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The Litigation Landscape Five Years After the Passage of the ADA Amendments Act[1]

The Promise of the ADA Amendments Act

When Congress enacted the Americans with Disabilities Act in 1990, it intended to create a law that provided broad coverage for people with disabilities. Instead of drafting a new definition of the term disability, Congress adopted the Rehabilitation Act of 1973's definition,[2] which the Supreme Court had previously declared to be "broad."[3] However, to the surprise of Congress and people with disabilities, courts narrowly interpreted the ADA's definition of disability, and regularly dismissed claims after finding that the plaintiff could not establish an ADA-qualifying disability. In 1999, three Supreme Court decisions commonly referred to as the *Sutton* trilogy confirmed that courts would take a narrow approach when deciding whether an individual would be deemed to have a disability under the ADA.[4] And in 2002, the Supreme Court narrowed the definition of disability even further in *Toyota v. Williams*.[5]

In direct response to these Supreme Court cases, Congress passed the ADA Amendments Act[6] ("ADAAA") in September of 2008 to "reinstat[e] a broad scope of protection" for people with disabilities diminished through erroneous judicial decisions.[7] Congress hoped that the ADAAA would provide the "clear and comprehensive national mandate for the elimination of discrimination" initially intended by the ADA.[8] People with disabilities and advocacy groups spent years advocating for legislation restoring the ADA's original intent,[9] and had high hopes that the ADAAA would effectively expand ADA coverage.

Now, five years since the ADAAA's passage, the impact of this law is starting to become clear. This Legal Brief reviews how courts have interpreted the definition of disability under the ADAAA's new standards, discusses trends in judicial interpretations, and identifies emerging ADA legal issues.

The Litigation Landscape Five Years After the Passage of the ADA Amendments Act

Broad Interpretation of the Definition of Disability

The ADAAA mandates that the definition of disability "be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] Act"[10] and the Equal Employment Opportunity Commission ("EEOC") reiterated this requirement.[11] These statutory and regulatory requirements are intended to expressly reject the Supreme Court's 2002 decision in *Toyota*, which held that the definition of disability should be "interpreted strictly" to create a "demanding standard."[12]

A review of recent case law reveals that courts are uniformly acknowledging that the ADAAA significantly broadened the ADA's definition of disability, and making affirmative statements regarding the ADAAA's purpose. The following quotations are examples of the language commonly found in judicial opinions:

- The "overarching purpose of the [ADA Amendments Act] is to reinstate the 'broad scope of protection' available under the ADA."[13]
- The ADA Amendments Act "is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute."[14]
- "The ADAAA 'broadened the category of individuals entitled to statutory protection from discrimination under the ADA.'"[15]
- "The ADAAA seeks to broaden the scope of disabilities covered by the ADA after that scope had been narrowed by Supreme Court interpretation."[16]
- "We construe this definition liberally, with an eye towards 'broad coverage of individuals under' the ADA."[17]

Likewise, many courts reach conclusions about disability quickly, without extensive analysis. For example, in *Edwards v. Chevron U.S.A., Inc.*, the plaintiff provided sworn statements that she had been diagnosed with a medical bowel disease that flares up from time to time, requiring her to take several months of medical leave.[18] Without making any other statements or describing the plaintiff's limitations in any greater detail, the court concluded that "[u]nder the amended ADA, that is sufficient."[19]

Broad Interpretation of the Substantial Limitation

In addition to rendering broad proclamations about the breadth of the definition of disability under the ADAAA, courts also acknowledge the regulatory directive that "[w]hether an impairment 'substantially limits' a major life activity should not demand extensive analysis."[20] In *Gibbs v. ADS Alliance Data Sys., Inc.*, the court considered whether an employee's carpel tunnel syndrome constituted a disability.[21] The employee provided evidence that she underwent multiple surgeries and was unable to use her left hand for a few weeks. After "keeping in mind that this inquiry is not meant to be 'extensive' or demanding," the court concluded that the employee provided "some evidence that plaintiff's condition affected her ability to perform manual tasks"

and allowed her case to proceed.[22]

Courts are also complying with the EEOC's regulatory directives regarding the broadened interpretation of substantial limitation, including the requirement to consider the condition and manner in which major life activities are performed. *See Kravits v. Shinseki*, 2012 WL 604169, at *6 (W.D. Pa. Feb. 24, 2012) (rejecting the defendant's argument that the plaintiff with various impairments including back impairments, fibromyalgia, irritable bowel syndrome, neuropathy, sleep apnea, hypertension, depressive disorder, and anxiety disorder lacked a substantial limitation in light of his physical, social and academic achievements and finding that the plaintiff established that he had a disability under the ADAAA); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013) (considering the pain the plaintiff with fibromyalgia experiences while performing activities and determining that the plaintiff presented sufficient evidence that she has a disability); *Molina v. DSI Renal, Inc.,* 840 F. Supp. 2d 984, 993-96 (W.D. Tex. 2012) (considering pain and focusing less on "outcomes" when determining that fact issue existed regarding whether plaintiff's back injuries constituted disability under analogous state law).

