PRACTITIONERS' NOTES

THE ADA AMENDMENTS ACT: DRAMATIC CHANGES IN COVERAGE

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INTRODUCTION AND BACKGROUND

Ever since the Americans with Disabilities Act ("ADA") was passed in 1990, employers, government agencies, and courts have struggled with the basic question of whether an individual's condition was a covered "disability." In fact, thousands of federal court cases, including several U.S. Supreme Court cases, have revolved around this issue, often leading to decisions seemingly at odds with the purposes of the ADA. As a result of years of cases from some very conservative courts—which rejected alleged disabilities because the conditions were not considered "severe" enough—Congress amended the law in September 2008 by passing the ADA Amendments Act of 2008[1] ("ADAAA").

To be covered under the original ADA, an individual must first show that s/he has a disability—a "physical or mental impairment" that "substantially limits" a "major life activity."[2] The term "disability" also

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1. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified in scattered sections of 42 U.S.C.) (signed by President Bush on September 25, 2008). The effective date of the ADAAA is January 1, 2009. *Id.* § 8. Cases arising prior to this date are covered under the pre-ADAAA standards and caselaw.

2. Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2)(A) (2000).

includes having a "record of" such an impairment, or being "regarded as" having such an impairment.[3] As discussed below, the ADAAA's major changes include the following: (1) providing a non-exclusive list of "major life activities," and expanding what this term includes;[4] (2) reversing two major U.S. Supreme Court cases which narrowly interpreted when a condition "substantially limits" a major life activity;[5] (3) expanding the "regarded as" category, by covering an individual subject to an adverse action taken because of any impairment (with limited exceptions);[6] and (4) reversing court cases which have held that employers must accommodate individuals who are only "regarded as" having disabilities.[7]

I have discussed these changes in the context of a step-by-step ADA analysis—first looking at "impairment," then focusing on "major life activities," then examining the elements of showing "substantially limits," followed by a discussion of "record of" and "regarded as" issues.

WHETHER AN INDIVIDUAL HAS AN IMPAIRMENT

The first question in an ADA case is whether the individual has an "impairment."[8] The term is very broad and includes virtually any physical or mental disorder (unless the disorder—such as pyromania—was expressly excluded for political reasons).[9] As a result, courts have found that most disorders are impairments.[10] For example, in *Agnew v. Heat Treating Services of America*,[11] the court noted that a bad back would be an impairment.[12] Similarly, in *Benoit v. Technical Manufacturing Corp.*,[13] the court noted that knee strains, caused either by the employee's improper lifting techniques or by his weight gain,

3. *Id.* § 12102(2)(B)(C).

4. *See* ADAAA § 4(a) (requiring the definition of a disability under the ADAAA be broadly construed).

5. *Id.* § 2(b)(2)-(5).

6. *Id.* § 4(a).

7. *Id.* § 2(b)(3).

8. *See* Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 194 (2002) ("[t]o qualify as disabled under subsection (A) of the ADA's definition of disability, a claimant must initially prove that he or she has a physical or mental impairment"); *see also* 42 U.S.C. § 12102(2)(A).

9. *See* 29 C.F.R. § 1630.2-.3 (2003) (listing physical and mental disorders that are both included and excluded from the definition of impairment under the original ADA).

10. *See infra* notes 11-20 and accompanying text.

11. No. 04-2531, 2005 U.S. App. LEXIS 27884 (6th Cir. Dec. 14, 2005).

12. *Id.* at *12.

13. 331 F.3d 166 (1st Cir. 2003).

were "impairments."[14] In *Arrieta-Colon v. Wal-Mart, Inc.*,[15] the court did not disturb the jury's finding that the plaintiff's erectile dysfunction, which required a penile implant (having the side effect of a "constant semi-erection"), was an impairment.[16] Likewise, in *Sinclair Williams v. Stark*,[17] the court noted that the plaintiff's migraine headaches were an impairment.[18] In *Cella v. Villanova University*,[19] the court held that the plaintiff's "tennis elbow" was an impairment under the ADA.[20]

An earlier version of the ADAAA, called the ADA Restoration Act, would have changed the definition of "disability" to say that any impairment is automatically a covered disability, regardless of the seriousness of the impairment.[21] However, after hearings on the ADA Restoration Act, Congress instructed the various interest groups to cooperate in rewriting the legislation.[22] When the ADAAA was introduced (replacing the ADA Restoration Act), it followed the language of the ADA, stating that an impairment must substantially limit a major life activity to be considered a "current" or "record of" disability.[23]

WHETHER A MAJOR LIFE ACTIVITY IS EVEN AFFECTED

Once an impairment has been identified, the ADA has required that the impairment affect a "major life activity."[24] However, there has been quite a bit of controversy over what are life's major activities. As discussed below, the ADAAA clarifies the issue.

The U.S. Supreme Court stated that "major life activities" are

14. *Id.* at 176.

15. 434 F.3d 75 (1st Cir. 2006).

16. *Id.* at 79-80, 88.

17. No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. Mar. 23, 2001).

18. *Id.* at *13.

19. No. 03-1749, 2004 U.S. App. LEXIS 21740 (3d Cir. Oct. 19, 2004).

20. *Id.* at *3.

21. *See* ADA Restoration Act, H.R. 3195, 110th Cong., 1st Sess. § 4 (2007). Section 4 of the ADA Restoration Act proposed defining the term "disability" to include any individual with a "physical or mental impairment," as opposed to an impairment that substantially limits a major life activity. *Compare id.*, *with* Americans with Disabilities Act (ADA), 42 U.S.C. § 12102(2)(A) (2000).

22. *See ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the H. Comm. On Education and Labor*, 110th Cong. 59-60 (2008).

23. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008). As discussed below, the ADAAA changed the definition of "regarded as" disabilities, no longer requiring a substantial limitation. *Id.*

24. 42 U.S.C. § 12102(2)(A).

activities "that are of central importance to daily life."[25] For example, the Court stated that for "manual tasks" to be a major life activity, "the manual tasks in question must be central to daily life."[26] If any particular manual task does not qualify as a major life activity, "then together they must do so."[27] In *Frazee v. City of Independence*,[28] a post-*Toyota* case, the court noted that the "central inquiry is whether claimant is unable to perform tasks central to most people's lives."[29]

There have been many cases in which the Equal Employment Opportunity Commission ("EEOC") and courts have been forced to consider what are the "major life activities." The EEOC has been very expansive. In its regulations, the EEOC has stated that the major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[30] In the Appendix to its regulations, the EEOC added sitting, standing, lifting, and reaching.[31] In its Compliance Manual, the agency added mental/emotional processes such as thinking, concentrating, and interacting with others.[32] In a 1997 policy guidance, the EEOC added "sleeping" as a major life activity.[33]

With some exceptions, courts have generally been broad in determining what are life's major activities. For example, cognitive functions have generally been held to be major life activities. In *Battle v. UPS, Inc.*,[34] the court held that the "ability to perform cognitive functions on the level of an average person," thinking, and concentrating are major life activities.[35] Similarly, in *Brown v. Cox Medical Centers*,[36] the court noted that the "ability to perform cognitive functions" is a major life activity.[37] In *Gagliardo v. Connaught Laboratories, Inc.*,[38] the court held that "concentrating and remembering (more generally,

25. Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 197 (2002).
26. *Id.*
27. *Id.*
28. No. 02-2596, 2003 U.S. App. LEXIS 2462 (8th Cir. Feb. 12, 2003).
29. *Id.* at *2.
30. 29 C.F.R. § 1630.2(i) (2008).
31. 29 C.F.R. Part 1630, app. § 1630.2(i) (2008).
32. *Definition of the Term Disability*, EEOC Compl. Man. (BNA) § 902.3(b) (2000).
33. *Enforcement Guidance on Psychiatric Disabilities And the Americans With Disabilities Act*, No. 915.002, EEOC Compl. Man. (BNA) ¶ 3 (Mar. 25, 1997).
34. 438 F.3d 856 (8th Cir. 2006).
35. *Id.* at 861 (quoting Brown v. Lester E. Cox Med. Ctrs., 286 F.3d 1040, 1045 (8th Cir. 2002)).
36. 286 F.3d 1040 (8th Cir. 2002).
37. *Id.* at 1045.
38. 311 F.3d 565 (3d Cir. 2002).

