEXIS 12640, at \*4 n.2 (2d Cir. June 21, 2010); *Equal Employment Opportunity Comm’n v. Agro Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565-67 (6th Cir. 2009); *Fredricksen v. United Parcel Serv., Co.*, 581 F.3d 516, 521 n.1 (7th Cir. 2009); *Becerril v. Pima County Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *Lytes v. DC Water and Sewer Auth.*, 572 F.3d 936, 939-42 (D.C. Cir. 2009); *Moran v. Premier Educ. Group*, 599 F. Supp. 2d 263, 271-72 (D. Conn. 2009).

229. *See* cases cited *supra* note 228.

230. *See* cases cited *supra* note 228.

231. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (2008).

232. No. 08-5371, 2009 U.S. App. LEXIS 2660, at \*5 (6th Cir. Feb. 11, 2009).

requested additional time on future medical exams.<sup>233</sup> His case was pending when the ADA went into effect.<sup>234</sup> Because he sought an accommodation on future exams, the court held that the ADA applied.<sup>235</sup>

Furthermore, the statute of limitations for bringing an ADA discrimination action was modified to be consistent with the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act) and the Civil Rights Act regulations implementing those changes.<sup>236</sup> Claimants thus have 180 days to file discrimination charges with the EEOC after the alleged discriminatory act or unlawful practice.<sup>237</sup> Before the Ledbetter Act, the Supreme Court strictly construed this requirement in *Ledbetter v. Goodyear Tire and Rubber Co.*, even though Lilly Ledbetter was unaware of the discrimination until after the 180 days had lapsed.<sup>238</sup> To correct this injustice, the Ledbetter Act considers each pay period in which the claimant is receiving diminished pay to start a new 180-day period in which to file a claim.<sup>239</sup> This is, in effect, a pay check accrual rule, in which past discriminatory decisions continue to affect the amount of pay throughout an employee's employment and during retirement. Additionally, compensatory damages for ADA violations are limited by federal statutory caps, but punitive damages are sometimes allowed.<sup>240</sup> The Supreme Court denied certiorari to a 2008 Fourth Circuit decision which upheld the reasonableness and constitutionality of an ADA punitive damages award.<sup>241</sup>

#### D. Challenge of Accommodating Disabilities

Supplementary information in the proposed EEOC regulations estimate that up to one million additional workers are now potentially covered by the ADA, some of whom will seek reasonable accommodations for their disabilities.<sup>242</sup> With this expanded class of individuals who qualify as disabled, the emphasis in litigation will shift to (a) evaluating the nature and level of accommodations required and (b) employers' defenses. The ADA ad-

233. *Id.* at \*2.

234. *Id.* at \*3.

235. *Id.*

236. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 5(a), 123 Stat. 5, 6 (2009).

237. 42 U.S.C. § 2000e-5(e)(1) (Supp. 2010) (requiring a charge to be filed within a specified period (either 180 or 300 days, depending on the state) after the alleged unlawful employment practice occurred).

238. 550 U.S. 618, 622, 627-29 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec.5(a), 123 Stat. 5, 6 (2009).

239. 42 U.S.C. § 2000e-5.

240. 42 U.S.C. § 1981a(a)-(b) (2006); 2 U.S.C. § 1311(b)(3) (2006).

241. Equal Employment Opportunity Comm'n v. Fed. Express Corp., 513 F.3d 360, 372 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 343 (2008).

242. 74 Fed. Reg. 48431, 48439 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).



dressed neither. Because more people now qualify for ADA protection, the issue of whether the individual's requested accommodation is reasonable will emerge more frequently. Such determinations are more difficult to disregard on motions for summary judgment. Employers who wish to dismiss disabled individuals also will have to look more closely at allowable ADA defenses, such as "business necessity" or "direct threat to the health or safety of other individuals in the workplace."<sup>243</sup> Judges who are reluctant to extend remedies available to the expanded class of disabled individuals may be more receptive to employers' arguments that accommodations made were reasonable or accommodations requested were unreasonable. These judges are also more likely to broadly construe defenses raised by employers. Accommodations and defenses will be the new battleground for ADA-qualified employees.<sup>244</sup>

