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ARTICLES

PLEADING DISABILITY AFTER THE ADAAA

Kevin Barry, Brian East, and Marcy Karin*

INTRODUCTION

Five years ago, Congress passed the ADA Amendments Act ("ADAAA"). The ADAAA reinstated the broad scope of coverage of the Americans with Disabilities Act ("ADA") by amending its definition of disability, which had been unduly narrowed in the employment context by the Supreme Court and lower courts for nearly twenty years. Three years ago, the Equal Employment Opportunity Commission ("EEOC") revised its regulations to clarify that broad scope of coverage. Since that time, the courts have gone to work interpreting

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4. In response to the Supreme Court's assertion in Sutton v. United Air Lines, 527 U.S. 471,
this new scope of coverage. The preliminary results are good, but they could be better.

As the National Council on Disability stated in its recent report on the ADAAA, *A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, some courts appear to be grappling with certain issues related to the ADA’s definition of disability. It is unclear whether the confusion demonstrated in these cases is the result of plaintiffs failing to raise appropriate arguments or of courts being unaware of the relevance of the new standards. Through outreach, education, and an aggressive amicus program, the EEOC has attempted to ensure that courts are aware of the statutory changes made


6. See *A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, NAT’L COUNCIL ON DISABILITY 8 (July 23, 2013), http://www.ncd.gov/publications/2013/07232013 [hereinafter NAT’L COUNCIL ON DISABILITY] (“The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits.”); see also Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314628 (stating that the 28.5 percentage point drop in pro-employer summary judgment rulings on issue of disability under ADAAA “provide[s] considerable support for the proposition that the ADAAA is having the intended effect of fostering a broad construction of the revised disability definition.”); C. Reilly Larson, *Conference Speakers Examine ADA Trends, Provide Practical Guidance Under the Law*, BLOOMBERG BNA (Apr. 30, 2013), http://www.bna.com/conference-speakers-examine-n17179873670 (“[T]he biggest trend” is “simply” that the ADA Amendments Act is having its “desired effect.” Employers and lawyers “are spending a lot less time” on the threshold issue of whether there is coverage, and instead are focusing on “all these other parts” of the law. . . . “[T]hat’s exactly I think what Congress had in mind.””) (quoting Paul Buchanan, Attorney, Buchanan Angeli Altschul & Sullivan); id. (stating that, while “there have not been too many appellate decisions yet arising out of the ADAAA . . . . the ‘vast majority’ of district court cases are surviving summary judgment . . . . The ADAAA is ‘doing what people intended it to do,’ . . . which was to make the focus in cases less on disability, with a much shorter analysis, and get into all the other issues under the law.”) (quoting Sharon Rennert, senior attorney adviser, Equal Employment Opportunity Commission).

7. See NAT’L COUNCIL ON DISABILITY, supra note 6, at 50 (“Some [court decisions] mention the ADAAA in passing and then proceed as if it did not exist. Some courts misstate or misinterpret elements of the ADAAA. Some decisions are much better reasoned or written than others; from time to time, courts do an excellent job of explaining the content and implications of the ADAAA, while every once in awhile a c linker of a juridical opinion is issued.”).
by Congress and the regulatory changes made by the EEOC.8

This Article is aimed at the other cohort—the plaintiffs and plaintiff-side lawyers who bring ADA claims. In a recent article, Professor Ruth Colker concluded that a major reason for the failure of ADA claims prior to the ADAAA was poor pleading.9 As Colker’s findings suggest, it is not enough for Congress to amend a statute and for the EEOC to refine it if plaintiffs and their lawyers do not understand it or, worse, do not know that it exists.10 While the ADAAA has made a host of important changes to the ADA’s definition of disability, plaintiffs and plaintiff-side lawyers need to do a better job taking advantage of these changes. This Article is their roadmap for pleading the definition of disability under the ADA, as amended.11 As the National Council on Disability has stated, in many ADAAA cases, “plaintiffs’ failure to prevail appears to have stemmed as much or more from the poor quality of the legal papers submitted on their behalf as from intrinsic invalidity of their ADA claims.”12 In order for the ADAAA to achieve its full promise, attorneys and advocates should therefore be provided “high quality continuing education and professional education programs . . . regarding the content and implications of the revisions to ADA law made by the ADAAA.”13 This

9. See Ruth Colker, Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern, 2010 UTAH L. REV. 1029, 1032 (2010) (“In a considerable number of cases . . . procedural difficulties, such as failing to file a charge with the [EEOC], precluded individuals from any consideration on the merits. If we ever expect the win-loss rate [under the ADA] to approach a more balanced level, we have to find a way to provide individuals with disabilities competent counsel to handle their cases.”); see also Nat’l Council on Disability, supra note 6, at subsection VLD, 101 (observing cases where “deficient pleadings” under the ADAAA have resulted in cases being dismissed); E. Pierce Blue, Arguing Disability Under the ADA Amendments Act: Where Do We Stand?, THE FED. L., Nov. 30, 2012, at 38, 41.
10. See Colker, supra note 9, at 1032-33 (concluding plaintiffs’ lack of access to free or affordable competent counsel, rather than the definition of disability, caused plaintiffs’ unfavorable outcomes under the original ADA).
11. Portions of this document were published in the National Employment Lawyers Association’s 2012 Annual Convention E-Manual and are reproduced with permission from the National Employment Lawyers Association. Other portions were published in Corporate Counsel Magazine’s 2012 In-House Counsel Labor and Employment Law Forum Manual and are reproduced with permission from Corporate Counsel Magazine.
12. Nat’l Council on Disability, supra note 6, at 95; see also id. at 93 (“Not uncommonly, courts’ opinions attribute the dismissal of claims to the failure of the pleadings and other submitted documents to adequately assert or support the necessary elements of a cause of action . . . . In more than a few cases . . . [plaintiffs’] chances for favorable outcomes were squandered by substandard, sometimes dismal, legal pleadings and briefs on their behalf.”).
13. Id. at 15.
Article is part of that effort.

It is the authors’ hope, of course, that an article like this will not be necessary in a few years. The primary purpose of the ADAAA is, after all, “to make it easier for people with disabilities to obtain protection under the ADA. . . . The question of whether an individual meets the definition of disability should not demand extensive analysis.”14 In the future, plaintiffs and their lawyers will hopefully not need to tarry long on the issue of disability. But for now, while the ADAAA is new and not well-understood, plaintiffs and their lawyers would do well to plead the definition of disability clearly, comprehensively, and carefully, utilizing all of the powerful tools handed them by Congress under the ADAAA.

Part I of this Article describes an empirical study of ADA complaints conducted by the authors to determine whether plaintiffs and plaintiff-side lawyers are taking advantage of all of the helpful changes that the ADAAA makes to the ADA’s definition of disability. Part II explains each of the ADAAA’s relevant provisions with reference to three sources of law: (a) the ADAAA’s statutory text, (b) the EEOC’s final regulations and guidance, and (c) judicial decisions, organized by circuit, interpreting the definition of disability. Based on the results of the authors’ empirical study, Part III of the Article offers tips to plaintiffs and their lawyers on how to take better advantage of all that the ADAAA has to offer in pleading “disability” under the ADA, as amended.

I. THE STUDY

Under the ADAAA, the definition of disability retains the original tripartite structure found in the ADA.15 An individual with a disability is a person with:

- (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 (as described in

This, however, is where the similarities end between the ADA’s old and new definition of disability. While leaving the definition’s structure in place, the ADAAA radically changed its substance. Through rules of construction, findings, purposes, and new definitions, the ADAAA systematically changed everything the Supreme Court and lower courts had relied on to unduly narrow the definition of disability.

The authors set out to determine whether plaintiffs were taking full advantage of the many changes made by the ADAAA. To study this question, Arizona State University’s Work-Life Law and Policy Clinic, Quinnipiac University School of Law’s Disability Law class, and Disability Rights Texas, the federally designated legal protection and advocacy agency for people with disabilities in Texas, first assembled a list of best practices in pleading disability under the ADA. We then compared this list against all ADA complaints filed in the Second, Fifth, and Ninth Circuits between October 1, 2012 and December 31, 2012.

The results are striking. With several notable exceptions, employees’ lawyers are consistently failing to take advantage of all that the ADAAA

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16. Id. The “or” is important; coverage may be established under any or all of these prongs. See 29 C.F.R. § 1630.2(g)(2) (2012).


18. Data and analysis from the authors’ study includes information from 174 complaints. Bloomberg Law was used to search for complaints coded “Civil Rights – Disabilities – Employment [445].” This search resulted in 55 cases in the Second Circuit; of which 47 unique-ADA Title I complaints were coded and five false positives (e.g., Rehab Act, state claim, other non-ADA filing) and three additional cases whose complaints could not be retrieved online were excluded from the analysis. In the Fifth Circuit, this search captured 60 cases, which resulted in the coding of 54 unique ADA Title I complaints being coded, and the exclusion of four false positives, and two complaints that could not be retrieved. In the Ninth Circuit, 59 cases were reviewed, of which 42 unique ADA Title I complaints were coded, and 14 false positives and three duplicates of other included complaints were excluded. The statistics referenced below are based only on the Title I complaints that were reviewed and coded. E.g., false positives and duplicate complaints are not included in the percentages listed elsewhere in this document. Appendix B contains the questions surveyed; Appendix C contains the survey’s core findings. Lawyers filed complaints in 82.52% of the reviewed complaints.

has to offer, and neglecting many important changes to the ADA made by the ADAAA and the EEOC’s revised regulations implementing the new law. The next part discusses these changes.

II. PLEADING DISABILITY UNDER THE ADA, AS AMENDED

To aid plaintiffs and their lawyers in pleading disability under the ADA, as amended, this part summarizes the ADAAA’s relevant provisions with reference to three sources of law: (i) the ADAAA’s statutory text, (ii) the EEOC’s final regulations and guidance, and (iii) judicial decisions, organized by circuit, interpreting the definition of disability.

A. Impairment

The first step in proving disability under the ADA is showing that employees have, once had, or are perceived as having a “physical or

20. One might reasonably argue that ADA complaints do not require such detail—all they need do is give notice of the circumstances giving rise to the plaintiff’s claim for relief. Although the Supreme Court’s decisions in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), place renewed emphasis on pleading sufficient facts in federal court cases, the authors agree that they did not increase the burden of pleading legal theories. See, e.g., Hatmaker v. Mem’l Med. Ctr., 619 F.3d 741, 743 (7th Cir. 2010); Mechler v. U.S., 2012 WL 5289627, at *2 (D. Kan. Oct. 23, 2012). This is not to say that the failure to plead legal theories never has negative consequences; sometimes it does. See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (reflecting impact of plaintiff’s failure to timely plead ADA disparate-impact theory).

21. This article uses the word “employee” to include any individual who “can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (2009). Given this definition, our study includes claims brought by employees, former employees, and applicants. In our study, 8.45% of complaints involved claims brought by
mental impairment.”22 “Physical or mental impairment” was left undefined in the text of the ADA, and it remains so under the ADAAA. That said, the ADAAA maintains the regulatory definition of “physical and mental impairments” as promulgated by the EEOC and included in the regulations of the Department of Justice and Department of Education.23 Under these regulations, physical and mental impairments are defined as:

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 [a]ny mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.24

In contrast to the definition of substantially limits and major life activities, the EEOC’s definition of “physical or mental impairment” has always been broad—nearly any diagnosis will suffice.25 Recent changes to the EEOC regulations and guidance clarify this breadth.26 These administrative changes, together with case precedent, follow.