cognitive function)" are major life activities.[39] Some federal courts have suggested that "interacting with others" might not be a major life activity. For example, in *Davis v. University of North Carolina*,[40] the court noted that it has "some doubt" about whether the "ability to get along with others is a major life activity."[41] In *Steele v. Thiokol Corp.*,[42] the court held that difficulty interacting with co-workers is not a disability,[43] and in *Cameron v. Community Aid for Retarded Children, Inc.*,[44] the court noted that there is some question as to whether "interacting with others" is a major life activity.[45] Similarly, another federal court has held that "caring for others" is not a major life activity.[46]

Courts have generally held that bodily waste functions are major life activities. For example, in *Workman v. Frito-Lay, Inc.*,[47] the court noted that a jury could conclude that controlling one's bowels is a major life activity.[48] As a result, the employee's spastic colon, which occasionally manifested itself in constipation and diarrhea, could be a disability.[49] In *Heiko v. Colombo Savings Bank, F.S.B.*,[50] the court held that "elimination of bodily waste is a 'major life activity'" because it "is basic to any person's daily regimen," it is "a daily activity that the average person can accomplish with little effort," and it is "of life sustaining importance.[51] In *Fiscus v. Wal-Mart Stores, Inc.*,[52] the court held that the employee, who had no kidney function, was substantially

39. *Id.* at 569. *But see* Littleton v. Wal-Mart Stores, Inc., No. 05-12770, 2007 U.S. App. LEXIS 11150, *8-9 (11th Cir. May 11, 2007) (although "learning" is a major life activity, "it is unclear whether thinking, communicating and social interaction are 'major life activities'"); Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1130 (10th Cir. 2003) ("concentration" is not itself a major life activity); Hill v. Metro. Gov't of Nashville, No. 02-5305, 2002 U.S. App. LEXIS 26276, at *5 (6th Cir. Dec. 17, 2002) (it is doubtful" that "sitting and thinking" are major life activities); and Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) ("concentrating" is not a major life activity).

40. 263 F.3d 95 (4th Cir. 2001).

41. *Id.* at 101 n.4. *See also* Soileau v. Guilford of Maine, 105 F.3d 12, 15 (1st Cir. 1997) (although "ability to get along with others" is "a skill to be prized, it is different in kind from breathing or walking"; EEOC's manual is "hardly binding").

42. 241 F.3d 1248 (10th Cir. 2001).

43. *Id.* at 1255.

44. 335 F.3d 60 (2d Cir. 2003).

45. *Id.* at 63-64.

46. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996).

47. 165 F.3d 460 (6th Cir. 1999).

48. *Id.* at 467.

49. *Id.*

50. 434 F.3d 249 (4th Cir. 2006).

51. *Id.* at 255.

52. 385 F.3d 378 (3d Cir. 2004).

limited in the major life activities of "blood cleansing and body waste processing."[53] The court noted that these non-volitional, internal body functions are still major life activities because of their "importance to human life" in the same way that breathing or thinking are major life activities.[54]

Eating has been held to be a major life activity. For example, in *Weber v. Strippit, Inc.*,[55] *Lawson v. CSX Transportation*,[56] and *Waldrip v. General Electric Co.*,[57] the courts unanimously found that eating is a major life activity.[58] In *Fraser v. U.S. Bancorp*,[59] the court held that "broadly speaking, eating is a major life activity."[60] The court, however, carefully noted that "eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity."[61] For example, someone unable to eat chocolate cake does not have a disability because "eating chocolate cake is not a major life activity."[62] On the other hand, "peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions."[63]

Courts have also found sleeping to be a major life activity. For example, in *Corley v. Department of Veteran Affairs*,[64] the court noted that sleeping is a major life activity.[65] Likewise, in *Nadler v. Harvey*,[66] the court held that "sleep is a major life activity."[67] In *Greathouse v. Westfall*,[68] the court also held that sleeping is a major life activity.[69] In *McAlindin v. County of San Diego*,[70] the court held that sleeping and interacting with others (among other activities discussed below) are major life activities.[71]

53. *Id.* at 384.
54. *Id.*
55. 186 F.3d 907 (8th Cir. 1999).
56. 245 F.3d 916 (7th Cir. 2001).
57. 325 F.3d 652 (5th Cir. 2003).
58. *See Waldrip*, 325 F.3d at 655; *Lawson*, 245 F.3d at 923; *Weber*, 186 F.3d at 914.
59. 342 F.3d 1032 (9th Cir. 2003).
60. *Id.* at 1040.
61. *Id.*
62. *Id.*
63. *Id.*
64. No. 05-7137, 2007 U.S. App. LEXIS 3798 (10th Cir. Feb. 20, 2007).
65. *Id.* at *18.
66. No. 06-12692, 2007 U.S. App. LEXIS 20272 (11th Cir. Aug. 24, 2007).
67. *Id.* at *17-18.
68. No. 06-5269, 2006 U.S. App. LEXIS 27882 (6th Cir. Nov. 7, 2006).
69. *Id.* at *8.
70. 192 F.3d 1226 (9th Cir. 1999).
71. *Id.* at 1234.

Some courts have found that reading, writing, and even using a computer are major life activities. For example, in *Wilson v. Phoenix Specialty Manufacturing Co.*,[72] the court held that using a computer and writing are major life activities.[73] The court also suggested that "counting" is a major life activity.[74] In *Head v. Glacier Northwest, Inc.*,[75] the court held that reading is a major life activity (in addition to activities like sleeping and interacting with others).[76] The court noted that although someone will not "die" just because s/he cannot read, it is still of central importance to most people's daily lives.[77] In *Gonzales v. National Board of Medical Examiners*,[78] the court assumed that reading and writing are major life activities.[79] Likewise, in *Bartlett v. New York State Board of Law Examiners*,[80] the court held that reading is a major life activity.[81]

Most courts have held that reproduction and/or sexual activity are major life activities. For example, in *Bragdon v. Abbott*,[82] the U.S. Supreme Court held that reproduction is a major life activity.[83] The Court noted that an activity does not have to have a "public, economic, or daily dimension" to be a major life activity.[84] In *Bragdon*, the Supreme Court also stated that the "sexual dynamics surrounding" reproduction are "central to the life process itself."[85] This suggests that the Supreme Court might consider sex itself to be a major life activity. In *McAlindin v. County of San Diego*,[86] the court cited the *Bragdon* language and concluded that "engaging in sexual relations" is a major

72. 513 F.3d 378 (4th Cir. 2008).
73. *Id.* at 386.
74. *Id.*
75. 413 F.3d 1053 (9th Cir. 2005).
76. *Id.* at 1060-61.
77. *Id.* at 1061-62.
78. 225 F.3d 620 (6th Cir. 2000).
79. *Id.* at 626.
80. 226 F.3d 69 (2d Cir. 2000).
81. *Id.* at 80.
82. 524 U.S. 624 (1998).
83. *Id.* at 638.
84. *Id. See also* Miller v. Ameritech Corp., No. 05-4009, 2007 U.S. App. LEXIS 1039, *8 (7th Cir. Jan, 11, 2007) (noting that "sexual reproduction" is a major life activity); Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 684 (8th Cir. 2003) (noting that it is "consistent with controlling precedent" to conclude that "walking, standing, turning, bending, lifting, working, and procreation" are major life activities); Blanks v. Sw. Bell Commc'n, Inc., 310 F.3d 398, 401 (5th Cir. 2002) (acknowledging that reproduction is a major life activity).
85. *Bragdon*, 524 U.S. at 625.
86. 192 F.3d 1226 (9th Cir. 1999).