Impairments that are Episodic or in Remission

The ADAAA included a number of rules of construction as a way to provide clear direction about how to properly interpret the definition of disability. Congress used these rules to ensure that impairments that are episodic or in remission can still be qualifying disabilities, and explained that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[23] The EEOC regulations reiterate this statutory requirement. [24]

The vast majority of courts are properly evaluating whether an individual's disability is substantially limiting when active. As illustrations, in *Kinney v. Century Services Corporation II*, the court concluded that an employee with "isolated bouts" of depression could have an ADA disability under the ADAAA's "new paradigm."[25] In *Edwards v. Chevron U.S.A., Inc.*, the court found that a plaintiff with a medical bowel disease that "flared up from time to time" could be a disability, noting that the definition of disability "now includes" episodic impairments that "would substantially limit a major life activity when active."[26] In *Howard v. Pennsylvania Department of Public Welfare*, the defendant asserted that the plaintiff's fibromyalgia was not a disability because her symptoms "wax and wane."[27] The court declined to consider this argument because the "ADAAA plainly forecloses this line of reasoning."[28]

In addition to bowel disease, depression and fibromyalgia, courts have found a number of other episodic conditions to constitute disabilities because they are substantially limiting when active: kidney stones,[29] back conditions,[30] vocal cord enema,[31] Multiple

Sclerosis,[32] and Hepatitis C.[33]

Courts also consistently find the ADAAA to cover individuals with cancer in remission. In *Hoffman v. Carefirst of Fort Wayne, Inc.*, one of the first cases involving an individual with cancer in remission, the court considered whether the plaintiff established his claim.[34] The defendant argued that the employee did not have a disability because his cancer was in remission, and because the employee could return to work without restrictions. The defendant asserted that it "highly doubts that Congress intended all cancer survivors in remission, with no medical evidence of active disease, to be considered disabled as a matter of law for the rest of their lives."[35] However, relying on the "clear language of the ADAAA," the court disagreed with the defendant, and found that the plaintiff need not show that he was substantially limited in a major life activity at the time of the alleged adverse employment action.[36] The court noted that its conclusion was further bolstered by EEOC guidance, which listed cancer is an example of an impairment that is episodic or in remission. *See also Norton v. Assisted Living Concepts, Inc.,* 786 F. Supp. 2d. 1173, 1184-86 (E.D. Tex. 2011) (holding that renal cancer constitutes a disability under the ADAAA because cancer "substantially limits" the "major life activity" of "normal cell growth" when it is active, and finding it irrelevant whether the plaintiff's cancer was in remission when he returned to work). These cases mark a major change from the way cancer was viewed in pre-ADAAA cases.

Nonetheless, at least one court has failed to apply the ADAAA's revised standard. In *Wurzel v. Whirlpool Corporation*, for example, the court concluded an individual's sporadic angina spasms were not substantially limiting.[37] Citing Supreme Court decisions that pre-date the ADAAA, the court stated erroneously, that "[t]he principal that intermittent impairments, such as those resulting from plaintiff's sporadic angina spasms, are not deemed disabling remains good law."[38] It appears, however, that this court's holding is the exception and that most courts are properly applying the ADAAA's rules of construction regarding conditions that are episodic or in remission.

Disregarding Ameliorative Effects of Mitigating Measures

The ADAAA's rules of construction also require courts to consider whether an individual has a disability without taking into account the ameliorative effects of mitigating measures (except for ordinary eyeglasses and contact lenses).[39] To provide the courts and the public with additional guidance about this directive, Congress included a number of examples of mitigating measures, such as: medication, equipment, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, use of assistive technology, reasonable accommodations or auxiliary aids or services, and learned behavioral or adaptive neurological modifications.[40] The EEOC's regulations identified three additional examples of mitigating measures: psychotherapy, behavioral

therapy, and physical therapy.[41] Significantly, the EEOC also stated that even though the mitigating measure itself cannot be considered, the negative side effects of mitigating measures may be considered in assessing disability.[42] In addition, the benefits of mitigating measures may be considered in showing the ability to perform essential job functions.[43]

Given the clarity of the statutory and regulatory text, it is not surprising that courts are largely applying this directive correctly. In *Orne v. Christie*, an employee was diagnosed with sleep apnea and began to treat this condition with a CPAP machine.[44] Although the employee previously struggled to stay awake and concentrate at work, once he started to use the CPAP machine, he no longer experienced these symptoms. As a result, the employer argued that the employee did not have a disability because the CPAP machine "cure[d]" or "relieve[d]" the employee.[45] Applying the ADAAA, however, the court found the employer's argument without merit and allowed the employee's claim to go forward.

Similarly, in *Harty v. City of Sanford*, the plaintiff was a veteran with restrictions in his ability kneel, squat, run, jump, climb stairs or a ladder, or walk up or down inclines.[46] During his job as a city foreman, the plaintiff found ways to mitigate the impact of his physical restrictions. The court denied the employer's motion for summary judgment on the issue of disability, holding that when disregarding the ameliorative measures used by the plaintiff, he had substantial limitations sufficient to meet the definition of disability. *See also Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10-11 (S.D.N.Y. July 9, 2012) (disregarding impact of planning meals to mitigate impact of digestive disorder); *Molina v. DSI Renal, Incorporated*, 840 F.Supp.2d 984, 995 (W.D. Tex. 2012) (disregarding pain medication for back impairment); *Berard v. Wal-Mart Stores East, Limited Partnership*, 2011 WL 4632062, at *2 (M.D. Fla. Oct. 4, 2011) (finding plaintiff could be substantially limited due to diabetes when disregarding insulin and testing kit used for treatment); *Markham v. Boeing Co.*, 2011 WL 6217117, at *4 (D. Kan. Dec. 14, 2011) (finding an employee with one eye could have a disability under the ADAAA despite the fact that the employee can compensate by turning his head 180 degrees).

