No Disability If You Recover: How The ADA Shortchanges Short-Term Impairments

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ABSTRACT

A significant gap in the ADA's protections lingers even after the ADA Amendments Act of 2008: whether individuals are protected from disability discrimination if their impairment lasted six months or less but was nonetheless the basis for some type of adverse employment or other action. The ADA does not explicitly exclude all short-term impairments, and the EEOC's regulations provide they can be an actual disability if they are "sufficiently severe." Without any further definition, not surprisingly perhaps, courts invoke reasoning similar to what they employed prior to the ADAAA's course correction in 2008, primarily focusing on duration as a measure of the impairment's severity and dismissing significant limitations as "trivial." This is inconsistent with several of the ADAAA's Rules of Construction. Relatedly, plaintiffs alleging short-term impairments under the "regarded as" prong frequently see their claims dismissed because the ADAAA excludes "transitory and minor" perceived impairments. Congress defined transitory—six months or less—but left minor to be interpreted by the courts. As with the actual disability cases, courts in the "transitory and minor" cases are finding impairments that are objectively more than trivial to nonetheless be minor. There is no discernable principle for what makes one impairment minor but not another, other than vague analogies to infected fingers and seasonal flues. This Article argues that many short-term impairments are indistinguishable in any meaningful way from other protected impairments and individuals alleging such impairments are entitled to the full scope of ADA protections.

I. INTRODUCTION

In 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) to correct undue judicial narrowing of the Americans with Disabilities Act (ADA), directing courts to focus on the merits of disability

discrimination claims rather than the threshold issue of disability.[1] Courts appear to have taken this mandate seriously in many respects.[2] Nonetheless, a significant number of individuals are routinely excluded from the ADA's protections despite experiencing adverse employment actions based on a physical or mental impairment or the perception of one. Two present day hypotheticals illustrate this.

In the first, Mei, an employee of LMN Health Care, travels home to China once a year to visit her family. Unfortunately, in late 2019, Mei was exposed to the Covid-19 virus during her travels, was hospitalized, and she spent two months in recovery. Her employer terminated her when he learned of her condition. Mei sued her employer under the ADA, alleging that her Covid-19 infection was a physical or mental impairment that substantially limited one or more of her major life activities.[3] The court dismissed her claim because she recovered in less than six months. In the second hypothetical, Mei did not actually contract the virus, but her employer fired her because he believed anyone who travels to China is likely to be contagious. Mei brought suit alleging that her employer regarded her as having a disability under the ADA.[4] The court dismissed this claim because it found her employer did not regard her as actually having an impairment at the time it decided to discharge her, and even if it did, the impairment would have been only transitory and minor.[5]

Under either scenario, each invoking a different part of the ADA, the court found Mei could not meet the statutory threshold of showing she has a disability. This is despite that in the former case, the virus landed her in the hospital, and in the latter case, the employer viewed her as physically unable to safely perform her work.[6] In either case, the stigma is the same;

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1. *See* ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(5), 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213) ("[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .").

2. *See* Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 19 (2014) (concluding that courts have taken Congress's directives seriously and more cases find plaintiffs to have a disability under the ADAAA).

3. *See* 42 U.S.C. § 12102(1)(A).

4. *See id.* § 12102(1)(C).

5. *See id.* § 12102(3)(B).

6. Some employees diagnosed with a virus, such as Covid-19, may be fired for the diagnosis alone or for the fact they seek reasonable accommodations for the physical consequences of the disease. Studies show that even individuals with mild Covid-19 cases

Mei was discharged because of a real or perceived impairment related to Covid-19.

Although the recent Covid-19 pandemic has brought the ADA's coverage of short-term impairment into sharper relief, the issues are not unique to that context.[7] The hypotheticals were inspired by an actual case in which an employer fired an employee out of fear that she had been exposed to the Ebola virus while traveling in Africa.[8] Plaintiffs have also unsuccessfully sought relief under the ADA for adverse employment actions based on

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may experience long lasting effects, which has been deemed Long Covid Syndrome. *See* Francis Collins, *Trying to Make Sense of Long COVID Syndrome*, NIH DIR.'S BLOG (Jan. 19, 2021), https://directorsblog.nih.gov/2021/01/19/trying-to-make-sense-of-long-covid-syndrome/ [https://perma.cc/7JP8-4VYH] (summarizing studies showing the lasting effects of Covid-19 infection). It is not clear whether these employees will be protected from discrimination under the ADA. In the early months of the coronavirus pandemic, the EEOC declined to say whether Covid-19 itself was an ADA disability. *Transcript of March 27, 2020 Outreach Webinar*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar [https://perma.cc/UWW8-WXLW] ("Here is what the EEOC can say now. This is a very new virus and while medical experts are learning more about it, there is still much that is unknown. Therefore, it is unclear at this time whether COVID-19 is or could be a disability under the ADA.").

7. Denying protections for short-term impairments is also not a workplace-exclusive concern. Most cases arise out of employment, but both the ADA and the Rehabilitation Act apply the same definition of disability to prohibit discrimination in government programs, services, and activities—including such diverse things as public education and operation of prisons—and private businesses. *See* 42 U.S.C. § 12131–12165 (applying the definition to public entities); *id.* §§ 12181–12189 (applying the definition to places of public accommodation and commercial facilities); *see also* 29 U.S.C. § 794(b) (defining programs and activities that, if they receive federal financial assistance, are prohibited from discriminating based on disability). For example, a federal court dismissed a prisoner's ADA Title II discrimination claim, based on his injured ankle, because he did not show a permanent or long-term impairment. *See* Shaw v. Williams, No. 16-CV-1065, 2018 WL 3740665, at *9 (N.D. Ill. Aug. 7, 2018); *cf.* Claudia Irizarry Aponte, *Cast Adrift by the Virus, the Newly Homeless Seek a Place to Recover*, CITY (Apr. 1, 2020, 8:50 PM), https://thecity.nyc/2020/04/cast-adrift-by-the-virus-the-newly-homeless-seek-a-refuge.html [https://perma.cc/N5S7-5V4P] (describing a landlord who threw out a tenant because he tested positive for Covid-19).

8. *See* Equal Emp. Opportunity Comm'n v. STME, LLC, 938 F.3d 1305, 1318 (11th Cir. 2019) (granting employer's motion to dismiss). Similar fears are easy to envision given findings of increased contagiousness of various Covid-19 variants and data showing that asymptomatic unvaccinated individuals can spread the disease. *See, e.g.*, Nicholas G. Davies et al., *Estimated Transmissibility and Impact of SARS-CoV-2 Lineage B.1.1.7 in England*, SCIENCE (Apr. 9, 2021), https://science.sciencemag.org/content/372/6538/eabg3055 [https://perma.cc/UQ3D-6KBT] (describing the increased transmissibility of certain Covid-19 variants).

their having contracted H1N1, swine flu,[9] broken limbs,[10] pregnancy complications,[11] conditions requiring surgery,[12] and other impairments that resolved in six months or less but were functionally limiting while active.[13] Occasionally courts have found claims based on short-term impairments sufficient to meet the disability threshold.[14] More commonly, however, courts read the ADAAA restrictively to exclude most short-term impairments despite the Amendments Act's intent to create a broad definition of disability that in most cases should require little demanding inquiry.[15]

By design, the ADA does not protect everyone. The broad premise of the ADA is rooted in the social model of disability, which finds disability to be the result of societal attitudes and environmental barriers rather than merely a personal problem to be overcome by the individual.[16] But, as

9. *See* Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *1 (M.D. Fla. Sept. 16, 2011) (finding the plaintiff had neither an actual nor perceived disability); Valdez v. Minn. Quarries, Inc., No. 12-CV-0801 (PJS/TNL), 2012 WL 6112846, at *3 (D. Minn. Dec. 10, 2012) (finding the plaintiff failed to establish a perceived disability claim).

10. *See* Zick v. Waterfront Comm'n of N.Y. Harbor, No. 11 Civ. 5093(CM), 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012) (finding an employee could not show a "regarded as" claim under the ADA for her broken leg that had an eight-to-ten-week recovery period).

11. *See* Love v. First Transit, Inc., No. 16-CV-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 16, 2017) (suggesting that the plaintiff's miscarriage was not a pregnancy-related disability because the miscarriage itself was over within one day and the plaintiff alleged no history of complications leading up to it).

12. *See* Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564 (VLB), 2014 WL 840229, at *5–6 (D. Conn. Mar. 4, 2014) (finding kidney stones that required multiple hospitalizations and surgeries over the course of a month did not rise to a disability under the ADA); Butler v. BTC Foods Inc., No. 12-492, 2012 WL 5315034, at *1 (E.D. Penn. Oct. 19, 2012) (holding that double hernia that required a six week leave of absence after surgery was not a disability under the ADA).

13. *See infra* Part III. These cases are different from those involving certain types of impairments, such as cancer, to which courts have applied a new rule of construction that directs courts to consider impairments in remission as if they were active. *See* 42 U.S.C. § 12102(4)(D) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."). As will be discussed *infra* Part III.C, some courts have refused to apply § 12102(4)(D) to short-term impairments, at least where the court is not persuaded to consider the potential for recurrence.

14. *See, e.g.*, Judge v. Landscape Forms, Inc., No. 1:12-CV-1117, 2014 WL 12502685, at *5 (W.D. Mich. Mar. 6, 2014) (finding a torn bicep sufficiently severe to avoid summary judgment because the employee was subject to four months of workplace restrictions).

15. *See supra* note 1.

16. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 653 (1999) ("In contrast to the medical model of disability, which views disadvantages as

Professor Samuel Bagenstos has explained, within the social model the statute reflects a tension between a universalist approach that would cover everyone and a minority rights approach that protects only certain individuals.[17] The ADA ultimately took the latter approach, stating in its original findings and purposes that people with disabilities are a discrete and insular minority.[18] The limitation was a political compromise by the Act's supporters to overcome business and conservative objections to the universal approach.[19] In other words, the degree to which a universalist approach would intrude on employer decision-making, not the absence of stigma associated with certain impairments, explained the Act's limited coverage.[20]

When Congress revisited the ADA in 2008 to correct judicial misconstruction, it kept the minority rights approach by still not covering everyone.[21] To the extent there was discussion of short-term impairments, that discussion was about conditions that would have no or only very trivial functional limitations. For example, the House Judiciary Committee Report references

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flowing naturally from a defect located in an individual, the social model of disability sees disadvantages as flowing from social systems and structures.").

17. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 44–45 (2009) (describing the tension between the universalist model, which would cover everyone, and the minority rights model, which covers only a particular group).

18. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101(a)(7)). Professor Bagenstos points out how the minority rights model inevitably led to courts "policing the line" between who has a disability and who does not. BAGENSTOS, *supra* note 17, at 47; *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 39 (2000) ("[Characterizing individuals with disabilities as a] discrete and insular minority . . . invites judges to view the problem of disability narrowly rather than broadly. In reality, the problems addressed by the ADA are experienced by a wide-ranging and amorphous spectrum of people.").

19. BAGENSTOS, *supra* note 17, at 44–45 (describing how the original ADA acceded to objections to the universalist approach). *But see* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 207 (2010) (agreeing that the social model permits both the minority rights and universalist approach, but disagreeing that there was an overt political compromise where the universalist model was abandoned).

20. BAGENSTOS, *supra* note 17, at 53 (suggesting a universalist approach would have imposed a rationality requirement on all employer decisions).

21. *See* Barry, *supra* note 19, at 208. Kevin Barry, who was on the legislative legal team that negotiated the ADAAA's language, described the scope of that Act as still not covering everyone:

> The ADAAA resolves the original tension by striking a balance between the universal and minority group approaches, thereby bringing coherence to a statute long misunderstood. Specifically, the ADAAA provides nearly universal nondiscrimination protection under the ADA's "regarded as" prong, and it extends reasonable accommodations under the first and second prongs to a broader but not unlimited group of people whose impairments are stigmatized.

Id.

a "misapplication of resources" for conditions like the common cold and the seasonal flu.[22] The floor debate mentioned other supposedly trivial conditions, such as stomach aches, mild seasonal allergies, and hangnails.[23] These examples read like shorthand for conditions that seldom result in any significant functional limitations. Indeed, Representative Jerry Nadler, in his comments supporting the passage of the ADAA, observed that, "I have yet to see a case where the ADA covered an individual with a hangnail."[24] Perhaps that is correct, that there are conditions with effects too trivial to warrant disability protection, but to agree with that does support a general rule that short-term impairments, even those that in their acute stage are substantially limiting, fall outside the ADA's scope. Nonetheless, that is how courts have interpreted the statute, as this Article will show.

To be clear, the statute does not explicitly exclude short-term impairments from the definition of disability under the first two prongs, the actual and "record of" prongs,[25] and creates only a narrow an exception under the perceived disability prong, also known as the "regarded as" prong, for short-term impairments that are both transitory and minor.[26] As will be discussed in more detail in the next section, the regulations implementing the Act indicate that an impairment lasting less than six months can be an actual disability "if sufficiently severe."[27] This marks a broadening of the EEOC's original ADA regulations, which stated more definitively that certain short-term conditions would not meet the threshold definition.[28] Nonetheless, many courts continue to assert a durational threshold for any impairment.[29] There is little judicial explanation why duration should be

22. *See* H.R. REP. NO. 110-730, pt. 2, at 18 (2008).
23. 154 CONG. REC. H6064 (daily ed. June 25, 2008) (statement of Rep. Nadler).
24. *Id.*
25. 42 U.S.C. § 12102(1)(A)–(B).
26. *Id.* § 12102(3)(B). "Transitory" means "an actual or expected duration of 6 months or less." *Id.* Courts, with help from the EEOC, have particularly muddled this prong because the exception also requires them to find the impairment "minor." *See id.* Courts have either conflated minor with the transitory nature of the impairment or disregarded it as a separate element altogether. *See infra* Part IV.
27. 29 C.F.R. app. § 1630.2(j)(1)(ix) (2020).
28. *See* 29 C.F.R. app. § 1630.2(j) (1991) ("[T]emporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities.").
29. *See, e.g.*, Orr v. City of Rogers, 232 F. Supp. 3d 1052, 1065 n.6 (W.D. Ark. 2017) (finding that the plaintiff's claim regarding her broken leg was a close case that only avoided dismissal because of "unique circumstances" involving corrective surgery that impaired her ability to work for a full year); *see also infra* Part III.

the controlling variable, especially when in some cases, courts acknowledge the short-term impairments in question created significant restrictions on major life activities while they were active.[30]

Borrowing from economic theory, duration is a sticky variable.[31] The ADAAA made many changes to how courts approach the threshold question of disability, but it has not had a sufficiently meaningful effect on how courts view short-term impairments.[32] This Article argues that the ADA protects individuals from discrimination based on actual impairments that are substantially limiting while they are active, and perceived impairments that defendants mistakenly believed to be more than objectively trivial, regardless of whether the plaintiff fully recovers from the impairment in a fairly short period of time. Courts are erroneously following patterns similar to their pre-ADAAA decisions, and the result is a substantial and unwarranted gap in the ADA's anti-discrimination protections.

Part II of this Article briefly covers the statutory, regulatory, and legislative history's treatment of short-term impairments. Part III looks at actual disability claims involving short-term impairments. Part IV looks at "regarded as" claims also involving short-term impairments. Part V offers a critique of how courts have created an unwarranted broad exclusion of short-term impairments. Finally, Part VI offers an alternative approach that is more in line with the stated purposes of the ADAAA.

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30. *See, e.g.*, Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564, 2014 WL 840229, at *5 (D. Conn. Mar. 4, 2014) (finding the plaintiff had a physical impairment that substantially limited his ability to work and walk but concluding that he failed to state a claim because his impairment was short-term).

31. In economics terms, stickiness refers to variables that are resistant to change, a concept generally attributed to John Maynard Keynes. *See, e.g.*, George A. Hanson & E.E. Keenan, *Lifting All Boats: The Case for Wage and Hour Enforcement in Recessionary Times*, 19 KAN. J.L. & PUB. POL'Y 454, 457 n.24 ("The theory of sticky wages was promoted by John Maynard Keynes."). Some commentators have applied the concept to describe how the law can be resistant to change. *See* Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 556 (2015) ("Constitutional applications are thus resistant to future adjustments unless the constitutional principle itself is changed. This stickiness of judicial constitutional applications ultimately limits constitutional adaptation to new societal contexts.").

32. Courts frequently reject impairments, unless they last longer than six months, regardless of whether those impairments, either actually or as perceived by the employer, otherwise substantially limit major life activities. *See, e.g.*, White v. Interstate Distrib. Co., 438 F. App'x 415, 420 (6th Cir. 2011) (reasoning that regardless of how the employer might have perceived the significance of the plaintiff's impairment in a "regarded as" disability claim, what mattered was that the impairment resolved in less than six months); Shaw v. Williams, No. 16-CV-1065, 2018 WL 3740665, at *8–9 (N.D. Ill. Aug. 7, 2018) (dismissing an ADA claim because the plaintiff failed to present evidence that the effects of his impairment lasted longer than six months).