life activity.[87] The court noted that "[t]he number of people who engage in sexual relations is plainly larger than the number who choose to have children," and that "sexuality is important in how 'we define ourselves and how we are perceived by others' and is a fundamental part of how we bond in intimate relationships."[88] Similarly, in *Adams v. Rice*,[89] the court held that "engaging in sexual relations" is a major life activity.[90] Citing Genesis 1:28's instructions to "be fruitful and multiply," the court noted that "sex is unquestionably a significant human activity, one our species has been engaging in at least since the biblical injunction," it is "a basic physiological act practiced regularly by a vast portion of the population," it is "a cornerstone of family and marital life, a conduit to emotional and spiritual fulfillment, and a crucial element in intimate relationships."[91] The court held that the plaintiff, who had undergone surgery for breast cancer, arguably had a record of a disability because she was substantially limited in sex because of her psychological concerns about post-surgery sexual relations.[92]

The major life activity of working is arguably the most difficult to analyze. In addition, the Supreme Court has explicitly questioned whether "working" is even a major life activity, noting "there may be some conceptual difficulty in defining 'major life activities' to include work."[93] Nonetheless, most courts have held that working is a major life activity. In fact, in a post-*Sutton* case, one of the more conservative circuits emphatically declared that working is a major life activity. In *EEOC v. R.J. Gallagher Co.*,[94] the court stated that "the plain text of the ADA" indicates that working is a major life activity.[95] The court further noted that:

> [f]or many, working is necessary for self-sustenance or to support an entire family. The choice of an occupation often provides the opportunity for self-expression and for contribution to productive

87. *Id.* at 1234.

88. *Id.*

89. 531 F.3d 936 (D.C. Cir. 2008).

90. *Id.* at 947.

91. *Id.*

92. *Id.* at 949. *But see* Scheerer v. Potter, 443 F.3d 916, 921 (7th Cir. 2006) ("this court has not recognized lowered sexual drive or impotence as the types of disruptions than can amount to a disability"); and Squibb v. Mem'l. Med. Ctr., 497 F.3d 775, 785 (7th Cir. 2007) (plaintiff's testimony that she had been unable to engage in sex for two years because of back pain was not sufficient evidence of a substantial limitation).

93. Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).

94. 181 F.3d 645 (5th Cir. 1999).

95. *Id.* at 654 (footnotes omitted).

> society. Importantly, most jobs involve some degree of social interaction, both with coworkers and with the public at large, providing opportunities for collegial collaboration and friendship. For those of us who are able to work and choose to work, our jobs are an important element of how we define ourselves and how we are perceived by others. The inability to access the many opportunities afforded by working constitutes exclusion from many of the significant experiences of life. Without doubt, then, working is a major life activity.[96]

Likewise, in *Rodriguez v. Conagra Grocery Products Co.*,[97] the court held that "the ability to engage in gainful employment" is a major life activity.[98] Similarly, in *Greathouse v. Westfall*,[99] the court held that working is a major life activity.[100] In *Mahon v. Craven Crowell*,[101] the court held that working will be considered a major life activity, but will be analyzed "only when a complainant cannot show she or he is substantially impaired in any other, more concrete major life activity."[102]

In response to the conflicting cases, the ADAAA specifically provides a very broad, non-exclusive list of conditions that should always be considered major life activities.[103] The ADAAA states that "major 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."[104] As a result, any controversy is resolved by the Act concerning certain activities such as lifting, concentrating, thinking, and working.

Importantly, the law even more broadly states that the term major

96. *Id.* at 654-55.

97. 436 F.3d 468 (5th Cir. 2006).

98. *Id.* at 475 n.24 (citing Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 508 (5th Cir. 2003)).

99. No. 06-5269, 2006 U.S. App. LEXIS 27882 (6th Cir. Nov. 7, 2006).

100. *Id.* at *11-12.

101. 295 F.3d 585 (6th Cir. 2002).

102. *Id.* at 590. Even though "working" has generally been held to be a major life activity, the Supreme Court decisions seem to indicate that there are two major questions: (1) Is the individual unable to perform a class or broad range of jobs because of the disability? and (2) Is the individual nonetheless *able* to perform many other jobs? Taken together, these questions seem to require that individual be virtually precluded from working in order to be considered "substantially limited" in working; therefore, plaintiffs have lost a large number of ADA cases by arguing "working" as their major life activity.

103. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3554 (2008).

104. *Id.*

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."[105] This arguably mixes up the issue of "impairment" and "major life activity,"[106] but it is certainly the right of Congress to mix up these issues if it wishes to do so.

Interestingly, the ADAAA does not itself discuss whether certain activities such as sexual relations, driving, and using a computer are major life activities. Therefore, it is likely that these activities will continue to be litigated. It is, however, worth noting that the U.S. House of Representatives Committee on Education and Labor Committee Report states that the Committee believes that other major life activities include "interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination."[107]

WHETHER THE IMPAIRMENT IS SUBSTANTIALLY LIMITING

Meaning of "Substantially Limits"

Under the pre-Amendments Act ADA, the U.S. Supreme Court stated that "substantially" limits means "considerable" or "to a large degree."[108] Therefore, noted the court, to be substantially limited in a major life activity, "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."[109] The EEOC was also fairly restrictive, stating that an impairment "substantially limits" a

105. *Id.*

106. For example, in *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 449 (7th Cir. 2001), the court rejected the plaintiff's allegation that his Hepatitis B impairment was a disability because it substantially limited the major life activity of "liver function." The court held that "liver function" is not a major life activity, but is simply "a characteristic of the impairment, much as a decline in white blood cells is a characteristic of the HIV virus." *Id.* at 450. The court noted that the "activities that have been held to be major life activities under the ADA (e.g., eating, working, reproducing) are not the impairments' characteristics—they are activities that have been impacted because of the plaintiffs' impairments." *Id.*

107. H.R. Rep. No.110-730, at 11 (2008).

108. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196-97 (2002) (citations omitted).

109. *Id.* at 198.

major life activity if the person is either:

> [u]nable to perform a major life activity that the average person in the general population can perform; or
>
> [s]ignificantly restricted as to the condition, manner or duration under which s/he performs the activity as compared to the condition, manner, or duration under which the average person in the general population performs the activity.[110]

Examining the Severity of the Condition

As a result, many cases have been dismissed because courts have found that the impairment was not serious enough. For example, in *Granados v. J.R. Simplot, Inc.*,[111] the court held that the plaintiff could not show that he was substantially limited in sleeping where he alleged only that he could sleep for three or four hours at a time and that his sleep was not "restful."[112] In *Storey v. City of Chicago*,[113] the court held that the plaintiff was not substantially limited in sleeping where she alleged only that she "had trouble sleeping on one side as a result of her neck pain," and admitted that the pain subsided after she was no longer required to perform a particular task at work.[114] In *Gretillat v. Care Initiatives*,[115] the court held that the employee's inability to stand for more than one hour without rest was not a substantial limitation in standing.[116] Taking this one step further, in *Williams v. Excel Foundry & Machine, Inc.*,[117] the court held that the employee's inability to stand for more than thirty to forty minutes was not a substantial limitation in standing.[118] In *Maclin v. SBC Ameritech*,[119] the court held that the inability to sit for more than two hours at a time was not considered to be substantially limiting.[120] Similarly, in *Squibb v. Memorial Medical*

110. 29 C.F.R. § 1630.2(j)(1) (2008).
111. No. 06-35584, 2008 U.S. App. LEXIS 2593 (9th Cir. Feb. 1, 2008).
112. *Id.* at *3.
113. No. 07-1815, 2008 U.S. App. LEXIS 3391 (7th Cir. Feb. 13, 2008).
114. *Id.* at *7-8.
115. 481 F.3d 649 (8th Cir. 2007).
116. *Id.* at 653.
117. 489 F.3d 309 (7th Cir. 2007).
118. *Id.* at 311.
119. 520 F.3d 781 (7th Cir. 2008).
120. *Id.* at 787.