As referenced above, although the ameliorative effects of mitigating measures must be disregarded under the ADAAA, the negative effects of mitigating measures must be considered, and it appears that courts are complying with this requirement as well. In *Seim v. Three Eagles Communications, Inc.*, when determining whether the plaintiff had a disability, the court considered the plaintiff's limitations caused by Graves' disease, as well as the negative side effects of the medications he took to ameliorate symptoms of this disease.[47] The plaintiff's medication caused him to experience drowsiness and confusion in the morning, leading the court to conclude that the plaintiff could establish that he had a disability under the ADA based on the substantial limitations caused by the medication's side effects. Similarly in *Wells v. Cincinnati*

Children's Hospital Medical Center, the court held that the plaintiff met her burden to establish that she had a substantial limitation in an actual impairment caused by the medications prescribed to ameliorate her gastrointestinal condition, because such medications caused her to experience blackout, disorientation, and confusion that interfered with her work performance as a nurse.[48]

It is important for plaintiffs with disabilities to remember that even though courts are disregarding the corrective effects of mitigating measures, plaintiffs still need to demonstrate how their conditions substantially limit a major life activity absent the mitigating measures. In *Lloyd v. Housing Authority*, although the court recognized that the ADAAA required it to evaluate the plaintiff's condition in its unmitigated state, it concluded that the plaintiff failed to produce evidence about how his asthma and high blood pressure would affect him if left untreated.[49] *See also O'Donnell v. Colonial Intermediate Unit 20*, 2013 WL 1234813, at *6 (E.D. Pa. March 27, 2013) (granting defendant's motion to dismiss because plaintiff failed to identify how his "treated or untreated" mental health disorders were substantially limiting).

Expansion of Definition of "Major Life Activities"

Before the ADAAA, litigation regularly focused on the definition of "major life activity," which caused a great deal of uncertainty. In response, Congress included a number of examples of major life activities in the ADAAA, and clearly stated that its list was not exhaustive.[50] Specifically, the ADAAA identified the following as major life activities: caring for oneself, walking and standing, performing manual tasks, reading, seeing, lifting, hearing, bending, eating, speaking, sleeping, breathing, learning, communicating, concentrating and thinking, and working.[51] Further, the EEOC's regulations identified three additional major life activities: interacting with others, sitting, and reaching.[52]

As a result, there has not been a significant amount of litigation to date on the definition of major life activities. This is true even when a plaintiff alleges limitations in one of the major life activities specified in the EEOC regulations, but not included in the statutory text. For instance, in *Bar-Meir v. University of Minnesota*, the court confirmed that "interacting with others" was a major life activity under the ADAAA pursuant to the EEOC regulations.[53]

Another indication that courts are unlikely to delve into the question of major life activity comes from a district court case, *Thomas v. Bala Nursing & Retirement Center*.[54] In *Thomas*, the plaintiff asserted that she was substantially limited in sleeping because her anemia caused her to sleep up to twelve hours per day. The defendant asserted that this limitation should be "characterized as 'waking up' instead

of 'sleeping,' and that sleeping longer than the average individual is hardly a substantial *limitation* in sleeping."[55] The court rejected this argument, finding that it cannot conclude as a matter of law that "waking up" is not a major life activity.[56]

Major Bodily Functions

Congress greatly expanded ADA coverage by broadening the definition of "major life activities" to include the concept of "major bodily functions."[57] The ADAAA defines major bodily functions to include: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine, and reproductive functions, and clarified that this is not an exhaustive list.[58] In its regulations, the EEOC identified seven additional major bodily functions: special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, musculoskeletal, and individual organ operation.[59]

In the past five years, courts have consistently applied the concept of major bodily functions in numerous cases involving a variety of impairments. As a result, by including the concept of major bodily functions, the ADAAA has done a great deal to accomplish the goal of significantly broadened coverage for people with disabilities. The following impairments have been found to substantially limit the following major bodily functions in the case law:

- Type II Diabetes substantially limits the endocrine function[60]
- Cancer substantially limits normal cell growth[61]
- HIV substantially limits the immune system[62]
- Heart disease substantially limits circulatory function[63]
- Irritable bowel syndrome substantially limits bowel functions[64]
- Graves' Disease substantially limits immune, circulatory and endocrine functions[65]
- Multiple Sclerosis substantially limits normal neurological functions[66]
- Brain tumor substantially limits brain functions and normal cell growth[67]
- Spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limit operation of the musculoskeletal system[68]
- Removal of stomach and other parties of gastrointestinal system substantially limit bowel and digestive bodily functions[69]
- Post Traumatic Stress Disorder substantially limits brain function[70]
- Hepatitis C substantially limits the immune system, digestive, bowel and bladder function[71]

At least one court, unfortunately, has failed to apply the concept of major bodily functions, reminding all plaintiffs litigating ADA cases to include a clear articulation of the relevant major life activity or major bodily function. In *Fierro v. Knight Transportation*,[72] a *pro se* plaintiff brought an ADA claim and asserted that his cancer

rendered him "disabled" under the ADAAA. Relying on pre-ADAAA precedent, the court rejected the plaintiff's argument and stated that "merely having cancer-which, though, may be an 'impairment,'" is insufficient to establish a disability.[73] Without mentioning that concept of major bodily functions or cancer's impact on normal cell growth, the court dismissed the plaintiff's claim.