II. STATUTORY LANGUAGE, REGULATORY GUIDANCE, AND LEGISLATIVE HISTORY

The overall history of the ADA shows Congress intended the Act to cover disorders and conditions from which people recover if, while they are in their active state, those impairments cause substantial functional limitations.[33] The congressional debate on the ADAAA singled out how courts applying the ADA's original language erroneously characterized certain impairments as "too temporary and short-lived to qualify . . . for protection."[34] Congress added rules of construction to reverse judicial rejection of impairments that occurred only episodically or were in remission.[35] While the ADAAA retained elements that would exclude truly minor conditions, the Judiciary Committee's report states they were intended to be construed narrowly to exclude only those impairments that were at the "lowest end of the spectrum of severity."[36] Overarching the entire Act, Congress exhorted courts to give their "primary attention" to the merits of ADA claims and "not demand extensive analysis" of the threshold question of disability.[37]

The ADA defines disability three ways: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."[38] The ADA did not define "impairment."[39]

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33. Two of the most significant sections of the ADAAA affirming this intent are the rules of construction that direct courts to evaluate episodic impairments and impairments in remission while in their active state, 42 U.SC. § 12102(4)(D), and to not consider the effects of ameliorative effects of medications and other mitigating measures, *id.* § 12102(4)(E)(i).

34. 154 CONG. REC. 19434 (2008) (giving an example of a nurse who died a few months after a court found her breast cancer too temporary and short-lived to qualify as a disability under the ADA).

35. 42 U.S.C. § 12102(4)(D).

36. *See* H.R. REP. NO. 110-730, pt. 2, at 18 (2008) (expressing intent that the exception for transitory and minor impairments under the "regarded as" prong applies narrowly only to "claims at the lowest end of the spectrum of severity"). As examples of what would be at that lower rung, Representative Nadler noted during the floor debate that other legislators had raised concerns about "stomachaches, the common cold, mild seasonal allergies, or even a hangnail." 154 CONG. REC. H6064 (daily ed. June 25, 2008) (statement of Rep. Nadler).

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

38. *See* 42 U.S.C. § 12102(1). The first prong is typically referred to as the "actual" disability prong, the second as the "record of" prong, and the third the "regarded as" prong.

39. *See id.*

The legislative history shows that while Congress was concerned about extending the Act to cover minor and trivial impairments, this concern was not tied to how long the impairment lasted. The House of Representative's Report coupled "minor" with "trivial": "A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity."[40] This sentence is followed by an explanation that individuals must show their "important life activities are restricted" as compared to "most people."[41] In context, the report treats minor and trivial impairments as those lacking functional limitation; as opposed to impairments with substantial, or important, limitations, which do.[42] Duration is mentioned as only one of three alternative ways that a person can be substantially limited: "the conditions, manner or duration" under which [important life activities] can be performed."[43]

The EEOC subsequently filled in the definitional gap broadly:

> Physical or mental impairment means -
>
> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.[44]

This definition was drawn verbatim from the Rehabilitation Act's long-standing regulations defining "handicapped person."[45] It is reasonable to conclude Congress approved of the broad scope of that definition[46] because the Amendments Act stated its purpose was to correct both the judiciary

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40. H.R. REP. NO. 101-485, pt. 2, at 52–53 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334.

41. *Id.*

42. *See id.*

43. *Id.* The House used the phrase "important life activities" here rather than major life activities. *See id.*

44. 29 C.F.R. § 1630.2(h) (2019).

45. *See* 45 C.F.R. § 84.3(j)(2)(i) (2020); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) (noting that the Rehabilitation Act regulations date back to 1977), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

46. Although it criticized *Toyota Motor Manufacturing's* treatment of "substantially limits," in the ADAAA's findings and purposes Congress did not state any concerns about how the Court defined impairment and its reliance on the Rehabilitation Act regulations. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(a)(7), (b)(4)–(5), 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. § 12101).

and the EEOC[47] and, while Congress added a definition of "major life activities,"[48] as well as a set of rules of construction regarding whether an impairment substantially limits one of those major life activities, it did not address "impairment."[49]

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47. *Id.* (stating the expectation that the EEOC will revise its regulations which would set the standard for "substantially limits" to reflect the lessened burden articulated by the ADAAA).

48. 42 U.S.C. § 12102(2). Section 12102(2) provides:

> (A) In general
> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
> (B) Major bodily functions
> For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Id.

49. *See id.* § 12102(4). Section 12102(4) provides:

> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (E)
> (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
> (II) use of assistive technology;
> (III) reasonable accommodations or auxiliary aids or services; or
> (IV) learned behavioral or adaptive neurological modifications.
> (ii) 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.
> (iii) As used in this subparagraph—
> (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate

Consistent with the House Report, the EEOC's Title I regulations incorporated duration as one factor in determining whether a physical or mental impairment substantially limited a major life activity.[50] Its Interpretive Guidance went further, however, and identified a list of impairments that were generally not disabilities because of their duration: "[T]emporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza."[51] Neither the regulations nor the Interpretive Guidance reference the "minor, trivial" language from the House Report or explain why the listed impairments such as a broken limb would be "trivial."

The second prong of the definition, the "record of" a disability prong, was specifically intended to apply to people who have recovered from their impairments. The original House of Representatives Report indicates that the purpose of this prong is to "protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity" as well as individuals misclassified as having a substantially limiting impairment.[52] Despite that, none of the legislative or administrative sources have much to say about how it applies to short-term impairments. Because the "record of" prong incorporated the actual disability prong's "substantially limited" standard,[53] the EEOC's regulations and Interpretive Guidance largely incorporated the same statutory definition and substance of the legislative history.[54] Neither addressed how this prong applies to short-term impairments or people whose impairments might have been misclassified as short-term impairments.

The definition's third prong extended disability to include individuals who are regarded as having a physical or mental impairment; however, the plaintiff had to show that the perceived disability was one that would

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refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

Id.

50. 29 C.F.R. § 1630.2(j)(2) (2020). The regulations set out three factors for assessing whether an impairment substantially limits a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment." *Id.*

51. 29 C.F.R app. § 1630.2(j) (2020).

52. H.R. REP. NO. 101-485, pt. 2, at 52–53 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334–35.

53. 42 U.S.C. § 12102(1)(B) (defining disability to include having a record of an impairment that substantially limits a major life activity).

54. *See* 29 C.F.R. § 1630.2(k) (2020); *id.* app. § 1630.2(k) (2020).

substantially limit a major life activity.[55] The House Report reflects Congress included this prong to address disability-based animus.[56] The Interpretive Guidance explained that the prong addressed employment decisions based on "myths, fears and stereotypes" about individuals with disabilities.[57] But, because this prong referenced the actual disability prong by requiring plaintiffs to show they were regarded as having "such" an impairment, all elements applied to the actual disability prong became part of the courts' analysis of this prong as well, including the exclusion of short-term impairments.[58] The result was that very few plaintiffs succeeded in raising "regarded as" claims.[59]

In 2008, Congress added several rules of construction to assess substantial limitations to correct the misinterpretation of the first two prongs.[60] The rules most relevant to short-term impairments are that 1) the statute should be construed broadly in favor of coverage;[61] 2) episodic impairments or

55. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2)(C), 104 Stat. 327 (codified as amended at 42 U.S.C. § 12102(2)(C)) (including in the definition "being regarded as having such an impairment"); Sutton v. United Airlines, Inc., 527 U.S. 471, 490 (1999) ("An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

56. H.R. REP. NO. 101-485, pt. 3, at 30–31 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453 ("In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities would be inferred and the plaintiff could qualify for coverage under the 'regarded as' test.").

57. 29 C.F.R. app. § 1630.2(l) (1991) ("Where an employer bases a prohibited employment action on an actual or perceived impairment that is not 'transitory and minor,' the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision.").

58. *See, e.g.*, Jurczak v. J & R Schugel Trucking Co., No. 03AP-451, 2003 WL 22999504, at *5–6 (Ohio Ct. App. Dec. 23, 2003) (finding that the plaintiff's alleged disability failed under both the actual and "regarded as" definitions because it was too short-term to be substantially limiting). In the present case, the plaintiff neither alleged nor presented evidence that his upper respiratory infection was anything more than a short-term or temporary physical impairment or that it had any adverse long-term residual effects.

59. *See* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 201 (2010) (discussing how the Supreme Court incorporated its interpretation of "substantially limits" into the "regarded as" prong, thereby limiting that prong's ability to ameliorate the restrictions on the actual disability prong).

60. *See* 42 U.S.C. § 12101(4).

61. *Id.* § 12102(4)(A).

impairments in remission should be evaluated in their active state;[62] and 3) impairments should be evaluated without taking into account the ameliorating effects of mitigating measures.[63] Subsequently, the EEOC's Interpretive Guidance explained how the agency believes short-term impairments might substantially limit major life activities:[64]

> [A]n impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, . . . if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."[65]

The agency provided no further guidance regarding when something is "sufficiently severe."[66] The Interpretive Guidance more generally references parts of various legislative reports that indicate impairments must be "important" and that "not every impairment will constitute a 'disability' within the meaning of this section."[67] Interestingly, the EEOC initially proposed retaining, in both its regulations and interpretive guidance, language specifically stating certain types of impairments, such as the seasonal flu, are generally

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62. *Id.* § 12102(4)(D).
63. *Id.* § 12102(4)(E)(i).
64. 29 C.F.R. app. § 1630.2(j)(1)(ix) (2020) (citing 154 CONG. REC. 13766 (2008)).
65. *Id.* The explanation is adopted from the Joint Statement of Senators Hoyer and Sensenbrenner that the ADAAA was not intended to change the original ADA's consideration of duration as one factor in assessing substantial limitation under the first two prongs of the definition:

> Second, a concern has been raised about whether the bill changes current law with respect to the duration that is required for an impairment to substantially limit a major life activity. The bill makes no change to current law with respect to this issue. The duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.

154 CONG. REC. 13766 (2008).
66. Nathaniel P. Levy, *You're Fired, but Get Well Soon: Temporary Impairments as ADA Disabilities in Employment Cases*, 54 WILLAMETTE L. REV. 547, 581 (2018).
67. 29 C.F.R. app. § 1630.2(j)(1)(ii) (2020) ("While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity to qualify as a disability."); 154 CONG. REC. S8345 (daily ed. Sept. 11, 2008) (statement of Managers) ("[R]eaffirm[ed] that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA.").

not substantially limiting,[68] but removed it from the final version because it was sufficient to note not every impairment will be a disability.[69]

In addition to the changes to the first two prongs of the definition, Congress significantly altered the "regarded as" prong, and for the first and only time, added an explicit durational limitation.[70] A "regarded as" plaintiff now needs only show that she was regarded as having an *impairment*:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[71]

The expanded definition, however, "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."[72] The statute does not define what is a minor impairment.[73]

The EEOC has made clear that this "minor and transitory" exception applies only to disability claims arising under the "regarded as" prong.[74] The regulations also indicate this exception is an affirmative defense.[75] The regulations provide for an objective standard to assess the exception but, like the statute, they do not further elucidate what is meant by a "minor" impairment:

> To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor." Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor.

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68. 74 Fed. Reg. 48,431, 48,443 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).
69. *See* 76 Fed. Reg. 16,978, 16,981 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).
70. 42 U.S.C. § 12102(3).
71. *Id.* § 12102(3)(A).
72. *Id.* § 12102(3)(B).
73. *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1027 ("The Act provides no inkling as to what is meant by a minor impairment . . . .").
74. 29 C.F.R. app. § 1630.2(j)(1)(ix) (2020).
75. 29 C.F.R. § 1630.15(f) (2020).

> For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.[76]

The accompanying Interpretive Guidance largely relies on the ADAAA's legislative reports to explain what is transitory and minor.[77] The Senate Managers' Statement indicates the transitory and minor exception was added in response to employer concerns that the third prong eliminated any functional limitation requirement.[78] The House Education and Labor Committee Report explains that:

> [A]bsent this exception, the third prong . . . would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time.[79]

But the report also reiterates how important the "regarded as" prong is to ensuring broad protection and that the exception "should be construed narrowly."[80]

The Interpretive Guidance further addresses how to determine whether the employer perceives an impairment as transitory and minor, using the example of a person with "an objectively transitory and minor hand wound" who is fired not for the wound per se, but because the employer mistakenly believes the wound is the result of HIV infection.[81] The perceived HIV infection would not be transitory and minor and the employer cannot utilize the transitory and minor defense because that mistaken perception would be the basis for the employer's adverse action.[82] The EEOC's hand wound example follows a similar theme as the legislative history references to "simple infected finger[s]" and hangnails as examples of minor and trivial non-covered impairments.[83]

In sum, the statutory language, regulatory guidance, and legislative history reflect that short-term impairments are not excluded from the definition

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76. *Id.*
77. *See* 29 C.F.R. app. § 1630.2(l) (2020).
78. 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of Managers).
79. 29 C.F.R. app. § 1630.2(l) (2020) (citing H.R. REP. NO. 110-730, pt. 1, at 14 (2008)).
80. *Id.*
81. *Id.*
82. *See id.*
83. *See* H.R. REP. NO. 110-730, pt. 2, at 30 (2008) (first citing S. REP. NO. 101-116, pt. 1, at 23 (1989); and then citing H.R. REP. NO. 101-485, pt. 2, at 52 (1990)) (noting original ADA legislative history about exclusion of trivial impairments such as an infected finger); 154 CONG. REC. H6064 (daily ed. June 25, 2008) (statement of Rep. Nadler) ("They worry about covering stomachaches, the common cold, mild seasonal allergies, or even a hangnail.").

of disability unless they have effects so minor that they can be considered trivial, like a hangnail. Duration is merely one factor in determining both substantial limitation and the "transitory and minor" exception to the amended "regarded as" prong. Exclusions to the ADA's coverage of disabilities should be construed narrowly. While these sources invite some scrutiny of short-term impairments, they do not support the level of exclusion that is seen in the judicial decisions.

III. HOW COURTS HAVE EXCLUDED SHORT-TERM IMPAIRMENTS UNDER THE ACTUAL DISABILITY PRONG

Although, as discussed, the actual disability prong does not explicitly exclude minor and transitory impairments, plaintiffs have had a difficult time proceeding with their actual disability claims based on impairments that last six months or fewer. This is true even in cases when the functional limitation of the active impairment was far from trivial.[84] There are three themes that emerge from the cases: 1) courts are elevating duration to the most important, if not the only important, consideration in evaluating whether a short-term impairment substantially limits a major life activity; 2) courts are erroneously relying on pre-ADAAA decisions that categorically excluded short-term impairments; and 3) courts are failing to recognize the significance of the episodic and mitigating measure rules of construction.

A. Elevating Duration to the Most Important or Only Consideration

As noted above, the ADAAA and EEOC's regulations and interpretive guidance require some showing of severity for short-term impairments, leaving courts to figure out what a "sufficiently severe" short-term impairment might be. With no further guidance, courts have perhaps unsurprisingly tended to circle back to duration.[85] The court may acknowledge that a

84. *See generally* Levy, *supra* note 66.

85. *See, e.g.*, Leone v. All. Foods, Inc., No. 8:14-CV-800-T-27TBM, 2015 WL 4879406, at *6 (M.D. Fla. Aug. 14, 2015) (finding that although the plaintiff had identified significant major life activities limited by his eye injury, it was not substantially limiting because any limits lasted just over two weeks). This type of reasoning leads to rather absurd conclusions such as how a miscarriage would not be sufficiently severe enough to overcome the fact it was "an impairment lasting less than a day." *See* Love v. First Transit, Inc., No. 16-CV-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 3, 2017). In *Love*, the court apparently believed that the plaintiff needed to show a history of complications leading up to the miscarriage. *See id.* (noting the plaintiff failed to plead sufficient facts of pregnancy complications). To be clear, the case is not a model of pleading by the plaintiff because

short-term impairment can be substantially limiting if sufficiently severe but then rely on the fact that an impairment is short-term to establish it is not severe enough to be substantially limiting.[86] This reasoning is especially likely if the court characterizes the impairment as a one-time occurrence.[87]

For example, the Eastern District of Pennsylvania required as a pleading standard that the plaintiff allege an impairment that was more than a one-time occurrence.[88] In that case, the plaintiff suffered from a double hernia that occurred at work and underwent surgery that required a six week medical leave of absence.[89] The court reasoned that his inability to work did not support finding sufficient limitation because the hernia occurred only once.[90] Similarly, the Northern District of Texas concluded that an employee who was fired for safety concerns related to an episode of dehydration and possible heat stroke failed to show that the episode was substantially limiting because, even though his doctor required several follow up medical appointments, the episode only occurred once and lasted only a few hours.[91]

If courts do not frame the rule as requiring more than a one-time occurrence, they may instead suggest that the plaintiff establishes some kind of medical complication or long-term consequence from the impairment. For example, the Western District of Arkansas reasoned that "typically, broken limbs will not constitute disabilities under the ADA. It is only the unique circumstances of [the plaintiff's] injury—that it required corrective surgery, impairing her ability to work for a full year—that render it a disability under the Act."[92] Even with the year-long restrictions, the court

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she did not outright state whether she had a miscarriage. Nonetheless, the court's reasoning indicates that the short duration of a miscarriage would disqualify it from ADA coverage. *See id.*

86. *See, e.g.*, Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564, 2014 WL 840229, at *5 (D. Conn. Mar. 4, 2014) (finding that even though the plaintiff had a physical impairment that substantially limited his ability to work and walk, the court nonetheless concluded that he failed to state a claim because of the short-term nature of the impairment).