1. EEOC Regulations and Guidance

• New body systems—the immune and circulatory systems—are added to the regulatory definition of “physical impairment.” Further, the regulation clarifies that the list of body systems is non-exhaustive.27

• Pregnancy, by itself, is not an impairment; however, pregnancy-
related impairments may be covered.28

2. Case Precedent


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28. See 29 C.F.R. pt. 1630, app. § 1630.2(h) (2011). For a thorough discussion of how the ADAAA’s changes “entitle women to a broad range of accommodations for their pregnancy-related conditions under federal law,” including how to plead pregnancy-related impairments under the ADAAA, see Joan C. Williams et al., I Just Need Water: Pregnancy Accommodation after the ADA Amendments Act of 2008 (on file with authors).
B. Non-Accommodation Claims v. Accommodation Claims

The ADA always has recognized two distinct types of claims—non-accommodation claims, which encompass everything from disparate treatment to harassment, and accommodation claims, which involve the failure to accommodate.\textsuperscript{29} The ADAAA sharpens this distinction by proffering a different disability showing for each.\textsuperscript{30} Subpart 1 addresses the disability showing for non-accommodation claims; subpart 2 addresses the showing for accommodation claims.

1. Non-Accommodation Claims

Under the ADA, as amended, employees alleging a non-accommodation claim—that is, discrimination that does not involve a failure to accommodate—should normally seek coverage under prong 3 of the ADA’s definition of disability, the “regarded as” prong.\textsuperscript{31} The reason for this is simple: the regarded as prong is now the broadest prong and therefore the easiest way to prove coverage under the ADA, but it only protects those alleging a non-accommodation claim.\textsuperscript{32} A brief description of the ADAAA’s changes to the regarded-as prong, and its implications for non-accommodation claims, follows.

a. New-and-Improved “Regarded As” Prong

In 1987, in School Board of Nassau County v. Arline, the Supreme Court broadly interpreted the Rehabilitation Act’s “regarded as” prong to cover anyone who is adversely treated based on an impairment.\textsuperscript{33} The

\textsuperscript{29} See 42 U.S.C. § 12112(b) (2009).
\textsuperscript{30} See id. ([D]iscriminate against a qualified individual on the basis of a disability” includes (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee. . .). In legal scholarship, non-accommodation claims are often referred to as “simple discrimination” claims. See, e.g., Emens, supra note 5, at 222-23 (discussing the ADAAA’s distinction between simple discrimination and accommodation claims); see also Michelle A. Travis, Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory, 16 LEWIS & CLARK L. REV. 527 (2012); Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833 (2001).
\textsuperscript{31} 42 U.S.C. § 12102(3)(A) (2009); see also 29 C.F.R. pt. 1630 app. § 1630.2(l) (2011). In an abundance of caution, as discussed in Part II.B.2, plaintiffs and their lawyers should also seek coverage under prongs 1 and/or 2.
\textsuperscript{32} See 42 U.S.C. §§ 12102(3)(A) (broadening regarded as prong); Id. §12201(h) (disallowing reasonable accommodations under regarded as prong).
\textsuperscript{33} See Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 284 (1987); Kevin Barry, Exactly What Congress Intended?, 17 EMP. RTS. & EMP. POL’Y J. 5 (2013) (“According to Arline, the definition of disability includes not only those of us with real or perceived functional limitations—it
Court did not dwell on the employer’s subjective beliefs about the employee’s functional limitations; it was enough that the employee was terminated because of a diagnosis (in that case, tuberculosis).34 In 1999, in Sutton v. United Airlines, the Supreme Court reversed course, interpreting the ADA’s “regarded as” prong very narrowly.35 To prove coverage under the “regarded as” prong, the Court said employees must show that their employers perceived them as having an impairment that substantially limited them in a major life activity.36 Proving the subjective mental state of an employer is, of course, a tall order because few employers “make[] the mistake of articulating the depths of [their] prejudices or the exact nature of [their] motivation.”37 Where the major life activity at issue was working, the order was taller still; employees had to show that their employers perceived them as having an impairment that limited them not in one job, but rather in a broad range of jobs.38

The ADAAA redefines the “regarded as” prong (sometimes referred to as “prong 3”) in dramatic fashion, making it the broadest prong under which to prove coverage.39 An employee is no longer required to show that a covered entity perceived the employee as having an impairment that substantially limits him or her in a major life activity.40 Now, an employee need only show that he or she: (1) actually has, or is perceived by the employer as having, an impairment; and (2) was subjected to an adverse action (i.e., non-selection, demotion, termination, harassment, discrimination by association, or denial of any

also includes any one of us who is treated adversely because of any impairment, regardless of whether the impairment limits or is perceived to limit functioning. One might call this the super-broad or “universal” interpretation of disability.”).

34. See Sch. Bd. of Nassau Cnty., 480 at 282-83.
36. See id. at 490.
38. Sutton, 527 U.S. at 491.
39. See Barry, supra note 33, at 22 (“[T]he Amendments reinstate Arline by rewriting the “regarded as” prong to focus on adverse treatment, not the difficult-to-prove perception of an employer, and by explicitly referencing Arline’s broad interpretation in its findings. The new-and-improved “regarded as” prong protects nearly anyone who is adversely treated based on any impairment—whether the impairment is actual or perceived, and functionally limiting or not.”).
other term, condition or privilege of employment, but for defenses) because of the actual or perceived impairment. 41 In non-accommodation cases, employee’s lawyers should plead the new-and-improved regarded as prong. The ADAAA’s textual changes, together with the EEOC’s new regulations and guidance as well as helpful case precedent, follow.

i. ADAAA Statutory Text

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. 42

ii. EEOC Regulations and Guidance

- Prong 3 is the primary means of coverage in non-accommodation cases:

Where an individual is not challenging a covered entity’s failure to make reasonable accommodations and does not require a reasonable accommodation, ... the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. 43

- No showing of limitation is required. 44 “Whether an individual’s impairment “substantially limits” a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the “regarded as” prong) of this section.” 45

To qualify for coverage under the “regarded as” prong, an individual is not subject to any functional test . . . . The concepts of “major life activities” and “substantial limitation” simply are not relevant in evaluating whether an individual is “regarded as having such an impairment”. . . . This provision is designed to restore Congress’s

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41. Id.
42. Id.
43. 29 C.F.R. § 1630.2(g)(3) (2012).
44. See 42 U.S.C. § 12201(h) (disallowing reasonable accommodations under regarded as prong); 29 C.F.R. pt. 1630, app. § 1630.2(l) (2011).
45. 29 C.F.R. § 1630.2(j)(2) (2012).
intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment.46

- Prong 3 coverage requires a showing of causation.47 "[A]n individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action."48

The fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a "regarded as" claim is complex. While a person must show, for both coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.49

To illustrate how straightforward application of the "regarded as" prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability. . . . [And] an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry [that goes to ultimate liability].50

- "Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion

47. See id.
48. 29 C.F.R. § 1630.2(l)(2) (2012) (emphasis added); see also id. § 1630.2(g)(1)(iii) (2012).
50. Id.
for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.”

- Establishing that an individual is covered under the “regarded as” prong “does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability....”

- Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability.

- Showing an adverse action is sufficient to establish liability; under the regulations, a showing of myths, fears, or stereotypes is not required. “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.”

- The EEOC’s final regulations delete the proposed regulations’ prohibition of discrimination based on the symptoms of or mitigating measures used for an impairment.

The Commission believes that it requires a more comprehensive treatment than is possible in this regulation. Therefore, the final regulations do not explicitly address the issue of discrimination based on symptoms or mitigating measures under the “regarded as” prong [discussed in the proposed regulations]. No negative inference concerning the merits of this issue should be drawn from the deletion.

54. See id.
55. Id.
iii. Case Precedent

• First Circuit: *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 240–41 (D. Mass. 2010) (holding that employee stated claim that he was disabled under “regarded as” prong because employer terminated him based on his monocular vision).

• Second Circuit: *Hilton v. Wright*, 673 F.3d 120, 129 (2d Cir. 2012) (“Although both parties thought that Hilton needed to demonstrate that the defendants regarded him as being substantially limited in a major life activity, it is clear that he was only required to raise a genuine issue of material fact about whether [defendants] regarded him as having a mental or physical impairment.”) (emphasis added); *Davis v. NYC Department of Education*, No. 10-cv-3812 (KAM)(LB), 2012 WL 139255, at *1-2, *6 (E.D.N.Y. Jan. 18, 2012) (holding that employee stated claim that she was disabled under the ADAAA’s “new, more lenient” prong 3 because employer evaluated employee’s performance as unsatisfactory and denied her full amount of bonus after employee took leave of absence to treat back and shoulder injury); *Darcy v. City of New York*, No. 06-CV-224 (RJD), 2011 WL 841375, at *4 (E.D.N.Y. Mar. 8, 2011) (holding that employee presented sufficient evidence that he was disabled under “regarded as” prong based on employer’s transfer of employee to new position five months after employer commented that employee was alcoholic).

• Third Circuit: *Estate of Murray v. UHS of Fairmount, Inc.*, No. 10-2561, 2011 WL 5449364, at *6–9 (E.D. Pa. Nov. 10, 2011) (holding that employee presented sufficient evidence that she was disabled under “regarded as” prong because she was terminated several days after informing her supervisor of her depression and explaining that [u]nder pre-ADAAA case law, [employee’s] evidence would almost certainly have failed to demonstrate substantial limitation. But post-ADAAA, the result is more uncertain given the statute’s command that “substantially limits” is not meant to be a demanding standard.”); *Gaus v. Norfolk Southern Railway Co.*, No. 09-1698, 2011 WL 4527359, at *18-20 (W.D. Pa. Sept. 28, 2011) (denying employer’s motion for summary judgment for events occurring after the ADAAA’s effective date, and holding that employee was disabled under the “regarded as” prong when employer medically disqualified employee from returning to work after FMLA leave
based on employee’s chronic pain in joints, hands, and hip); Cohen v. CHLN, Inc., No. 10-00514, 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) (holding that employee had submitted sufficient evidence that he was disabled under the “regarded as” prong based on his termination one day after notifying his employer that he may need back surgery); Fleck v. WILMAC Corp., No. 10-05562, 2011 WL 1899198, at *6 (E.D. Pa. May 19, 2011) (holding that employee stated claim that she was disabled under “regarded as” prong because she was terminated based on chronic ankle injury, and noting “ADAAA’s de-emphasis on an employer’s beliefs as to the severity of a perceived impairment”).

- Fourth Circuit: Chamberlain v. Valley Health Sys. Inc., 781 F. Supp. 2d 305, 312 (W.D. Va. 2011) (holding that employee submitted sufficient evidence that she was “regarded as” disabled when she was placed on involuntary leave and subsequently terminated shortly after being diagnosed with “visual field defect”).