In the recent case of *Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th, and 22nd Judicial Circuits*, for example, the Seventh Circuit concluded that a claimant was not entitled to ADA relief where his or her employer offered reasonable accommodations, even if those accommodations were different from the relief sought by the claimant.<sup>245</sup> Using pre-2009 ADA reasoning, the court was unsympathetic to a court reporter's need for accommodation due to her frequent, urgent need to urinate.<sup>246</sup> Jeanne Gratzl initially worked in the control room as an electronic court reporter specialist, in a situation that freely allowed her to run to the bathroom as needed.<sup>247</sup> When the chief judge eliminated her specialist position and required all court reporters to rotate through live courtrooms and the control room, this posed difficulties for Gratzl, who was unable to maintain bladder control for extended periods of time.<sup>248</sup>

The appellate court upheld the district court's conclusion that she was not a qualified individual with a disability, because, incredibly, the ADA and implementing regulations (pre-2008 amendments) did not explicitly list eli-

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243. 42 U.S.C. § 12113(b)-(c) (providing a defense where the applicant poses "a direct threat to the health or safety of other[s]" and where qualification standards and tests related to vision criteria are used due to "business necessity"); *see also* *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (upholding 29 C.F.R. § 1630.15(b)(2) (2001), which permitted the defense that the applicant's disability posed a direct threat to his own health on the job).

244. *See* Carrie Griffin Basas, *Back Rooms, Board Rooms – Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008) (supporting the conclusion that ADA accommodations will be an increasing area of contention).

245. 601 F.3d 674, 681-82 (7th Cir. 2010).

246. *Id.* (concluding that rotating between the courtrooms had become an essential job function).

247. *Id.* at 676.

248. *Id.*

mination of waste as a major life activity.<sup>249</sup> The employer court offered Gratzl certain accommodations, including not assigning her to courtrooms that were farther from restrooms and establishing a “high sign” that she could use to signal her urgent need for a break.<sup>250</sup> On the accommodation issue, the court concluded that Gratzl had rejected these reasonable accommodations due to her insistence on being allowed to work only in the control room.<sup>251</sup> Therefore, the court found that Gratzl was not entitled to ADA relief.<sup>252</sup>

It is unlawful for an employer to deny reasonable accommodations for the physical limitations of an employee unless the employer can establish that such accommodations would constitute an undue hardship on the business.<sup>253</sup> Furthermore, the defendant bears the burden to prove that the employee’s suggested reasonable accommodation will create an undue hardship on the defendant.<sup>254</sup> In the post-ADAAA era, cases like Gratzl’s are more likely to focus on whether the court believes that reasonable accommodations have been offered, and, if so, some courts may use a claimant’s rejection of such proposed accommodations as a basis of denying further ADA relief, while more sympathetic courts may emphasize the burden of proof on the employer to show that the requested accommodation constitutes an undue hardship.

In addition to on-the-job accommodations issues, many disabled individuals lack transportation to and from work, a problematic issue not addressed by ADAAA.<sup>255</sup> Where an otherwise qualified employee requests only daytime work assignments in a retail store, the employer may need to make shift change accommodations if that employee’s blindness in one eye makes night driving difficult and dangerous and thus impairs the employee’s ability to get to work when no nighttime public transportation is available.<sup>256</sup>

Uncertainties remain regarding the degree to which an “interactive process” is required in developing reasonable accommodations.<sup>257</sup> Employ-

249. *See id.* at 679; *see also* 29 C.F.R. § 1630.2(i) (2010) (elimination of bodily wastes is not on the list of major life activities). *But see* 42 U.S.C. § 12102(2)(B) (Supp. 2009) (recognizing bladder functions as a major life activity).

250. *Gratzl*, 601 F.3d at 678.

251. *Id.* at 682.

252. *Id.*

253. 29 C.F.R. § 1630.9(a).

254. *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002).