87. *See, e.g.*, Willis v. Noble Env't Power, LLC, 143 F. Supp. 3d 475, 477, 482–83 (N.D. Tex. 2015). In *Willis*, the court correctly noted that duration was only one factor in the analysis, but then proceeded to distinguish other cases on the basis that they were not one-time occurrences. *See id.* at 483.

88. Butler v. BTC Foods Inc., Civil Action No. 12-492, 2012 WL 5315034, at *3 (E.D. Pa. Oct. 19, 2012). The court supported this assertion by citing the episodic rule of construction. *Id.* (citing 42 U.S.C. § 12102(4)(D)).

89. *Id.* at *1.

90. *See id.* at *3.

91. *Willis*, 143 F. Supp. 3d at 477, 482; *see also* Clay v. Campbell Cnty. Sheriff's Off., No. 6:12-CV-00062, 2013 WL 3245153, at * 2–3 (W.D. Va. June 26, 2013) (rejecting plaintiff's disability claim based on an episode of kidney stones because court found it "a temporary, one-time issue that was resolved within two weeks").

92. Orr v. City of Rogers, 232 F. Supp. 3d 1052, 1065 (W.D. Ark. 2017) ("Orr originally broke her arm in February of 2013. Because the break did not heal correctly, her doctor recommended corrective surgery in September of that year, and she did not fully

called it a "a borderline case, just barely falling within the ADA's protections."[93] The court gave no rationale for why it was a close case other than citing to "the weight of the post-ADAAA case law" finding similar injuries not to be disabilities.[94] In a Title II and Rehabilitation Act case involving an inmate who sustained a foot injury, which limited his mobility for six months and required him to at one point use crutches, the Northern District of Illinois acknowledged that the amended ADA does not categorically exclude temporary impairments.[95] However, the court again looked to the duration of the impairment and reasoned that "[o]rdinarily, temporary injuries that neither cause nor relate to longer-term impairments generally do not demonstrate a disability under the ADA . . . ."[96] The court found the inmate failed to show "evidence of any lasting consequence past that [six month] period."[97]

By contrast, some courts have found that fairly short-term impairments can be substantially limiting of major life activities under the ADAAA's expanded definition.[98] Some decisions note the Interpretive Guidance refers in a fairly non-specific way to a lifting restriction "that lasts for several months."[99] For example, the Western District of Michigan relied on that sample restriction to deny an employer's summary judgment motion when the plaintiff's torn bicep resulted in approximately four months of work-

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recover until the early part of 2014. Thus, Orr's impairment lasted for approximately a year.").

93. *Id.* at 1065 n.6.

94. *See id.* at 1065.

95. Shaw v. Williams, No. 16-CV-1065, 2018 WL 3740665, at *8–9 (N.D. Ill. Aug. 7, 2018).

96. *Id.* at *9.

97. *Id.* The court acknowledged that short-term impairments could be substantially limiting; however, the court concluded that duration plays a role in this analysis and that short-term impairments are not covered unless sufficiently severe. *Id.*

98. *See* Esparza v. Pierre Foods, 923 F. Supp. 2d 1099, 1106 (S.D. Ohio 2013) (finding the plaintiff plausibly alleged an ADA disability based on his kidney stones that required a two week recuperation period); *see also* Burnell v. Tealwood Care Ctrs., Inc., No. 16-3001, 2018 WL 4293150, at *7 (D. Minn. July 10, 2018) (finding the plaintiff had created a material issue of fact regarding whether she had a disability due to a fractured leg because a broken bone can substantially impair "walking, standing, or working, for a period of a few months").

99. *See Burnell*, 2018 WL 4293150, at *8 (citing 29 C.F.R. app. § 1630.2(j)(1)(ix) (2018)); Judge v. Landscape Forms, Inc., No. 1:12-CV-1117, 2014 WL 12502685, at *5 (W.D. Mich. Mar. 6, 2014) (citing 29 C.F.R. app. § 1630.2(j)(1)(ix) (2013)); *cf.* Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014) (finding impairments that lasted about seven months were sufficient to allege an ADA disability claim).

related restrictions.[100] Other courts have denied motions to dismiss because they focused on the effects of the impairments and not on their duration.[101] The Southern District of Florida concluded that a plaintiff had plausibly stated a claim when she alleged her sprained ankle limited her ability to walk and stand "for long periods of time."[102] The Northern District of California found it was sufficient to deny defendant's motion to dismiss for the plaintiff to allege her knee impairment required her to use crutches or otherwise walk with difficulty.[103]

Not all courts have taken a broader view of short-term impairments on motions to dismiss.[104] Equating severity with duration, the District of Connecticut found a complaint insufficient on its face even while acknowledging that the impairment was substantial while it was active.[105] The Western District of North Carolina characterized a complaint as merely conclusory because it did not include specific facts about the duration of the impairment.[106]

For other courts, the difference between a motion to dismiss as compared to summary judgment changed their conclusion about whether the plaintiff was able to show sufficient limitation from a short-term impairment.[107] The

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100. *See Judge*, 2014 WL 12502685, at *1–2, *5.

101. *See* Nails v. Spirit Airlines, Inc., No. 17-62172-CIV-COOKE, 2018 WL 1863623, at *2 (S.D. Fla. Feb. 15, 2018) (finding the plaintiff plausibly alleged that she had a disability by stating that her sprained ankle substantially limited her ability to walk).

102. *Id. Nails* stands in contrast to a summary judgment case in which the court found similar non-detailed allegations insufficient. *See* Weems v. Dallas Indep. Sch. Dist., 260 F. Supp. 3d 719, 728 (N.D. Tex. 2017) (reasoning that the note from plaintiff's doctor failed to contain sufficient specifics about how long he could stand and how far he could walk).

103. *See* Barrilleaux v. Mendocino County, 61 F. Supp. 3d 906, 916 (N.D. Cal. 2014) ("Although further discovery may reveal that Plaintiff is not a qualified disabled person, she has stated a claim for relief because she has alleged that she required crutches to walk or otherwise walks with difficulties due to a weakened knee, which reflects a substantial impairment in the major life activity of walking.").

104. *See, e.g.*, Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502, 513–14 (E.D. Pa. 2012) (acknowledging that the plaintiff's burden is much higher on a motion for summary judgment than on a motion to dismiss but nonetheless finding that the plaintiff failed to plead "important" limitations on a major life activity).

105. *See* Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564, at *4 (D. Conn. Mar. 4, 2014) (granting defendant's motion to dismiss a disability claim despite finding the plaintiff's limitations due to kidney stones were substantial during the month he suffered them).

106. *See* Pope v. ABF Freight Sys., Inc., No. 3:17-CV-564, 2018 WL 3551528, at *4 (W.D.N.C. July 24, 2018) (granting the motion to dismiss the ADA claim because the plaintiff alleged only that he injured his back, with no additional specifics about the injury or duration of his limitations, and his doctor required him to be placed on light duty as a result).

107. *Compare* Feldman v. Law Enf't Assocs. Corp., 779 F. Supp. 2d 472, 485 (E.D.N.C. 2011) (denying motion to dismiss), *with* Feldman v. Law Enf't Assocs. Corp., 955 F. Supp.

Eastern District Court of North Carolina initially found on a motion to dismiss that the plaintiff had stated a claim because the impairment he alleged, a transient ischemic attack—TIA—while short, nonetheless had significant effects while it was occurring.[108] That same court, however, later granted the employer's summary judgment motion, finding the plaintiff only alleged a "'mild TIA' that had 'since resolved.'"[109] Absent evidence that the TIA was likely to recur or other evidence it impaired his ability to work—the major life activity the plaintiff alleged—the court found the plaintiff failed to create a genuine issue of material fact that he had a disability.[110]

It is not surprising courts have a confusing track record applying a statute that sets up an incoherent scheme. The ADA requires a finding of substantial limitation, but severity is too demanding—except for short-term impairments where severity is specifically required but defined only by example. Rules excluding one-time occurrences or setting a six-month

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2d 528, 547 (E.D.N.C. 2013), *aff'd on other grounds*, 752 F.3d 339 (4th Cir. 2014) (granting the defendant summary judgment).

108. *See Feldman*, 779 F. Supp. 2d at 485. The court described the nature of a TIA as "a blood clot temporarily clogs an artery, and part of the brain does not get the blood it needs," and noted the plaintiff alleged "that while he suffered the effects of the TIA, he was substantially limited in his ability to perform 'multiple major life activities.'" *Id.* The court then moved to its conclusion:

> As a result, the court finds that a TIA is not comparable to a common cold, a sprained joint, or any of the other examples listed in the proposed EEOC regulations. Thus, at this early stage of the proceedings, the court is unwilling to say that Feldman has failed to sufficiently allege that he had a disability.

Id. It should be noted that the proposed regulation the court referenced, which would have singled out those particular short-term impairments as not substantially limiting major life activities, was not included in the final regulation or interpretive guidance. *See supra* notes 67–69 and accompanying text.

109. *Feldman*, 955 F. Supp. 2d at 538.

110. *Id.* at 539. In his complaint, the plaintiff alleged only the major life activity of working. *Id.* The "major bodily function" part of the expanded definition seemingly offered a stronger alternative pathway to find substantial limitations. *See* 42 U.S.C. § 12102(2)(B) (defining major life activities to include the operation of "major bodily function[s]" such as "neurological [systems and the] brain"). Had the plaintiff alleged a limitation of such bodily functions, the court should then have more clearly focused on the effects of the TIA while it was occurring and given more weight to the connection between TIAs, strokes, and other serious conditions. *See* Michael D. Hill & Shelagh B. Coutts, *Preventing Stroke after Transient Ischemic Attack*, 183 CAN. MED. ASS'N J. 1127, 1127–28 (2011) ("Among patients with transient ischemic attack, one in five will have a subsequent stroke (the most common outcome), a heart attack or die within one year.").

minimum allow courts to continue to apply their preexisting notions about the type of impairments deserving of anti-discrimination protections.

B. Continuing to Cite Pre-ADAAA Precedent

Duration has been a sticky variable in large part because courts continue to cite pre-ADAAA case law and the EEOC guidance that shorter term impairments are not substantial.[111] Some recent decisions cite the EEOC's pre-ADAAA substantial limitation definition, which asks whether someone is unable to perform a major life activity or is otherwise significantly restricted in doing so,[112] despite the fact that Congress explicitly rejected it in the ADAAA's findings and purposes.[113] The Northern District of Mississippi even acknowledged that the ADAAA does not preclude finding temporary impairments to be substantially limiting but then repeatedly cited to pre-ADAAA regulations and interpretive guidance indicating temporary impairments such as "broken limbs, sprained joints, concussions, appendicitis, and influenza" are not covered.[114] As noted above, neither

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111. *See, e.g.*, Kruger v. Hamilton Manor Nursing Home, 10 F. Supp. 3d 385, 389 (W.D.N.Y. 2014) (citing pre-ADAAA case law); Swann v. US Foods, Inc., No. 1:14-CV-01409, 2015 WL 3793739, at *4 (E.D. Va. June 17, 2015) (citing a string of pre-2009 ADA cases and reasoning that courts find impairments insubstantial if they "only moderately" affect a person's ability to walk); Martinez v. N.Y. State Div. of Hum. Rts., No. 1:13-CV-1252-GHW, 2015 WL 437399, at *10 (S.D.N.Y. Feb. 2, 2015) (citing both pre- and post-ADAAA cases for the proposition that an impairment of limited duration with no long-term effects is not substantially limiting). *Swann* similarly applied pre-ADAAA requirements to the plaintiff's claim that he was regarded as having a disability. *See Swann*, 2015 WL 3793739, at *5 (asserting that the employer not only must have known about the plaintiff's impairment but consequently must have regarded the plaintiff as having a substantial limitation in his ability to work).

112. *See, e.g.*, Clark v. Boyd Tunica, Inc., No. 3:14-CV-00204-MPM-JMV, 2016 WL 853529, at *3 (N.D. Miss. Mar. 1, 2016) (citing two different cases for its reliance on the pre-ADAAA version of 29 C.F.R. § 1630.2(j)(ii)), *aff'd*, 665 F. App'x 367 (5th Cir. 2016). Section 1630.2(j)(ii) previously set out three factors for substantial limitation:

> (1) unable to perform a major life activity that the average person in the general population can perform; or (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

See 29 C.F.R. § 1630.2(j)(ii) (2008).

113. *See* ADA Amendments Act of 2008, Pub. L. 110-325, § 2(b)(6), 122 Stat. 3553.

114. *See Clark*, 2016 WL 853529, at *4. *Clark* quoted the superseded version of 29 C.F.R. app. § 1630.2(j) that stated "temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities." *Id.* (misattributing the quoted language to the regulation rather than the Interpretive Guidance). The court also quoted language from the prior version of the EEOC's Interpretive Guidance that "broken limbs, sprained joints, concussions, appendicitis, and influenza" are non-disabling impairments. *See id.* (quoting 29 C.F.R. app. § 1630.2(j) (2015)); *see also* Shaw v. Williams,

the current regulation nor its interpretive guidance include a similar list of ordinarily excluded conditions.[115] Similarly, the Northern District of Texas granted an employer summary judgment because it found the plaintiff's doctor did not state that the plaintiff would have "considerable difficulty" or be "unable" to perform any major life activity.[116] Both of those are pre-ADAAA standards.[117]

Perhaps the most extreme example is how courts continue to cite the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, v. Williams*.[118] The Court held in *Toyota* that the definition of disability was to be strictly construed and required permanent or long-term impairments.[119] The ADAAA's findings and purposes could not have been clearer that Congress rejected those standards.[120] Nonetheless, courts cite *Toyota's* reasoning in their post-ADAAA decisions finding the plaintiff failed to show a substantially limiting impairment.[121]

No. 16-CV-1065, 2018 WL 3740665, at *8–9 (N.D. Ill. Aug. 7, 2018) (citing *Clark* and the same superseded list of "temporary, non-disabling impairments").

115. *See supra* notes 67–69 and accompanying text.

116. Weems v. Dall. Indep. Sch. Dist., 260 F. Supp. 3d 719, 728 (N.D. Tex. 2017). The doctor's note in *Weems* set out workplace restrictions on the plaintiff's activities including no walking for long distances, no climbing, and no standing for long amounts of time. *Id.* at 724. The court insisted the doctor's note was insufficient to establish substantial limitation because the plaintiff did not provide specific details about "what constitutes 'walking for long distances' or 'standing for long amounts of time.' Moreover, [the plaintiff] never stated how far he had to walk or how long he had to stand while [he performed his work]." *Id.* at 729. The court gave lip service to the broader post-ADAAA standard, but still concluded that the record was too scant to support the plaintiff's disability claim. *See id.*

117. ADAAA Interpretive Guidance specifically rejects "considerable" as compatible with the ADAAA's rules of construction. Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 76 Fed. Reg. 16,977, 16,981 (Mar. 25, 2011). The Interpretive Guidance further rejects pre-ADAAA reasoning that required individuals to show that they were "unable" to perform a major life activity. 29 C.F.R. app. § 1630.2(j)(1)(vii) (2020) (interpreting the rule of construction for episodic impairments).

118. Toyota Moto Mfg., Ky., 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).

119. *Id.* at 198–99.

120. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(7), 122 Stat. 3553 (2008) ("The Supreme Court, in [*Toyota*], interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress . . . .").

121. *See, e.g.*, Zurenda v. Cardiology Assocs., P.C., No. 3:10-CV-0882, 2012 WL 1801740, at *7 (N.D.N.Y. May 16, 2012) (citing *Toyota* for the standard to prove substantial limitation); *see also* Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *9 (N.D. Ohio Oct. 31, 2011) (citing pre-ADAAA caselaw that relied on *Toyota* for the rule that impairments must be permanent or long-term to be substantially

In a number of cases, courts provide no depth of analysis beyond citing to pre-ADAAA decisions and post-ADAAA cases reflecting similar reasoning.[122] For example, the Eastern District of Pennsylvania reasoned that "[a] temporary non-chronic impairment of short duration is not a disability covered under the ADA," citing in part to authority relying on pre-ADAAA case law.[123] In an extensive string cite that blended pre- and post-ADAAA cases, the District of Connecticut concluded courts "have still adhered to the traditional notion that temporary or short-term disabilities are not covered by the statute absent allegations highlighting the extreme severity of the disability."[124]

To consider whether a short-term impairment is "sufficiently severe" courts have also treated the EEOC's guidance as an invitation to revert to stringent pre-ADAAA standards.[125] As noted above, the District of Connecticut ramped up the standard by requiring plaintiffs to show "extreme severity."[126] That court rejected the plaintiff's claim that his kidney stones, which resulted in multiple hospitalizations and surgeries, were severe enough because he failed to show any continuing effects.[127] This was despite the fact that earlier in the opinion, the court acknowledged that during the month the kidney stones were active, "[t]here [was] no doubt . . . the Plaintiff demonstrated 'a physical or mental impairment that substantially limit[ed] one or more major life activities' because he could not go to work or even walk around."[128]

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limiting). *But see* Cohen v. CHLN, Inc., No. 10-00514, 2011 WL 2713737, at * 6–8 (E.D. Pa. July 13, 2011) (reasoning that Congress rejected *Toyota* and adopted a less restrictive standard with no strict duration requirement and, under that standard, a jury could find debilitating back and leg pain that lasted nearly four months to be a disability).