- Fifth Circuit: EEOC v. Res. for Human Dev. Inc., 827 F. Supp. 2d 688, 695–97 (E.D. La. 2011) (holding that genuine issues of fact existed as to whether employee with severe obesity who was terminated from job was disabled under “regarded as” prong); Schmitz v. Louisiana, No. 07-891-SCR, 2009 WL 210497, at *2-3 (M.D. La. Jan. 27, 2009) (“Before the [ADAAA, the “regarded as” prong] of the definition was interpreted to mean that an employer had to regard or perceive an individual as substantially limited in a major life activity. The ADAAA eliminates this requirement. . . . The new provision states that an individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that the employer discriminated against him because of an actual or perceived impairment, “whether or not the impairment limits or is perceived to limit a major life activity.” . . . Clearly, the new ADAAA provisions related to the definition of disability create new legal consequences . . . and broaden the scope of an employer’s potential liability under the statute.”); Meinelt v. P.F. Chang’s China Bistro, Inc., 787 F. Supp. 2d 643, 651-52 (S.D. Tex. 2011) (holding that employee was disabled under the “regarded as” prong when he was fired three days after telling employer that he had a brain tumor and finding unavailing employer’s argument that denial of summary judgment would mean that “any time a plaintiff informs a manager of an alleged health condition . . . he or she would be automatically
bestowed with a “regarded as” claim”); *Lowe v. American Eurocopter, L.L.C.,* No. 1:10CV24-A-D, 2010 WL 5232523, at *7-8 (N.D. Miss. Dec. 16, 2010) (holding that employee stated claim that she was disabled under the “regarded as” prong because she was terminated based on obesity).

- Sixth Circuit: *Milholland v. Sumner County Board of Education,* 569 F.3d 562, 566 (6th Cir. 2009) (stating that ADAAA’s change to “regarded as” prong “expands the coverage of the ADA to employer actions not previously covered”); *Azzam v. Baptist Healthcare Affiliates, Inc.,* 855 F. Supp. 2d 653, 661-62 (W.D. Ky. 2012) (holding that employee who was terminated because of stroke with resulting fatigue was disabled under “regarded as” prong, but granting employer’s motion for summary judgment because employee was not qualified to perform job); *Becker v. Elmwood,* No. 3:10-CV-2487, 2012 WL 13569, at *9-10 (N.D. Ohio Jan. 4, 2012) (holding that employee with obsessive compulsive disorder presented sufficient evidence that he was disabled under the “regarded as” prong because his employer knew of his OCD prior to his resignation); *Wells v. Cincinnati Children’s Hospital Medical Center,* 860 F. Supp. 2d 469, 479-80 (S.D. Ohio 2012) (holding that employee presented sufficient evidence that she was disabled under “regarded as” prong because employer refused to reinstate employee to her former position as a result of concerns over employee’s use of prescription medication to treat her gastrointestinal problems); *Rudolph v. U.S. Enrichment Corp.,* No. 5:08-CV-00046-TBR, 2009 WL 111737, at *6 (W.D. Ky. Jan. 15, 2009) (“[B]ecause the ADA[AA] broadens the definition of “disability” and who may have a cause of action under the “regarded as” prong[,] the amended Act would potentially increase [the employer’s] liability for past conduct.”).

- Seventh Circuit: *Horgan v. Simmons,* 704 F. Supp. 2d 814, 820 n.4 (N.D. Ill. 2010) (holding that employee stated claim that he was disabled under “regarded as” prong because after employee told employer that he was HIV positive, employer questioned employee’s ability to work and lead others and fired employee next day).

- Eighth Circuit: *Brown v. City of Jacksonville,* 711 F.3d 883, 889 (8th Cir. 2012) (stating that district court improperly focused exclusively
on whether plaintiff had actual impairment and "failed to consider whether Brown made a submissible claim under the post-amendment ADA’s expanded definitions of perceived . . . impairment," but affirming grant of summary judgment to employer on other grounds).

- Ninth Circuit: Kagawa v. First Hawaiian Bank/Bancwest Corp., 819 F. Supp. 2d 1125, 1129 (D. Haw. 2011) (holding that employee stated claim that she was disabled under “regarded as” prong because employer required her to attend counseling and told her counselor that she heard voices in her head, and because counselor instructed employee to see a doctor); Walker v. Venetian Casino Resort, L.L.C., 02:10-CV-00195-LRH-VCF, 2012 WL 4794149, at *15 (D. Nev. Oct. 9, 2012) (“Thus, in passing the ADAAA, Congress eliminated the requirement that employees establish their employer’s beliefs concerning the severity of their impairment.”); Smith v. Valley Radiologists, Ltd., CV1 2012 WL 3264504, at *5 (D. Ariz. Aug. 9, 2012) (holding that employee presented sufficient evidence that employer regarded her as disabled based on an email stating that employee would no longer perform mammograms because of her limited eyesight); McNamee v. Freeman Decorating Services, Inc., 2:10-CV-01294-GMN, 2012 WL 1142710, at *4 (D. Nev. Apr. 4, 2012) (holding that employee stated claim that he was disabled under “regarded as” prong because company executives made certain statements about his previous workplace injury).

- Eleventh Circuit: Wolfe v. Postmaster General, 488 F.App’x 465, 468 (11th Cir. 2012) (stating that “a plaintiff need demonstrate only that the employer regarded him as being impaired, not that the employer believed the impairment prevented the plaintiff from performing a major life activity,” and holding that termination of employee with ADHD was sufficient to establish disability under “regarded as” prong); Myers v. Winn-Dixie Stores, Inc., No. 8:10-CV-1987-T-17TGW, 2012 WL 529552, at *8 (M.D. Fla. Feb. 10, 2012) (“Under the ADAAA, whether or not an impairment substantially limits a major life activity is no longer relevant to the “regards as” test. An employer is deemed to have regarded the individual as having a disability if it makes an adverse decision based on an employer’s belief that the employee has an impairment.”); Beveridge v. HD Supply Waterworks, Ltd., No. 7:08-
CV-52 (HL), 2009 WL 4755370, at *5 n.8 (M.D. Ga. Dec. 7, 2009) (stating that "under this broadened definition, [the plaintiff] would likely be successful in proving he was “regarded as” disabled" based on insomnia).

b. Broad Scope of Coverage Under Regarded-as Prong

Through rules of construction, findings, and purposes, the ADAAA reflects Congress’ intent that the “regarded as” prong be construed broadly, as it was in Arline.57 The ADAAA’s textual changes discussing this broad scope of coverage, together with the EEOC’s new regulations and guidance as well as helpful case precedent, follow.

i. ADAAA Statutory Text

- ADAAA Rule of Construction No. 1: “The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this chapter.”58

- ADAAA Finding No. 1: “[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage.”59

- ADAAA Finding No. 3: “[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”60

- ADAAA Finding No. 4: “[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for

60. Id. § 2(a)(3) (emphasis added).
many individuals whom Congress intended to protect."\textsuperscript{61}

- **ADAAA Purpose No. 1:** "The purposes of this Act are (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA."\textsuperscript{62}

- **ADAAA Purpose No. 3:**

  The purposes of this Act are... to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.\textsuperscript{63}

ii. EEOC Regulations and Guidance

- **The regulations restate the ADAAA's goal of broad coverage and intent to move beyond the definitional question.**

The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the [ADAAA's] purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.\textsuperscript{64}

- **“Coverage under the “regarded as” prong of the definition of disability should not be difficult to establish... The ADAAA**

\textsuperscript{61} *Id.* § 2(a)(4) (emphasis added).

\textsuperscript{62} *Id.* § 2(b)(1) (emphasis added).

\textsuperscript{63} *Id.* § 2(b)(3).

\textsuperscript{64} 29 C.F.R. § 1630.1(c)(4) (2011).
reiterates Congress’s reliance on the broad views enunciated in [Arlene], and Congress “believe[s] that courts should continue to rely on this standard.” Accordingly, the ADA[AA] broadened the application of the “regarded as” prong...”

- “Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage.”

c. Transitory and Minor Defense

The regarded as prong, while broad, is not unlimited. It does not cover employees who are treated adversely based on a “transitory and minor” impairment. This is a narrow exception; only the most trivial impairments are transitory and minor. Although plaintiffs should anticipate this defense in the facts they allege, they need not disprove the elements of the defense as part of their prima facie case. It is the employer’s burden to assert that an impairment is “transitory and minor.”

The ADAAA’s textual changes discussing this exception, together with the EEOC’s new regulations and guidance and judicial decisions interpreting this exception, follow.

i. ADAAA Statutory Text

Being regarded as having an impairment “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.”

ii. EEOC Regulations and Guidance

- The EEOC regulations confirm that both elements must be met—essentially, “and” does not mean “or.”

69. See id.; see, e.g., Davis v. New York City Dep’t of Educ., No. 10-CV-3812 (KAM)(LB), 2012 WL 139255, at *6 (E.D.N.Y. Jan. 18, 2012) (“Although plaintiff’s three-month period of disability appears to be “transitory,” it is not apparent from the face of the Complaint that plaintiff’s impairment was “minor.””).
a covered entity must demonstrate that the impairment is both "transitory" and "minor."\textsuperscript{72}

- ""[T]ransitory" is defined as lasting or expected to last six months or less."\textsuperscript{73} "[A]n individual who is denied a promotion because he has a minor back injury would be "regarded as" an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory."\textsuperscript{74}

- An objective test is used to apply this limitation on coverage.\textsuperscript{75}

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.\textsuperscript{76}

The EEOC provides the following example,

an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively "transitory and minor" hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have "regarded" the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not "transitory and minor."\textsuperscript{77}

- "[A]n exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly."\textsuperscript{78}

\textsuperscript{72.} Id.
\textsuperscript{73.} Id.
\textsuperscript{74.} 29 C.F.R. pt. 1630, app. § 1630.15(f) (2011).
\textsuperscript{75.} See id.
\textsuperscript{76.} Id.
\textsuperscript{78.} Id.
iii. Case Precedent


- Third Circuit: *Gaus v. Norfolk Southern Railway Co.*, No. 09-1698, 2011 WL 4527359, at *17 (W.D. Pa. Sept. 28, 2011) (rejecting employer’s “transitory and minor” defense because employee’s chronic pain in joint, hands, and hip lasting in excess of one year was not “transitory”); *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) (holding that employee submitted sufficient evidence that his back condition was not transitory and minor under “regarded as” prong because it began four months prior to termination and was not expected to “resolve[] permanently” (not transitory), and, in any event, his condition was perceived to be severe and ongoing (not minor); see id. (erroneously stating that impairments that are “transitory or minor” are excluded under “regarded as” prong) (emphasis added).

- Fifth Circuit: *Dube v. Tex. Health & Human Servs. Commission*, No. SA-11-CV-354-XR, 2011 WL 3902762, at *4-5 (W.D. Tex. Sept. 6, 2011) (rejecting employer’s “transitory and minor” defense because “it is not apparent from the face of the complaint that [employee’s] impairment lasted less than six months or was otherwise “transitory” and “minor” as defined by the regulations.”).

- Eleventh Circuit: *Lewis v. Fla. Default Law Grp.*, No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *5-7 (M.D. Fla. 2011) (holding that employee with flu was not disabled under “regarded as” prong because flu was “transitory and minor.”).

d. No Accommodations Under Regarded As Prong

As referenced above, only employees alleging non-accommodation can seek coverage under prong 3; those alleging a
failure to accommodate must seek coverage under the first two prongs of the definition of "disability", as discussed in subsection II.B.2 below. The ADAAA’s textual changes discussing this limitation, together with the EEOC’s new regulations and guidance and judicial decisions interpreting it, follow.

i. ADAAA Statutory Text

A covered entity “need not provide a reasonable accommodation or a reasonable modification to policies, practices or procedures to an individual who meets the definition of disability” under the third prong. 80

ii. EEOC Regulations and Guidance

“A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong . . . or “record of” prong . . . but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong. . . .”81

iii. Case Precedent

• Third Circuit: Fleck v. WILMAC Corp., No. 10-05562, 2011 WL 1899198, at *6 n.3 (E.D. Pa. May 19, 2011) (holding that coverage under “regarded as” prong applied only to employee’s discrimination claims and “not her claims for failure to provide reasonable accommodation”).

