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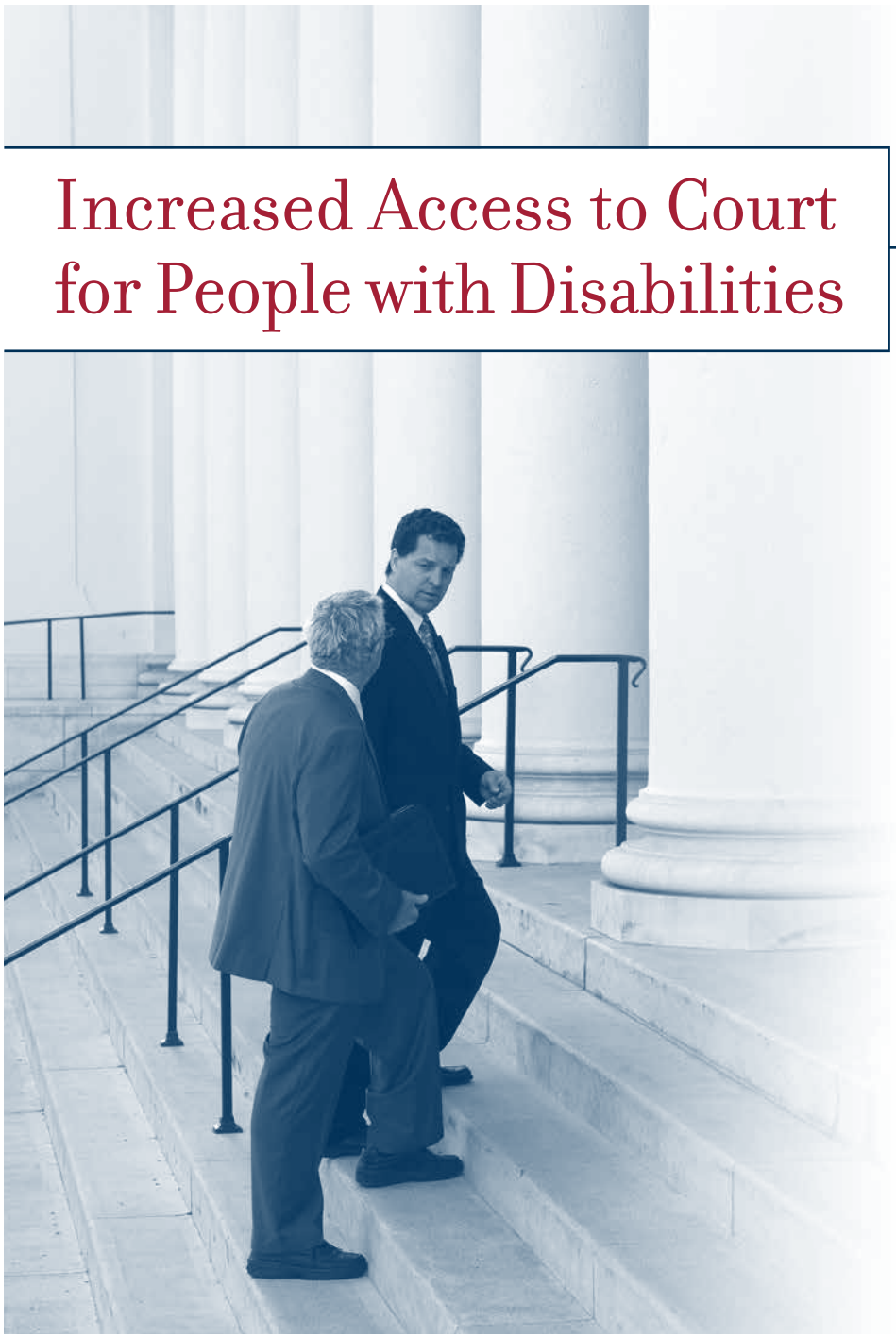
Increased Access to Court for People with Disabilities



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Reopening Access to the Courts for People with Disabilities

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Congress passed the Americans with Disabilities Act (ADA) in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1] The ADA sought to remedy the historical discrimination against people with disabilities, as well as prevent the discrimination that continued in "critical areas" such as employment, voting, public services, transportation, and access to public accommodations.[2]