EEOC's Regulatory Discussion of Specific Impairments

The EEOC's regulations include a list of eighteen impairments that should easily be found to substantially limit a major life activity: deafness, blindness, mobility impairments requiring wheelchair, intellectual disability, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, human immunodeficiency virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[74]

Courts are generally deferring to this list and finding plaintiffs with listed impairments to be covered without engaging in a detailed analysis. As an example, in *Franklin v. City of Slidell*, the court stated: "Considering . . . that the EEOC regulations interpreting the ADA indicate that post-traumatic stress disorder is an impairment that should easily be concluded to substantially limit brain function, the Court finds that Plaintiff has adequately pleaded that he is disabled within the meaning of the ADA."[75] Further, in *Angell v. Fairmount Fire Protection District*, relying on EEOC regulations, the court avoided a drawn-out analysis and, found that it "should easily be concluded" that cancer is a disability under the ADA.[76] *See also Horgan v. Simmons*, 704 F.Supp.2d 814, 819 (N.D. Ill. 2010) (citing regulatory guidance stating that HIV should easily be concluded to substantially limit the immune system); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013) ("The EEOC has advised that diabetes "will, as a factual matter, virtually always be found to impose a substantial limitation" on endocrine function.").

Despite the EEOC's clear directive, some courts will not conclude that an individual has a disability without proof that he actually has one of the impairments listed. For instance in *Kravits v. Shinseki*, the court noted that while post-traumatic stress disorder will "virtually always" be found to impose a substantial limitation on a major life activity, here, the plaintiff "identified no evidence" that he lived with post-traumatic stress disorder.[77]

As a result of the EEOC's list, litigants are spending less time arguing about whether impairments found on the EEOC's list are ADA qualifying disabilities. It is possible the majority of litigation involving the definition of disability will involve impairments not specifically included in the EEOC's list, such as such as learning disabilities,[78] arthritis, anxiety and back injuries. However, in light of the ADAAA's other provisions requiring

broad interpretation of the definition of disability, people with disabilities and their advocates can be optimistic that their cases will not be dismissed on this basis.

Transient or Short Term Impairments

Courts have had occasion to consider whether people with "transient" or "short term" impairments qualify as disabled under the "actual disability" prong or "record of" prong. According to the EEOC's regulations, short term impairments can be substantially limiting, and the exception discussed below regarding temporary impairments under the "regarded as" prong does not apply to the other two methods of proving disability.[79] Indeed, the EEOC confirmed that "the effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting within the meaning" of the definition of actual disability and record of disability.[80]

A handful of cases have addressed this issue thus far, and have provided differing interpretations of this provision, making this area another one that is ripe for future litigation. In *Newman v. Gagan LLC*, the employee experienced a workplace injury resulting in a lifting restriction.[81] The court allowed the employee's claim to proceed, even though the duration of his disability was not completely clear. Citing the EEOC's regulations, the court stated that the "apparently transitory nature of Plaintiff's lifting impairment does not automatically negate the conclusion that he qualified as disabled under the ADAAA standard."[82] Still, courts are unlikely to find individuals with ailments like the flu to be covered by the ADA. In *Lewis v. Florida Default Law Group, P.L.*, the court found that a plaintiff who contracted the H1N1 virus and could not perform various major life activities for a period of one to two weeks did not have an ADA qualifying disability because the plaintiff's inability to perform functions for this "extremely short duration" is not a substantial limitation.[83]

There is at least one troublesome case regarding non-permanent impairments. In *Green v. DGG Properties Co., Inc.*, 2013 WL 395484, at *11 (D. Conn. Jan. 31, 2013), a *pro se* plaintiff brought a claim under Title III following his experience at an inaccessible hotel.[84] Although the plaintiff permanently lacked complete mobility and had undergone three surgeries, in his complaint, he qualified such allegations and pled that he used a walker and wheelchair *at the time of his visit*. The court interpreted this pleading to imply that the plaintiff's need for a mobility device was temporary. Perhaps due to the plaintiff's inadequate pleading, or possibly due to error in light of the modified legal standards, the court, citing a wide range of pre-ADAAA cases, concluded that the plaintiff was not covered by the ADAAA because "even under the ADAAA's broadened definition of disability, short term impairments would still not render a person disabled within the meaning of the statute."[85]

Broad Definition of "Regarded As"

The ADAAA redefined the "regarded as" prong of the definition of disability by significantly broadening who is eligible for coverage. Specifically, the ADAAA removed the requirement that an individual demonstrate that he was regarded as having an impairment that substantially limits a major life activity. Now, under the ADAAA, an individual only needs to show that he is "regarded as" having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially limiting.[86]