• Seventh Circuit: Powers v. USF Holland, Inc., 667 F.3d 815, 823 n.7 (7th Cir. 2011) (noting that employee was not entitled to reasonable accommodation under “regarded as” prong).

2. Accommodation Claims

As discussed above in subpart 1, the regarded-as prong is limited to non-accommodation claims. For accommodation claims, employees
must seek coverage under one of the first two prongs of the ADA’s definition of disability. 82 Specifically, employees must show that they have: (1) a physical or mental impairment that substantially limits one or more major life activities (hereinafter, “prong 1” or the “actual disability” prong); or (2) a record of such an impairment (hereinafter, “prong 2” or the “record of” prong). 83

As a result of the Supreme Court’s decisions in Sutton and Toyota, proving coverage under prongs 1 and 2 used to be a very difficult showing. 84 It no longer is. While not as expansive as the regarded as prong, prongs 1 and 2 are far broader than ever before, thanks to a number of changes made by the ADAAA. This Part explains the most prominent changes.

a. Broad Scope of Coverage Under Prongs 1 and 2

The ADAAA rejects the high level of limitation imposed by the Supreme Court and the EEOC in their interpretation of disability, specifically the terms “substantially limits” and “major life activities.” 85 Through rules of construction, findings, and purposes, the ADAAA creates a less demanding standard for qualifying as disabled by requiring that the definition of disability be construed broadly. 86 This section

83. Id. The primary difference in pleading prongs 1 and 2 is that the former asks for evidence of a present impairment while the latter asks for a “record” of the impairment; the rest of the analysis is essentially the same.


86. To further signal to lawyers and courts that they should “spend less time and energy on the minutia of an individual’s impairment, and more time and energy on the merits of the case,” 29 C.F.R. pt. 1630, app. § 1630.4 (2011) (quoting Joint Hoyer–Sensenbrenner Statement), the ADAAA prohibits discrimination “on the basis of disability” instead of prohibiting discrimination against a qualified individual “with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a)-(b) (2009 Supp V. 2006). The “on the basis of disability” language originated with the National Council on Disability’s 2004 proposed bill to amend the ADA, “The ADA Restoration Act of 2004,” which, in turn, borrowed the phrase from the ADA itself (“An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.”). According to EEOC guidance, the purpose of this change is to conform the ADA “to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination “on the basis of disability” rather than discrimination “against an individual with a disability” because of the individual’s disability.” 29 C.F.R. pt. 1630, app. § 1630.4 (2011) (quoting Joint Hoyer–Sensenbrenner Statement); see also id. ("[T]he emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of

http://scholarlycommons.law.hofstra.edu/hlelj/vol31/iss1/1
summarizes the ways in which the ADAAA broadens the scope of coverage under prongs 1 and 2, with references to the statutory text, regulations and guidance, and select case law.

i. ADAAA’s Statutory Text

- **ADAAA Rule of Construction No. 1**: "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." 87

- **ADAAA Rule of Construction No. 2**: "The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." 88

- **ADAAA Finding No. 1**: "[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage." 89

- **ADAAA Finding No. 4**: "[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." 90

- **ADAAA Finding No. 5**: "[T]he holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA." 91

- **ADAAA Finding No. 6**: "[A]s a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that disability, and not unduly focused on the preliminary question of whether a particular person is a "person with a disability.""

88. Id. § 12102(4)(B) (Supp. V 2012).
90. Id. § 2(a)(4) (emphasis added).
91. Id. § 2(a)(5) (emphasis added).
people with a range of substantially limiting impairments are not people with disabilities."\(^{92}\)

- **ADAAA Finding No. 7:** "[I]n particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress."\(^{93}\)

- **ADAAA Finding No. 8:** "Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard."\(^{94}\)

- **ADAAA Purpose No. 1:** "The purposes of this Act are (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA."\(^{95}\)

- **ADAAA Purpose No. 4:**

  The purposes of this Act are . . . (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."\(^{96}\)

- **ADAAA Purpose No. 5:**

  The purposes of this Act are . . . (5) to convey congressional intent that

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92. *Id.* § 2(a)(6).
93. *Id.* § 2(a)(7).
94. *Id.* § 2(a)(8).
95. *Id.* § 2(b)(1) (emphasis added).
96. *Id.* § 2(b)(4).
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the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for “substantially limits,” and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it 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.97

• ADAAA Purpose No. 6: “The purposes of this Act are . . . (6) to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term “substantially limits” as “significantly restricted” to be consistent with this Act, including the amendments made by this Act.”98

• The ADAAA removes the ADA’s “43 million Americans” finding (“some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older”) and replaces it with a new finding, “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination.”99

• The ADAAA removes the ADA’s “Discrete and Insular Minority” Finding (“individuals with disabilities are a discrete and insular minority.”).100

97. Id. § 2(b)(5) (emphasis added).
98. Id. § 2(b)(6).
100. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3554 (2008). In a concurring opinion in Sutton, Justice Ginsburg determined that Congress’ use of the phrase “discrete and insular minority” in its findings was “a telling indication of its intent to restrict the ADA’s coverage to a confined, and historically disadvantaged, class.” Sutton, 527 U.S. at 495.
ii. EEOC Regulations and Guidance

- The law has "[b]road coverage." The EEOC regulations confirm:

The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis. 102

- “Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage.” 103

iii. Case Precedent

- First Circuit: Brodsky v. New England School of Law, 617 F. Supp. 2d 1, 4 (D. Mass. 2009) (stating that “the ADA amendment is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute”).


(Ginsburg, J., concurring).

102. Id.


b. Substantially Limits

The term “substantially limits” was not defined in the ADA, and it
remains undefined under the ADAAA. The EEOC originally defined the term narrowly to mean “significantly restricts,” and, in Toyota, the Supreme Court went further, defining the term to mean “prevents or severely restricts.”

Through rules of construction, findings, and purposes, the ADAAA explicitly rejects these interpretations in favor of a less demanding, more inclusive standard. As a result, the EEOC’s prior regulations interpreting the term “substantially limits,” the Toyota Court’s definition of the term, and lower court cases relying on these definitions are no longer good law. The following is a summary of the relevant statutory and regulatory changes to “substantially limits,” together with correctly decided judicial interpretations.

i. ADAAA Statutory Text

- ADAAA Rule of Construction No. 1: “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.”

- ADAAA Rule of Construction No. 2: “The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”

- ADAAA Finding No. 7: “[T]he Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress.”


106. Toyota, 534 U.S. at 198.


110. Id. § 12102(4)(B).

• ADAAA Finding No. 8: "Congress finds that the Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard."112

• ADAAA Purpose No. 4:
The purposes of this Act are . . . to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."113

• ADAAA Purpose No. 5: "The purposes of this Act are . . . to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."114

• ADAAA Purpose No. 6: "The purposes of this Act are . . . to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act."115

ii. EEOC Regulations and Guidance

• ""Substantially limits" is not meant to be a demanding standard."116

"The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the

112. Id. § 2(a)(8).
113. Id. § 2(b)(4).
114. Id. § 2(b)(5).
115. Id. § 2(b)(6).
terms of the ADA.'\textsuperscript{117}

- "Substantially limits" does not mean prevents or severely restricts.\textsuperscript{118} "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."\textsuperscript{119}

- "[T]he threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis."\textsuperscript{120} The EEOC clarified that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity."\textsuperscript{121}

- Scientific, medical, or statistical evidence is not required to determine if a major life activity is limited.\textsuperscript{122}

The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.\textsuperscript{123}

- An individualized assessment is still required, but the required degree of functional limitation is lower.\textsuperscript{124}

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the

\textsuperscript{117} Id.
\textsuperscript{118} Id. § 1630.2(j)(1)(ii).
\textsuperscript{119} Id.
\textsuperscript{120} Id. § 1630.2(j)(1)(iii).
\textsuperscript{121} Id.
\textsuperscript{122} Id. § 1630.2(j)(1)(v).
\textsuperscript{123} Id.
\textsuperscript{124} Id. § 1630.2(j)(1)(iv).
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ADAAA.\(^{125}\)

- The EEOC’s regulations state that the required degree of functional limitation “will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking to prove discrimination under the ADA.”\(^{126}\) Nevertheless, the EEOC’s regulations observe that “not every impairment will constitute a disability within the meaning of this section.”\(^{127}\)

- The EEOC’s regulations provide a list of predictable assessments:

> [T]he individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.\(^{128}\)

- The EEOC’s regulations contain these examples:

> [I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

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125. Id.
128. Id. § 1630.2(j)(3)(ii).
function. The types of impairments described in this section may substantially limit additional major life activities [i.e., walking, eating sleeping, thinking] not explicitly listed above.129

- Learning disabilities are typically covered.130

Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.131

- The EEOC removed the proposed regulations’ list of impairments that “may be substantially limiting for some individuals but not for others” and those that are “usually not disabilities,” because of the confusion generated by such lists.132

- The three-part “Condition, Manner, Duration” standard may be relevant but is not required, thereby implicitly rejecting Toyota’s requirement that the impairment’s impact be “permanent or long-term.”133

[I]t may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.134

[W]hile the Commission’s regulations retain the concept of “condition, manner, or duration,” they no longer include the additional list of

129. Id. § 1630.2(j)(3)(iii).
130. See id. § 1630.2(j)(4)(iii); see infra note 131 and accompanying text.
134. 29 C.F.R. § 1630.2(j)(4)(i) (2012); see also id. § 1630.2(j)(4)(ii) (discussing condition, manner, and duration).
"substantial limitation" factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment). 135

"[C]ondition, manner, or duration" are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. "Condition, manner, or duration" are not required "factors" that must be considered as a talismanic test. Rather, in referring to "condition, manner, or duration," the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage. 136

- Analysis of "condition, manner, or duration" is often unnecessary. 137

Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward. 138

- Duration is not dispositive for prongs 1 and 2:

The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage... does not apply to the definition of disability under [prongs 1 or 2]. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section. 139

- The EEOC's regulations continue,

[A]n impairment does not have to last for more than six months in

136. Id.
137. See id.
139. Id. § 1630.2(j)(1)(ix) (emphasis added).
order to be considered substantially limiting under [prongs 1 or 2] 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 [prong 1] of the definition of disability.\textsuperscript{140}

- Impairments of short duration are typically not covered. "[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."\textsuperscript{141}

iii. Case Precedent

- First Circuit: *Gil v. Vortex, L.L.C.*, 697 F. Supp. 2d 234, 239–40 (D. Mass. 2010) (holding that employee stated claim that he was disabled under prong 1 because he alleged that his monocular vision "inhibits two major life activities, seeing and working"); *Id.* at 240 ("Although [employee] might have done a better job of providing details in his Complaint describing the precise nature of his "substantial limitations," enough is pled to satisfy the relaxed disability standard under the Amendments Act."); *Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258–59 (D.N.H. 2009) (holding that student stated claim that she was disabled under prong 1 of pre- and post-Amendment ADA because her eating disorder—which resulted in her spending six weeks in outpatient and inpatient clinics, and losing nearly five pounds—substantially limited her eating).