To ensure protection of all people with disabilities, Congress intentionally drafted a broad definition of "disability," modeled after the definition of disability in the Rehabilitation Act of 1973, whose coverage, in nearly two decades, had not been challenged. People with disabilities and their advocates were therefore quite surprised and disheartened when a significant number of ADA cases were dismissed after courts deemed plaintiffs unable to meet the definition of disability. Courts took an extremely narrow view of who was entitled to the ADA's protections. People with impairments that most would agree should be covered by the ADA were consistently denied the opportunity to pursue their discrimination cases because they could not meet the definition of disability, including diabetes, epilepsy, developmental disabilities, deafness, asthma, cancer, heart disease, and learning disabilities.[3]

In response to court decisions interpreting the definition of disability so narrowly, Congress passed the ADA Amendments Act to ensure that the ADA would fulfill its original promise.[4] The ADA Amendments Act was signed into law on September 25, 2008,

[1]Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1).

[2]*Id*. §§ 12101(a)(2)–(3).

[3]For a more detailed analysis of the Americans with Disabilities Act (ADA) Amendments Act's implications for individuals with learning disabilities, see our *Changing the Landscape for Individuals with Learning Disabilities*, in this issue.

[4]ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as amended in scattered sections of the ADA, 42 U.S.C. §§ 12101–12213).

and became effective on January 1, 2009. Now, nearly five years later, many people with disabilities have been able to have their claims of discrimination heard by courts. Here we review the key provisions of the ADA Amendments Act and discuss how federal enforcement agencies and the courts have interpreted them.

The ADA

The ADA seeks to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities.[5] When the ADA was passed, congressional support was bipartisan and overwhelming.[6] Intending broad coverage, Congress adopted the definition of disability set forth in Section 504 of the Rehabilitation Act of 1973, an earlier federal antidiscrimination law protecting people with disabilities.[7] The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[8]

Before the ADA, the U.S. Supreme Court analyzed this definition under the Rehabilitation Act in *School Board of Nassau County v. Arline* and held that "the definition of 'handicapped individual' is broad."[9] When analyzing the same definition under the ADA, however, the Court deviated from precedent and opted instead to interpret the definition of disability narrowly.[10] The Court's approach contradicted traditional rules of statutory construction requiring liberal interpretation of civil rights laws and remedial statutes.[11] Bound by Court precedent, lower courts followed along and narrowly interpreted the ADA's definition of disability. As a result of these judicial rulings, individuals who had impairments and whom Congress intended to protect were often left without legal protection.

Major Court Rulings that Altered the ADA

In 1998, when the Court heard its first ADA case, *Bragdon v. Abbott*, it followed a traditional civil rights analysis and applied the liberal approach articulated in *Arline*. In *Bragdon* the Court held that an individual who was positive for human immunodeficiency virus (HIV) was protected by the ADA as she was substantially limited in the major life activity of reproduction, even though the condition was not symptomatic at the time.[12] However, less than one year later, the Court's analysis and approach regarding the definition of disability changed dramatically in a trio of cases known as the *Sutton* trilogy.[13]

The Sutton Trilogy. The question at issue in *Sutton* was whether an individual's mitigating measures, such as eyeglasses, prosthetic devices, or medication, should be considered when determining whether the individual had an impairment that substantially limited a major life activity. When the Court decided the *Sutton* trilogy, eight out of nine federal

[5]42 U.S.C. § 12101(a)(7).

[6]The ADA was passed by the Senate 76 to 8 (135 Cong. Rec. S10756-01 (daily ed. Sept. 7, 1989)). The ADA was passed by the House 403 to 20 (136 Cong. Rec. H2599-01 (daily ed. May 22, 1990)).

[7]Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 7(6), 504, 87 Stat. 355, 361, 394 (1973). See H.R. Rep. No. 101-485(III), at 27–31 (1990); Consortium of Citizens with Disabilities, Background and Justification for and Summary of the ADA Restoration Act 2 (Sept. 2006), http://bit.ly/1aAcYae.

[8]42 U.S.C. § 12102(1).

[9]*School Board of Nassau County v. Arline*, 480 U.S. 273, 285 (1987). See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (replacing "handicapped" with "disability" in Rehabilitation Act).

[10]See, e.g., *Toyota Motor Manufacturing, Kentucky, Incorporated v. Williams*, 534 U.S. 184, 197–98 (2002).

[11]See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (noting "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); see also *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 295–96 (1976).

[12]*Bragdon v. Abbott*, 524 U.S. 624, 641 (1998).