122. *See, e.g.*, Zick v. Waterfront Comm'n of N.Y. Harbor, No. 11 Civ. 5093(CM), 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012) (citing pre-ADAAA case law to conclude that the plaintiff's broken leg was not considered a disability under the ADA); *Neumann*, 2011 WL 5360705, at *9 (citing pre-ADAAA caselaw for the requirement that impairments must be permanent or long-term).

123. Poper v. SCA Ams., Inc., No. 10-3201, 2012 WL 3288111, at *8 (E.D. Pa. Aug. 13, 2012) (citing Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 274 (3d Cir. 2012) (addressing facts arising prior to the effective date of the ADAAA)).

124. Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564(VLB), 2014 WL 840229, at *4 (D. Conn. Mar. 4, 2014).

125. *See* 29 C.F.R. app. § 1630.2(j)(1)(ix) (2020).

126. *See Mastrio*, 2014 WL 840229, at *4. Among the cases *Mastrio* cites is *Palmieri v. City of Hartford*, which itself cites a pre-ADAAA Second Circuit decision for the proposition that the "[c]ircuit has explicitly deferred consideration of whether a temporary impairment is per se unprotected under the ADA." Palmieri v. City of Hartford, 947 F. Supp. 2d 187, 198–99 (D. Conn. 2013) (citing Adams v. Citizens Advice Bureau, 187 F.3d 315, 317 (2d Cir. 1999)).

127. *Mastrio,* 2014 WL 840229, at *5–6.

128. *See id.*

To date, only the Fourth Circuit has directly addressed how the ADAAA covers short-term impairments, and although that case involved an impairment that lasted longer than six months it avoided most of the pitfalls discussed above.[129] The Fourth Circuit criticized the lower court for relying on pre-ADAAA decisions and emphasized Congress's mandate to construe the ADA as broadly as its text permits.[130] As such, "it seem[ed] clear" to the court that the plaintiff's serious leg injuries, although ostensibly treated by surgery and seven months of recovery time, were serious enough to be considered an actual disability under the EEOC's interpretive guidance on short-term impairments.[131] Although the court referenced the duration of the plaintiff's recovery, it equally emphasized the degree of impairment the plaintiff experienced.[132] Comparing the plaintiff's facts to the back impairment example in the Interpretive Guidance, the court reasoned "surely a person whose broken legs and injured tendons render him completely immobile for more than seven months is also disabled."[133]

Despite that guidance, at least one subsequent case acknowledged the Fourth Circuit's reasoning but then again emphasized the importance of duration, citing a confused mash-up of the current and outdated Interpretive Guidance, including the superseded guidance listing types of impairments not considered disabilities.[134] The case in many ways encapsulates the

129. *See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 330 (4th Cir. 2014) (noting that the Fourth Circuit was the first federal circuit to apply ADAAA's expanded definition of disability); *see also* Levy, *supra* note 66, at 555 ("The Fourth Circuit's opinion in [*Summers*] was the first circuit court decision to give the ADAAA strong effect as applied to temporary impairments . . . .").

130. *See Summers*, 740 F.3d at 329–30.

131. *Id.* at 330.

132. *See id.* at 329–30.

133. *Id.* at 330.

134. *See* Shaw v. Williams, No. 16-CV-1065, 2018 WL 3740665, at *8 (N.D. Ill. Aug. 8, 2018) (citing *Summers*, 740 F.3d at 333). The court first correctly references the "sufficiently severe" standard in the current Interpretive Guidance. *Id.* (citing 29 C.F.R. app. § 1630.2(j)(1)(ix) (2018)). However, the court then quotes the list of temporary, non-disabling impairments listed only in the pre-ADAAA Interpretive Guidance. *See id*. (attributing to the current Title I Interpretive Guidance language from the 1991 regulations which lists "broken limbs, sprained joints, concussions, and influenza" as examples of temporary impairments that are not covered by the ADA (quoting 29 C.F.R. app. § 1630.2(j)(1)(ix) (2018)); *see also* 29 C.F.R. § 1630.2(j) (2020) (defining substantial limitation to exclude temporary, non-chronic conditions); 29 C.F.R. app. § 1630.2(j)(1)(ix) (2020) (making clear that impairments that last less than six months can be substantially limiting, without listing impairments that are generally not covered).

stickiness of pre-ADAAA law and the resulting judicial confusion about the proper sources for interpreting post-ADAAA cases.

C. Failing to Recognize the Significance of the Episodic and Mitigating Measures Rules of Construction

Two of the ADAAA's new rules of construction should have lead courts away from their emphasis on duration but they have not been particularly fruitful for plaintiffs alleging short-term impairments.[135] The ADAAA provides that impairments that are episodic or in remission can be disabilities if they are substantially limiting in their active state.[136] In addition, impairments that can be mitigated by taking medication, using assistive technology, or engaging in learned behavioral modifications, among other things, should be evaluated without taking these mitigating measures into account.[137] A few courts have cited to these rules in support of their decision to allow short-term impairment cases to proceed.[138] In other cases, however, courts have concluded the rule does not apply to short-term impairments.[139]

The Eastern District of North Carolina rejected applying the episodic rule to the plaintiff's claim that he was discriminated against after he suffered a transient ischemic attack, TIA, otherwise known as a mini-stroke.[140] TIAs are caused by blood clots that briefly block blood flow to

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135. 42 U.S.C. § 12102(4)(D) (clarifying the coverage of impairments that are episodic or in remission); *id.* § 12102(4)(E)(i) (excluding consideration of mitigating measures).

136. *Id.* § 12102(4)(D); *see also* 29 C.F.R. § 1630.2(j)(1)(vii) (2020). The episodic rule was added to protect individuals with impairments that are episodic or in remission because such impairments will continue to substantially limit their major life activities. *See* H.R. REP. NO. 110-730, pt. 2, at 19 (2008).

137. 42 U.S.C. § 12102(4)(E)(ii) (providing that ordinary eyeglasses are a limited exception from the prohibition on considering mitigating measures).

138. *See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 330 n.3 (4th Cir. 2014) (noting that the EEOC rejected a proposed regulation which implemented the mitigating measures rule of construction which would have allowed courts to reject claims if surgical intervention permanently eliminated the plaintiff's impairment); Esparza v. Pierre Foods, 923 F. Supp. 2d 1099, 1106 (S.D. Ohio 2013) (citing the rule on episodic and in-remission impairments to find that the plaintiff's kidney stones "appear[ed] to meet this minimal threshold").

139. *See* Feldman v. Law Enf't Assocs. Corp., 955 F. Supp. 2d 528, 538 (E.D.N.C. 2013) (declining to apply the episodic rule to a short-term impairment), *aff'd on other grounds*, 752 F.3d 339 (4th Cir. 2014); Clark v. Boyd Tunica, Inc., 3:14-CV-00204-MPM-JMV, 2016 WL 853529, at *5 (N.D. Miss. Mar. 1, 2016) (suggesting that episodic conditions tend to be recurring conditions). *But see Esparza*, 923 F. Supp. 2d at 1106 (denying the defendant's motion to dismiss the plaintiff's claim that his kidney stones were a disability because the complaint met the minimal threshold to assert an impairment that is episodic or in remission).

140. *Feldman*, 955 F. Supp. 2d at 538.

the brain.[141] While the TIA itself typically resolves after a few minutes, a significant number of people who experience a TIA go on to have a stroke or other serious health conditions including death.[142] The court acknowledged the significant risk that a person who suffers a TIA would eventually suffer a stroke, but nonetheless concluded that the episodic rule did not apply because a TIA "is an acute condition that is different from . . . more chronic conditions—such as cancer, epilepsy, multiple sclerosis . . . ."[143] Moreover, the court suggested that even if the TIA was an impairment that is episodic or in remission, the plaintiff failed to prove substantial limitation because he offered no evidence that his activities were restricted beyond an overnight hospital visit.[144]

As that case illustrates, the episodic rule is problematic because it can be read to presuppose a continuing condition—one that comes and goes and could come again, such as the seizures experienced with epilepsy.[145] Even when plaintiffs do not clearly raise the episodic rule in support of their argument the court may use it against them as support for requiring the impairment "be of a reoccurring or on-going nature."[146]

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141. *What Is a TIA?*, AM. STROKE ASS'N (Dec. 28, 2018), https://www.stroke.org/en/about-stroke/types-of-stroke/tia-transient-ischemic-attack/what-is-a-tia [https://perma.cc/H4CL-7MQU].

142. *See, e.g.*, Hill & Coutts, *supra* note 110, at 1127–28 ("Among patients with transient ischemic attack, one in five will have a subsequent stroke (the most common outcome), a heart attack or die within one year."). In 2009, A medical expert panel recommended to the Federal Motor Carrier Safety Administration "that all individuals who have experienced a single TIA be immediately excluded from driving a [commercial motor vehicle]" and that they remain "free from recurrent TIA or stroke for a period of at least one year" in order to be considered qualified thereafter. ABIODUN AKINWUNTAN, PHILIP GORELICK & MEHEROZ RABADI, EXPERT PANEL RECOMMENDATIONS: STROKE AND COMMERCIAL MOTOR VEHICLE DRIVER SAFETY 8 (2009).

143. *Feldman*, 955 F. Supp. 2d at 538.

144. *Id.* at 538–39. This case may have been affected by the plaintiff's choice to allege that the TIA substantially limited his ability to work, rather than argue that, while active, the TIA substantially limited his cardiovascular and neurological systems under the new major bodily function section in the definition of major life activities. *See id.* at 539 n.4 (noting that the plaintiff had only alleged working as a major life activity in his amended complaint); *see also* 42 U.S.C. § 12102(4)(D).

145. The legislative history used epilepsy as the example to demonstrate what Congress intended the episodic rule to address. *See* H.R. REP. NO. 110-730, pt. 2, at 19 (2008) (indicating that a person with epilepsy who experiences loss of control over major life activities during a seizure would be covered under the episodic rule "even if those seizures occur daily, weekly, monthly, or rarely").

146. Clark v. Boyd Tunica, Inc., 3:14-CV-00204-MPM-JMV, 2016 WL 853529, at *5 (N.D. Miss. Mar. 1, 2016) (citing Carmona v. Sw. Airlines Co., 604 F.3d 848, 855 (5th

Similar reasoning is found in cases analyzing the new mitigating measures rule.[147] The new rule was specifically intended to increase the summary judgment survival of claims involving impairments which are often effectively treated by medication, such as epilepsy and diabetes.[148] In some short-term impairment cases plaintiffs have invoked the new mitigating measures rule in support of their argument that their impairment is covered despite its short duration.[149] For example, one plaintiff argued that the court should consider the staph infection and corneal infiltration in his eye without taking into account the antibiotics and creams he was prescribed to treat it.[150] His ophthalmologist gave him a thirty percent chance of losing the eye.[151] The court disagreed with the plaintiff's argument, however, reasoning the "provision [on mitigating measures] applies to efforts to mitigate the symptoms of an impairment, not treatment that resolves a condition in its entirety."[152] The court cited the Merriam-Webster Dictionary definition of "'mitigate' as 'to cause to become *less* harsh or hostile; to make *less* severe or painful.'"[153] In a different case, the same judge had elaborated his concern that if the court were required to evaluate something like an H1N1 virus infection in its untreated condition, that would mean "almost any infection or injury, regardless of its actual impact, be treated as a covered disability [because] virtually any minor injury could lead to long-term disability or death if not properly treated."[154] By setting up such an extreme strawman, it was easy for the court to knock it down.[155]

Cir. 2010)) (addressing that the ADAAA made it easier to establish coverage for episodic conditions), *aff'd*, 665 F. App'x 367 (5th Cir. 2016).

147. 42 U.S.C. § 12102(4)(E)(ii) (providing a limited exception for ordinary eyeglasses from the prohibition on considering mitigating measures).

148. H.R. REP. NO. 110-730, pt. 2, at 20–21 (2008).

149. *See, e.g.*, Leone v. All. Foods, Inc., No. 8:14-CV-800-T-27TBM, 2015 WL 4879406, at *2, *7 (M.D. Fla. Aug. 14, 2015); McKenzie-Nevolas v. Deaconess Holdings, LLC, No. CIV-12-570-D, 2014 WL 518086, at *2 (W.D. Okla. Feb. 7, 2014); Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *5 (M.D. Fla. Sept. 16, 2011).

150. *Leone*, 2015 WL 4879406, at *7. While the court acknowledged the ADAAA's admonition to construe the statute in favor of broad coverage, it was more persuaded by the regulation's suggestion that short-term impairments are typically not covered. *Id.*

151. *Id.* at *2.

152. *Id.*

153. *Id.* at *7 n.9.

154. Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *5 & n.19 (M.D. Fla. Sept. 16, 2011).

155. *Lewis* suggested that failure to treat a wound may lead to a serious life-threatening infection and failure to properly treat a broken bone can result in permanent disfigurement. *Id.* But it is difficult to see how those examples can be distinguished from any other mitigating measure case, where the impairment's active status matters, not how the individual is able to ameliorate it with treatment. Of significance, although the original ADA legislative reports suggested that the Act would not cover a "simple infected finger," the ADA

Instead, more relevant is that both the statute and regulations list "medication, medical supplies, [and] equipment" as potential mitigating measures without delineating the effect of those measures.[156] The regulations similarly specifically delineate "[p]sychotherapy, behavioral therapy, or physical therapy" as mitigating measures, any of which could resolve the impairment for which the individual seeks treatment.[157] Further, the legislative reports reference "surgical interventions," which clearly have the potential to cure an impairment.[158] The language in the House Reports is unequivocal that Congress expected that mitigating measures—other than ordinary eye glasses—would not be considered to determine substantial limitation.[159]

The better read of congressional intent puts the mitigating measures provision in context with the episodic impairment provision and recognizes that impairments that significantly limit function when they are active, even if short-term and resolved by treatment, are nonetheless substantially limiting. With this understanding, a minor sprain that does not significantly

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legislative history references this example only in the Additional Views to the House of Representative Report, which expresses the minority's concern that the amended statute is not read to allow coverage of impairments that are not permanent and long-term. H.R. REP. NO. 110-730, pt. 2, at 30 (2008) (first citing S. REP. NO. 101-116, pt. 1, at 23 (1989); and then citing H.R. REP. NO. 101-485, pt. 2, at 52 (1990)).

156. 42 U.S.C. § 12102(4)(E)(i)(I); 29 C.F.R. § 1630.2(j)(5)(i) (2020).

157. *See* 29 C.F.R. § 1630.2(j)(5)(v). The ADAAA's text does not spell out those measures but it does more generally include "learned behavioral or adaptive neurological modifications." 42 U.S.C. § 12102(4)(E)(i)(IV). Both the Fourth and Ninth Circuits have concluded that "learned behavioral modifications," such as following a strict diet to control celiac disease or diabetes, are mitigating measures that the court cannot take into account, even if they completely control the plaintiff's symptoms. *See* J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 670 (4th Cir. 2019) (addressing celiac disease); Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 861 (9th Cir. 2009) (addressing diabetes).

158. *See* H.R. REP. NO. 110-730, pt. 1, at 15 (2008) (stating that surgical interventions should not be considered "in determining whether an impairment is substantially limiting"). The EEOC initially proposed as an example mitigating measure "surgical interventions, except for those that permanently eliminate an impairment." *See generally* Regulations of the Americans with Disabilities Act, 76 Fed. Reg. 16,978 (Mar. 25, 2011). It dropped this proposal after the public comments indicated it was confusing, and instead suggested that surgical interventions were more appropriately considered on a case-by-case basis. *Id.* at 16,979. At least one case, nonetheless, has suggested that treatments that alleviate a condition in its entirety are not mitigating measures as referenced in the statute. *Cf.* McKenzie-Nevolas v. Deaconess Holdings LLC, No. CIV-12-570-D, 2014 WL 518086, at *2 (W.D. Okla. Feb. 7, 2014).

159. *See* H.R. REP. NO. 110-730, pt. 2, at 20 (2008) ("Once the ameliorative effects of a mitigating measure can no longer be considered in determining whether an impairment is substantially limiting . . . .").

restrict the individual's ability to walk and heals in a few days without need for medical treatment would not substantially limit either the ability to walk or a person's musculoskeletal function. But a fractured ankle would be substantially limiting because, until it is treated with surgery and a cast, the fracture would substantially weaken a significant part of the musculoskeletal system—a major bodily function—and make walking more difficult.[160] The fact that the fracture healed without complication makes no significant difference as to whether the impairment was substantially limiting when it was active.

IV. HOW COURTS HAVE CONFUSED THE "REGARDED AS" PRONG'S MINOR AND TRANSITORY IMPAIRMENTS EXCLUSION

As discussed in Part II above, unlike the "actual" prong in the ADA's definition of disability, the "regarded as" prong is explicitly hinged on duration.[161] The ADAAA excludes from the otherwise broad coverage of this prong impairments that are "transitory and minor."[162] The statute defines transitory as "an impairment with an actual or expected duration of 6 months or less," but does not define minor.[163] The EEOC's regulations also do not define what is minor beyond providing it should be determined by an objective standard.[164] As this section demonstrates, the "transitory and minor" defense has proven to be quite popular with defense counsel and frequently succeeds despite it being a narrow exception to an otherwise broad rule.[165]

The cases demonstrate several questionable interpretations of the revised "regarded as" prong. First, as with actual disability claims, some courts continue to apply pre-ADAAA standards by requiring proof of substantial limitation of a major life activity.[166] Second, some courts read "and" out of the statute, dismissing claims solely because they find the impairment to have lasted less than six months.[167] This may change in light of a recent

160. *See* 29 C.F.R. § 1630.2(i)(1)(ii) (defining "major bodily function" to include operation of the musculoskeletal system); *id.* § 1630.2(j)(1)(ii) (defining substantial limitation by comparing an individual's ability to perform a major life activity to "most people in the general population").