- Third Circuit: *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) (holding that employee presented sufficient evidence that he was disabled under prong 1 because his back condition, which limited his ability to walk more than ten to twenty yards at a time, substantially limited his ability to walk and "stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu."); *Id.* (noting that employee’s back injury “easily passes muster under the

\textsuperscript{141}  Id.
more inclusive standards of the ADAAA.”); Naber v. Dover Healthcare Associates, Inc., 765 F. Supp. 2d 622, 646–47 (D. Del. 2011) (erroneously conflating pre-ADAAA “unable” or “significantly restricted” and post-ADAAA construction of “substantially limits,” but holding that employee set forth prima facie case that she was disabled under prong 1 because her depression substantially limited her ability to sleep); Fleck v. WILMAC Corp., No. 10-05562, 2011 WL 1899198, at *5 (E.D. Pa. May 19, 2011) (holding that employee stated claim that she was disabled under prong 1 because her chronic ankle injury substantially limited major life activities of standing and walking).

- Fourth Circuit: Summers v. Altarum Institute, Corp., No. 13-1645, 2014 WL 243425, at *3-5 (4th Cir. Jan. 23, 2014) (citing EEOC regulations regarding temporary impairments) (holding that employee stated claim that he was disabled under prong 1 because knee injury, although temporary, left him unable to walk normally for seven months (and would have left him unable to walk for more than a year without surgery, pain medication, and physical therapy) and therefore substantially limited his ability to walk); “If, as the EEOC has concluded, a person who cannot lift more than twenty pounds for “several months” is sufficiently impaired to be disabled within the meaning of the amended Act, ... then surely a person whose broken legs and injured tendons render him completely immobile for more than seven months is also disabled.” Id. at 4. Feldman v. Law Enforcement Associates, 779 F. Supp. 2d 472, 484–85 (E.D.N.C. 2011) (holding that employee stated claim that he was disabled under prong 1 because Transient Ischemic Attack (mini-strokes), although temporary, substantially limited multiple life activities); Pridgen v. Department of Public Works/Bureau of Highways, No. WDQ-08-2826, 2009 WL 4726619, at *4-5 n.17 (D. Md. Dec. 1, 2009) (“Under the ADA Amendments Act of 2008, a person who has lost sight in one eye but retains full use of his other eye is “disabled.” Disability is to be construed “in favor of broad coverage” . . . “). 

162333, at *6 (N.D. Tex. Jan. 18, 2012) (holding that genuine issues of material fact existed as to whether employee, whose depression, panic, anxiety, and acute stress prevented her from “sleep[ing] more than one hour a night,” was substantially limited in sleeping); Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 994–96 (W.D. Tex. Jan. 4, 2012) (holding that employee presented sufficient evidence that her “intermittent back pain, as well as pain, numbness and tingling in her right leg” substantially limited her ability to sleep, sit, stand, lift, and bend and limited the operation of her musculoskeletal functions); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185–86 (E.D. Tex. 2011) (citing cancer’s inclusion in the EEOC’s list of predictable assessments in support of holding that employee’s renal cancer was a disability under prong 1); Lowe v. American Eurocopter, L.L.C., No. 1:10CV24-A-D, 2010 WL 5232523, at *7-8 (N.D. Miss. Dec. 16, 2010) (holding that employee stated claim that she was disabled under prong 1 because her obesity substantially limited her ability to walk).

- Sixth Circuit: Medlin v. Honeywell Analytics, Inc., No. 3-10-0654, 2012 WL 511997, at *5 (M.D. Tenn. Feb. 15, 2012) (holding that injuries sustained by employee in car accident, which “made it difficult for him to sit for long periods” and to climb stairs and ladders, carry heavy things, sleep, and engage in sexual activity, substantially limited major life activities); Thomas v. Werthan Packaging, Inc., No. 3:10-cv-00876, 2011 WL 4915776, at *5 (M.D. Tenn. Oct. 17, 2011) (holding that pro se employee who testified that he might be able to lift twenty pounds, but was not sure for how long, created a genuine dispute as to whether was substantially limited in lifting); See id. (finding pre-ADAAA cases “inapposite and their persuasive authority minimal”); Gesegnet v. J.B. Hunt Transport, Inc., No. 3:09-CV-828-H, 2011 WL 2119248, at *4 (W.D. Ky. May 26, 2011) (holding that employee’s bipolar and anxiety disorders were disabilities under prong 1); Jenkins v. National Board of Medical Examiners, No. 08-5371, 2009 WL 331638, at *2, *4 (6th Cir. Feb. 11, 2009) (vacating judgment of district court that test-taker who “read[] written language in a slow and labored fashion when compared to the general public” was not disabled under prong 1 and remanding case in light of ADAAA, noting that “the categorical threshold scope of the ADA’s coverage has been broadened.”).

* Eighth Circuit: *Brown v. City of Jacksonville*, 711 F.3d 883, 889 & n.6 (8th Cir. 2012) (stating that district court “improperly analyzed Brown’s ADA claim under the more restrictive” pre-amendment definition of “substantially limits” as opposed to “the more generous post-amendment version of the ADA,” but affirming grant of summary judgment to employer on other grounds); *Seim v. Three Eagles Communications, Inc.*, No. 09-CV-3071-DEO, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (holding that employee presented sufficient evidence of a disability because his autoimmune disorder, Graves’ disease, substantially limited the major life activities of “sleeping; standing; speaking; concentrating; thinking; communicating; working; and the functions of his immune, circulatory, and endocrine systems.”).


* Tenth Circuit: *Allen v. SouthCrest Hospital*, 455 F.App’x 827, 833-34 (10th Cir. 2011) (holding that employee’s allegations that migraine medication caused her to sleep after work did not demonstrate that she was substantially limited in caring for herself, but erroneously failing to consider employee’s migraines in their active state and without mitigation measures or migraines’ substantial limitation of neurological functions) (emphasis added); *Gibbs v. ADS Alliance Data System, Inc.*, No. 10-2421-JWL, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011) (holding that genuine issues of material fact existed as to whether employee’s carpel tunnel syndrome, which “affected [employee’s] ability to perform manual tasks,” constituted disability under ADA).

to "most people in the general population," and certainly qualify as a significant restriction" in musculoskeletal functioning).

c. Mitigating Measures

In Sutton and its companion cases, the Supreme Court held that the ameliorative effects of mitigating measures, such as medication, therapy, or learned behavioral modifications, must be considered when determining whether a person was substantially limited in a major life activity.142 This situation created a Catch-22: "the more successful a person [was] at coping with a disability, the more likely it [was] the Court [would] find that they [were] no longer disabled and therefore no longer covered under the ADA."143

The ADAAA explicitly rejects the Supreme Court's holding in Sutton.144 The ADA, as amended, now requires exactly the opposite—courts must determine whether a person is disabled without reference to the ameliorative effects of mitigating measures.145 The exception to this rule is that courts are allowed to consider the ameliorative effects of ordinary eyeglasses or contact lenses when determining whether a disability "substantially limits a major life activity."146

i. ADAAA Statutory Text

- "The purposes of this Act are... to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."147


• 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 ... 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. 148

• "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." 149

ii. EEOC Regulations and Guidance

• The ameliorative effects of mitigating measures, with the exception of ordinary eyeglasses and contact lenses, shall not be considered in determining whether an impairment substantially limits a major life activity. 150

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that ... covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence. 151

149. Id. § 12102(4)(E)(ii) (emphasis added). But see id. § 12113(c) (prohibiting employer from using "qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria . . . is shown to be job-related for the position in question and consistent with business necessity") (emphasis added).
• The EEOC provides new examples of mitigating measures. "Mitigating measures include... (v) Psychotherapy, behavioral therapy, or physical therapy," as well as "assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test," and a "regimen of medicine, exercise and diet."  

• The EEOC’s final regulations remove the proposed regulations’ example of surgical intervention as a mitigating measure. "The Commission has eliminated “surgical interventions, except for those that permanently eliminate an impairment” as an example of a mitigating measure in the regulation, given the confusion evidenced in the comments... [These d]eterminations... are better assessed on a case-by-case basis."  

• “The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.”  

• The non-use of mitigating measures is not relevant to the coverage determination, but may be applicable to defenses.  

The determination of whether or not an individual’s impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures... However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be

152. 29 C.F.R. § 1630.2(j)(5)(v) (2012).  
155. Id.  
156. 29 C.F.R. pt. 1630, app. § 1630.2(j)(4) (2011) (stating that non-ameliorative effects of mitigating measures include “complications that arise from surgery”).  
relevant in determining whether the individual is qualified or poses a direct threat to safety. 158

iii. Case Precedent


- Sixth Circuit: *Verhoff v. Time Warner Cable, Inc.*, 299 F. App’x 488, 494 (6th Cir. 2008) (noting that, under the ADAAA, sleep problems would have to be assessed without regard to use of sleep medication); *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1029 (D. Minn. 2011) (holding that employee with progressive disease that negatively impacted vision was disabled under prong 1 notwithstanding employee’s use of mitigating measures such as “a magnifying glass and/or a pocket telescope. . . . [T]he use of such equipment is not part of the determination of whether a condition

158. *Id.*
substantially limits a major life activity, nor is there any evidence to suggest here that the temporary use of such devices addresses [employee’s] overall visual impairment in the way in which corrective lenses might resolve nearsightedness.”); Handley v. General Security Services Corp., No. 1:07-cv-501, 2009 WL 2132626, at *4 n.5 (S.D. Ohio July 10, 2009) (noting that, under the ADAAA, hearing impairment would have to be assessed without regard to hearing aids); E.E.O.C. v. Burlington North & Santa Fe Railway Co., 621 F. Supp. 2d 587, 593 n.3 (W.D. Tenn. June 3, 2009) (prosthetics no longer considered).

- Ninth Circuit: Rohr v. Salt River Project Agricultural Improvement & Power District, 555 F.3d 850, 861–62 (9th Cir. 2009) (“Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.”).


d. Episodic or in Remission

Before the ADAAA, many courts held that impairments like epilepsy were not substantially limiting because their impacts were episodic.159 Further, many courts discounted the impacts of impairments in remission, like cancer, as too short-lived to be substantially limiting.160 Similarly, in reliance on EEOC regulations that encouraged consideration of the “permanent or long term impact” of an impairment, the Supreme Court in Toyota concluded that an “impairment’s impact must also be permanent or long term” to be substantially limiting.161

The ADAAA rejects these holdings by requiring that courts assess impairments whose impacts are episodic or in remission in their active


state for purposes of determining substantial limitation. In addition, as discussed above, the EEOC has deleted from its regulations the "permanent or long-term impact" language upon which Toyota relied. Relevant excerpts from the text of the ADAAA, the EEOC's regulations and guidance, and case law follow.

i. ADAAA Statutory Text

"An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

ii. EEOC Regulations and Guidance

- The EEOC implicitly rejects Toyota's "permanent or long-term" requirement by deleting such language from the regulations.

- The EEOC provides examples of impairments that are episodic or in remission. These impairments "include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia." Other examples referenced in the regulations include epilepsy, multiple sclerosis, cancer, and PTSD.

- The duration or frequency of an impairment's active state is not relevant.