[13]*Sutton v. United Air Lines Incorporated*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service Incorporated*, 527 U.S. 516 (1999); *Albertson's Incorporated v. Kirkingburg*, 527 U.S. 555 (1999).

courts of appeals had held that mitigating measures should not be examined in determining whether an individual was substantially limited in a major life activity—rulings consistent with the Interpretive Guidance issued by the Equal Employment Opportunity Commission (EEOC). The EEOC, the federal agency charged with interpreting and enforcing the employment provisions of the ADA, stated that disability determinations should be made "without regard to mitigating measures."[14] The *Sutton* Court chose not to follow the EEOC's guidance or the position taken by most of the appellate courts that had ruled on this issue, even though prior Court decisions afforded EEOC interpretations "great deference."[15] The Court instead held that corrective or mitigating measures must be considered in determining whether a person with a correctable condition had a disability under the first "prong" of the ADA (a physical or mental impairment that substantially limits a major life activity).[16] The Court found that the individuals in the three *Sutton* cases did not meet the ADA's definition of disability because they were not substantially limited in any major life activity when those individuals were evaluated in their mitigated state.[17]

The Court's holding in *Sutton* regarding mitigating measures significantly restricted ADA protections in the courts. While some plaintiffs who used mitigating measures were found to have an ADA disability, courts dismissed a high proportion of cases brought by plaintiffs who used mitigating measures. Specifically, courts found that people living with hearing impairments, multiple sclerosis, epilepsy, sleep apnea, attention deficit disorder, diabetes, depression, heart disease, asthma, cancer, hypertension, lupus, muscular dystrophy, or narcolepsy were not substantially limited in a major life activity when the mitigating measures of those people living with such impairments were taken into account.[18]

Toyota v. Williams. The Court's decision in *Toyota v. Williams* further narrowed the ADA's definition of disability. In *Toyota* an employee claimed that she was substantially limited in performing manual tasks.[19] The Court did not look at limitations involving "major life activities" but instead created a new standard by examining activities of "central importance to most people's daily lives"; the Court held "that to be substantially limited in performing manual tasks, 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. The impairment's impact must also be permanent or long term."[20]

The Court in *Toyota* addressed the rules of construction for interpreting the ADA and further departed from the "broad"

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[14]29 C.F.R. pt. 1630 app. § 1630.2(j) (1998). The U.S Department of Justice and U.S. Department of Transportation adopted similar positions on mitigating measures (see *Sutton*, 527 U.S. at 502 (Stevens, J., dissenting)).

[15]See, e.g., *McDonald*, 427 U.S. at 279.

[16]*Sutton*, 527 U.S. at 482.

[17]*Sutton*, 527 U.S. at 488–89; *Murphy*, 527 U.S. at 521; *Albertson's*, 527 U.S. at 565–66.

[18]See, e.g., *Kemp v. Holder*, 610 F.3d 231, 235–36 (5th Cir. 2010) (hearing impairments); *Berry v. T-Mobile USA Incorporated*, 490 F.3d 1211, 1217–18 (10th Cir. 2007) (multiple sclerosis); *Carlson v. Liberty Mutual Insurance Company*, 237 F. App'x 446, 448–49 (11th Cir. 2007) (epilepsy); *Rossi v. Alcoa Incorporated*, 129 F. App'x 154, 158 (6th Cir. 2005) (sleep apnea); *Collins v. Prudential Investment and Retirement Services*, 119 F. App'x 371, 378–79 (3d Cir. 2005) (attention deficit disorder); *Orr v. Wal-Mart Stores Incorporated*, 297 F.3d 720, 724 (8th Cir. 2002) (diabetes); *Boerst v. General Mills Operations Incorporated*, 25 F. App'x 403, 408 (6th Cir. 2002) (depression); *Taylor v. Nimock's Oil Company,* 214 F.3d 957, 960 (8th Cir. 2000) (heart disease); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (asthma); *Equal Employment Opportunity Commission (EEOC) v. R.J. Gallagher Company*, 181 F.3d 645, 655 (5th Cir. 1999) (cancer); *Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 894 (8th Cir. 1999) (hypertension); *Smith v. Quintiles Transnational Corporation,* 509 F. Supp. 2d 1193, 1207 (M.D. Fla. 2007) (lupus); *McClure v. General Motors Corporation*, No. 01-cv-878, 2003 WL 124480, at *4–5 (N.D. Tex. Jan. 10, 2003) (muscular dystrophy); *Hoskins v. Northwestern Memorial Hospital*, No. 01-c-1116, 2002 WL 1424562, at *6–7 (N.D. Ill. June 28, 2002) (narcolepsy).