In light of these significant changes, the EEOC has explained that the "regarded as" prong should, in most circumstances, be the most viable avenue for ADA coverage: "Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment."[87]

Courts are properly applying the ADAAA's new iteration of the "regarded as" prong. As an example, in *Meinelt v. P.F. Chang's China Bistro*, an employee with a brain tumor was terminated three days after disclosing his disability to his employer.[88] The court held that the employer "regarded" the employee as having a disability without any discussion of whether the employee's condition substantially limited a major life activity. Likewise, in *Darcy v. City of New York*, the court found the employee presented sufficient evidence that he was "regarded as" having a disability because his employer commented that he was an "alcoholic" and transferred him to a new position five months later, again omitting any discussion of a substantial limitation.[89]

In another example, *Gil v. Vortex, LLC,* the court held that an employee with monocular vision established evidence sufficient to demonstrate that his employer regarded him as having a disability.[90] In a conversation with the employee's daughter, the employer cited concerns about the employee's ability to do the job properly due to his vision problems as a reason for his termination. The court held that, under the new ADAAA standard, the employee had met his burden of pleading a claim of "regarded as" disability.

In other words, courts are finding that whether an individual is regarded as having an impairment is "not subject to a functional test."[91] *See Saley v. Caney Fork, LLC*, 886 F.Supp.2d 837, 851 (M.D. Tenn. 2012) (finding employee to be regarded as having a disability and noted that an employee with hemochromatosis "may recover under the 'regarded as' prong in the absence of visible symptoms, or any symptoms at all");

Johnson v. Farmers Insurance Exchange, 2012 WL 95387, at *1-2 (W.D. Okla. Jan. 12, 2012) (rejecting defendant's argument that plaintiff was not regarded as having a disability because her sleep apnea did not substantially limit a major life activity).

The stark difference between the pre-ADAAA and post-ADAAA standards required to satisfy the "regarded as" prong is clearly illustrated in *Wolfe v. Postmaster General*.[92] In *Wolfe*, an individual with ADHD alleged that he endured discrimination both before and after the ADAAA's effective date. The individual argued that his supervisors perceived his ADHD to substantially limit his ability to work. With respect to the pre-ADAAA allegations, the court disagreed. The court explained that although some of the employee's supervisors testified that they believed the individual's limited attention span occasionally affected his ability to stay in his work area, there was no evidence that they perceived his impairment to foreclose or substantially limit his ability to work in a "broad class of jobs," which was required to show a substantial limitation in the major life activity of working. However, with respect to the individual's post-ADAAA allegations, the court came to a different conclusion. Explaining that that under the ADAAA, "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," the court quickly concluded that the plaintiff "carried his burden of showing that [his employer] regarded him as disabled." Note, however, that the court still granted the employer's motion for summary judgment because the employee failed to provide sufficient evidence that he was discriminated against because of his perceived disability.

Judicial Interpretation of "Transitory and Minor"

To address concerns from the business community regarding the breadth of the new "regarded as" prong, Congress created an exception for impairments that are both transitory and minor. Although the ADAAA defines a transitory impairment as one that has an actual or expected duration of six months or less, it does not define the term "minor."[94]

Courts have found the flu and non-episodic anemia to be objectively both transitory and minor. *See Lewis v. Florida Default Law Group*, 2011 WL 4527456, at *5-7 (M.D. Fla. 2011) (H1N1 virus); *LaPier v. Prince George's County, Maryland.*, 2011 WL 4501372, at *5 (D. Md. Sept. 27, 2011) (non-episodic anemia lasting one week). These decisions appear to be consistent with the plain language of the ADAAA and the EEOC's regulations.

Some defendants have tried to argue that cases should be dismissed because the plaintiff's impairment was either transitory *or* minor. These types of assertions have mostly failed, as most courts are complying with the ADAAA's language that requires

an impairment to be *both* temporary and minor to fall within the scope of its exemption. In *Davis v. NYC Dept. of Education*, the court found that an employee sufficiently pled that she was regarded as having a disability, even though her back and shoulder impairments may have been "transitory," because there was nothing to suggest that her impairments were "minor."[95] Courts are also concluding that whether an impairment is "transitory and minor" is an objective determination.[96]

Courts are confirming that it is the defendant's burden to show that a plaintiff's impairment is both transitory and minor. In *Dube v. Texas Health and Human Services Commission*, the employee alleged in her complaint that she was regarded as having a disability and was terminated for using 11 weeks of leave to undergo treatment for a "serious medical condition."[97] The defendant filed a motion to dismiss, asserting that the employee was only temporarily impaired. The court refused to dismiss the claim on this basis, however, and explained that nothing in the complaint suggested that the employee's disability was objectively "transient." It further noted that nothing in the complaint suggested that the plaintiff's impairment was objectively "minor."