Center,[121] the court held that the plaintiff was not substantially limited in sitting where she only needed a break every thirty minutes.[122] In *Caracciolo v. Bell Atlantic-Pennsylvania*,[123] the court found that the plaintiff's mental disorder did not substantially limit her ability to interact with others where, at most, she simply could not tolerate "angry, irate or strongly negative communications."[124] The court noted that a plaintiff must allege more than this, such as consistently high levels of hostility, social withdrawal, or a failure to communicate as needed.[125] Similarly, in *Agnew v. Heat Treating Services of America*,[126] the court held that the plaintiff's back problems did not substantially limit his major life activities where he was only prevented "at times" from heavy lifting, bending, twisting, and long periods of standing and walking.[127] In *Hinojosa v. Jostens, Inc.*,[128] the court held the plaintiff did not adequately allege a "substantial" limitation where he only argued that his impairment (reflex sympathetic dystrophy) made it "difficult" for him to perform manual tasks, such as putting on and buttoning his shirt, washing his hair, doing dishes, driving short distances, and sleeping.[129] Likewise, in *Dillon v. Roadway Express*,[130] the court held that the plaintiff was not substantially limited in hearing where "the only symptom he complains of is an occasional inability to localize a sound."[131] The court also held that the plaintiff was not substantially limited in walking where his temporary paralysis (caused by muscle weakness) only occurred "occasionally."[132] In *Thompson v. St. Johns Unified School District*,[133] the court found that the employee did not sufficiently allege a substantial limitation simply by claiming that his bladder cancer, crushed foot, glaucoma, and hernia condition affected him "in terms of weakness, stamina and my ability to walk in normal fashion."[134] In *EEOC v. Daimler Chrysler Corp.*,[135] the court held that

121. 497 F.3d 775 (7th Cir. 2007).
122. *Id.* at 784-85.
123. No. 03-4472, 2005 U.S. App. LEXIS 3698 (3d Cir. Mar. 4, 2005).
124. *Id.* at *7-8.
125. *Id.*
126. No. 04-2531, 2005 U.S. App. LEXIS 27884 (6th Cir. Dec. 14, 2005).
127. *Id.* at *12.
128. No. 04-10229, 2005 U.S. App. LEXIS 6137 (5th Cir. Apr. 12, 2005).
129. *Id.* at *4-6.
130. No. 04-60785, 2005 U.S. App. LEXIS 7490 (5th Cir. Apr. 29, 2005).
131. *Id.* at *9.
132. *Id.* at *9-10.
133. No. 00-16259, 2002 U.S. App. LEXIS 896 (9th Cir. Jan. 17, 2002).
134. *Id.* at *8-9.
135. No. 02-2361, 2004 U.S. App. LEXIS 20422 (6th Cir. Sept. 15, 2004).

classifying the plaintiff as unable to perform certain duties in the workplace did not establish that he was substantially limited in the life activity of moving; rather, these classifications simply showed that the employer doubted his ability to perform "the rigors of the job of jitney repair mechanic."[136] In *McCoy v. USF Dugan, Inc.*,[137] the plaintiff claimed that she was substantially limited in walking since flare-ups of her multiple sclerosis affected her equilibrium, causing her to fall at times.[138] The court held that this was only a moderate restriction on her ability to walk, noting that she is "still physically and psychologically capable of walking."[139] Interestingly, in *Boerst v. General Mills Operations, Inc.*,[140] an arguably tough court held that "[g]etting between two and four hours of sleep a night, while inconvenient, simply lacks the kind of severity we require of an ailment before we will say that the ailment qualifies as a substantial limitation under the ADA."[141] In *Fultz v. City of Salem*,[142] the court found that the plaintiff's finger injury, which made it "more difficult" for him to do certain manual tasks, such as button his shirt, was not a disability because "diminished" is different from "substantially limited."[143] In one of the most extreme cases, *Garrett v. University of Alabama*,[144] the court actually held that the employee, who had breast cancer and intensive radiation/chemotherapy treatments, did not have a disability where her numerous limitations were short-term (although lasting for many months) and/or subjective.[145]

As a result of these and other cases, the ADAAA rejected the strict standard provided above by the U.S. Supreme Court in *Toyota v. Williams*, and required that the EEOC revise the agency's regulations which have defined the term "substantially limits" as meaning "significantly restricted."[146] In addition, the ADAAA provides that the definition of disability "shall be construed broadly."[147] As a result, it seems clear that the result under the ADAAA would be different for

136. *Id.* at *16-*17.
137. No. 01-3189, 2002 U.S. App. LEXIS 13271 (10th Cir. July 3, 2002).
138. *Id.* at *6.
139. *Id.* at *7 (quoting Steele v. Thiokol Corp., 241 F.3d 1248, 1254 (2001)).
140. No. 00-3281, 2002 U.S. App. LEXIS 813 (6th Cir. Jan. 15, 2002).
141. *Id.* at *12.
142. No. 01-35355, 2002 U.S. App. LEXIS 19678 (9th Cir. Sept. 13, 2002).
143. *Id.* at *3.
144. 507 F.3d 1306 (11th Cir. 2007).
145. *Id.* at 1315.
146. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 2(a)(5), (8), 122 Stat. 3553, 3554 (2008).
147. *Id.* at § 4(a).

many of the cases noted above in which the courts held that the impairment was not serious enough.

Still, there is an open question of how serious the condition must be. In the original version of the ADAAA passed by the U.S. House of Representatives in June 2008, the legislation stated that "substantially limits" means "materially restricts."[148] However, this version of the bill had virtually no support in the U.S. Senate. As soon as this "materially restricts" definition was deleted from the bill, the ADAAA almost immediately picked up sixty co-sponsors in the Senate. Of course, the fact that "materially restricts" was deleted from the bill raises its own question: Was this provision deleted because the Senators found the provision too restrictive, or not restrictive enough? Unfortunately, there is nothing in the legislative history that answers this question, and both sides will unquestionably litigate this issue.

Comparing the Individual to the Average Person

As noted earlier, under the ADA, courts have analyzed the severity of the individual's condition compared to the average person. For example, in *Collins v. Prudential Investment and Retirement Services*,[149] the court found that the employee's ADHD did not "substantially limit" her ability to think, learn, concentrate, and remember, where she sometimes became distracted from her tasks, had trouble placing tasks in priority order, and had trouble showing up for events on time.[150] The court noted that "many people who are not suffering from ADHD/ADD must regularly cope with" such limitations.[151] In *Bowen v. Income Producing Management of Oklahoma, Inc.*,[152] the plaintiff, who suffered a brain injury, claimed that he was substantially limited in learning in light of his memory loss, inability to concentrate, and difficulty performing simple math.[153] The court found that he was not "substantially limited" because he had "greater skills and abilities than the average person in general."[154]

Still, an interesting question has always lingered under the ADA:

148. ADA Restoration Act, H.R. 3195, 110th Cong., 2d Sess. § 4 (2008) (amending interpretation of "substantially limits").

149. No: 03-2356, 2005 U.S. App. LEXIS 148 (3d Cir. Jan. 4, 2005).

150. *Id.* at *10-*11.

151. *Id.* at *11.

152. 202 F.3d 1282 (10th Cir. 2000).

153. *Id.* at 1287.