161. *See supra* notes 70–81 and accompanying text.

162. 42 U.S.C. § 12102(3)(B).

163. *Id.*; *see also* Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., 795 F.3d 698, 706 (7th Cir. 2015) (noting that the statute does not define minor).

164. 29 C.F.R. § 1630.15(f) (2020).

165. *See* 29 C.F.R. app. § 1630.2(l) (2020) (indicating that the "transitory and minor" exception is to be constructed narrowly).

166. *See infra* Part IV.A.

167. *See infra* Part IV.B.

Third Circuit opinion[168] but that is not yet clear. Third, courts struggle to apply the objective standard for "minor," especially when the employer took adverse action based on an actual albeit short-term impairment that the employer considered to be substantial.[169] Fourth, the EEOC regulations indicate transitory and minor is an affirmative defense but not all courts agree.[170] Finally, there is the special case of employers who perceive the employee may develop a disorder or condition, such as when the employee is believed to have been exposed to an infectious disease but is not showing any symptoms.[171] Courts parse the language of the statute to require a present impairment, or perception of a present impairment, which results in these cases falling entirely outside the scope of the ADA.[172]

A. Continuing to Apply the pre-ADAAA Requirement that the Employer Perceive an Impairment that Substantially Limits a Major Life Activity

The amended ADA makes it straightforward that the plaintiff need only establish that the employer regarded her as having an impairment.[173] Whether that impairment substantially limits a major life activity is no longer relevant.[174] Despite this clear change in the statute, some courts continue to apply the pre-ADA standard. In some cases, they do so without acknowledging the ADAAA, simply citing the substantial limitation standard as articulated in pre-ADAAA case law.[175] More commonly, courts mix ADA and ADAAA standards, typically citing old authority that requires

168. *See generally* Eshleman v. Patrick Indus., Inc., 961 F.3d 242 (3d Cir. 2020) (holding that the district court was obligated to evaluate both whether the impairment was transitory and whether it was minor).

169. *See infra* Part IV.C.

170. *See infra* Part IV.D.

171. *See* Equal Emp. Opportunity Comm'n v. STME, LLC, 938 F.3d 1305, 1310 (11th Cir. 2019) (evaluating situation where an employer fired an employee out of fear that she was exposed to the Ebola virus while on a trip to Ghana).

172. *See infra* Part IV.E.

173. *See* 42 U.S.C. § 12102(3)(A).

174. *See id.*

175. *See, e.g.*, Swann v. US Foods, Inc., No. 1:14-CV-01409, 2015 WL 3793739, at * 4 (E.D. Va. June 17, 2015) (quoting pre-ADAAA case law for the proposition that the defendant must mistakenly believe that the alleged impairment substantially limits a major life activity); Chi. Reg'l Council of Carpenters v. Berglund Constr. Co., No. 12 C 3604, 2012 WL 3023422, at *2 (N.D. Ill. July 24, 2012) (finding that the plaintiff failed to state either an actual or "regarded as" claim because the evidence did not show that he was substantially limited in the major life activity of lifting).

the plaintiff to show substantial limitation and the new "transitory and minor" rule.[176] Blending of old and new law can be head-spinning:

> A plaintiff is "regarded as" disabled if he is "subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantial limit, a major life activity." To establish disability through this avenue, "the plaintiff must demonstrate that the employer believed that a wholly unimpaired plaintiff had an impairment that substantially limited at least one major life activity or that the employer believed an employee's actual impairment to limit major life activities when it in fact did not."
>
> To prove a "regarded as" claim, "it does not suffice for a plaintiff to merely show that his employer perceived him to be impaired." Rather, a plaintiff "must also show that his employer perceived such impairment as substantially limiting his ability to work." To establish that Defendants believed Plaintiff to be substantially limited in the life activity of working, Plaintiff must demonstrate that Defendants "misinterpreted information about an employee's limitations to conclude that the employee is incapable of performing a wide range of jobs."

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176. *See* Wilson v. Graybar Elec. Co. Inc., No. 17-3701, 2019 WL 1229778, at *13–14 (E.D. Pa. Mar. 15, 2019). The Sixth Circuit, and several district courts within the circuit, continued to commit this error until 2019, and the Sixth Circuit itself continued to cite the same three-part test of a "regarded as" claim that required plaintiffs to show the perceived impairment substantially limited a major life activity. *See* Ferrari v. Ford Motor Co., 826 F.3d 885, 893 (6th Cir. 2016) (misstating the standard for regarded as claims but correctly citing the revised regulation defining major life activities), *aff'd*, 826 F.3d 885 (6th Cir. 2016)*, abrogated by* Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 (6th Cir. 2019) (holding that "regarded as" plaintiffs need only establish that they were perceived to have an impairment). Among the district courts, several decisions continued to cite authority from older cases requiring plaintiffs to show substantial limitation, but then pivoted to considering whether the impairment is transitory and minor under the ADAAA. *See* White v. Interstate Distrib. Co., 438 F. App'x 415, 420 (6th Cir. 2011) (quoting the superseded version of 42 U.S.C. § 12102(1)(C) that requires proof of substantial limitation of a major life activity; however, the current version of 42 U.S.C. § 12102(3)(B) requires the transitory and minor exception); *see also* Bernau v. Architectural Stainless, Inc., No. 17-CV-10766, 2017 WL 2831518, at *3 (E.D. Mich. June 30, 2017) (reasoning that the plaintiff must show her employer mistakenly believed she had an actual or merely perceived physical or mental impairment that substantially limited a major life activity and that the ADA excludes transitory and minor impairments); Sasser v. ABF Freight Sys., Inc., 219 F. Supp. 3d 701, 707 (M.D. Tenn. 2016); Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *10–11 (N.D. Ohio Oct. 31, 2011) (holding the same). The Sixth Circuit finally corrected itself by acknowledging that substantial limitation was no longer required and "[t]o the extent [the court had] issued decisions in recent years holding to the contrary—and, regrettably, [the court did]—that was error." *Babb*, 942 F.3d at 319. *Babb's* acknowledgement may have corrected the "substantial limitation" issue, but it has not kept Sixth Circuit district courts from still relying on outdated pre-ADAAA standards. *See* Richardson v. Koch Foods of Ala., LLC, No. 2:16-CV-00828-SRW, 2019 WL 1434662, at *7 (M.D. Ala. Mar. 29, 2019) (correctly citing the current version of the "regarded as" prong but mistakenly citing pre-ADAAA case law for the proposition that a physical impairment corrected by medication is not covered by the ADA).

> A plaintiff cannot demonstrate that he was "regarded as" disabled if the impairment is "'transitory or minor, which means it has an actual or expected duration of six months or less."[177]

Even when a court purports to utilize the correct standard, its reasoning may not shake off the old standards. One court concluded that although the employer knew the plaintiff had undergone surgery, "had some limitations physically," and had asked the plaintiff what was wrong with his leg, this "[did] not mean [the employer] regarded [the plaintiff] as being disabled."[178] But of course, the question is whether the employer regarded the plaintiff as having an impairment, which that employer clearly did. Another element creeping into courts' reasoning is whether the plaintiff is able to work, which does not bode well for plaintiffs.[179] In some post-ADAAA regarded as cases, courts emphasize how soon plaintiffs returned to work after an injury or surgery in determining whether their impairment was transitory and minor.[180] A case from the Northern District of Mississippi illustrates how courts tie the two together:

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177. *Wilson*, 2019 WL 1229778, at *13–14 (first quoting 42 U.S.C. § 12102(3)(A); then quoting Fagan v. Elwyn Inc., No. 17-393, 2017 WL 3456528, at *3 (E.D. Pa. Aug. 11, 2017); then quoting Siegfried v. Lehigh Valley, Dairies, Inc., No. 02-cv-2951, 2003 WL 23471747, at *10 (E.D. Pa. Oct. 29, 2003); then quoting *id.*; then quoting Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 381 (3d Cir. 2002); and then quoting Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 259 (3d Cir. 2014)). Tellingly, in the portion of *Wilson* quoted in the text, the court quotes the *Budhun* decision as requiring an impairment not be "transitory *or* minor," when that case correctly cites the statutory language requiring both "transitory *and* minor." *See Budhun*, 765 F.3d at 259 ("The statute curtails an individual's ability to state a 'regarded as' claim if the impairment is 'transitory and minor,' which means it has an 'actual or expected duration of six months or less.'" (quoting 42 U.S.C. § 12102(3)(B))). Contributing to the courts' confusion is the habit of quoting statutory language as if it is a rule set by a case, as reflected by *Wilson's* citing *Budhun* for the transitory and minor defense and excluding that case's statutory citation. *See Wilson*, 2019 WL 1229778, at *14.

178. Weems v. Dall. Indep. Sch. Dist., 260 F. Supp. 3d 719, 730 (N.D. Tex. 2017).

179. Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL'Y 1, 34 (2018) (noting 71.6% of cases in which plaintiffs lose on summary judgment involve the "risk factor" of whether the plaintiff was substantially limited in the ability to work).

180. *See* Martinez v. N.Y. Div. of Hum. Rts., No. 1:13-CV-1252-GHW, 2015 WL 437399, at *11 (S.D.N.Y. Feb. 2, 2015) (emphasizing that the plaintiff attended a job interview one month after she sprained her back and was cleared to return to work within two or three months).

> As stated above, Plaintiff was cleared to resume regular working duties approximately five months after the accident. There is also no indication [the plaintiff] or her doctors expected the injury to last more than six months, thereby qualifying the injury . . . as a "transitory impairment with an actual or expected duration of six months or less."[181]

In a case from the Northern District of Ohio, the court similarly emphasized the lack of evidence relating to the plaintiff's ability to work.[182] The plaintiff alleged he had continuing pain from his back and leg injury, which needed surgery, and that his employer knew and discharged him for that reason.[183] The court rejected the plaintiff's claim, reasoning that his employer had not reassigned him to a different job nor reduced his hours and, at the time the plaintiff was fired, he was able to complete all his job duties without any physical restriction.[184]

B. Ignoring the "And" in "Transitory and Minor"

One of the cases discussed in the previous subsection illustrates another questionable judicial habit when interpreting the ADAAA, namely glossing over any real analysis of whether an impairment may be considered minor separate from its duration.[185] The ADA excludes impairments if they are both "transitory *and* minor."[186] Despite the presence of "and" in this provision, some courts have looked only to the duration of the impairments.[187] For example, the Eleventh Circuit reasoned that the plaintiff's "regarded as" argument failed as a matter of law because there was no question that his

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181. Clark v. Boyd Tunica, Inc., 3:14-CV-00204-MPM-JMV, 2016 WL 853529, at *6 (N.D. Miss. Mar. 1, 2016), *aff'd*, 665 F. App'x 367 (5th Cir. 2016).

182. Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *1, *10 (N.D. Ohio Oct. 31, 2011).

183. *See id.* at *9–10.

184. *See id.* at *10.

185. *See Clark*, 2016 WL 853529, at *6 (asserting that broken bones are generally minor and transitory and that the plaintiff's broken bone was expected to heal in less than six months without evaluating whether the impairment was minor).

186. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(3)(B) (emphasis added).

187. *See, e.g.*, Lyons v. Katy Indep. Sch. Dist., 964 F.3d 298, 303 (5th Cir. 2020) ("Any impairment as a result of [the plaintiff's] lap band surgery was objectively transitory and minor by her own admission, because the actual or expected duration of any impairment related to the lap band procedure was less than six months."); Kruger v. Hamilton Manor Nursing Home, 10 F. Supp. 3d 385, 390 (W.D.N.Y. 2014) (reasoning that "[a]s a result" of the fact that the plaintiff's activities were only temporarily impacted, her "temporary impairment is not covered" under the "regarded as" prong); Butler v. Advance/Newhouse P'ship, No. 6:11-CV-1958-ORL-28GJK, 2013 WL 1233002, at *8 (M.D. Fla. Mar. 26, 2013) (evaluating a "regarded as" claim based on plaintiff's back injury as lasting only twelve weeks with no separate analysis of whether it was objectively minor).

impairments were transitory.[188] The Eastern District of Michigan reasoned that "[e]ven if the [plaintiff's] opioid use constituted an impairment, plaintiff could not have been regarded as being disabled based on the opioid use under the ADA, because the impairment was transitory."[189]

After issuing more than one opinion in which it appeared to interpret the transitory and minor exception as based on duration alone,[190] the Third Circuit recently walked that back.[191] The court acknowledged that the legislative history indicated the exception "was intended to weed out only 'claims at the lowest end of the spectrum of severity,' such as 'common ailments like the cold or flu . . . .'"[192] As such, the exception should be construed narrowly.[193] The court articulated a series of factors the trial court should have considered: "the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary—as well as the nature and scope of any post-operative care."[194] A district court applying this standard subsequently found that a plaintiff stated a "regarded as" claim regarding a stroke and seizure that required only three days of medical care, because

188. White v. Interstate Distrib. Co., 438 F. App'x 415, 420 (6th Cir. 2011).

189. Ferrari v. Ford Motor Co., 96 F. Supp. 3d 668, 675 (E.D. Mich. 2015), *aff'd*, 826 F.3d 885 (6th Cir. 2016)*, abrogated by* Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 (6th Cir. 2019).

190. *See* Michalesko v. Borough, 658 F. App'x 105, 107 (3d Cir. 2016) ("Employees cannot bring ["regarded as"] claim[s] when the alleged impairment is 'transitory and minor,' defined by the ADA as 'an impairment with an actual or expected duration of 6 [sic] months or less.'" (quoting 42 U.S.C. § 12102(3)(B))); Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 259 (3d Cir. 2014) ("The statute curtails an individual's ability to state a 'regarded as' claim if the impairment is 'transitory and minor,' which means it has an 'actual or expected duration of six months or less.'" (quoting 42 U.S.C. § 12102(3)(B))). A defendant in a Third Circuit district court suggested that there was in fact a presumption that an impairment lasting less than six months would be minor. *See* Bush v. Donahoe, 964 F. Supp. 2d 401, 423 (W.D. Pa. 2013). The court avoided the issue by deciding the alleged impairment was objectively minor. *See id.*

191. Eshleman v. Patrick Indus., Inc., 961 F.3d 242, 248 (3d Cir. 2020) (reasoning that the ADA does not apply the six-month duration standard to determining what is minor and that the employer must show the perceived impairment is objectively "*both* transitory and minor"). The court rationalized its prior decision in *Budhun* as determining that the perceived impairment was minor. *See id.* at 249 (finding it to be abundantly clear the employer considered Budhun to have "a broken bone in her hand and nothing more" (quoting *Budhun*, 765 F.3d at 259)).

192. *Id.* at 248 (quoting H.R. REP. NO. 110-730, pt. 1, at 18 (2008)).

193. *Id.*

194. *Id.* at 249.

the court emphasized a factual record needed to be developed regarding whether the impairment was minor.[195]

It remains to be seen whether courts in other jurisdictions will follow the Third Circuit's lead. Courts tend to default back to the duration of the impairment even in cases that purport to separately evaluate whether the impairment was minor.[196] The Southern District of New York concluded the eight to ten week recovery period for the plaintiff's broken leg "thus" made their injury "transitory *or* minor."[197] The Northern District of Indiana concluded that the plaintiff's back impairment was only minor, even though the plaintiff had experienced intense pain, because it was "an acute injury" from which the plaintiff "ma[de] a swift and complete recovery."[198]

C. Determining What Is an Objectively Minor Impairment

Under the EEOC regulations, only impairments that are objectively minor are excluded under the "regarded as" prong.[199] A decision out of the Western District of Pennsylvania shows how some courts apply a barely disguised substantial limitation analysis to determine this issue.[200] That court held that an ankle sprain which required the plaintiff to wear a walking boot for just under six months was objectively minor because she could not demonstrate how it impaired her ability to work or any other activity of daily living.[201] Without explicitly invoking the substantial limitation standard, the court nonetheless employed its reasoning:

> [A]pplying an objective standard, the Court finds the evidence of record overwhelmingly supports the conclusion [the plaintiff's] impairment was also minor . . . . [S]he could perform all the duties of her job description wearing a walking cast, and there is no evidence that her orthopedic physician ever removed her from her full duty. . . . In addition, there is no evidence that any of her co-workers or supervisors observed her having any difficulty performing her job, and Plaintiff has failed to provide any evidence that she required any type of treatment for her sprained ankle/foot (other than an open-toed walking cast), or the use of

195. Marx v. Arendosh Heating & Cooling, Inc., No. 2:20-CV-00338, 2020 WL 7425275, at *6 (W.D. Pa. Dec. 18, 2020); *see also* Baker v. City of Washington, No. 2:19-CV-00113-CCW, 2021 WL 2379709, at *12 (W.D. Pa. June 10, 2021) (citing *Eshleman*, 961 F.3d at 249) ("[C]ourts inquire on a case-by-case basis into several factors" to determine if an impairment is minor).