Case Law on Reasonable Accommodations and "Regarded As"

The ADAAA's other significant revision to the "regarded as" prong is that individuals that qualify for coverage under the "regarded as" prong are not entitled to a reasonable accommodation under Title I.[98]

Courts are following the ADAAA's language requirement that employees covered by the ADAAA's "regarded as" prong no longer may bring a claim for failure to accommodate. In *Ryan v. Columbus Regional Healthcare System*, the plaintiff worked as an operating room nurse, and had a degenerative joint disease and arthritis in her knee.[99] After exhausting her FMLA leave, the plaintiff requested a number of accommodations including limited standing, stooping, kneeling and crouching. The employer denied these requests, and the employee filed suit, alleging that she was regarded as having a disability. Because the ADAAA does not require employers to accommodate employees who are regarded as disabled, the court dismissed the claim.

This new provision can have implications for individuals who are trying to prove that they are "qualified" under the ADA. For instance, in *Walker v. Venetian Casino Resort, LLC*, a cocktail server at the Venetian Casino Restaurant was injured on the job and subsequently terminated.[100] She brought a claim alleging that she was regarded as disabled, and in response, her former employer argued that she was not qualified to do her job. The employee agreed that she was not qualified without a reasonable accommodation, but asserted that she would have been qualified under an accommodated reassignment. Because the ADAAA does not require employers to

accommodate individuals under the "regarded as" prong, and because the plaintiff could not demonstrate that she was qualified absent a reasonable accommodation, the court found that the plaintiff failed to properly allege the elements of her ADA claim.

Regulatory Authority

In the ADAAA, Congress expressly granted authority to the EEOC, Department of Justice, and Department of Transportation to issue regulations interpreting the definition of disability under the ADA.[101] It did this to respond to the Supreme Court decision that declined to give deference to the definition of disability as set forth by federal agencies.[102]

So far, there has been no real question as to whether courts should afford deference to agency regulations. In the few cases that have acknowledged this statutory provision, they have simply cited it in conjunction with the federal agency regulations. In *Kravits v. Shinseki*, the court cited the EEOC's regulations regarding the term "substantially limits" and noted the statutory rule of construction regarding regulatory authority.[103] Similarly, in *Angell v. Fairmount Fire Protection District*, the court cited the EEOC's regulations, along with the statutory grant of authority to do so.[104] Thus far, the Department of Justice and the Department of Transportation have not issued new regulations under the ADAAA.

Retroactivity of ADA Amendments Act

In the first few years following the ADAAA's enactment, a significant number of cases assessed whether the ADAAA applied to claims that arose before January 1, 2009, the ADAAA's effective date.[105] Courts nearly universally held that the ADAAA should not be applied retroactively.[106] In fact, twelve of the thirteen circuit courts to consider this issue held that the ADAAA should not be applied retroactively.[107] These courts applied the general rule that absent clear congressional intent, statutes are not applied retroactively because it is unfair to hold a defendant liable for a standard articulated after it engaged in the alleged conduct.[108] In addition to the courts, the EEOC also opined that the ADAAA does not apply retroactively in its *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*.[109]

However, at least one court applied the ADAAA retroactively, when the plaintiff sought prospective injunctive relief. In *Jenkins v. National Board of Medical Examiners*, the Sixth Circuit reversed the district court's decision that held that the plaintiff did not have an ADA-qualifying disability.[110] The appellate court explained that because the plaintiff sought "the right to receive an accommodation on a test that will occur in the future, well after [the ADAAA's] effective date," the new and broader standard should apply.

Although courts declined to apply the ADAAA retroactively, many still noted the new law in its decisions or used it to bolster their holding. *See*, *e.g.*, *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 862 (9th Cir. 2009) ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.").

Conclusion

Five years ago, Congress passed the ADAAA in attempt to significantly expand the ADA's coverage for people with disabilities. As analyzed in this Legal Brief, courts are generally complying with Congress's statutory directives and broadly interpreting the definition of disability. While there have been a few outlying cases, they appear to be the exception and not the rule. Thus far, it appears that the ADAAA has effectively broadened protections for people with disabilities, just as Congress intended, and successfully focused judicial analysis away from whether an individual has a disability, and toward whether discrimination occurred.

Notes

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2. Americans with Disabilities Act, 42 U.S.C. § 12102(1); Rehabilitation Act of 1973, Pub. L. No. 93-112 §§ 7(6), 504, 87 Stat. 355, 361, 394 (1973).
3. *School Bd. of Nassau County, v. Arline*, 480 U.S. 273, 285 (1987).
4. *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service Inc.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
5. *Toyota Motor Manufacturing, Kentucky, Incorporated v. Williams*, 534 U.S. 184, 197 -98 (2002) ((deviating from traditional civil rights jurisprudence and holding that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled").
6. ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008).
7. 42 U.S.C. § 12101 note (b)(1) (2013).