The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.
iii. Case Precedent

- Second Circuit: *Katz v. Adecco USA, Inc.*, 845 F. Supp. 2d 539, 544-46 (S.D.N.Y. 2012) (holding that genuine issues of material fact existed as to whether employee with remissive breast cancer was disabled); *Negron v. City of New York*, No. 10 CV 2757(RRM)(LB), 2011 WL 4737068, at *11–12 (E.D.N.Y. Sept. 14, 2011) (holding that employee who was injured in firearm accident stated claim that she was disabled under prong 1 because pain and inflammation, when active, substantially limited her ability to perform manual tasks and work).

- Third Circuit: *Britting v. Secretary, Department of Veterans Affairs*, 409 F. App’x 566, 568 (3d Cir. 2011) (acknowledging the ADAAA’s rule of construction requiring that episodic or remissive impairments be looked at in their active state); *Estate of Murray v. UHS of Fairmount, Inc.*, No. 10-2561, 2011 WL 5449364, at *6–8 (E.D. Pa. Nov. 10, 2011) (holding that employee presented sufficient evidence that she was disabled under prong 1 because her depression, when active, substantially limited her ability to think, eat, and sleep); *Medvic v. Compass Sign Co.*, No. 10-5222, 2011 WL 3513499, at *7 (E.D. Pa. Aug. 10, 2011) (holding that employee was disabled under prong 1 because his stutter, when active, substantially limited employee’s ability to communicate); *Chalfont v. U.S. Electrodes*, No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (holding that employee with cancer in remission and heart disease stated claim that he was disabled under prong 1 because his impairments substantially limited normal cell growth and circulatory functions).

- Fourth Circuit: *Feldman v. Law Enforcement Association Corp.*, 779 F. Supp. 2d 472, 484–85 (E.D.N.C. 2011) (holding that employee stated claim that he was disabled under prong 1 because multiple sclerosis, when active, substantially limits normal neurological functions).

- Fifth Circuit: *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 855 (5th Cir. 2010) (stating that the amendments to the ADA “would be very favorable to [plaintiff’s] case if they are applicable, because they make it easier for a plaintiff with an episodic condition [in that case, psoriatic arthritis] . . . to establish that he is an “individual with a disability.””); *Carbaugh v. Unisoft International, Inc.*, No. H-10-
0670, 2011 WL 5553724, at *8, *18 (S.D. Tex. Nov. 15, 2011) (holding that employee was disabled under prong 1 because multiple sclerosis, when active, substantially limits major life activities and giving pre-ADAAA cases "no precedential weight"); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d. 1173, 1185 (E.D. Tex. May 13, 2011) (holding that employee’s renal cancer was a disability under the prong 1 because “renal cancer, when active, “substantially limits” the “major life activity” of “normal cell growth . . . that [employee] may have been in remission when he returned to work . . . is of no consequence.”).


- Tenth Circuit: Allen v. SouthCrest Hospital, 455 F. App’x 827, 833-34 (10th Cir. 2011) (holding that employee was not substantially limited in caring for herself, but erroneously failing to consider whether migraines, when active, substantially limited employee’s major life activities and neurological functions) (emphasis added).

e. Major Life Activities

Like “substantially limits,”169 the term “major life activities” was not defined in the ADA.170 The EEOC originally defined the term to mean “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”171 The Supreme Court in Toyota subsequently narrowed the term to mean “activities that are of central importance to most people’s daily lives.”172

Under the ADA, as amended, the term “major life activities” is now defined.173 The ADAAA expands the definition promulgated by the

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169. See supra Part II.B.2.b.
170. See supra Part II.B.2.b.
EEOC in two significant ways: first, by including additional examples of major life activities, and second, by including "major bodily functions," the latter of which is discussed immediately below in subsection II.B.g of this Article. The rest of this section contains the relevant statutory text, references to the EEOC's regulations and guidance, and case law.

i. ADAAA Statutory Text

- "The purposes of this Act are ... (4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.""

- "[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."

- Rule of Construction No. 3: "An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."

ii. EEOC Regulations and Guidance

- The EEOC rejects Toyota's "central importance" requirement.

174. Id. § 12102(2)(A).
175. Id. § 12102(2)(B).
179. 29 C.F.R. § 1630.2(i)(2) (2012).
"In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability . . . . Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life.""

- The EEOC rejects its former definition of "major life activities" as "those basic activities that the average person in the general population can perform with little or no difficulty."181 "[W]hile the ability of most people to perform the activity is relevant when evaluating whether an individual is substantially limited, it is not relevant to whether the activity in question is a major life activity."182

- In addition to the ADAAA's non-exhaustive examples, the EEOC regulations include "interacting with others," "sitting," and "reaching" as examples of major life activities.183

iii. Case Precedent


180. Id.
obesity substantially limited ability to walk).


f. Major Life Activity of Working

The EEOC’s original regulations implementing the ADA contained several provisions that, read together, placed undue focus on the major life activity of working. Most notably, the regulations required that, in order to be considered substantially limited in “working,” a plaintiff must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes,” and that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. As a result of these regulations and the judicial interpretation of them, “working” became one of the most difficult major life activities in which to prove substantial limitation.

Under the ADA, as amended, “working” is listed as one of many examples of major life activities. However, because the EEOC retains the “class of jobs” or “broad range of jobs” standard, “working” should be a major life activity of last resort for plaintiffs and their lawyers. Whenever possible, plaintiffs and their lawyers should show substantial limitation in at least one major life activity other than working. The

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184. See 29 C.F.R. § 1630.2(j)(3), as amended, 29 C.F.R. § 1630.2; see also NCD 2004 Study, supra note 37, at 46-51, 56 (discussing EEOC’s restrictive interpretation of standard required to show substantial limitation of working).


186. Id.

187. NCD 2004 Study, supra note 37, at 47, 49 (stating that employees “seek[ing] to establish that they are actually substantially limited in working . . . face demanding and at times antagonistic evidentiary burdens.”).


relevant statutory text, together with the EEOC’s new regulations and guidance and judicial decisions, follow.

i. ADAAA’s Statutory Text

- “[M]ajor life activities include . . . working.”

ii. EEOC Regulations and Guidance

- The EEOC streamlined its discussion of the major life activity of working and moved it from the text of the regulations to the appendix. “This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.”

- It is unnecessary to demonstrate a substantial limitation in working in most cases.

In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities . . . . In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person’s ability to work usually substantially limit one or more other major life activities.

- The EEOC has lowered the standard for showing substantial limitation in working. “[T]he determination of coverage under the law should not require extensive and elaborate assessment, and the

190. 42 U.S.C. § 12102(2)(A) (Supp. V 2012). For a more thorough discussion of particular major life activities, such as performing manual tasks, lifting, learning, and seeing, see East, supra note 177.


193. See id.

194. Id. (emphasis added).
EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act."\textsuperscript{195} The appendix retains the terms "class of jobs" and "broad range of jobs in various classes" language, but these terms "will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act."\textsuperscript{196}

- The EEOC retains the concept of a single specific job.\textsuperscript{197} "Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working."\textsuperscript{198}

iii. Case Precedent

- \textit{Feldman v. Law Enforcement Associate}, 779 F. Supp. 2d 472, 484–85 (E.D.N.C. 2011) (holding that both Transient Ischemic Attack ("TIA" or mini-strokes), although temporary, and multiple sclerosis, substantially limited multiple life activities including working); see id. at 485 ("[E]ven if [employee’s] TIA "only temporarily limited [his] ability to work, the stringent requirements of \textit{Toyota Motor} may be rejected by the amended statute in favor of a more inclusive standard."); \textit{Kinney v. Century Services Corp. II}, No. 1:10-cv-00787-JMS-DML, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011) (holding that depression requiring inpatient treatment substantially limited ability to work). \textit{But see Allen v. SouthCrest Hospital}, 455 F. App’x 827, 835 (10th Cir. 2011) (holding that employee’s migraines did not substantially limit her ability to work); \textit{Zurenda v. Cardiology Associates, P.C.}, No. 3:10–CV–0882, 2012 WL 1801740, at *8–9 (N.D.N.Y. May 16, 2012) (holding that employee’s knee injury did not substantially limit her ability to work).

\textsuperscript{195} Id.  
\textsuperscript{196} Id.  
\textsuperscript{197} See id.  
\textsuperscript{198} Id.
g. Major Bodily Functions

Under the original ADA, many courts held that substantial limitation in a major bodily function, such as liver function, did not qualify as a disability. The ADAAA expands the term “major life activity” to include the operation of “major bodily functions.” Under the ADAAA, these individuals no longer need to show how their disability limits them in specific activities; the substantial limitation of a major bodily function is sufficient to qualify them for protection. Because the major bodily functions analysis makes it easier for an individual to qualify as disabled, employees’ lawyers should always consider the client’s limitations in major bodily functions. This will often be the clearest path to coverage, and in many cases should be the employee’s primary argument for coverage. The ADAAA’s textual changes discussing this path, together with the EEOC’s new regulations and guidance and judicial decisions interpreting “major bodily functions,” follow.

i. ADAAA Statutory Text

“[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.”

ii. EEOC Regulations and Guidance

- The inclusion of “major bodily functions” is an important change to the definition. “The ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of “major life activities”.

199. See Furnish v. SVI Sys., Inc., 270 F.3d 445, 449-50 (7th Cir. 2001) (holding that an individual with a cirrhosis of the liver caused by Hepatitis B did not substantially limit him in a major life activity because liver function was “not integral to one’s daily existence”).
201. See id.
202. Id.
under the ADA. ”

- The EEOC provides additional examples of major bodily functions than found in the statute. “Major life activities include, but are not limited to . . . [t]he operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”

- “The operation of a major bodily function includes the operation of an individual organ within a body system.” Organs include “the kidney, liver, pancreas, or other organs.”

iii. Case Precedent

- Second Circuit: *McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012) (implying that the district court erred in not considering autism’s substantial limitation of brain function, but affirming grant of summary judgment to employer on other grounds); *Katz v. Adecco USA, Inc.*, 845 F. Supp. 2d 539, 548 (S.D.N.Y. 2012) (holding that cancer, when active, substantially limits normal cell growth).


- Fourth Circuit: *Feldman v. Law Enforcement Associates Corp.*, 779

205. Id.
F. Supp. 2d 472, 484–85 (E.D.N.C. 2011) (holding that employee stated claim that he was disabled under prong 1 because episodic flare ups of multiple sclerosis, when active, substantially limit normal neurological functions).

- Fifth Circuit: Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 994–96 (W.D. Tex. 2012) (holding that employee was disabled under prong 1 because “intermittent back pain, as well as pain, numbness and tingling in her right leg” substantially limited musculoskeletal functions); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d. 1173, 1185 (E.D. Tex. 2011) (holding that employee’s renal cancer was disability under prong 1 because “renal cancer, when active, ‘substantially limits’ the ‘major life activity’ of ‘normal cell growth’”); Meinelt v. P.F. Chang’s China Bistro, Inc., 787 F. Supp. 2d 643, 651–52 (S.D. Tex. 2011) (holding that employee was disabled under prong 1 because brain tumor substantially limited major bodily function of “normal cell growth” and “brain functions”).

- Seventh Circuit: Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010) (holding that employee was disabled under prong 1 because remissive renal cancer, when active, substantially limited major life activity of normal cell growth); Horgan v. Simmons, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010) (holding that employee stated claim that he was disabled under prong 1 because HIV substantially limited “the function of [the] immune system”).