154. *Id.*

To whom should the plaintiff be compared? Court decisions are in conflict on this issue. In *McCrary v. Aurora Public Schools*,[155] the court found that although the plaintiff's learning disabilities presented some deficits in her ability to think and learn (especially on particular days), she was not "substantially" limited "when compared with what would be expected from someone with her strengths."[156] Likewise, in *Schumacher v. General Security Services Corp.*,[157] the court held that the plaintiff's heart impairments did not substantially limit his major life activities because his heart "was actually healthier than the average heart for a man his age."[158] The court noted that the plaintiff's treadmill test was "normal" and he had "an exercise capacity of 16 percent above the average for active, healthy men his age."[159]

On the other hand, in *Singh v. George Washington University School of Medicine*,[160] the court held that the learning ability of a medical student should be compared to "the average person in the general population," not someone of similar age and education level.[161] In supporting its position, the court noted that if "a 97 year old woman with hip problems has difficulty walking, it would be strange to tell her that she walks at least as well as the average 97 year old—that is, not well at all—and is therefore not disabled or entitled to reasonable accommodations."[162] The court also stated that it "is intuitively appealing to measure limitation by comparing the plaintiff's condition impaired with her own condition, unimpaired" because "[t]here is something poignant, in some cases even tragic, in the plight of a person cut off from exceptional achievement by some accident of birth or history."[163] However, the court noted, "the ADA is not addressed to that plight."[164] Similarly, in *Weisberg v. Riverside Township Board of Education*,[165] the court considered evidence comparing the plaintiff's reading ability to that of the average 18-year old.[166] Although the plaintiff claimed that the figures should be adjusted to someone of the

155. No. 02-1098, 2003 U.S. App. LEXIS 1449 (10th Cir. Jan. 29, 2003).
156. *Id.* at *21.
157. No. 98-36128, 2000 U.S. App. LEXIS 22395 (9th Cir. Aug. 28, 2000).
158. *Id.* at *3-4.
159. *Id.* at *4.
160. 508 F.3d 1097 (D.C. Cir. 2007).
161. *Id.* at 1100.
162. *Id.* at 1103.
163. *Id.* at 1101.
164. *Id.*
165. No. 04-4533, 2006 U.S. App. LEXIS 11800 (3d Cir. May 11, 2006).
166. *Id.* at *13 n.2.

plaintiff's "age, education and experience," the court held that "the relevant comparison is to the 'average person in the general population,' not to the average person of similar age, education and experience."[167]

Although the ADAAA does not answer this question in the text of the law, the legislative history provides the intention of Congress. The House of Representatives Committee on Education and Labor Report accompanying the original House version of the ADAAA noted that the individual should be compared to "most people," not simply someone with the same demographics as the employee (such as gender, age, education).[168] Assuming courts give deference to the Committee Report, this would overrule cases comparing the individual to someone in his/her shoes. Comparing the individual to the average individual (not including demographics) will assist older individuals in proving disabilities; however, individuals with learning disabilities who are performing at an average level in higher education institutions will likely have a harder time showing that they are substantially limited.

Examining Activities the Individual is Able to Perform

Under the pre-Amendments Act ADA, most courts have looked at the activities which a plaintiff was able to perform in determining that the individual was not substantially limited in a major life activity. For example, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[169] the U.S. Supreme Court held that in determining whether an individual is substantially limited in a major life activity (such as performing manual tasks), a court should focus on what activities the individual is able to perform (such as tending to personal hygiene and performing household chores).[170] As discussed below, it is an open question whether, after the ADAAA, it will still be relevant to examine the activities that an individual is able to perform.

Pre-ADAAA cases consistently support the position that these activities are relevant. In *Thomas v. Avon Products, Inc.*,[171] the court held that the plaintiff was not substantially limited in self-care where she was unable to use scented soaps due to her odor sensitivity, but was able to bathe, dress herself, and drive.[172] Likewise, in *Lloyd v. Washington &*

167. *Id.*
168. H.R. Rep. No.110-730, at 9-10 (2008).
169. 534 U.S. 184 (2002).
170. *Id.* at 200-02.
171. No. 07-3924, 2008 U.S. App. LEXIS 10327 (6th Cir. May 8, 2008).
172. *Id.* at *2.

Jefferson College,[173] the court held that the plaintiff was not substantially limited in "thinking" and "interacting with others" because he was able to perform many things involving these activities, such as working and teaching three days per week, serving as a local councilman, engaging in family and social outings, and working on weekends.[174] Similarly, in *Rolland v. Potter*,[175] the court held that the plaintiff was not substantially limited in a major life activity, in part because of all of the activities he was able to perform, including his job duties, working overtime, mowing his lawn, vacuuming, loading the dishwasher, walking, lifting up to twenty pounds, blowing snow, and doing laundry.[176] In *Bryson v. Regis Corp.*,[177] the court held that where the employee could stand for fifteen to twenty minutes at a time and sometimes for one and a half hours, she was not substantially limited in standing.[178] Likewise, in *Squibb v. Memorial Medical Center*,[179] the court held that the plaintiff was not substantially limited in "caring for herself" even though she was limited in certain household tasks, since she "admittedly can perform" tasks such as "driving, bathing, brushing her teeth, and dressing herself."[180] In *Adams v. Potter*,[181] the court noted that the employee's back condition did not rise to the level of "disability" where he was merely limited in "lifting objects heavier than fifty pounds, prolonged standing, and repetitive bending, twisting, and stooping."[182] The court noted that the "number of activities in which Adams can engage without limitation" (e.g., "care for his personal hygiene, fish, drive, work as a paralegal, play non contact sports," have "sexual relations") "weakens his argument that he is disabled."[183] In *Doebele v. Sprint*,[184] the court analyzed whether the plaintiff was substantially limited in interacting with others.[185] The court stated that although she "had difficulty interacting with a number of her coworkers," she did not show that she "had problems interacting with

173. No. 07-2907, 2008 U.S. App. LEXIS 12435 (3d Cir. June 11, 2008).
174. *Id.* at *4-5.
175. 492 F.3d 45 (1st Cir. 2007).
176. *Id.* at 49.
177. 498 F.3d 561 (6th Cir. 2007).
178. *Id.* at 576.
179. 497 F.3d 775 (7th Cir. 2007).
180. *Id.* at 784.
181. No. 05-5811, 2006 U.S. App. LEXIS 21503 (6th Cir. Aug. 22, 2006).
182. *Id.* at *11-12.
183. *Id.* at *12.
184. 342 F.3d 1117 (10th Cir. 2003).
185. *Id.* at 1131.

people in general."[186] The court's conclusion was based in part on the evidence showing that the plaintiff "played softball and volleyball on organized teams, was in a group at work that collected Beanie Babies, babysat, went to Kansas State and Kansas City Chiefs football games, was active in her local college alumni association, and had a boyfriend on and off for a number of years with whom she went to church, the movies and out to dinner."[187]

It is fair to ask whether these cases—examining the activities that the individual is able to perform—survive the ADAAA. One could argue that these cases flow from *Toyota* and, therefore, are reversed by the ADAAA. However, in my opinion, the stronger argument is that the ADAAA reversed *Toyota* only as to how severe the impairment must be, not as to the relevant evidence on whether the impairment is substantially limiting. Therefore, courts would be wise to accept this evidence, even though applying a less severe standard.