196. *See infra* notes 197–98 and accompanying text.

197. Zick v. Waterfront Comm'n of N.Y. Harbor, No. 11 CIV. 5093(CM), 2012 WL 4785703, at *5 (S.D.N.Y. Oct. 4, 2012) (emphasis added) ("Here, Plaintiff's broken leg had an expected duration of eight to ten weeks, as projected by her doctor . . . Thus, her injury is 'transitory' or 'minor' and is not covered under the exception.").

198. Quick v. City of Fort Wayne, No. 1:15-CV-056, 2016 WL 5394457, at *3 (N.D. Ind. Sept. 27, 2016).

199. 29 C.F.R. § 1630.15(f) (2020).

200. *See* Bush v. Donahoe, 964 F. Supp. 2d 401, 423 (W.D. Pa. 2013).

201. *Id.*

> medication. There are no documented complaints of pain, nor evidence of the effect, if any, of her impairment on her activities of daily living.[202]

This reasoning seemingly contradicted what the court found regarding the plaintiff's actual disability claim, where the court characterized her injury as a "severe sprain," explicitly noting how it required her to wear the walking boot.[203] In particular, the court's observation that the plaintiff showed no "impairment on her activities of daily living" mirrors the *Toyota* pre-ADAAA standard.[204] The court in effect imported a functional limitation test into the third prong that Congress purposefully eliminated.[205]

Some other cases use reasoning similar to the "one time occurrence" cases discussed above regarding actual disability claims.[206] An earlier Third Circuit case rejected a police officer's claim that his employer regarded him as having an impairment based on what the officer characterized as an "acute stress reaction with anxiety distress," which the court noted in a footnote was actually a suicide attempt.[207] With no additional reasoning other than citing the transitory and minor provision in the statute and the objective standard for "minor," the Third Circuit concluded that a "single acute stress reaction [was] objectively transitory and minor."[208] The court

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202. *Id.*

203. *Id.* at 416. The fact that the sprain required a walking boot was sufficient for the court to conclude it "clearly" affected her musculoskeletal system under the major bodily function subcategories of major life activities. *Id.*

204. *See supra* note 116 and accompanying text.

205. There are also cases where the court explicitly insisted that, to prove a "regarded as" claim, the plaintiff must show a substantial limitation of a major life activity. *See, e.g.*, Ferrari v. Ford Motor Co., 826 F.3d 885, 893–94 (6th Cir. 2016) (concluding that the plaintiff failed to present evidence that the employer regarded his opioid use as a substantial limitation of any major life activity), *abrogated by* Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308 (6th Cir. 2019) (holding that "regarded as" plaintiffs need only establish they were perceived to have an impairment, reasoning that "[t]o the extent [the court had] issued decisions in recent years holding to the contrary—and, regrettably, [the court did]—that was error"); Hohenstein v. City of Glenpool, No. 11-CV-0559-CVE-FHM, 2012 WL 1886510, at *6 (N.D. Okla. May 23, 2012) ("Even if the Court were to assume that defendant regarded plaintiff as having a more permanent impairment, plaintiff must still show that defendant mistakenly perceived her as having a substantially limiting impairment that prevented her from performing a major life activity." (citing Justice v. Crown Cork & Seal Co., Inc., 527 F.3d 1080, 1086–87 (10th Cir. 2008)).

206. *See, e.g.*, Michalesko v. Borough, 658 F. App'x 105, 107 (3d Cir. 2016) (concluding a single suicide attempt was objectively transitory and minor); *see also supra* notes 86–90 and accompanying text.

207. *Michalesko*, 658 F. App'x at 107 & n.2.

208. *Id.* at 107.

did not explain how a suicide attempt could be considered objectively minor. The only basis for its decision appears to be that the employer fired the officer after one such attempt, creating a rather perverse incentive for employers to rid themselves of employees who experience a mental health crisis rather than trying to assist them.[209]

A related problem arises when a plaintiff making a "regarded as" claim actually has a short-lived impairment. There can be a disconnect when this impairment itself is objectively transitory and minor, but the employer's subjective perception of the impairment was more substantial.[210] The EEOC anticipated the opposite situation where an employer would argue that although it acted upon the employee's actual impairment, it subjectively thought that impairment was only transitory and minor:

> A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor.[211]

But the EEOC's example does not explain how to resolve the situation where a plaintiff has an impairment that resolves in six months or less and appears minor in hindsight, but the employer treated it as longer lasting and more significant at the time.[212] In that circumstance, it is not clear if the court should apply the objective standard for minor to the actual impairment itself or to the impairment as the employer perceives it. If the latter, employers could defeat a perceived disability claim despite the significance of what they in fact perceived.

Some cases hold for the employer under those circumstances. For example, the Northern District of Texas dismissed a "regarded as" claim at summary judgment because it found a plaintiff's episode of dehydration and possible heat stroke actually lasted only a few hours and resulted in only three days off work, after which the plaintiff received a clean bill of

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209. *See id.* In a footnote, the Third Circuit suggested it did not mean to say that all one-time occurrences were minor. *See* Eshleman v. Patrick Indus., Inc., 961 F.3d 242, 250 n.58 (3d Cir. 2020) (suggesting an organ transplant would "perhaps" be an example of a non-minor one-time occurrence).

210. *See, e.g.*, Willis v. Noble Env't Power, LLC, 143 F. Supp. 3d 475, 484 (N.D. Tex. 2015) (addressing a case in which plaintiff's impairment lasted only a short time but an employer expressed concern about their employee's ability to do their job safely in the future).

211. 29 C.F.R. § 1630.15(f) (2020).

212. *See, e.g.*, Odysseos v. Rine Motors, Inc., No. 3:16CV2462, 2017 WL 914252, at *3 (M.D. Pa. Mar. 8, 2017) (finding employer's on-going questions about the plaintiff's heart and his health after he wore a heart monitor for a short time were sufficient to show that the employer regarded the plaintiff as having more than a transitory and minor impairment).

health.[213] The evidence showed the employer was concerned about the plaintiff's continuing ability to perform the job, which required climbing over 300 feet and working in temperatures above 100 degrees safely in the future.[214] The court did not address those facts, only the length of time the plaintiff's condition actually lasted.[215] Similarly, in two cases involving H1N1—swine flu—the courts interpreted the EEOC regulation to look at what was known about the impairment at the time the case was being decided rather than evaluating what the employer perceived at the time.[216] In the first case, the Middle District of Florida cautioned that:

> The "transitory and minor" exception to the "regarded as prong" focuses on the perceived impairment itself and not the condition giving rise to such impairment. As a result, the fact that [the employer] and the healthcare community may have viewed a potential H1N1 pandemic as quite serious is not relevant to a determination of whether [the employer] perceived [the plaintiff] herself as seriously impaired by the H1N1 virus.[217]

In the second case, the District of Minnesota emphasized it was evaluating the significance of the impairment "*as it is now understood*," and that the objective standard "turns not on perception, but on reality."[218] In both cases, the courts reviewed what was known about the seriousness of H1N1 symptoms and complications at the time the case was decided and concluded that H1N1 was not significantly different from the common flu, making it thus only a transitory and minor impairment.[219]

The courts' reasoning is contradicted by the hand wound example in the Interpretive Guidance, which shows how the status of a claim depends on what an employer perceives.[220] According to that example, if an employer perceives an otherwise minor hand wound as evidence of HIV infection, then it is not a transitory and minor impairment *as mistakenly perceived*.[221]

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213. *Willis*, 143 F. Supp. 3d at 484.
214. *Id.* at 477, 484.
215. *See id.* at 484.
216. Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *6 (M.D. Fla. Sept. 16, 2011); Valdez v. Minn. Quarries, Inc., No. 12-CV-0801, 2012 WL 6112846, at *3 (D. Minn. Dec. 10, 2012).
217. *Lewis*, 2011 WL 4527456, at *6 (citations omitted).
218. *Valdez*, 2012 WL 6112846, at *3.
219. *See Lewis*, 2011 WL 4527456 at *6 ("[Plaintiff] was unable to provide concrete differences between the symptomatology of the seasonal flu virus and the H1N1 virus."); *Valdez*, 2012 WL 6112846, at *3 (concluding that the facts showed the H1N1 outbreak had a mortality and hospitalization rate similar to seasonal influenza).
220. 29 C.F.R. app. § 1630.2(l) (2020).
221. *Id.*

This suggests that the court should apply the objective test to the employer's underlying, if mistaken, concern. If the employer perceives the impairment as one that could continue into the future, or one that could be more substantial than it turned out to be, the employer has regarded the plaintiff has having something more than a transitory or minor impairment.

Some cases have followed that line of reasoning in regard to employers who condition employment on medical clearance or make other inquiries concerning the individual's future health.[222] For example, the Ninth Circuit reasoned that:

> [i]n requesting an MRI because of [the plaintiff's] prior back issues and conditioning his job offer on the completion of the MRI at his own cost, [the employer] assumed that [the plaintiff] had a "back condition" that disqualified him from the job unless [he] could disprove that proposition. And in rejecting [his] application because it lacked a recent MRI, [the employer] treated him as it would an applicant whose medical exam had turned up a back impairment or disability. [The employer] chose to perceive [the plaintiff] as having an impairment at the time it asked for the MRI and at the time it revoked his job offer.[223]

Similarly, the Western District of Michigan found an employer perceived an employee as having a disability when it put her on a "medical hold," even though she passed a physical exam, because her medical records contained information about possible impairments that may be aggravated in the future.[224]

Too often, however, courts turn a blind eye to the reality of how employers perceive plaintiffs.[225] The Eleventh Circuit went so far as to state in one case that "no matter what [the plaintiff] may be able to prove about how [his employer] perceived his physical condition," the plaintiff did not have a "regarded as" claim because the actual length of the plaintiff's impairment was less than six months.[226] The statute and regulations are not a model of clarity on this issue, but the transitory and minor exception was intended

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222. *See* Equal Emp. Opportunity Comm'n v. BNSF Ry. Co., 902 F.3d 916, 924 (9th Cir. 2018) (concluding that the employer perceived the plaintiff as having an impairment when it required him to obtain an MRI at his own cost); *see also* Odysseos v. Rine Motors, Inc., No. 3:16CV2462, 2017 WL 914252, at *2–3 (M.D. Pa. Mar. 8, 2017) (finding that the plaintiff stated a claim when the defendant repeatedly inquired into the plaintiff's heart, health, and plans for retirement after they wore a heart monitor for a short period of time).

223. *BNSF*, 902 F.3d at 924 (9th Cir. 2018).

224. E.E.O.C. v. M.G.H. Fam. Health Ctr., 230 F. Supp. 3d 796, 799, 808, 810 (W.D. Mich. 2017); *see also Odysseos*, 2017 WL 914252, at *2–3 (finding an employer's repeated inquiries about the plaintiff's heart and health were sufficient to state a claim that the employer regarded him as having a disability that was not transitory and minor).

225. *See, e.g.*, Weisel v. Stericycle Commc'ns Sols., No. 3:13-CV-3003, 2015 WL 390954, at *11 (M.D. Pa. Jan. 28, 2015) (reasoning that the employer perceived the plaintiff's gallbladder surgery itself as her impairment, which was a temporary condition, not the permanent loss of her gallbladder function).

226. White v. Interstate Distrib. Co., 438 F. App'x 415, 420 (6th Cir. 2011).

to be narrow and exclude only cases that fall on the lowest end of the spectrum.[227] It makes sense to limit the employer's ability to use its subjective perception as a defense because employers can be disingenuous about whether they knew an impairment was more than transitory and minor. However, the same rationale does not support allowing the employer to defeat claims when the plaintiff can show the employer was treating her impairment as something more than transitory and minor. To the contrary, the latter case falls even more squarely within the overarching purpose for the "regarded as" prong—to address stereotypes and assumptions about the abilities of individuals with disabilities.[228]

The Western District of Texas reconciled the difference between an actual impairment and an impairment perceived by the employer by applying the objective standard to what the employer perceived.[229] That court reasoned "that the relevant inquiry is whether the shoulder injury perceived by [the employer] to exist would be objectively transitory and minor, not by determining whether [the employer] subjectively perceived or believed that [his] shoulder injury was transitory and minor."[230] The court found that the plaintiff had created an issue of fact from evidence that his employer wanted him to get an MRI in order for him to return to work because they had concerns about his ability to work safely.[231]

Moreover, at least one case has recognized the flaw in reading the regulation to prohibit considering the employer's subjective beliefs in every case.[232] The Northern District of Alabama found this interpretation to be inconsistent with the very purpose of the revised section.[233] As that court saw it, the regulation closed a specific loophole, namely where the employer argued it believed an actual impairment was transitory and minor regardless of the objective facts showing otherwise.[234] The court reconciled the regulation

227. *See* 29 C.F.R. app. § 1630.2(l) (2020) (indicating the "transitory and minor" exception is to be constructed narrowly); *see also* H.R. REP. NO. 110-730, pt. 1, at 14 (2008) (expressing intent that the exception apply only to "claims at the lowest end of the spectrum of severe limitations").

228. *See* H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453 (describing the purpose of the regarded as prong).

229. Mesa v. City of San Antonio, No. SA-17-CV-654-XR, 2018 WL 3946549, at *3 (W.D. Tex. Aug. 16, 2018).

230. *Id.* at *14.

231. *Id.* at *16.

232. *See generally* Nevitt v. U.S. Steel Corp., 18 F. Supp. 3d 1322 (N.D. Ala. 2014).

233. *Id.* at 1329.

234. *Id.* at 1331.

by focusing on the plaintiff's specific claim—did the employee's actual impairment result in the alleged discrimination, or was it the plaintiff's impairment as perceived by the employer?[235] As the court observed, assessing only the plaintiff's actual disability when the employer perceives it as something more substantial "would render the perceived impairment prong . . . meaningless in all but the rare scenario where a perceived perception has no basis in reality."[236] The court noted the Interpretive Guidance's hand wound example, and concluded it directed courts to consider what the employer perceived even if the actual impairment was objectively minor and transitory.[237]

There is also an issue regarding what evidence the court considers relevant to determine what the employer perceives. In some cases, courts have allowed employers to narrow the perceived impairment to the plaintiff's medical treatment, which may be short-term, rather than the underlying condition. For example, the Middle District of Pennsylvania reasoned that the relevant "transitory and minor" inquiry was in regard to the employer's perception of the plaintiff's gall bladder surgery, not the permanent loss of an organ and the physical consequences thereof.[238] Similarly, the Northern District of Ohio found that the employer was entitled to summary judgment because the plaintiff did not present evidence that his recuperation from back surgery lasted longer than six to eight weeks, despite the fact that the surgery was the culmination of an ongoing back problem that had existed for at least three years.[239] By contrast, the Seventh Circuit concluded an employer had not established that the plaintiff's heart condition was transitory when the evidence showed it was severe enough to require triple bypass surgery.[240] The employer wanted the court to focus on the surgery to show it was transitory but the court characterized the surgery as the treatment, not the impairment.[241]

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235. *Id.* at 1329.

236. *Id.*

237. *Id.* at 1331. Professor Befort identifies a related situation where the employer takes an adverse action against an employee whose impairment is anticipated to last less than six months but, after that action is taken, the impairment ends up lasting longer. *See* Befort, *supra* note 73, at 1027 (suggesting the exception would apply). The answer should depend on what the employer perceived. If everyone was mistaken, Professor Befort is probably correct. If, however, the evidence shows that the employer fired the employee because it feared the impairment would last longer than six months, this would not seem to be the type of case that the exclusion was meant to address.

238. Weisel v. Stericycle Commc'ns Sols., No. 3:13-CV-3003, 2015 WL 390954, at *11 (M.D. Pa. Jan. 28, 2015). *But see* Eshleman v. Patrick Indus., Inc., 961 F.3d 242, 250 n.62 (3d Cir. 2020) (criticizing a case for failing to treat minor and transitory as distinct inquiries).

239. Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *1, *11 (N.D. Ohio Oct. 31, 2011).

240. Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., 795 F.3d 698, 706 (7th Cir. 2015).

241. *Id.*

The ADAAA's findings and purposes explicitly direct courts not to engage in demanding examination of the question of disability.[242] The cases reading transitory and especially minor to set a more demanding standard are inconsistent with that purpose.[243] They are reminiscent of pre-ADAAA cases that focused minutely on the nature of the impairment and not the fact that the employer relied upon it in its decision making.[244]

D. Who Bears the Burden of Proof on Whether an Impairment Is Transitory and Minor?

The ADAAA does not clearly state who bears the burden of addressing the "transitory and minor" exception to the "regarded as" prong.[245] The EEOC treats it as an affirmative defense.[246] A number of courts have

242. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (2008) ("[C]ongressional intent . . . to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .").

243. *See, e.g.*, Lewis v. Fla. Default L. Grp., P.L., No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456, at *6 (M.D. Fla. Sept. 16, 2011) (focusing on whether the employer perceived the plaintiff as being "seriously impaired").