[19]*Toyota*, 534 U.S. at 190.

[20]*Id*. at 198.

definitional reading required under *Arline*.[21] The *Toyota* Court deviated from traditional civil rights jurisprudence and held that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[22] Further, while the Court seemed to link its new restrictive analysis to limitations involving "manual tasks," lower courts applied *Toyota's* analysis to a variety of other major life activities.[23]

The ADA Amendments Act

As a result of the narrow judicial interpretations of the ADA's definition of disability, many people with disabilities subjected to discrimination could not seek redress in the courts, and impairments that Congress had intended to be covered by the law were deemed not to fall within the ADA's definition of disability. Accordingly Congress amended the law so that the ADA would be interpreted as Congress originally intended. The result was the ADA Amendments Act.

Definition of Disability to Be Construed in Favor of Broad Coverage. The ADA Amendments Act stresses that the definition of disability is to be construed in favor of broad coverage to the maximum extent permitted.[24] This broad reading of "disability" repudiates the Court's prior finding in *Toyota* that the definition of disability should be "interpreted strictly" to create a "demanding standard."[25] The ADA Amendments Act rejected the Court's other finding in *Toyota* that to rise to the level of disability 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.[26] Since the passage of the ADA Amendments Act, courts across the country have embraced Congress' directive that the definition of disability be broadly construed. One court has found that the "overarching purpose of the [ADA Amendments Act] is to reinstate the 'broad scope of protection' available under the ADA."[27] Another held that the ADA Amendments Act "is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute."[28] Courts have agreed that the focus should be on whether covered entities have complied with their obligations and proclaimed that "[w]hether an impairment 'substantially limits' a major life activity should not demand extensive analysis."[29]

In addition to mandating that the overall definition of disability be construed in favor of broad coverage, Congress required that the term "substantially limits" within the definition of disability be interpreted broadly. Congress found that the EEOC's original ADA regulations defining the term "substantially limits" as "significantly restricted" were inconsistent with congressional intent by expressing too high a standard.[30] Congress directed the EEOC to revise its regulations to be consistent with the ADA Amendments Act.[31] In response to this congressional directive, the EEOC's regulations now state that the term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent per-

[21] *Arline*, 480 U.S. at 285.

[22] *Toyota*, 534 U.S. at 197.

[23] See, e.g., *Calef v. Gillette Company*, 322 F.3d 75, 85–86 (1st Cir. 2003) (learning or speaking); *Capobianco v. City of New York*, 422 F.3d 47, 59–60 (2d Cir. 2005) (seeing); *Velarde v. Associated Regional and University Pathologists*, 61 F. App'x 627, 630–31 (10th Cir. 2003) (lifting).

[24] ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(4)(A)).

[25] *Toyota*, 534 U.S. at 197.

[26] ADA Amendments Act § 2(b)(4).

[27] *Fournier v. Payco Foods Corporation,* 611 F. Supp. 2d 120, 129 (D.P.R. 2009).

[28] *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009).

[29] *Kravits v. Shinseki*, Civ. No. 10-861, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012) (citing 29 C.F.R. § 1630.2(j)(1)(i), (iii)).

[30] ADA Amendments Act § 2(a)(8).

[31] *Id.* § 2(b)(6).

mitted by the terms of the ADA, and that "substantially limits" is not meant to be a demanding standard.[32] What is significant is that courts across the country have generally embraced the position taken by Congress and the EEOC; the courts regularly find that the ADA Amendments Act's inquiry about substantial limitation is not meant to be extensive.[33]

Moreover, the EEOC's regulations include a list of eighteen impairments that should easily be found to limit a major life activity substantially: deafness, blindness, mobility impairments requiring a wheelchair, intellectual disability, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[34] Courts have relied upon the EEOC's list when analyzing the definition of disability under the ADA Amendments Act and have found plaintiffs with impairments on the list to be covered without extensive analysis.[35]

Impairments that Are Episodic or in Remission. Under the original ADA, people who had impairments that were either in remission or episodic in nature were frequently found not to be covered by the law. Courts originally interpreted the term "substantially limits" as needing to be a current state.[36] As a result, many plaintiffs with impairments such as cancer, which can be in remission, or mental illness, diabetes, and epilepsy, which can be episodic, were found not to be covered by the ADA because they could not meet the exacting requirement of showing a substantial limitation at the time of the adverse action.[37]