Duration of the Condition

Courts have struggled as to how long a condition must last to be considered "substantially limiting." In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[188] the U.S. Supreme Court held that an impairment's impact must be "permanent or long-term."[189] Therefore, short-term conditions have not been covered under the ADA.[190] For example, in *Schulz v. Rental Services Corp.*,[191] the court held that the employer did not regard the employee's broken wrist as a disability where there was no evidence that it thought the condition was long-term.[192]

Generally, conditions lasting up to several months without residual effects have been considered short-term. For example, in *Anders v. Waste Management of Wisconsin, Inc.*,[193] the court held that the plaintiff's panic disorder, which caused him to attack his supervisor (but which lasted less then one week), was not a disability because of the

186. *Id.*
187. *Id.*
188. 534 U.S. 184 (2002).
189. *Id.* at 198.
190. *See also* 29 C.F.R. Part 1630, app. § 1630.2(j) (2008).
191. No. 06-1072, 2006 U.S. App. LEXIS 25633 (8th Cir. Oct. 13, 2006).
192. *Id.* at *5.
193. 463 F.3d 670 (7th Cir. 2006).

short duration.[194] In *Vierra v. Wayne Memorial Hospital*,[195] the court held that a broken finger, requiring a splint for one month, is a "non severe injury without permanent or long term impact."[196] Likewise, in *Oblas v. American Home Assurance Co.*,[197] the court held that the employee's depression was not a disability because it lasted only one month.[198] In *Velarde v. Associated Regional and University Pathologists*,[199] the court held that a lifting impairment, which lasted less than two months, was not "long-term."[200]

The position of EEOC and other courts is that if an impairment lasts "at least several months," it is not short-term.[201] In *Sinclair Williams v. Stark*,[202] the court found that hypertension, which causes someone to miss nearly three months of work, could be considered "substantially" limiting.[203] In *Regional Economic Community Action Program, Inc. v. City of Middletown*,[204] the court found that the plaintiffs' impairment (alcoholism) had "long term" effects because the individuals would be discharged from a halfway house "between three and nine months after admission."[205] Likewise, in *Aldrich v. The Boeing Company*,[206] the court stated that "an impairment need not be permanent" to be a disability.[207] The court found that the plaintiff's flexor tenosynovitis could be a disability since its "anticipated duration was indefinite, unknowable, or was expected to be at least several months."[208]

Some courts have applied a much more severe standard. For example, in *Samuels v. Kansas City School District*,[209] the court held that the employee's impairment was not long-term because her restrictions were expected to last six months.[210] Interestingly, the court seemed to look only prospectively at the school teacher's restrictions

194. *Id.* at 677.
195. No. 04-4510, 2006 U.S. App. LEXIS 3062 (3d Cir. Feb. 8, 2006).
196. *Id.* at *9-*10.
197. No. 98-9350, 1999 U.S. App. LEXIS 23371 (2d Cir. Sept. 24, 1999).
198. *Id.* at *3.
199. No. 02-4073, 2003 U.S. App. LEXIS 6432 (10th Cir. Apr. 2, 2003).
200. *Id.* at *10 n.3.
201. *See* EEOC COMPLIANCE MANUAL (BNA), § 902.4(d), at EEOM 902:13 (June 2006).
202. No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. Mar. 23, 2001).
203. *Id.* at *11.
204. 281 F.3d 333 (2d Cir. 2002).
205. *Id.* at 346
206. 146 F.3d 1265 (10th Cir. 1998).
207. *Id.* at 1270.
208. *Id.*
209. 437 F.3d 797 (8th Cir. 2006).
210. *Id.* at 802.

(i.e., not taking into account that her restrictions had already lasted for approximately four months), noting that "the determination of whether an individual is entitled to protection under the ADA should be made as of the time of the employment decision."[211] In *Ashton v. AT&T*,[212] the court held that even if the plaintiff's impairment lasted for six months, this period was not long enough to be considered "long-term."[213] In *Guzman-Rosario v. United Parcel Service*,[214] the court noted that a condition must have a duration longer than "several months."[215] The court suggested that at a minimum, the condition must last from six to twenty-four months.[216] The court also implied that "shorter durations" (such as six months) "are tolerated only for more severe impairments."[217]

The ADAAA does not specify the length of time a condition must last to be substantially limiting. However, it does state that an individual is not "regarded as" disabled if the condition is minor and lasts for less than six months.[218] Importantly, the House of Representatives Committee on Education and Labor Report accompanying the original House version of the ADAAA noted that this six-month rule does not apply to actual and "record of" disabilities.[219] Therefore, one can make a very strong argument that Congress intended that conditions with durations of less than six months might still be covered disabilities.

Whether Medication/Prosthetic Devices/Behavioral Changes Should be Taken into Account When Analyzing Substantial Limitation

In analyzing whether an impairment substantially limits a major life activity, one very important issue under the ADA has been whether the mitigating effects of medication, prosthetic devices, or behavioral modifications should be taken into account. Originally, based on the ADA's legislative history, most courts held that an individual should be analyzed without regard to mitigating measures.[220]

211. *Id.*
212. No. 06-1610, 2007 U.S. App. LEXIS 4338 (3d Cir. Feb. 27, 2007).
213. *Id.* at *13.
214. 397 F.3d 6 (1st Cir. 2005).
215. *Id.* at 10.
216. *Id.*
217. *Id.*
218. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008).
219. H.R. Rep. No.110-730, at 14 (2008).
220. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998) (diabetes);

The Supreme Court, however, ignored the legislative history because it felt that the statute was clear on its face. It held that if an individual takes measures "to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity."[221] In *Sutton*, the Court noted that

> a 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity.[222]

To this end, in *Darwin v. Nicholson*,[223] the court held that the plaintiff's hearing impairment was not a disability because, with his hearing aids, he was not substantially limited in hearing as compared with "the general populace."[224] In *Knapp v. City of Columbus*,[225] a class action, the court held that the plaintiffs' ADHD did not substantially limit their major life activity of learning where it was admittedly controlled with Ritalin.[226] In *Greathouse v. Westfall*,[227] the court held that the plaintiff was not substantially limited in sleeping where he admittedly slept well with the use of medication.[228] Similarly, in *Rossi v. Alcoa, Inc.*,[229] the court held that the plaintiff was not substantially limited in the major life activity of sleeping where his medication allowed him to sleep well.[230] In *Nasser v. City of Columbus*,[231] the court

Taylor v. Phoenixville Sch. Dist., 174 F.3d 142 (3d Cir. 1999) (mental disability), *vacated* 184 F.3d 296 (1999); Washington v. HCA Health Servs. of Texas, 152 F.3d 464 (5th Cir. 1998) (adult still disease); Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998) (diabetes); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997) (monocular vision), *cert. denied*, 522 U.S. 1048 (1998); Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996) (mental syndrome), *cert. denied*, 520 U.S. 1162 (1997); Harris v. H&W Contracting Co., 102 F.3d 516 (11th Cir. 1997) (Graves disease).

221. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999); *see also* Murphy v. United Parcel Serv., 527 U.S. 516 (1999).

222. *Sutton*, 527 U.S. at 482-83.

223. No. 06-13990, 2007 U.S. App. LEXIS 8153 (11th Cir. Apr. 4, 2007).

224. *Id.* at *8.

225. No. 05-3455, 2006 U.S. App. LEXIS 17081 (6th Cir. July 6, 2006).

226. *Id.* at *16-17.

227. No. 06-5269, 2006 U.S. App. LEXIS 27882 (6th Cir. Nov. 7, 2006).

228. *Id.* at *11.