244. *See, e.g.*, Sutton v. United Airlines, Inc., 527 U.S. 471, 490 (1999) (holding that the employer did not regard the plaintiffs as substantially limited in their ability to work because their vision limitations could be corrected using eyeglasses, and not considering that the employer disqualified them from being a commercial airline pilot because it regarded their eyesight as impaired), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

245. *See* Mesa v. City of San Antonio, No. SA-17-CV-654-XR, 2018 WL 3946549, at *12 (W.D. Tex. Aug. 16, 2018) (characterizing the statutory language as "not entirely clear" on who bears the burden to prove whether an impairment is transitory and minor).

246. 29 C.F.R. § 1630.15(f) (2020). The regulation provides that:

> It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor."

Id.

adopted the EEOC's approach.[247] Other courts fail to acknowledge it.[248] In one case, the court acknowledged transitory and minor was an affirmative defense that the defendant had failed to specifically plead, but then found it was sufficient that the defendant denied the plaintiff had a disability in its answer.[249] Other courts, such as the Tenth Circuit, place the burden directly on the plaintiff.[250] That circuit has articulated a three-part test that requires plaintiffs to show: "(1) he has an actual or perceived impairment, (2) that impairment is neither transitory nor minor, and (3) the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action."[251]

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247. *See, e.g.*, Eshleman v. Patrick Indus., Inc. 961 F.3d 242, 246 n.25 (3d Cir. 2020) (observing that the Third Circuit has "[f]ollow[ed] the EEOC's lead" in describing the issue as an affirmative defense); Silk v. Bd. of Trs. Moraine Valley Cmty. Coll., 795 F.3d 698, 706 (7th Cir. 2015) (reasoning that the defendant bore the burden of proving both transitory and minor); *Mesa*, 2018 WL 3946549, at *13 n.13 (citing Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 230 (5th Cir. 2015)) (concluding that the employer must prove transitory and minor as a defense and suggesting that the Fifth Circuit agrees).

248. *See* Adair v. City of Muskogee, 823 F.3d 1297, 1306–07 (10th Cir. 2016) (articulating a test which requires plaintiffs to allege a non-transitory and minor impairment without referencing the EEOC affirmative defense regulation); *see also* Equal Emp. Opportunity Comm'n v. BNSF Ry. Co., 902 F.3d 916, 922–23 (9th Cir. 2018) (citing *Adair* for proposition the plaintiff is required to show the alleged impairment was not transitory and minor); Brtalik v. S. Huntington Union Free Sch. Dist., No. CV-10-0010, 2010 WL 3958430, at *8 (E.D.N.Y. Oct. 6, 2010) ("[P]laintiff . . . must at least show a disability that is not transitory and minor.").

249. *See* Treynor v. Knoll, Inc., No. 1:19-CV-753, 2021 WL 567438, at *5 (W.D. Mich. Feb. 16, 2021) ("[T]here is no indication that [the transitory and minor exception] must be expressly asserted as a defense at the pleadings stage; the Court could not find a case denying the . . . defense on grounds of waiver." (citing *Eshleman*, 961 F.3d at 246 n.25)).

250. *Adair*, 823 F.3d at 1310.

251. *Id.* In *Adair*, the Sixth Circuit corrected its earlier post-ADAAA decisions that had continued to require plaintiffs in "regarded as" cases prove substantial limitation of major life activities. *See id.* at 1305–06. Although the court in *Adair* correctly cited to the ADAAA's amended standards, it did not cite to the EEOC's revised regulations identifying transitory and minor as a defense. *See id.* at 1306–07; *see also* 29 C.F.R. § 1630.15(f) (2011) (providing that the defendant must show an impairment is transitory and minor). District courts in the Sixth Circuit have noted this failure to cite the relevant regulations but assumed the burden would apply to the plaintiff. *See, e.g.*, Equal Emp. Opportunity Comm'n v. UPS Ground Freight, Inc., 443 F. Supp. 3d 1270, 1285 (D. Kan. 2020) ("The Court assumes without deciding that Plaintiff bears the burden of demonstrating that his impairment was not transitory and minor."); Vannattan v. VendTech-SGI, LLC, No. 16-CV-2147-JWL, 2017 WL 2021475, at *5 (D. Kan. May 12, 2017) ("The Circuit appears to place the burden of proof on the plaintiff to establish that his or her impairment is 'not minor' as part of the plaintiff's prima facie case. . . . Both the statute and implementing regulations, however, seem to place the burden of proof on the employer to establish that the impairment is minor. . . . The parties do not address this issue. Either way, the court cannot grant summary judgment on the issue of whether plaintiff's impairment is 'minor' because defendants have raised that issue for the first time in their reply brief . . . .").

Even among the courts that seemingly agree transitory and minor is an affirmative defense, a number nonetheless have required that it not be apparent on the face of the complaint that the impairment was not transitory and minor.[252] The Third Circuit, acknowledging that the court had previously called it an affirmative defense, indicated "a regarded-as plaintiff alleging a transitory and minor impairment has failed to state a legally sufficient claim, even if the employer does not include a transitory and minor defense in its Answer."[253] Nonetheless, those courts seem to interpret "on the face of the complaint" broadly in plaintiffs' favor.[254] For example, the Northern District of Georgia found a complaint sufficient on its face when the plaintiff alleged she had been hospitalized for one day for a "heart-related event" caused by workplace stress.[255] The court reasoned that the heart event did not suggest a minor condition, and it could not at that juncture say the defendant had defeated the plaintiff's "regarded as" claim.[256] Similarly, the Eastern District of New York concluded that the plaintiff's back injury as pled in the complaint was transitory because it resolved within three months; however it was not minor because she had been granted a leave of absence to recover.[257]

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252. *See, e.g.*, Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 259 (3d Cir. 2014) ("While ordinarily a party may not raise affirmative defenses at the motion to dismiss stage, it may do so if the defense is apparent on the face of the complaint."); Green v. ADCO Int'l Plastics Corp., No. 1:17-CV-337-WSD-LTW, 2017 WL 8810690, at *10 (N.D. Ga. Dec. 27, 2017) (reasoning that the plaintiff does not have to plausibly plead facts suggesting the transitory and minor defense fails, but allowing the complaint to be dismissed if it is apparent on its face that the impairment was transitory and minor); Mayorga v. Alorica, Inc., No. 12-21578-CIV, 2012 WL 3043021, at *8 (S.D. Fla. July 25, 2012) ("To the extent that this defense is apparent from the face of the complaint, it is an appropriate basis for dismissing the claim that [the employer] regarded [the plaintiff] as having a disability."); Davis v. NYC Dep't of Educ., No. 10-CV-3812, 2012 WL 139255, at *6 (E.D.N.Y. Jan. 18, 2012) (denying a motion to dismiss because it was not apparent on the face of the complaint that the plaintiff's impairment was minor).

253. Eshleman v. Patrick Indus., Inc., 961 F.3d 242, 246 n.25 (3d Cir. 2020).

254. *See id.* at 246 n.25, 250 (finding the plaintiff plausibly alleged his employer regarded his series of medically-related absences as a non-transitory and minor impairment); Odysseos v. Rine Motors, Inc., No. 3:16CV2462, 2017 WL 914252, at *2–3 (M.D. Pa. Mar. 8, 2017) (finding the employer's repeated questions about plaintiff's heart and health condition were sufficient to state a plausible claim that the employer regarded him as having a disabling heart condition, despite facts showing that the condition required medical monitoring for less than six months); *see also Adair*, 823 F.3d at 1310–11.

255. *Green*, 2017 WL 8810690, at *10.

256. *Id.*

257. *See Davis*, 2012 WL 139255, at *6 (reasoning the plaintiff only needed to give defendants fair notice of her claim).

This all matters because the party who bears the burden of proof bears the burden of presenting sufficient objective evidence.[258] The Middle District of Alabama granted an employer summary judgment on the plaintiff's claim that his employer terminated him due to his heart condition because the plaintiff had not presented sufficient objective facts that the employer perceived that heart condition "as anything but relatively short-term."[259] If the burden was properly placed on the defendant, the court's inquiry should have been not only whether the defendant presented sufficient facts that the heart condition itself was objectively transitory and minor, but also whether the condition as the employer perceived it also met that criteria.[260] The Seventh Circuit recognized exactly that, holding, in another heart condition case, that the defendant failed to meet its burden because "it ha[d] provided no evidence as to how long such a condition would last. Likewise, the [defendant] ha[d] presented no evidence to establish that such a condition could be considered 'minor.'"[261]

E. The Special Situation of Employers Who Perceive the Employee May Develop a Disorder or Condition in the Future

Several circuit courts read the "regarded as" prong to require proof that the employer regards the plaintiff as being *currently* impaired when taking an adverse employment action.[262] These courts characterize language in the Act as using the present tense: "being regarded as *having* such an impairment."[263] If this language indeed requires employers to perceive an

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258. Richardson v. Koch Foods of Ala., LLC, No. 2:16-CV-00828-SRW, 2019 WL 1434662, at *2–3 (M.D. Ala. Mar. 29, 2019) (noting that the plaintiff did not present sufficient objective facts regarding whether his employer perceived his heart condition as anything other than short-term).

259. *Id.* at *7.

260. The court also characterized the plaintiff's heart condition, which involved an acute inferior wall infarction and surgery to place a stent, as "relatively routine." *See id.* at *7.

261. Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., 795 F.3d 698, 706–07 (7th Cir. 2015).

262. Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 336 (7th Cir. 2019); Equal Emp. Opportunity Comm'n v. STME, LLC, 938 F.3d 1305, 1315 (11th Cir. 2019); Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1113 (8th Cir. 2016); Equal Emp. Opportunity Comm'n v. BNSF Ry. Co., 902 F.3d 916, 923 (9th Cir. 2018); *see also* Adair v. City of Muskogee, 823 F.3d 1297, 1306 (10th Cir. 2016) ("The employer [must have] perceived the impairment at the time of the alleged discriminatory action.").

263. 42 U.S.C. § 12102(1)(C) (emphasis added); *see also Shell*, 941 F.3d at 336 ("The key word is 'having' . . . ."). *Shell* acknowledged a technical difference of opinion about whether "having" as used in this context is a present participle or a gerund and came down on the side of present participle. *See id.* ("To settle the technical debate, it is a present participle, used to form a progressive tense."). A similar argument has been made in cases involving obesity. The majority of courts have held both pre- and post-ADAAA that obesity is not itself an impairment unless it is the result of an underlying

ongoing impairment, the employer's actions fall outside of the Act if its adverse employment actions are based on concerns about something that could develop in the future.[264] One court, for example, concluded that a massage therapist did not state a "regarded as" claim although, after travelling to Africa, her employer terminated her in fear that she had contracted Ebola.[265] The court reasoned that the statute protected against "a current, past, or perceived disability—not . . . a potential future disability."[266]

Besides creating a significant gap in ADA coverage for employment decisions made on assumptions and stereotypes about the potential to develop physical and mental impairments, this interpretation may present

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physiological disorder. *See, e.g.*, Merker v. Miami-Dade County Florida, 485 F. Supp. 2d 1349, 1351 (S.D. Fla. 2007) ("Courts have uniformly held that obesity is not a qualifying impairment, or disability, unless it is shown to be the result of a physiological disorder."), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 (2008), *as recognized in* Lowe v. Am. Eurocopter, LLC, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010); *Morriss*, 817 F.3d at 1109 (concluding that it remains the case after the ADAAA that obesity is not an impairment under the actual disability prong unless it arises out of an underlying physiological disorder or condition). *But see* Equal Emp. Opportunity Comm'n v. Res. for Hum. Dev., Inc., 827 F. Supp. 2d 688, 695 (E.D. La. 2011) (finding in a pre-ADAAA case that the plaintiff did not have to prove her obesity was the result of an underlying physiological condition). Plaintiffs have tried to work around the physiological cause requirement by alleging that employers regard them as being impaired due to the high risk of developing future medical conditions associated with obesity. *See, e.g.*, *Moriss*, 817 F.3d at 1113 (describing the plaintiff's theory that the defendant refused to hire him because the defendant perceived that his obesity posed an unacceptable risk of future medical conditions). Courts have rejected those claims because they required the plaintiff to show that the employer perceived them as having an existing impairment. *See id.* (rejecting plaintiff's perceived disability claim because the plaintiff needed to show the employer perceived obesity as an existing physical impairment).

264. *See STME*, 938 F.3d at 1318 (concluding that the ADA required the plaintiff to show that her employer regarded her as having an existing impairment).

265. *Id.* at 1310. The EEOC used the Dictionary Act to argue that words used in statutes include the future tense unless context required otherwise. *Id.* at 1317. The statutory definition was therefore broad enough to include an employer's perception that an employee will imminently contract Ebola. *Id.* The Eleventh Circuit refused to apply the Dictionary Act, however, because it found no present tense verb in § 12102(3)(A) to carry into the future. *See id.* at 1317–18. The court quoted 12102(3)(A) to show that it actually used only a past tense verb, namely that the plaintiff "was subjected" to a prohibited action. *See id.* at 1314. Instead, it concluded that the natural reading of the statute required the plaintiff to show the employer perceived her to have a current existing impairment. *Id.* at 1318. A large part of the EEOC's problem in that case was that its own guidance stated that impairments do not include "characteristic predisposition to illness or disease." *See* 29 C.F.R. app. § 1630.2(h) (2018); *see also STME*, 938 F. 3d at 1317 (discussing the EEOC guidance on predisposition to illness and disease).

266. *Id.* at 1311.

a gateway to considering the employer's subjective perception outside of the transitory and minor exception. For example, in one case, an employer argued that it did not perceive an impairment as ongoing because the employee was cleared to return to work.[267] The court denied the EEOC's motion for summary judgment finding that there was a fact question based on whether the employer perceived a current impairment.[268] The court reasoned that subjective awareness was a distinct question from the objective determination of whether the impairment was transitory and minor.[269]

V. RESOLVING THE INCOHERENT COVERAGE OF SHORT-TERM IMPAIRMENTS

The following two cases particularly illustrate the incoherence of current ADA doctrine regarding short-term impairments. In the first case, the plaintiff suffered a quadricep strain while participating in a corrections officers' training academy.[270] The court considered the impairment to be minor because the strain did not stop him from participating in the training.[271] However, the court concluded it was not transitory, and his ADA claim survived, because it took longer than six months for the strain to fully heal.[272] In the second case, the plaintiff alleged she suffered bleeding related to a miscarriage but she returned to work the next day.[273] The court acknowledged that pregnancy-related complications can meet the definition of disability and that short-term impairments may satisfy the actual disability prong if sufficiently severe, but concluded the ADA could not "be stretched to cover a period of impairment lasting fewer than twenty-four hours . . . ."[274] Although the former case involved a "regarded as" claim and the latter an actual disability claim, the second plaintiff would have been in the same situation had she tried to allege a "regarded as" claim under the ADAAA

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267. *See* Equal Emp. Opportunity Comm'n v. UPS Ground Freight, Inc., No. 17-2453-JAR, 2020 WL 1984293, at *12 (D. Kan. Apr. 27, 2020) ("[T]he [c]ourt . . . must find [the defendant] perceived a current impairment—perception of a past impairment that has ended will not do. The fact that [the plaintiff] was released to work and worked for two months with no perceived limitations is relevant to the timing of [the defendant]'s awareness.").

268. *Id.* at *7–8.

269. *Id.* at *13.

270. Sherman v. County of Suffolk, 71 F. Supp. 3d 332, 338 (E.D.N.Y. 2014).

271. *See id.* at 346.

272. *Id.*

273. Love v. First Transit, Inc., No. 16-CV-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 16, 2017).

274. *Id.* Although the court quoted the plaintiff's EEOC charge, in which it clearly states that she miscarried, the court also criticized her for being vague about whether she actually had a miscarriage. *See id.* at *1. Given the court's emphasis on how the plaintiff was absent from work only one day, nothing in the court's reasoning suggests that it would have found a miscarriage in and of itself sufficient. *See id.* at *6.

because of the transitory exception. Thus, a "minor" muscle strain qualified as a disability while a miscarriage did not, by the happenstance that one lingered longer. There is no principled basis for this difference in protection.

Courts have reasoned that short-term impairments can be covered disabilities but find an impairment's short-term nature renders it not substantial enough.[275] They reason there must be longer term complications, chronic effects, or the possibility of recurrence.[276] But if an impairment has ongoing complications, or is chronic or episodic, then it is not a short-term impairment and the other rules of construction, such as the episodic rule, would instead guide the determination.[277] For example, the Seventh Circuit recognized that, if the episode was connected to a long-standing condition, the episodic rule applied regardless of how short-term an acute episode might be.[278] In other words, when the plaintiff experiences an acute impairment that is tied to a continuing condition, there is no reason for courts to consider duration; instead, the only question is how impairing the acute episode was while it was active. This is not the same question as whether a non-recurring short-term impairment can meet the definition of an actual disability for purposes of the ADA's protections.

Some courts have correctly looked at the nature of the short-term limitations, not their duration. For example, the Northern District of Alabama denied a summary judgment motion that argued the plaintiff's broken ankle was only a non-covered temporary impairment, finding it sufficient that the injury substantially limited major life activities—including standing, walking,

275. *See, e.g.*, Mastrio v. Eurest Servs., Inc., No. 3:13-CV-00564, 2014 WL 840229, at *4 (D. Conn. Mar. 4, 2014) (acknowledging the EEOC guidance that impairments lasting less than six months can nonetheless be substantially limiting, but then reasoning that the courts within that circuit "still adhere[] to the traditional notion" that temporary or short-term impairments are not covered unless the disability is extremely severe).