255. Office of Disability Employment Policy, *Statistics About People With Disabilities and Employment*, July 2001, <http://www.dol.gov/odep/archives/ek01/stats.htm> (citing PAMELA LOPREST & ELAINE MAAG, *THE URBAN INST., BARRIERS AND SUPPORTS FOR WORK AMONG ADULTS WITH DISABILITIES: RESULTS FROM THE NHIS-D (2001)*).

256. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505-06 (3d Cir. 2010).

257. *See* Hillary K. Valderrama, *Is the ADAAA a “Quick Fix” or Are We Out of the Frying Pan and Into the Fire?: How Requiring Parties to Participate in the Inter-*

ers should communicate with employees, act promptly in responding to requests, and document relevant information (while being cognizant of confidentiality requirements). In some cases, interim accommodations may be necessary during the interactive phase. The employer should focus on whether or not the employee is able to perform his or her essential job functions and should document the employee's ability or inability to do so. When the employee raises the issue of a disability that may require reasonable accommodation and the requested accommodation would cause undue burdens, the employer must document the costs and nature of such hardship. Federal circuit courts are divided over the question of whether an employer must reassign a qualified disabled employee when it could fill the position with a more qualified employee.<sup>258</sup>

Even if scholars and courts reach a consensus on what constitutes an ADA disability, there is little reliable data estimating the costs of reasonable accommodations.<sup>259</sup> The EEOC regulatory analysis did not include data regarding situations in which an employer may argue cost-benefit analysis to counter an accommodation request. Small businesses (who employ fewer than 500 workers) constitute 35% of the workforce covered by the ADA.<sup>260</sup> The EEOC ADA AAA regulatory promulgation findings estimate that these small businesses may collectively incur accommodation costs of \$5.1 to \$16.1 million, but cost estimates vary extensively.<sup>261</sup> A 2009 presentation by Lisa Nishii and Susanne Bruyegravere at the American Psychological Association Convention found that nearly half of all accommodations cost the company no money, and that when costs are involved, 75% of businesses incur costs of less than \$500.<sup>262</sup> The Nishii-Bruyegravere study also concluded that 82% of disabled employees requested an accommodation, but more than 90% of the accommodation requests were made by people without a qualified disability.<sup>263</sup> Job Accommodation Network data showed the me-

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*active Process Can Effect Congressional Intent under the ADA AAA*, 47 HOUS. L. REV. 175, 189 (2010).

258. See Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 457-70 (2009).

259. 74 Fed. Reg. 48431, 48433 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

260. *Id.* at 48439.

261. *Id.* (referencing U.S. Small Business Administration Office of Advocacy data based on U.S. Census Bureau statistics (without reference to a year), based on the assumption that 16% of all workers with disabilities request accommodations). The findings were much larger – as high as \$82.3 million – when the assumption was that 82% requested accommodations. *Id.*

262. *Id.* at 48434. An additional study revealed a mean cost of \$865.43 and a median cost of \$751.50.

263. *Id.* at 48437.

dian cost of accommodations to be \$250.<sup>264</sup> In contrast, three other studies showed a wide variation in accommodation costs, ranging from \$462 to \$1,434 per accommodation.<sup>265</sup> There are no new reporting or recordkeeping costs under the ADA, so compliance costs will come primarily from providing accommodations,<sup>266</sup> such as job restructuring, leave requirements, or adaptation of workstations, handrails, or ramps,<sup>267</sup> to a broader range of disabled individuals.

## V. CONCLUDING RECOMMENDATIONS

In the ADA, Congress expressed clear intent to provide broad protection to disabled individuals in the workplace.<sup>268</sup> An employee's disabling impairment is now generally assessed in its pre-corrected state to determine whether the physical or mental impairment "substantially limits" a major life activity.<sup>269</sup> The ADA includes an extensive list of qualifying major life activities, which is augmented by proposed EEOC regulations.<sup>270</sup> "Working" is now clearly recognized as a "major life" activity in the ADA, and an individual needs to be "substantially limited" in only one such major life activity to qualify for ADA protection.<sup>271</sup> These ADA changes, which went into effect on January 1, 2009, were enacted in response to court cases in the previous decade that significantly narrowed the circumstances in which an employee could qualify for ADA disability coverage.<sup>272</sup> In the final version of Senate Bill 3406, which became the ADA, congressional findings directly criticized Supreme Court cases that "created a greater degree of limita-

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264. *Id.* at 48434; *see also* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I – Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902 (1997).