- Eighth Circuit: Seim v. Three Eagles Communications Inc., No. 09-CV-3071-DEO, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (autoimmune disorder (Graves’ disease) substantially limited immune, circulatory, and endocrine functions).

h. Reasonable Accommodation Under “Record of” Prong

Prong 2, or the “record of” prong, retains its original structure under the ADA, as amended. This prong is most important in cases in which a person is seeking an accommodation for an impairment that has completely resolved—for example, a broken hip that has healed.207 A

207. See, e.g., 29 C.F.R. § 1630.2(k)(3) (2012) (“[A]n employee with an impairment that
person seeking an accommodation for an impairment that has not completely resolved—i.e., it may return—should claim coverage under the “record of” prong as well as the “actual disability” prong. 208 “This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active.” 209

Of course, a person not seeking an accommodation should claim coverage under the “regarded as” prong, which provides coverage to a person treated adversely based on a perceived impairment. 210 The relevant EEOC regulations and case precedent follow.

i. EEOC Regulations and Guidance

“An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.” 211

ii. Case Precedent

Davis v. Vermont, Department of Corrections, 868 F. Supp. 2d 313, 326-27 (D. Vt. 2012) (holding that employee who returned to work after medical absence for hernia surgery stated claim that he was disabled under prong 2).

III. A CHECKLIST FOR PLEADING DISABILITY

This section provides a checklist for plaintiffs and their lawyers to

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211. 29 C.F.R. § 1630.2(k)(3) (2012).
use to help take advantage of all that the ADAAA has to offer in pleading disability under the ADA, as amended.\textsuperscript{212} Consistent with the ADAAA’s purpose, which is “to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis,”\textsuperscript{213} this checklist is not intended to be a talismanic test for pleading disability. Rather, it is intended to point plaintiffs and their attorneys to the most important changes made by the ADAAA, as well as the statutory sections, regulatory provisions, and case law precedent that may be cited in pleadings to support those changes. Findings from our study are included where appropriate. Although plaintiffs and their lawyers would be wise to consult this checklist, they are not required to follow the checklist to the letter to make out a successful claim of disability under the ADA, as amended.

A. Reference that the ADA has been amended

1. State that the claim is brought under the “ADA as Amended” and cite the statute (not “under the ADAAA”; the ADA is the discrimination statute that supports the claim).

* 57.34\% of complaints failed to reference the “ADA as Amended.”\textsuperscript{214}

2. State that, because of the date of the actions complained of, the greatly expanded definition of the ADA Amendments Act of 2008 (and/or parallel state law changes) applies.

* Only two complaints (1.40\% of complaints) stated that the expanded definitions of the ADAAA apply because of the date the action occurred.

\textsuperscript{212} There are, of course, other things besides those relating to the definition of disability that should routinely be considered for inclusion in ADA complaints. For example, an ADA complaint should: state that administrative remedies have been exhausted and reference a “right to sue” letter; state that the employer has 15 or more employees; plead that the employee was a qualified individual with disability; and plead, with specificity, that the plaintiff can perform the essential functions of the job. Our study also demonstrated deficiencies in these areas. See generally infra app. B.


\textsuperscript{214} Reviewers were instructed to “Answer “yes” if the complaint uses the words “ADA as Amended,” “ADA as amended by the ADA Amendments Act,” or reflects that the ADA has been amended.” ASU Work-Life Law and Policy Clinic, ADA Law-School Alliance: Coding Key, 2013 (on file with authors).
B. Identify the Impairment

1. Expressly identify the diagnosis by name and refer to it as a physical or mental impairment; do not simply call it a “disability” or impairment or the like.

   * Of the complaints that allege claims under prong 1 and/or prong 2, 15.33% fail to reference any impairment by name; 18.18% of all complaints failed to do so.

2. Review Appendix A. If the impairment is included in the list, include a reference to the EEOC regulation or case(s) that has already found the impairment to be a disability.

3. If the impairment is physical, use the term “physiological,” which is the term used by the EEOC to define a physical impairment.

   * No complaint used the term “physiological” to identify a physical impairment.

4. Briefly explain how the impairment affects a body system if physical.

C. Allegations to Include in Non-Accommodation Claims

1. When alleging a non-accommodation claim, state that the employee has a disability under the newly expanded regarded as prong, as follows.

   * Despite the breadth of the regarded as prong, a staggering 62.50% of complaints alleging a non-accommodation claim failed to raise it. Numerous courts share the apparent confusion regarding the newly expanded regarded as prong.215

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2. Expressly identify the prohibited action (e.g., failure to hire, termination, demotion, harassment, discrimination by association).

3. State that the prohibited action occurred because of an actual or perceived physical or mental impairment, and include causation facts (direct or pretext-type evidence).

4. State that the employee does not have to identify any major life activity or major bodily functions that are substantially limited, and cite the relevant ADAAA/EEOC regulations.\(^{216}\)

5. In anticipation of “transitory and minor” defense:

(a) state that the duration—or expected duration—of the impairment (i.e., the diagnosis—not just the manifestations) is greater than 6 months (don’t use word “transitory” because that is a defense, not an element of the claim);

or

(b) if the duration is—or is expected to be—less than 6 months (i.e., the diagnosis—not just the manifestations), state facts to show that the impairment is more than minor (e.g., showing of pain) (29 C.F.R. § 1630.2(j)(4)(ii)) (don’t use word “minor” because it is a defense, not an element of the claim).\(^{217}\)

6. The regarded as prong is the easiest way to prove coverage in a non-accommodation case. However, because some courts continue to misunderstand this prong, employees’ lawyers should, in an abundance of caution, also plead prong 1 (actual impairment) and/or prong 2 (past impairment) in a non-accommodation case. Subsection D discusses pleading “disability” under these two prongs.

D. Allegations to include in Accommodation Claims

1. Plead prong 1 and/or 2 if you are alleging an accommodation claim.\(^{218}\) If the claim can be construed as a non-accommodation claim,

\(^{216}\) See supra part II.B.1.a.ii for further discussion.

\(^{217}\) See 29 C.F.R. § 1630.2(j)(4)(ii).

\(^{218}\) The only difference between prongs 1 ("actual disability") and 2 ("record of" disability) is that the former asks for evidence of a present impairment while the latter asks for a "record of"
you should also plead the regarded as prong.\textsuperscript{219}

2. State that “major life activity” and “substantial limitation” are to be construed as broadly as possible and cite to ADAAA/EEOC regulations.

3. State that, under the ADAAA, “major life activities” include “major bodily functions.”

4. List at least one \textit{major bodily function} that is substantially limited by the identified impairment, and allege facts about how the major bodily function is substantially limited by the identified impairment.

5. If applicable, cross-reference the relevant major bodily function(s) in the ADA and/or EEOC regulations.

6. List at least one \textit{major life activity} that is substantially limited by the identified impairment, cross-reference the relevant major life activity in the ADA and/or EEOC regulations; and allege facts about how the major life activity is substantially limited by the identified impairment.

7. Do not list the major life activity of “working” except as a last resort, and—even then—do not make it the \textit{sole} major life activity alleged. (“Working” still requires evidence (albeit lesser now) regarding the impact on a “broad range or class of jobs.”)

\textbf{*} 17.52\% of complaints that included prong 1 and/or 2 claims listed working as a major life activity that was substantially limited by the identified impairment.

\textbf{*} 7.30\% of complaints that included prong 1 and/or 2 claims listed working as the only major life activity that was substantially limited.\textsuperscript{220}

\footnotesize{the impairment. The rest of the analysis is essentially the same.

\textsuperscript{219} See supra part III.C. For example, the failure to grant accrued leave to a person with a disability gives rise to an accommodation claim, but it might also be construed to give rise to a non-accommodation (disparate treatment) claim—i.e., a person with a disability is denied leave while those without disabilities are granted leave.

\textsuperscript{220} See infra app. C. (reflecting 41.67\% of all complaints that included working as a major life activity).}
8. State "[i] the condition under which the individual performs the major life activity; [ii] the manner in which the individual performs the major life activity; [iii] and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity."\textsuperscript{221}

9. Specifically note that "condition," "manner," and "duration" are \textit{not} "required "factors" that must be considered as a talismanic test."\textsuperscript{222}

10. If applicable, state that the impairment falls within the EEOC's list of "predictable assessments,"\textsuperscript{223} and note that it is \textit{not necessary} to include an analysis of "condition," "manner," or "duration" for an impairment included in the EEOC's list of "predictable assessments."\textsuperscript{224}

* No complaint referenced the "predictable assessments" regulation, even when the impairment was included in the list.

11. State that the impairment must be assessed without regard to mitigating measures, and cite to the ADAAA and/or EEOC regulations.\textsuperscript{225}

12. Identify the mitigating measure(s) used (e.g., medication, therapy), and describe what the condition would be like without the mitigating measure(s).

* Only 15.33\% of cases identified a mitigating measure. Only seven complaints (or a third of the cases that identified one) described what the condition would be like without mitigating measures.

13. If the impairment is episodic or in remission, state as much, and (i) note that, under the ADAAA, the impairment must be assessed \textit{in its active state}, with cites to the ADAAA and/or EEOC regulations,\textsuperscript{226} and (ii) describe the impacts of the impairment in that active state.

* At least 39.16\% of complaints identified typically episodic

\textsuperscript{221} 29 C.F.R. § 1630.2(j)(4)(i) (2012).
\textsuperscript{223} 29 C.F.R. § 1630.2(j)(3)(ii)-(iii) (2012).
impairments (e.g., mental impairments, cancer, epilepsy), however, only 5.84% stated that the condition was in remission or episodic. None alleged that the impairment must be assessed in its active state, with citations, and a description of the active state.

CONCLUSION

Five years ago, Congress passed the ADAAA, which reinstated the ADA's broad scope of coverage. Although case law under the ADAAA is still in its infancy, the ADAAA appears to be having its intended effect; plaintiffs are prevailing under the definition of disability where before they would have failed. While these preliminary results are encouraging, our empirical study of ADA complaints reveals that plaintiffs and their lawyers could be doing a much better job of taking advantage of all that the ADAAA has to offer. This Article will help plaintiffs and their attorneys by pointing them to the most important changes made by the ADAAA, as well as the statutory sections, regulatory provisions, and case law precedent that may be cited in support. With this roadmap in hand, we hope to make it easier for plaintiffs and their lawyers to plead disability under the ADA, as amended, so that courts “can get down to the business of truly opening the doors of opportunity to all people with disabilities”\textsuperscript{227} by focusing on what really matters: discrimination.

APPENDIX A

ADAAC Disabilities “At a Glance”

The EEOC and/or the courts have found the following impairments to be disabilities under prongs 1 and/or 2 of the ADA, as amended, for purposes of ruling on a motion to dismiss or summary judgment motion. This list is not exhaustive; it is intended to show the breadth of the ADA’s definition of disability.


228. In a section of its ADAAA regulations, entitled “Predictable assessments,” the EEOC lists impairments that, “[g]iven their inherent nature, . . . will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity.” 29 C.F.R. § 1630.2(j)(3)(ii) (2012).

229. In all cases cited, disability was found to be a disability for purposes of denying a motion to dismiss or ruling on a motion for summary judgment.


Diabetes – 29 C.F.R. § 1630.2(j)(3)(iii) (2011); Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act, EEOC, http://www.eeoc.gov/laws/types/diabetes.cfm (last visited Oct. 12, 2013) (“As a result of changes made by the ADAAA, individuals who have diabetes should easily be found to have a disability.”); Rohr v. Salt River Project Agricultural Improvement & Power District, 555 F.3d 850 (9th Cir. 2009).