8. 42 U.S.C. § 12101 note (b)(1) (2013); *see also* Joint Remarks of Rep. Steny Hoyer and Rep. Jim Sensenbrenner on *S. 3406*, 154 Cong. Rec. H8294 (daily ed. Sept. 17, 2008) ("With the passage of the [ADAAA], we ensure that the ADA's promise for people with disabilities will be finally fulfilled. Our expectation is that this law will afford people with disabilities the freedom to participate in our community, free from discrimination and its segregating effects, that we sought to achieve with the original ADA.")
9. *See* National Council on Disability, Righting the ADA (Dec. 1, 2004). Available at: http://www.ncd.gov/publications/2004/Dec12004 (last accessed September 4, 2013); National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, 17 (July 23, 2013). Available at: www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb (last accessed August 13, 2013).
10. 42 U.S.C. § 12102(4)(A).
11. 29 C.F.R. § 1630.1(c)(4).
12. *Toyota Motor Manufacturing*, 534 U.S. at 197–98.
13. *Fournier v. Payco Foods Corporation,* 611 F. Supp. 2d 120, n. 9 (D.P.R. 2009).
14. *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009).
15. *Semenko v. Wendy's Intern., Inc.*, 2013 WL 1568407, at *6 (W.D. Pa. April 12, 2013).
16. *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012).
17. *Diaz v. City of Philadelphia*, 2012 WL 1657866, at *9 (E.D. Pa. May 10, 2012).
18. *Edwards v. Chevron U.S.A., Inc.,* 2013 WL 474770, at *2 (S.D. Tex. Feb. 7, 2013).
19. *Id*.
20. *See, e.g., Kravits*, 2012 WL 604169, at *5 (citing 29 C.F.R. § 1630.2(j)(1)(i), (iii)).
21. *Gibbs v. ADS Alliance Data Sys., Inc.*, 2011 WL 3205779, at *1-3 (D. Kan. July 28, 2011).
22. *Id*. at *3.
23. 42 U.S.C. § 12102(4)(D).
24. 29 C.F.R. § 1630.2(j)(1)(vii).

25. *Kinney v. Century Services Corp. II,*, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011).
26. *Edwards,* 2013 WL 474770, at *2.
27. *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *12 (E.D. Pa. Jan. 9, 2013).
28. *Id*.
29. *Esparza v. Pierre Foods,* 923 F.Supp.2d 1099, 1103-06 (S.D. Ohio 2013).
30. *Molina v. DSI Renal, Inc.,* 840 F. Supp. 2d 984, 993-96 (W.D. Tex. 2012) (finding that whether lumber internal disc derangement, lumbar radiculopathy, and lumbago, all causing periodic bouts of severe pain in plaintiff's pelvis, thighs, feet, and back, substantially limited plaintiff's ability to stand, sit, and walk were substantially limiting when active).
31. *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *10-11 (W.D. Pa. June 11, 2012) (caused plaintiff to experience "losing voice" and pain in speaking).
32. *Carbaugh v. Unisoft Int'l, Inc., 2011 WL 5553724 at *8 (S.D. Tex. Nov. 15, 2011) (finding that Multiple Sclerosis is substantially limiting when active).*
33. *Hardin v. Christus Health Southeast Texas St. Elizabeth*, 2012 WL 760642 (E.D. Tex. Jan. 6, 2012).
34. *Hoffman v. Carefirst of Fort Wayne, Inc.,* 737 F. Supp. 2d 976, 984-86 (N.D. Ind. 2010).
35. *Id*. at 985.
36. *Id*.
37. *Wurzel v. Whirlpool Corp.*, 2010 WL 1495197, at *10 (N.D. Ohio Apr. 14, 2010) *aff'd*, 482 F. App'x 1 (6th Cir. 2012) (appellate court decision did not discuss whether the plaintiff had an ADA-qualifying disability).
38. *Id*.
39. ADA Amendments Act § 2(b)(3).
40. *Id*. at §§ 12102(4)(E)(i).
41. 29 C.F.R. § 1630.2(j)(5)(v).
42. 29 C.F.R. § 1630.2(j)(1)(vi).
43. 29 C.F.R. Part 1630 app. § 1630.2(j)(1)(vi).

44. *Orne v. Christie*, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013).
45. *Id*.
46. *Harty v. City of Sanford*, 2012 WL 3243282, at *4-5 (M.D. Fla. Aug. 8, 2012).
47. *Seim v. Three Eagles Commc'ns, Inc.,* 2011 WL 2149061, at *1-3 (N.D. Iowa June 1, 2011).
48. *Wells v. Cincinnati Children's Hosp. Med. Ctr.,* 860 F. Supp. 2d 469, 480 (S.D. Ohio 2012).
49. *Lloyd v. Housing Authority*, 857 F.Supp.2d 1252, 1263-64 (M.D. Ala. 2012).
50. 42 U.S.C. § 12102(2)(A).
51. *Id*.
52. 29 C.F.R. § 1630.2(i)(1)(i).
53. *Bar-Meir v. Univ. of Minnesota*, 2012 WL 2402849, at *2-3 (D. Minn. June 26, 2012) (dismissing case because plaintiff failed to show causation between disability and adverse employment action).
54. *Thomas v. Bala Nursing & Ret. Ctr.,* 2012 WL 2581057, n. 14 (E.D. Pa. July 3, 2012).
55. *Id*.
56. *Id*.
57. 42 U.S.C. § 12102(2)(B).
58. *Id*.
59. 29 C.F.R. § 1630.2(i)(1)(ii).
60. *Szarawara v. Cnty. of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013).
61. *Haley v. Community Mercy Health Partners,* 2013 WL 322493, at *10 (S.D. Ohio Jan. 28, 2013) (breast cancer); *Angell v. Farmount Fire Protection Dist.*, 907 F.Supp.2d 1242, 1250-51 (D. Colo. 2012) (cancer in remission); *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (renal cancer); *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (heart disease and leukemia).
62. *Horgan v. Simmons*, 704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010).
63. *Chalfont*, 2010 WL 5341846, at *9 (heart disease and leukemia).