265. 74 Fed. Reg. at 48434-35.

266. *Id.* at 48439.

267. *See* U.S. Equal Employment Opportunity Commission, Small Employers and Reasonable Accommodation, <http://www.eeoc.gov/facts/accommodation.html> (last visited Oct. 31, 2010) (discussing reasonable accommodations that may have to be made under the ADA).

268. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), (b)(1), 122 Stat. 3553, 3553-54 (2008).

269. 42 U.S.C. § 12102(1) (Supp. 2009).

270. *Id.* § 12102(2); *see also* 74 Fed. Reg. at 48431, 48440 (to be codified at 29 C.F.R. § 1630.2(i)).

271. 42 U.S.C. § 12102(2)(A), (4)(C).

272. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); *see also supra* Part II.

tion than was intended by Congress,” thereby “eliminating protection for many individuals whom Congress intended to protect.”<sup>273</sup>

The ADAAA mandates a broad interpretation of what constitutes a “substantial limitation” of a major life activity.<sup>274</sup> The EEOC’s 2009 proposed regulations and guidelines reinterpret the meaning of whether an impairment of a major life activity is “substantially limited” in comparison to “most people in the general population” and provide that such “impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.”<sup>275</sup> The focus is on what the individual is limited in doing, rather than on what he or she is able to achieve.<sup>276</sup> The ADAAA uses a common sense approach in determining whether an individual is substantially limited instead of requiring extensive analysis of scientific or medical evidence.<sup>277</sup> Five key interpretive problems emerge, however, in construing what constitutes a “substantial limitation.”

First, while the EEOC definition of “substantially limits” is consistent with the congressional mandate for a broad interpretation, it is contrary to the ordinary and common sense meaning of “substantially” (a conundrum likely to cause interpretive problems in the courts). How can an impairment “substantially limit” a major life activity and simultaneously “not significantly or severely restrict” the same activity? It is inadequate to define a term only in the negative – by explaining what the term does not mean.

Second, the focus seems to have shifted from the degree of disability to whether or not the condition is on the list of protected disability categories. If “substantially limits” is to have real meaning, it still needs to be a test for the degree of the disability, even if the degree of the disability required is much less severe than its characterization in prior Supreme Court decisions.

The EEOC should create a definition that affirmatively defines “substantially limits” and that includes an element of materiality (rather than simply describing what the term does not mean). “Substantial limitation” should mean that “because of a material impairment, the person is more restricted or limited to a greater degree than most people, although the impairment need not be so extreme as to prevent or severely or significantly restrict a major life activity.” Then, as applied to work, the material impairment would make the work-related task “more difficult to perform, although the person need not be severely restricted in performing the work-related task or activity.” A common sense, rather than statistical, determination should be used to decide pragmatically whether the limitation is substantial enough as to necessitate a reasonable accommodation. Alternately, Congress should

273. ADA Amendments Act of 2008 § 2(a)(4), (7), 122 Stat. at 3553.

274. *Id.* § 2(b)(1), 122 Stat. at 3554.

275. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(1)).

276. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(2)(vi)).

277. *Id.* (to be codified at 29 C.F.R. 1630.2(j)(2)(iv)).

replace the word “substantially” in the ADA statute with moderate verbiage instead of charging the EEOC with the rhetorically difficult task of defining “substantially limits” in a way that did not include “significantly restricted.” A change in the operative language of EEOC regulations would be more consistent with the congressional goal of conveying to the courts the necessity of providing broad protection to disabled individuals in the workplace.