276. *See, e.g.*, Shaw v. Williams, No. 16-CV-1065, 2018 WL 3740665, at *9 (N.D. III Aug. 7, 2018) (finding that the record lacked any evidence of lasting consequences or impairments beyond the period during which the plaintiff recovered from an ankle injury).

277. *See* 42 U.S.C. § 12102(4)(D) (stating the episodic rule). The mitigating measure rule of construction would presumably also apply to circumstances where the length of recovery is shortened by surgical intervention, medication, and therapies. *See id.* § 12102(4)(E)(i).

278. Gogos v. AMS Mech. Sys., Inc., 737 F.3d 1170, 1173 (7th Cir. 2013). In *Gogos*, for about a month the plaintiff experienced high blood pressure spikes as well as intermittent vision loss for a few minutes at a time. *Id.* at 1171. The court said that duration was not relevant because these brief episodes were tied to the plaintiff's longstanding blood pressure condition. *Id.* at 1173. Instead, "the relevant issue is whether, despite their short duration in this case, [the plaintiff's] higher-than-usual blood pressure and vision loss substantially impaired a major life activity when they occurred." *Id.*

and running—as well as major bodily functions such as musculoskeletal function.[279] The court concluded that "[t]he fact that the limitation was temporary is irrelevant."[280] The court is correct.

Courts that categorically exclude impairments, such as broken limbs, simply because a plaintiff might recover in six months or less are clearly incorrect. The "regarded as" prong demonstrates that Congress knew what language to use to impose a durational limitation on coverage. It did not use such language in the first two prongs of the definition, which makes a judicially constructed six-month threshold inappropriate. Even under the "regarded as" prong, duration alone is not sufficient.[281] The court must find the impairment itself to have been minor.[282] Courts in both actual and "regarded as" cases should assess on an individualized basis the extent of the alleged impairment while it was active.

In some of the cases rejecting short-term impairments, plaintiffs' lawyers may not have made strong litigation choices especially regarding the major life activities they allege to be substantially limited. For example, in the transient ischemic attack—TIA—case discussed earlier, the plaintiff alleged that the TIA caused a substantial limitation of his ability to work.[283] The court may have had a harder time seeing the plaintiff's limitations as substantial because he did not allege any particular disruption in his work activities.[284] At no point in the case were the ADAAA's new major life activities, namely limitations of major bodily functions, considered.[285] The court might have come to a different conclusion if the plaintiffs had presented the TIA as a substantial limitation to his neurological function. The court could still have concluded that the impairment was inadequate because it did not recur.[286] But, the plaintiff might have successfully used either the

279. Moore v. Jackson Cnty. Bd. of Educ., 979 F. Supp. 2d 1251, 1261 (N.D. Ala. 2013). The court noted that there was no dispute that the plaintiff experienced these limitations while she was recovering from her broken ankle. *See id.* at 1259.

280. *Id.* at 1261.

281. *See* 42 U.S.C. § 12102(3)(B) (defining an exception that requires showing that the impairment was both transitory and minor).

282. Eshleman v. Patrick Indus., Inc., 961 F.3d 242, 248 (3d Cir. 2020) (setting out factors for assessing whether an impairment is minor).

283. Feldman v. Law Enf't Assocs. Corp., 955 F. Supp. 2d 528, 539 (E.D.N.C. 2013), *aff'd on other grounds*, 752 F.3d 339 (4th Cir. 2014).

284. *See id.* (noting that the plaintiff's physician released him without any restrictions on his activities).

285. *See id.*

286. Although the court in *Feldman* cited to a medical source that included a statistic that one in three individuals who experience a TIA go on to have a stroke, the court nonetheless referred to a TIA as an "acute condition that is different from the more chronic conditions" the statute was intended to cover. *Id.* at 538 (citing *Definition of Transient Ischemic Attack (TIA)*, MAYO CLINIC (Mar. 7, 2020), http://www.mayoclinic.com/health/transient-ischemic-attack/DS00220 [https://perma.cc/26MT-GRRQ]).

episodic or remission rules of construction to focus on the physiological aspects of a TIA and how it raises the risk of stroke and death, and not on the more attenuated question of whether it interfered with his ability to work.[287] Asserting the new major bodily functions definition certainly does not guarantee success,[288] but it might make courts have to work harder to justify their limiting approach.[289]

What the short-term impairment cases currently reflect is simply more of the same. Although Congress intended to reverse the judicial backlash against the scope of the ADA by eliminating the severity standard,[290] the cases show that when there is no explicit rule constraining them, courts will continue to render decisions consistent with that backlash. The EEOC itself has contributed to this. The amended statute does not say what role duration plays in the substantial limitation assessment and the EEOC's regulations reinsert severity as the litmus test to determine substantial limitation when the impairment's duration is short-term.[291] It is no surprise that courts then

287. *Feldman* cited the episodic rule, but it did not believe the rule applied because it characterized a TIA as an acute condition unlike the chronic conditions it believed the statute intended to cover. *Id.* (including a list of conditions such as cancer and epilepsy characterized as chronic based on 29 C.F.R. § 1630.2(j)(1)(vii)).

288. *See, e.g.*, Equal Emp. Opportunity Comm'n v. UPS Ground Freight, Inc., No. 17-2453-JAR, 2020 WL 1984293, at * 2–3 (D. Kan. Apr. 27, 2020) (denying EEOC's motion to reconsider denial of its motion for summary judgment based on the allegedly undisputed claim that the plaintiff's stroke substantially limited his neurological and cardiovascular systems).

289. For example, a court may find it more difficult to dismiss the significance of an impairment because it does not impede the plaintiff's ability to perform work-related activities. *See* Martinez v. N.Y. Div. of Hum. Rts., No. 1:13-CV-1252-GHW, 2015 WL 437399, at *9 (S.D.N.Y. Feb. 2, 2015) (emphasizing that none of the plaintiff's medical records established what specific activities plaintiff could not perform). Similarly, had the plaintiff, who alleged he experienced depression, framed his claim as an impairment of his neurological or brain function, the court may not have dismissed his claim so easily for failing to allege any functional limitations caused by that depression. *See* Butler v. BTC Foods Inc., No. 12-492, 2012 WL 5315034, at *3 (E.D. Pa. Oct. 19, 2012); *see also* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 404 (2019) (suggesting that the plaintiff's chances of success would have been better if the court had considered impairment of major bodily function).

290. *See* ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b)(4)–(5), 122 Stat. 3553 (2008) (rejecting Supreme Court precedent that required a severe level of restriction and noting how the courts created an inappropriately high standard for proving limitation).

291. *See* 29 C.F.R. § 1630.2(j)(1)(ix) (2020); *see also supra* notes 63–65 and accompanying text.

apply the same substantial limitation analysis that they did pre-ADAAA, sometimes by citing pre-ADAAA cases without attention to context.[292]

The approach most consistent with the ADAAA's less demanding standards is to evaluate short-term impairments based on their effects when active. This is, of course, the rule of construction applied to impairments that are episodic or in remission.[293] It is also consistent with the plain meaning of both terms. Congress did not define "episodic." The Oxford English Dictionary defines the term to mean "[o]f or pertaining to, or of the nature of, an episode; incidental, occasional."[294] A person could have a skin condition that flares up and resolves more than once over the course of less than six months, which would make it episodic under that definition.

Even more on point, Congress also did not define "remission." The medical definition of that term recognizes that a remission can be "temporary or permanent."[295] In a permanent, or complete, remission, a condition may occur once, be treated so that no evidence of the condition or disease remains in the body, and then never recur.[296] Consider, for example, a localized form of cancer that is removed with surgery followed by a short course of chemotherapy and clean scans within six months.[297] Whether the cancer would recur is speculative and, through the new rules of construction, the ADAAA rejects that speculation.[298] What matters was how limiting the cancer was when it was active. It should be no different for a broken bone that needs surgery and rehabilitation even though the plaintiff is released from therapy in less than six months.

Both the Interpretive Guidance and case law have cited to the legislative reports for the proposition that the functional impairment in question to be "important."[299] Courts have rejected as not sufficiently important: severe

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292. *See* discussion *supra* Part III.B.

293. 42 U.S.C. § 12102(4)(D).

294. *Episodic*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

295. *Remission*, WEBSTER'S NEW WORLD MEDICAL DICTIONARY (3d ed. 2008).

296. *Cf. Understanding Cancer Prognosis*, NAT'L CANCER INST. (June 17, 2019), https://www.cancer.gov/about-cancer/diagnosis-staging/prognosis [https://perma.cc/F5D9-ZPQG] (discussing complete remission and how the passage of time effects the chances of cancer returning).

297. The legislative history shows that the ADAAA's proponents were particularly concerned about case law finding cancer too temporary to be a substantial limitation. *See supra* note 34 and accompanying text.

298. Some courts have suggested cancer surgery and treatment is sufficient to establish the plaintiff's ADA disability. *See* Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1251 (D. Colo. 2012) ("Here, it is undisputed that Plaintiff was diagnosed with cancer, and that he underwent surgeries and treatment for his cancer; therefore, Plaintiff has adequately alleged that he had a disability under the ADA."), *aff'd*, 550 F. App'x 596 (10th Cir. 2013).

299. *See* 29 C.F.R. app. § 1630.2(j)(1)(ii) (2020) ("While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or

pain, hospitalization and surgery, taking prescription medication, and wearing casts, among other things.[300] But again, the legislative history indicates Congress only intended to eliminate those impairments that were at the very bottom of the spectrum.[301] The ADAAA did not intend to retain the normative assessments of importance, or worth, that were prevalent in pre-ADAAA decisions.[302] The level of functional impairment when active is what should matter; the length of time should not. The conceptual floor identified in the original ADA legislative reports was a "simple infected finger" that does not impair a major life activity.[303] Both the courts and the EEOC have been too quick to categorize other functional impairments as trivial merely because they were short-term.

Specific to the "regarded as" prong, Congress initially intended to eliminate consideration of functional impairments by eliminating the need to prove "substantial" limitation but then re-injected this consideration by directing courts to exclude transitory and minor impairments.[304] What is "minor" should be evaluated based on what the defendant perceives as the active effects of an impairment.[305] Congress was concerned that common ailments, such as colds and the flu, would be covered without the transitory

significantly restricting the ability to perform a major life activity to qualify as a disability."); Bush v. Donahoe, 964 F. Supp. 2d 401, 416 (W.D. Pa. 2013) ("Although Congress sought to abrogate the 'significantly or severely restricting' requirement as it pertained to the 'substantially limits' factor of the ADA, the ADAAA still requires that the qualifying impairment create an 'important' limitation.").

300. *See, e.g.*, Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *1, *9–11 (N.D. Ohio Oct. 31, 2011) (rejecting actual and "regarded as" claims involving a back injury that caused severe pain and required surgery); Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502, 508, 513–14 (E.D. Pa. 2012) (granting the defendant's motion to dismiss where the plaintiff alleged that, after ACL surgery, he was in pain, heavily medicated, and subsequently wore a cast that interfered with his ability to move about and drive).

301. H.R. REP. NO. 110-730, pt. 2, at 18 (2008) (expressing intent that exception apply only to "claims at the lowest end of the spectrum of severity").

302. *See* Barry, *supra* note 19, at 279 ("The [ADAAA's] 'regarded as' prong also paves the way toward a broader conception of the social model of disability, one less likely to lapse into the medical model's 'truly disabled' approach. By defining 'disability' to include just about everyone on the continuum of impairments, the 'regarded as' prong dissolves the line between 'disabled' and 'the rest of us.'").

303. H.R. REP. NO. 101-485, pt. 2, at 52 (1990) ("A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity.").

304. H.R. REP. NO. 110-730, pt. 1, at 14 (2008).

305. *See* Nevitt v. U.S. Steel Corp., 18 F. Supp. 3d 1322, 1329–33 (N.D. Ala. 2014) (reasoning that the employer's perception must be taken into account where it viewed the impairment as more than minor).

and minor exception.[306] Courts have expanded the types of excluded impairments far beyond that and disregarded the overriding exhortation that the exception be construed narrowly.[307]

Circling back to this Article's opening context, there is mounting evidence that Covid-19 leaves long-term effects on the body, even after seemingly minor or even asymptomatic cases.[308] The "long haul" effects on the lungs and other organs may be enough to convince some courts that are otherwise hostile to short-term impairments.[309] But it is likely that other Covid-19 plaintiffs will encounter courts that dismiss their impairments as a one-time occurrence or that give overriding weight to the fact the plaintiff returned to work in less than six months. Courts may dismiss Covid-related "regarded as" claims as transitory and minor for similar reasons, by focusing on how long the infection actually lasted rather than on the employer's view that the impairment was more than trivial and short-term. Those cases along with many others fall into the significant gaps in the ADA's protections that this Article identified.

VI. CONCLUSION

The ADA's original goals included overcoming assumptions and stereotypes about individuals with disabilities and eliminating barriers to employment based on physical or mental impairments that can be reasonably accommodated and do not pose an undue hardship on employers.[310] The ADAAA reinforced these goals by rejecting over a decade of unduly narrow judicial interpretation of the definition of disability.[311] Congress was clear that most disability

306. H.R. REP. NO. 110-730, pt. 1, at 14 (2008).

307. *Id.*

308. FAIR HEALTH, A DETAILED STUDY OF PATIENTS WITH LONG-HAUL COVID: AN ANALYSIS OF PRIVATE HEALTHCARE CLAIMS 1 (2021) (finding that 23.2% of almost two million patients reviewed had a persistent or new condition more than four weeks after being diagnosed with Covid-19, including 19% of patients who had been asymptomatic).

309. To encourage such conclusions, the Departments of Justice and Health and Human Services issued a guidance stating that "long COVID can be a disability" under the federal statutes over which those agencies have jurisdiction. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., GUIDANCE ON "LONG COVID" AS A DISABILITY UNDER THE ADA SECTION 504, AND SECTION 1557, at 1 (2021). The guidance sets out several examples of long-haul symptoms that would be substantially limiting but tellingly does not address how long these symptoms would have lasted. *See id.* at 2–3.

310. *See* 42 U.S.C. § 12101(a)(2), (7), (8) (articulating the serious and pervasive problem of discrimination against individuals with disabilities and the need to ensure equal opportunities in employment and protect other civil rights); *id.* § 12101(b)(1) (expressing the ADA's purpose to eliminate discrimination based on disability); *id.* § 12112(b)(5)(A) (defining discrimination to include not making reasonable accommodations unless those accommodations pose an undue hardship on the employer).

311. *See* ADA Amendments Act of 2008, Pub. L. 110-325, § 2(b)(2)–(5), 122 Stat. 3553 (2008).

claims should require limited scrutiny of whether the plaintiff has a disability and instead focus on the merits of the defendant's adverse actions.[312] Unfortunately, while Congress included specific rules of construction directing courts how to address things like mitigating measures and episodic impairments, it left coverage of shorter term impairments unclear. Courts have taken advantage of that lack of clarity to engage in a mini backlash of sorts.[313] Impairments less than six months in duration either face per se exclusion or must meet a severity test that mirrors rejected pre-ADAAA standards. This goes beyond eliminating only those claims at the very bottom end of the spectrum.

There is no coherent explanation for why the length of an impairment is the most important determinant of whether someone subjected to discrimination based on that impairment is protected under the ADA. The legislative history makes only vague reference to the business community's concerns about "misapplication of resources" unless claims at the lowest end of the severity spectrum are excluded.[314] Perhaps it would be a misapplication of resources for an employer to have to accommodate the common cold or mild allergies or a hangnail, the types of ailments referenced in the debate.[315] They are not impairments that lead to adverse employment actions absent highly unusual situations.[316] But as to other fairly common impairments discussed in this Article that do frequently result in adverse employment actions, things like broken limbs, kidney stones, and miscarriages, the fact that they may occur more commonly and resolve more quickly than other covered impairments does not result in any less discriminatory stigma when they are the basis for those adverse actions. When an employer acts adversely based on an individual's physical or mental impairment, or the employer's perception of such an impairment, the harm experienced by the individual cannot be meaningfully distinguished merely because that individual ultimately recovered from that impairment in a relatively brief time.

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312. *See id.* § 2(b)(5).

313. *Cf.* Porter, *supra* note 289, at 388 (summarizing the backlash theory which demonstrated that courts were deliberately construing the ADA narrowly out of hostility to the potential scope of the protected class).

314. *See* H.R. REP. NO. 110-730, pt. 2, at 18 (2008).

315. 154 CONG. REC. H6064 (daily ed. June 25, 2008) (statement of Rep. Nadler) (referencing concerns expressed about the ADA covering stomachaches, the common cold, mild seasonal allergies, or even a hangnail).

316. As Representative Nadler stated in his comments during the floor debate, "I have yet to see a case where the ADA covered an individual with a hangnail." *Id.*

Congress intended the ADAAA to exclude only truly trivial impairments.[317] Congress or the EEOC should clarify how narrow that exception was intended to be—the "hangnail" exception discussed in the legislative history.[318] Otherwise, we continue to give courts the power to decide which disabilities are deserving of protection under anti-discrimination law, and they have not shown themselves to be good stewards of that decision.

317. H.R. REP. NO. 101-485, pt. 2, at 52 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334.

318. 154 CONG. REC. H6064 (daily ed. June 25, 2008) (statement of Rep. Nadler).