Epilepsy – 29 C.F.R. § 1630.2(j)(3)(iii) (2011); Questions &

\(^{230}\) The plaintiff's claim in Franchi was brought pursuant to Title III of the ADA. 656 F. Supp. 2d 252, 256 (D.N.H. 2009).
Answers about Epilepsy in the Workplace and the Americans with Disabilities Act, EEOC, http://www.eeoc.gov/laws/types/epilepsy.cfm (last visited Oct. 12, 2013) ("As a result of changes made by the ADAAA, individuals who have epilepsy should easily be found to have a disability.").


Intellectual Disability (formerly termed “mental retardation”) – 29 C.F.R. § 1630.2(j)(3)(iii) (2011); Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act, EEOC, http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (last visited Oct. 12, 2013) ("As a result of changes made by the ADAAA, individuals who have mental retardation should easily be found to have a disability.").

231. The plaintiff’s claim in Kravits was brought pursuant to the Rehabilitation Act, which uses the same definition of disability as the ADA. Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *1 (W.D. Pa. Feb. 24, 2012).
individuals who have an intellectual disability should easily be found to have a disability.


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232. See id.
Psoriatic Arthritis – Carmona v. Southwest Airlines Co., 604 F.3d 848, 855 (5th Cir. 2010). 233


233. Because the plaintiff’s case was “filed, tried, and decided” prior to the ADAAA’s enactment, the Fifth Circuit court applied the pre-ADAAA definition of disability and found the plaintiff to be disabled. Carmona v. Southwest Airlines Co., 604 F.3d 848, 855-57 (5th Cir. 2010). Significantly, the court noted that the ADAAA’s “amendments would be very favorable to Carmona’s case if they are applicable, because they make it easier for a plaintiff with an episodic condition like Carmona’s to establish that he is an “individual with a disability.”” Id. at 855.

APPENDIX B

The Survey's Matrix

This appendix contains questions used to review each complaint.235

Case Name:
Date Filed (or Removed to Federal Court):
Court Filed in (by Circuit & District Court):
Represented (and name of attorney or law firm) or Pro Se:
False Positive?236

<table>
<thead>
<tr>
<th>In all cases:</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brought by an applicant</td>
<td></td>
</tr>
<tr>
<td>States administrative remedies have been exhausted OR references “right to sue” letter</td>
<td></td>
</tr>
<tr>
<td>States that the claim is brought under the “ADA as Amended”</td>
<td></td>
</tr>
<tr>
<td>States that, because of the date of the actions complained of, the greatly expanded definition of the ADA Amendments Act applies</td>
<td></td>
</tr>
<tr>
<td>Pleads that employer has 15 or more employees</td>
<td></td>
</tr>
<tr>
<td>Pleads that employee was a qualified individual with disability</td>
<td></td>
</tr>
<tr>
<td>Pleads, with specificity, that claimant can perform the essential functions of the job</td>
<td></td>
</tr>
<tr>
<td>Identifies specific impairment by name</td>
<td></td>
</tr>
<tr>
<td>Refers to impairment as “physical” or “mental”</td>
<td></td>
</tr>
<tr>
<td>If physical impairment, explains it’s “physiological” (If mental impairment, note as such in comments)</td>
<td></td>
</tr>
</tbody>
</table>

235. See supra note 18 for a description of the study. The questions contained in the appendix were converted into an online survey located on Survey Monkey for ease of analysis. Reviewers were given the opportunity to add comments or questions after each question. In preparation for the data collection, reviewers were given instruction on the ADA as amended, and provided with a coding key to facilitate accuracy of responses. Further, one of the authors also reviewed each complaint along with its corresponding coding, and where necessary, revised the coding, to assist with consistency amongst reviewers.

236. If the complaint was a false positive (not a Title I complaint), reviewers were instructed to explain in the comments why it was a false positive. Reviewers were further instructed to skip the rest of the questions if the complaint was a false positive. If the complaint alleged only an associational disability question claim, reviewers were instructed to skip to the last section of questions after answering yes to this question.
Disability is alleged under actual disability and/or record of disability (first/second prong)\textsuperscript{237} & Yes/No
\hline
States “major life activity” and “substantial limitation” are to be construed as broadly as possible & \\
States that, under ADAAA, “major life activities” include “major bodily functions”; lists at least one “major bodily function” that is substantially limited; and alleges facts about how it is substantially limited & \\
States that “major life activities” include “major bodily functions” & \\
States that “major bodily function” is limited, e.g., uses phrase “major bodily function” & \\
Lists at least one “major bodily function” that is substantially limited & \\
Alleges facts about how the “major bodily function” is substantially limited & \\
Lists at least one “major life activity,” references statute or regulation recognizing such activity, and alleges facts about how it is substantially limited & \\
States “major life activity” is affected, e.g., uses phrase “major life activity” & \\
Lists at least one “major life activity” & \\
A “major life activity” other than a “major bodily function” is included & \\
References statute or regulation recognizing “major life activity” & \\
Alleges facts about how the “major life activity” is substantially limited & \\
Lists more than one life activity if “working” is alleged & \\
States that impairment falls within list of “predictable assessments” (29 C.F.R. § 1630.2(j)(3)(ii)-(iii)) & \\
If list of “predictable assessments” is not applicable, states (i) duration and (ii) pain of impairment. (29 C.F.R. § 1630.2(j)(4)) & \\
States that condition must be assessed without regard to mitigating measures, and cites to statute (42 U.S.C. § 12102(4)(E)) and 29 C.F.R. § 1630.2(j)(3)(ii)-(iii) & \\
\hline
\textsuperscript{237} If the answer to this question was no, reviewers were instructed to skip the remaining questions in this section and proceed to the prong 3 questions.
<table>
<thead>
<tr>
<th>States that condition must be assessed without regard to mitigating measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cites to mitigating measures statute (42 U.S.C. § 12102(4)(E)) and/or mitigating measures regulation, 29 C.F.R. § 1630.2(j)(3)(ii)-(iii)</td>
</tr>
<tr>
<td>Identifies mitigating measure(s) used (e.g., meds, therapy)</td>
</tr>
<tr>
<td>Describes what condition would be like without mitigating measure(s)</td>
</tr>
<tr>
<td>If applicable, states that (i) condition is in remission or is episodic; (ii) explains that, under ADAAA, it must be assessed in its active state, with cites to statute (42 U.S.C. § 12102(D)) and regs; and (iii) describes the symptoms in that active state (explain in comments)</td>
</tr>
<tr>
<td>If applicable, states that condition is in remission or is episodic</td>
</tr>
<tr>
<td>If applicable, explains that condition must be assessed in its active state</td>
</tr>
<tr>
<td>If applicable, cites to statute (42 U.S.C. § 12102(D)) and/or regulations on active state</td>
</tr>
<tr>
<td>If applicable, describes the symptoms in that active state</td>
</tr>
<tr>
<td>&quot;Regarded as having a disability&quot; claim is alleged (third prong) 238</td>
</tr>
<tr>
<td>Expressly identifies the actual or perceived physical or mental impairment (and, if physical, uses the term physiological)</td>
</tr>
<tr>
<td>States prohibited action occurred because of actual or perceived physical or mental impairment, and includes causation facts (direct or pretext-type evidence)</td>
</tr>
<tr>
<td>States prohibited action occurred because of actual or perceived physical or mental impairment</td>
</tr>
<tr>
<td>Alleges causation facts (direct or pretext-type evidence)</td>
</tr>
<tr>
<td>Identifies the prohibited action (state what in comments)</td>
</tr>
<tr>
<td>Provides and cites that π does not have to identify any</td>
</tr>
</tbody>
</table>

238. If the answer to this question was no, reviewers were instructed to skip the remaining questions in this section and proceed to the type of discrimination questions.
<table>
<thead>
<tr>
<th>Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;major life activity&quot; or &quot;major bodily functions&quot; that are substantially limited</td>
<td>States that π does not have to identify any &quot;major life activity&quot; or &quot;major bodily functions&quot; that are substantially limited</td>
</tr>
<tr>
<td>Provides citation for statement that π does not have to identify any &quot;major life activity&quot; or &quot;major bodily functions&quot; that are substantially limited</td>
<td>States that the duration—or expected duration—of the impairment (i.e., the diagnosis) is greater than 6 months</td>
</tr>
<tr>
<td>If duration is alleged to be less than—or expected to be less than—6 months, π states facts to show that impairment is more than minor (e.g., showing of pain)</td>
<td>(29 C.F.R. § 1630.2(j)(4)(ii))</td>
</tr>
<tr>
<td>Avoids the word &quot;transitory&quot;</td>
<td>Avoids the word &quot;minor&quot;</td>
</tr>
<tr>
<td>The following type of discrimination is alleged:</td>
<td>Discrimination in conditions of employment (42 U.S.C. § 12112(a))</td>
</tr>
<tr>
<td>Harassment based on disability</td>
<td>Failure to accommodate claim</td>
</tr>
<tr>
<td>If failure to accommodate is alleged, is it the only claim brought?</td>
<td>Retaliation claim</td>
</tr>
<tr>
<td>Associational disability claim</td>
<td>Additional Comments 239</td>
</tr>
</tbody>
</table>

239. Reviewers were asked to "[n]ote if the case: (1) was removed from state court in the comments, or (2) involves an FMLA or other discrimination claim." 30.77% of complaints also involved allegations relating to leave; 20.28% also involved another type of discrimination claim (most frequently based on age).
## APPENDIX B

### Select Findings from the Study

<table>
<thead>
<tr>
<th><strong>ALL CIRCUITS REVIEWED</strong></th>
<th><strong>All Complaints (%)</strong></th>
<th><strong>Represented by Counsel (%)</strong></th>
<th><strong>Pro Per Plaintiff (%)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of ADA Title I Complaints</td>
<td>143</td>
<td>118</td>
<td>25</td>
</tr>
<tr>
<td>States that the claim is brought under the “ADA as Amended”</td>
<td>42.66</td>
<td>44.92</td>
<td>32.00</td>
</tr>
<tr>
<td>Identifies specific impairment by name</td>
<td>81.82</td>
<td>83.90</td>
<td>72.00</td>
</tr>
<tr>
<td>Refers to impairment as “physical” or “mental”</td>
<td>23.78</td>
<td>24.58</td>
<td>20.00</td>
</tr>
<tr>
<td>Disability is alleged under actual disability and/or record of disability</td>
<td>95.80</td>
<td>96.61</td>
<td>92.00</td>
</tr>
<tr>
<td>States that “major life activity” includes “major bodily functions”</td>
<td>1.40</td>
<td>1.69</td>
<td>0.00</td>
</tr>
<tr>
<td>States that a “major bodily function” is limited</td>
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<tr>
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<td>If failure to accommodate is alleged, it is the only discrimination claim</td>
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### Second Circuit

- **Number of ADA Title I Complaints**: 47%
- **Represented by Counsel (%)**: 37%
- **Pro Se Plaintiff (%)**: 10%
- **States that the claim is brought under**: 53.19%

**All Complaints (%)**: 73%

**Represented by Counsel (%)**: 48.65%

**Pro Se Plaintiff (%)**: 70.00%
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<td>States that condition is in remission or is episodic</td>
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