Third, all disabilities should be determined before the mitigating measure is applied. The ADA’s exclusion of “ordinary eyeglasses” and contacts from the requirement that a disability be determined in the pre-mitigated state is both logically and pragmatically problematic. Although Congress did not want to markedly increase disability claims by individuals with correctable near-sightedness or far-sightedness, the exclusion does not adequately consider persons who have substantial limitations despite the use of ordinary eyeglasses. For many such individuals, a simple accommodation may be sufficient: allow the individual to wear his or her glasses or contacts at work. This accommodation would not unduly burden employers. The problem is not so simply resolved for everyone, however. It can be extremely difficult and disabling to attempt to see, and particularly to read, without a precisely accurate multi-focal prescription that is incorporated into a particularly suitable type of lens. The difficulty in achieving such workable precision can be significant and can drastically slow down or inhibit one’s ability to read. The EEOC simply dismisses such difficulties by saying that “evidence that a proper prescription would fully correct visual acuity or eliminate refractive error” disqualifies individuals who have outdated or wrong prescriptions.<sup>278</sup> Such a casual dismissal of a significant visual problem is counter to the otherwise broad purpose of recognizing and facilitating real disabilities in the workplace.<sup>279</sup> It is also contrary to the presumption that a “substantial limitation” be liberally construed and the determination of a disability be focused on “how a major life activity is substantially limited, not on what an individual can do in spite of an impairment.”<sup>280</sup>

Fourth, problems will arise in interpreting when short-term disabilities will be construed as “substantially limiting” major life activities. Before the ADA, statutory interpretations focused on long-term disabilities. Proposed EEOC regulations conclude that an actual impairment under 29 C.F.R. § 1630.2(g)(1) may substantially limit a major life activity “even if it lasts, or is expected to last, for fewer than six months” and that there is not a “durational minimum” for an actual disability.<sup>281</sup> However, the EEOC’s proposed

278. *Id.* at 48441 (to be codified at 29 C.F.R. § 1630 (j)(3)(iv)(C)).

279. Congress and the EEOC do not employ similar reasoning to an individual with a missing limb. They would not deny disability status to a person with a missing limb who could not be fitted with an adequately functional prosthesis.

280. 74 Fed. Reg. at 48440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(vi)).

281. *Id.* (to be codified at 29 C.F.R. § 1630.2(j)(2)(v)).

provisions continue to specify that actual “[t]emporary, non-chronic impairments of short duration with little or no residual effects,” such as the common cold, gastrointestinal disorder, or a broken bone, “usually will not substantially limit a major life activity,” and thus such an impairment normally will not qualify as a disability.<sup>282</sup> The two provisions are not easily reconciled, especially in light of the diluted definition of “substantially.” The latter is more consistent with the statutory recognition that minor or transitory impairments of six months or less are not protected when an employee is “regarded as” having a disability that he or she does not actually have. When a short-term disability is misconstrued as a long-term disability, however, it qualifies for protection even under the “regarded as” prong.<sup>283</sup> This variable treatment of short-term impairments is likely to be fertile ground for a myriad of court interpretations.

Finally, Congress must clarify the mixed-motive issue. To be actionable, disability discrimination against someone who is substantially limited in performing a major life activity need not be the sole, determining, or prevailing factor for an adverse employment action. The plaintiff should be allowed to prove a *prima facie* case even if there are mixed motives in the termination or other adverse employment action, as long as the disability discrimination was a *significant* or *contributing* factor.

The implementation of the ADAAA should nevertheless give most disabled employees new hope that employment opportunities will be open to them. The ADAAA reiterates ADA congressional findings, emphasizing that “physical or mental disabilities [should] in no way diminish a person’s right to fully participate in all aspects of society.”<sup>284</sup> The revived protection of persons with disabilities counters more than a decade of court cases restricting the definition of an ADA disability and what constitutes a “substantial limitation” of a major life activity. The ADAAA’s mandate that disabilities be construed broadly may now provide an opportunity for more individuals suffering from disabilities to use the ADA as a vehicle to prevent discrimination in employment, seek accommodations, or obtain remedies when such discrimination does occur.

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282. *Id.* at 48443 (to be codified at 29 C.F.R. § 1630.2(j)(8)).

283. *Id.* at 48440 (to be codified at 29 C.F.R. § 1630.2(l)(3)(v)).

284. 42 U.S.C. § 12101(a)(1) (2006).