229. No. 03-4133, 2005 U.S. App. LEXIS 5828 (6th Cir. Apr. 7, 2005).

230. *Id.* at *10.

held that the plaintiff's back impairment was not a disability because, in part, "he relieved his back pain through exercises and medicine."[232] Similarly, in *Mancini v. Union Pacific Railroad Co.*,[233] the court held that the plaintiff's epilepsy was not a disability because "the manifestations of his epilepsy, i.e., the seizures, are 'totally controlled' through the consistent use of medication."[234] In *Collins v. Prudential Investment and Retirement Services*,[235] the court noted that the employee's ADHD might not be a disability where the condition was corrected with medication.[236] The court stated that the mitigating measure need not "constitute a cure."[237] In *Manz v. County of Suffolk*,[238] the court found that the plaintiff's vision impairments were not a disability because he used very strong glasses which allowed him to see sufficiently well.[239] Likewise, in *Casey v. Kwik Trip, Inc.*,[240] the court found that the plaintiff was not substantially limited in performing household chores where she admitted that she performs these chores by using adaptive measures, such as using both hands or certain tools or equipment (such as an electric can opener) to grip and manipulate objects.[241]

In *Carr v. Publix Super Markets, Inc.*,[242] the court held that the employee's impaired arm did not substantially limit his major life activities because he had learned to compensate through the use of his other arm.[243] Similarly, in *Didier v. Schwan Food Co.*,[244] the court held that despite his hand injury, the employee was not substantially limited in performing manual tasks and caring for himself.[245] The court noted that although the employee "has difficulty with shaving and other grooming activities, he learned to do these things left handed."[246]

231. No. 03-3739, 2004 U.S. App. LEXIS 4737 (6th Cir. Mar. 10, 2004).
232. *Id.* at *4.
233. No. 02-36151, 2004 U.S. App. LEXIS 8213 (9th Cir. Apr. 23, 2004).
234. *Id.* at *4-5.
235. No. 03-2356, 2005 U.S. App. LEXIS 148 (3d Cir. Jan. 4, 2005).
236. *Id.* at *19-20.
237. *Id.* at *20.
238. No. 02-7756, 2003 U.S. App. LEXIS 3361 (2d Cir. Feb. 23, 2003).
239. *Id.* at *4-5.
240. No. 02-4360, 2004 U.S. App. LEXIS 22569 (7th Cir. Oct. 19, 2004).
241. *Id.* at *10-11.
242. No. 05-12611, 2006 U.S. App. LEXIS 2845 (11th Cir. Feb. 6, 2006).
243. *Id.* at *6.
244. 465 F.3d 838 (8th Cir. 2006).
245. *Id.* at 842.
246. *Id.*

Interestingly, in *Walton v. U.S. Marshals Service*,[247] the court held mitigating measures includes not only "measures undertaken with artificial aids, like medications and devices," but also "measures undertaken, whether consciously or not, with the body's own systems."[248] In this case, the court held that the plaintiff's inability to "localize sound" was mitigated by her own "visual localization."[249] In *Berry v. T-Mobile USA, Inc.*,[250] the court held that the plaintiff was not substantially limited in her major life activities since she can perform her activities "given sufficient rest," she can "walk with the aid of a cane," and she "can treat her symptoms with medication."[251] Using curious legal reasoning, the court also held that the plaintiff's "family's assistance with the household chores" can be considered in determining whether she is substantially limited "as that is part of daily living in most families."[252]

In *Orr v. Wal-Mart Stores, Inc.*,[253] the court found that the plaintiff did not show that his diabetes, as controlled with insulin, substantially limited his major life activities.[254] The court noted that it would not analyze "what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future."[255] In *Sinclair Williams v. Stark*,[256] and *Hill v. Kansas City Area Transportation Authority*,[257] the courts found that the employees' conditions were not disabilities because they controlled the conditions with medications such that they did not substantially limit their major life activities.[258] In *Cotter v. Ajilon Services, Inc.*,[259] the court held that the individual's colitis "must be viewed in its medicated—and thus substantially controlled—state."[260] Likewise, in *Hein v. All America Plywood Co.*,[261] the court held that the plaintiff's hypertension, as medicated, was not a disability because he functioned "normally" and had "no problems 'whatsoever'" (quoting the

247. 492 F.3d 998 (9th Cir. 2007).
248. *Id.* at 1008 (quoting Alberston's Inc., v. Kirkinburg, 527 U.S. 555, 565-66 (1999)).
249. *Id.*
250. 490 F.3d 1211 (10th Cir. 2007).
251. *Id.* at 1218.
252. *Id.*
253. 297 F.3d 720 (8th Cir. 2002).
254. *Id.* at 724.
255. *Id.*
256. No. 99-4081, 2001 U.S. App. LEXIS 5367 (6th Cir. Mar. 23, 2001).
257. 181 F.3d 891 (8th Cir. 1999).
258. *See Sinclair Williams*, 2001 U.S. App. LEXIS 5367, at *15; *Hill*, 181 F.3d at 894.
259. 287 F.3d 593 (6th Cir. 2002).
260. *Id.* at 598.
261. 232 F.3d 482 (6th Cir. 2000).

plaintiff).[262] In this case, the plaintiff, a truck driver, had asked the court to analyze his unmedicated condition because he was fired for refusing to take a driving assignment that he claimed would prevent him from getting a refill of his medication.[263] The court concluded that he could have obtained the refill if he had been more diligent.[264] In *Spades v. City of Walnut Ridge*,[265] the court held that the employee's depression was not a disability since he conceded that he functioned well with his medications.[266] Similarly, in *EEOC v. R.J. Gallagher Co.*,[267] the court noted that it did "not doubt" that the plaintiff's condition, "if left untreated, would affect the full panorama of life activities, and indeed would likely result in an untimely death."[268] Nonetheless, the court concluded that "the predicted effects of the impairment in its untreated state for the purposes of considering whether a major life activity has been affected by a physical or mental impairment has, however, been foreclosed" by the Supreme Court.[269] In *Muller v. Costello*,[270] the court concluded that the plaintiff's asthma did not substantially limit his ability to breathe, after taking into account his inhalers and other medications.[271] Similarly, in *Ivy v. Jones*,[272] the court held that whether the plaintiff's hearing impairment "substantially limited" her hearing should be determined as corrected by her hearing aids.[273] The court noted that the plaintiff's hearing might not be substantially limited in light of the evidence showing that her hearing was "corrected to 92% with one hearing aid and 96% with two hearing aids."[274]

The ADAAA specifically rejects the reasoning of *Sutton v. United Airlines*,[275] and instructs courts to analyze conditions "without regard to the ameliorative effects of mitigating measures," such as medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive

262. *Id.* at 487.
263. *Id.* at 485.
264. *Id.* at 486-87.
265. 186 F.3d 897 (8th Cir. 1999).
266. *Id.* at 900.
267. 181 F.3d 645 (5th Cir. 1999).
268. *Id.* at 653.
269. *Id.*
270. 187 F.3d 298 (2d Cir. 1999).
271. *Id.* at 314.
272. 192 F.3d 514 (5th Cir. 1999).
273. *Id.* at 516.
274. *Id.*
275. 527 U.S. 471 (1999).

neurological modifications, among other things.[276] The ADAAA notes, however, that individuals should be evaluated with their "ordinary eyeglasses or contact lenses," that "intended to fully correct visual acuity or eliminate refractive error."[277] This provision will return the ADA to the position most courts took prior to the *Sutton v. United Airlines* decision, and will result in many more individuals being covered under the first prong—the "current" disability category—of the ADA.

THE ADAAA'S EFFECT ON "RECORD OF" CASES

"Record of" cases have traditionally been far less common than cases involving individuals who actually have substantially limiting impairments. "Record of" cases involve individuals who have a history of, or who have been either classified or misclassified as having a disability. However, the number of "record of" cases increased after the Supreme Court cases, discussed earlier, holding that an individual's condition should be analyzed as controlled with mitigating measures. After those cases, the EEOC instructed its investigators that "[i]n all charges where a [charging party] indicates that s/he uses a mitigating measure, the Investigator should determine whether [s/he] has a record of a disability for the period before [s/he] began using the mitigating measure."[278] Courts agreed with this approach. For example, in *Mx Group, Inc. v. City of Covington*,[279] the court found that even if a recovering drug addict does not have a current disability (since the condition was ameliorated with medication), s/he likely had a "record of" a disability because the court looked at the prior unmedicated condition, when s/he was unable to work or "function."[280]

The ADAAA does not specifically alter "record of" cases, except by reducing the level of severity required to show a record of a "substantial" limitation.[281] However, because the ADAAA reverses the Supreme Court's cases on the medication/prostheses/behavioral modification issue, I believe that the number of "record of" cases will

276. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, §§ 2(b)(2), 4(a), 122 Stat. 3553, 3554, 3556 (2008).