64. *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638, at *7-8 (E.D. Pa. Dec. 12, 2011).
65. *Seim*, 2011 WL 2149061, at *3.
66. *Feldman v. Law Enforcement Assoc. Corp.*, 779 F.Supp.2d 472, 483-84 (E.D.N.C. 2011).
67. *Meinelt v. P.F. Chang's China Bistro*, 787 F.Supp.2d 643, 651-52 (S.D. Tex. 2011).
68. *Barlow v. Walgreen Co.*, 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012).
69. *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10-11 (S.D.N.Y. July 9, 2012).
70. *Franklin v. City of Slidell*, 2013 WL 1288405, at *10-11 (E.D. La. Mar. 27, 2013).
71. *Hardin v. Christus Health Se. Texas St. Elizabeth*, 2012 WL 760642, at *6 (E.D. Tex. Jan. 6, 2012).
72. *Fierro v. Knight Transp.*, 2012 WL 4321304, at *3 (W.D. Tex. Sept. 18, 2012).
73. *Id*.
74. 29 C.F.R. § 1630.2(j)(3)(iii).
75. *Franklin v. City of Slidell*, 2013 WL 1288405, at *11 (E.D. La. Mar. 27, 2013).
76. *Angell*, 907 F. Supp. 2d at 1250.
77. *Kravits*, 2012 WL 604169, at *5 (surviving summary judgment because plaintiff successfully established different disabilities).
78. *See Healy v. National Board of Osteopathic Medical Examiners*, 870 F.Supp.2d 607, 620-21 (N.D. Ind. May 3, 2012) (finding the plaintiff's reading disorder not to be substantially limiting when compared to the general population).
79. 29 C.F.R. § 1630.2(j)(1)(ix).
80. *Id*.
81. *Newman v. Gagan LLC*, 2013 WL 1332247, at *10 (N.D. Ind. Mar. 28, 2013).
82. *Id*.
83. *Lewis v. Florida Default Law Grp., P.L.*, 2011 WL 4527456, at *5 (M.D. Fla. Sept. 16, 2011).
84. *Green v. DGG Properties Co., Inc.*, 2013 WL 395484, at *11 (D. Conn. Jan. 31, 2013).

85. *Id*.

86. 42 U.S.C. § 12012(3).

87. 29 C.F.R. § 1630.2(g)(3).

88. *Meinelt*, 787 F.Supp.2d at 651-53.

89. *Darcy v. City of New York*, 2011 WL 841375, at *3-5 (E.D.N.Y. Mar. 8, 2011).

90. *Gil v. Vortex, Limited Liability Company*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010) (internal citations omitted).

91. *Id*.

92. *Wolfe v. Postmaster Gen.*, 488 F. App'x 465, 467 (11th Cir. 2012).

93. *Id*. at 468.

94. 42 U.S.C. § 12102(3)(B).

95. *Davis v. NYC Dept. of Education*, 2012 WL 139255, at *5-6 (E.D.N.Y. Jan. 18, 2012).

96. *See*, *e.g.*, *id*.

97. *See*, *e.g.*, *Dube v. Texas Health and Human Services Commission,* 2011 WL 3902762, at *4-5 (W.D. Tex. Sept. 6, 2011).

98. 42 U.S.C. § 12201(h).

99. *Ryan v. Columbus Regional Healthcare System*, 2012 WL 1230234, at *4-5 (E.D.N.C. Apr. 12, 2012).

100. *Walker v. Venetian Casino Resort, LLC*, 2012 WL 4794149, at *14-15 (D. Nev. Oct. 9, 2012).

101. *Id*. at § 12205a.

102. ADA Amendments Act § 2(b)(2);

103. *Kravits*, 2012 WL 604169, at *5.

104. *Angell*, 907 F. Supp. 2d at 1250 ("The authority to issue regulations granted to the Equal Employment Opportunity Commission ... under this Act includes the authority to issue regulations implementing the definitions of disability ... consistent with the ADA Amendments Act of 2008." 42 U.S.C. § 12205a.).

105. ADA Amendments Act, Pub. L. No. 110-325 § 8, 122 Stat. 3553 (2008) ("[The ADAAA] shall become effective on January 1, 2009").

106. *See, e.g., Thornton v. United Parcel Serv., Inc.,* 587 F.3d 27, 35 n.3 (1st Cir. 2009), *Milholland v. Sumner County Board of Education,* 569 F.3d 562, 565–67 (6th Cir. 2009); *Kiesewetter v. Caterpillar Incorporated,* 295 F. App'x 850, 851 (7th Cir. 2008); *EEOC v. Agro Distribution, Limited Liability Company,* 555 F.3d 462, 469 n.8 (5th Cir. 2009).

107. *See* National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, 20 (July 23, 2013). Available at: www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb (last accessed August 13, 2013).

108. *See Landgraf v. USI Film Products,* 511 U.S. 244, 264, 273 (1994).

109. Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, Question 1. Available at: www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last accessed August 13, 2013).

110. *Jenkins v. National Board of Medical Examiners*, 2009 WL 331638, at *2-4 (6th Cir. Feb. 11, 2009).