277. *Id.* at § 4(a).

278. *Analyzing Charges After Supreme Court Decisions Addressing "Disability" and Qualified,"* EEOC INSTRUCTIONS FOR FIELD OFFICES (July 1999), *available at* http://www.eeoc.gov/policy/docs/field-ada.html.

279. 293 F.3d 326 (6th Cir. 2002).

280. *Id.* at 339.

281. ADAAA at § 4, 122 Stat. 3555.

decrease because plaintiffs will find it much easier than it has been to show a current disability.

THE ADAAA'S EFFECT ON "REGARDED AS" CASES

One of the ADAAA's most significant changes concerns "regarded as" disabilities. Pre-ADAAA, to prove that an individual was "regarded as" disabled required showing that the employer "regarded" him/her as substantially limited in a major life activity. For example, in *Wilson v. Phoenix Specialty Manufacturing Co.*,[282] the court held that there was strong evidence that the employer regarded the plaintiff as disabled when: (1) its president wrote in an e-mail to his assistant that the plaintiff "qualifies for ADA designation"; and (2) the company ignored the plaintiff's doctor's statement that the plaintiff could return to work, instead relying on the company doctor's conclusion that the plaintiff could not key information into a computer, write, count washers, or use information on his computer screen.[283] In *Brady v. Wal-Mart Stores, Inc.*,[284] the court held that the employer may have regarded the employee with cerebral palsy as disabled where his supervisor, a pharmacist, testified that she perceived him to be "slow" and that she "knew there was something wrong" with him.[285] In *Josephs v. Pacific Bell*,[286] the court held that the plaintiff was regarded as substantially limited in working where the employer had made statements that the employee's mental disorder made him unfit for any job with the company.[287] Similarly, in *Quiles-Quiles v. Henderson*,[288] the court held that the employer may have regarded the plaintiff as substantially limited in working where his supervisors made comments indicating that they thought he posed a safety risk to his coworkers because he was under psychiatric treatment.[289] In *EEOC v. E.I. Du Pont de Nemours & Co.*,[290] the court held that the employer regarded the employee as substantially limited in walking where the employer admitted in its discovery responses that the employee was "incapable of walking" and

282. 513 F.3d 378 (4th Cir. 2008).
283. *Id.* at 385.
284. 531 F.3d 127 (2d Cir. 2008).
285. *Id.* at *14-15.
286. 443 F.3d 1050 (9th Cir. 2005).
287. *Id.* at 1063.
288. 439 F.3d 1 (1st Cir. 2006).
289. *Id.* at 6.
290. 480 F.3d 724 (5th Cir. 2007).

"permanently disabled from walking," and its doctors placed restrictions on her "walking anywhere at the plant site, including on level and paved surfaces," and stated that she "could not dependably be counted on to walk safely."[291] Likewise, in *Wysong v. Dow Chemical Co.*,[292] the court held that where the employer indicated its belief that the plaintiff could not lift more than five pounds, it regarded her as substantially limited in lifting.[293]

The ADAAA completely changes the definition of "regarded as" disabled. Rather than requiring an individual to show that s/he was regarded as having a substantially limiting impairment, the ADAAA states that an individual is "regarded as" disabled if s/he "has been subjected to an action prohibited under this Act 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."[294] The ADAAA excludes from this definition "impairments that are transitory and minor," defining "transitory" to mean an "actual or expected duration of 6 months or less."[295] Interestingly, the language of the ADAAA, as well as the U.S. Senate's "Statement of Managers" (accompanying the ADAAA) support the position that the exception only applies to conditions that are both transitory and minor.[296] Therefore, a plaintiff has an excellent argument that his/her condition is not excluded if it is severe, even if it is short-term (or if it is long-term, even if it is minor). As a result of this dramatically expanded definition, it is highly likely that most individuals claiming disability discrimination will include a "regarded as" claim, and that case law on this issue will grow.

Importantly, however, the ADAAA also states that an employer is not required to provide a "reasonable accommodation" to an individual who is covered only under the "regarded as" category.[297] This provision reverses a trend of cases holding that an employer must accommodate an individual if it has "regarded" the individual as disabled.[298] Therefore,

291. *Id.* at 729-30.

292. 503 F.3d 441 (6th Cir. 2007).

293. *Id.* at 452.

294. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (2008).

295. *Id.*

296. S. Stmt. Mgrs. Accompanying S.3406, 110th Cong., 2d Sess. (2008).

297. ADAAA § 6, 122 Stat. 3558.

298. For example, in *Williams v. Philadelphia Housing Authority Police Dept.*, the court held that a "regarded as" plaintiff may be entitled to reasonable accommodation because, in part, the statute does not distinguish between categories of "disability" in requiring reasonable accommodation. 380 F.3d 751, 774 (3d Cir. 2004). The court rejected the employer's contention

although this category of disability will be very helpful to individuals with an adverse action claim, it will be less important to individuals who require a reasonable accommodation.

CONCLUSION

The ADAAA, in effect, creates two separate definitions of disability. For "reasonable accommodation" cases, the law still requires a substantially limiting impairment. However, the "substantially limits" standard will be less restrictive—requiring less serious effects, likely requiring less duration, and analyzing the individual as if s/he were unmedicated or mitigated. For "disparate treatment" cases, the law will not require that the impairment substantially limit anything. However, it will not cover a condition that is both minor and transitory.

The ADAAA presents a number of issues which will be litigated in every jurisdiction and will ultimately be decided by the U.S. Supreme Court. In any event, the ADAAA will certainly make it easier for plaintiffs to prove that they have covered disabilities. As a result, it will

that accommodation in this context would give a "windfall" to an employee because of the employer's perception. *Id.* at 775-76. Specifically, the court noted that this employee (who could not carry a firearm because of his depression) would have been entitled to reassignment to a radio-room job if the employer did not harbor the misperception that the employee should not be around firearms at all. *Id.* at 760-61. Similarly, in *Kelly v. Metallics West, Inc.*, the court held that an employee who is regarded as disabled is entitled to reasonable accommodation. 410 F.3d 670, 676 (10th Cir. 2005). In this case, the employer refused the employee's request to allow her to bring oxygen to work (because of her lung problems). *Id.* The employee did not have an actual disability because her condition as mitigated by oxygen was not substantially limiting. *Id.* The court disagreed with other circuit court holdings that "regarded as" disabilities are not entitled to accommodation, noting that "an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions." *Id.* The court further stated that Congress did not distinguish between "actual" and "regarded as" disabilities in the ADA's reasonable accommodation obligation. *Id.* In *Brady v. Wal-Mart Stores, Inc.*, the court noted that an employer has a duty to provide accommodations where it regards the employee (in this case, an employee with cerebral palsy) as disabled. 531 F.3d 127, 135-36 (2d Cir. 2008). In *Roberts v. Rayonier, Inc.*, the court suggested that "regarded as" plaintiffs could be entitled to reasonable accommodation. No. 04-14031, 2005 U.S. App. LEXIS 11585, at *14 (11th Cir. June 16, 2005). The court held that the plaintiff was "not required to prove that he was seeking an accommodation for an actual disability." *Id.* at *15. Rather, he could claim that he was retaliated against "if he establishes that he had a reasonable belief that he was disabled or regarded as disabled and thus entitled to an accommodation." *Id.* Likewise, in *D'Angelo v. Conagra Foods, Inc.*, the court concluded that employees who are "regarded as" disabled are entitled to reasonable accommodation. 422 F.3d 1220, 1235 (11th Cir. 2005). Responding to criticism that such a result would be unwise, the court stated that "as a court, we are not free to question the efficacy of legislation that Congress validly enacted. Within constitutional limits, Congress may improvidently elect to legislate." *Id.* at 1238.

inevitably lead to more cases which conclude that the individual is covered, and then analyze the actual merits of whether an employer engaged in discriminatory conduct.