Congress sought to remedy this problem through the ADA Amendments Act and expressly added language that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[38] No longer would plaintiffs be required to demonstrate that they were substantially limited in a major life activity at the precise time of the alleged act of discrimination. Rather, they would have to demonstrate only that their impairment substantially limits a major life activity when it is active. The EEOC affirmed this concept in its regulations.[39]

Courts have followed the ADA Amendments Act and the EEOC's regulations and have consistently found impairments to be within the definition of disability even when they are episodic or in remission. For instance, one court rejected the employer's claim that the plaintiff's "isolated bouts" with depression did not constitute an ADA disability. The court found that an impairment that was "episodic or intermittent" could be an ADA disability if it substantially limited a major life activity when active.[40] Courts have consistently found that individuals with cancer in re-

[32]29 C.F.R. 1630.2(j) (2013).

[33]See, e.g., *Gibbs v. ADS Alliance Data Systems Incorporated*, No. 10-cv-2421, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011).

[34]29 C.F.R. § 1630.2(j)(3)(iii).

[35]See, e.g., *Horgan v. Simmons*, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010).

[36]*Sutton*, 527 U.S. at 481–83.

[37]See, e.g., *Waldrip v. General Electric Company*, 325 F.3d 652, 656–57 (5th Cir. 2003); *EEOC v. Sara Lee Corporation*, 237 F.3d 349, 352–53 (4th Cir. 2001); *Casseus v. Verizon New York Incorporated*, 722 F. Supp. 2d 326, 348 n.17 (E.D.N.Y. 2010) (noting that court would have decided case differently under ADA Amendments Act).

[38]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(4)(D)).

[39]29 C.F.R. § 1630.2(j)(1)(vii). In the appendix to its regulations, the EEOC identified the following nonexhaustive list of impairments that are frequently episodic or can be in remission: epilepsy, hypertension, diabetes, asthma, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, schizophrenia, and posttraumatic stress disorder (29 C.F.R. Part 1630 app. § 1630.2(j)(1)(vii)).

[40]*Kinney v. Century Services Corporation II*, No. 10-cv-787, 2011 WL 3476569 at *10 (S.D. Ind. Aug. 9, 2011); see also *Edwards v. Chevron U.S.A. Incorporated*, No. H-11-2568, 2013 WL 474770, at *2 (S.D. Tex. Feb. 7, 2013) (individual had disability due to episodic flare-ups with medical bowel disease).

mission are covered by the ADA Amendments Act.[41]

Mitigating Measures. The Supreme Court's ruling in the *Sutton* trilogy mandated courts, when determining whether there is a substantial limitation in a major life activity, to take into consideration any mitigating measures that plaintiffs use. In the aftermath of *Sutton,* an enormous number of people who used medication, assistive devices, or other measures to deal with the manifestations of their disability were deemed outside of the protections of the ADA.

With the ADA Amendments Act, Congress made clear that courts got it wrong when it came to the interplay between the definition of disability and mitigating measures. The ADA Amendments Act expressly states that one of the purposes of the Act was to reject the mitigation requirement in *Sutton* and its companion cases.[42] Congress set forth numerous rules of construction with respect to the definition of disability, including one on the issue of mitigating measures: Determinations of whether an impairment substantially limits a major life activity shall be made without taking into account mitigating measures, and only the ameliorative effects of ordinary eyeglasses and contact lenses shall be taken into account when determining whether an impairment is substantially limiting.[43]

In an effort to avoid any confusion about Congress' intent, the ADA Amendments Act includes an extensive, albeit nonexhaustive, list 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.[44] The EEOC's regulations identified three additional examples of mitigating measures: psychotherapy, behavioral therapy, and physical therapy.[45] Negative side effects of mitigating measures may be considered in assessing disability, even though the mitigating measure itself cannot be considered, and the benefits of mitigating measures may be considered in showing the ability to perform essential job functions.[46]

Since the passage of the ADA Amendments Act, courts have consistently followed Congress' directive to disregard the ameliorative effects of mitigating measures as part of the analysis of the definition of disability, including in cases involving a continuous positive airway pressure machine for sleep apnea, compensatory strategies to overcome limitations from a knee injury, planning meals to mitigate the impact of a digestive disorder, pain medication for a person with a back impairment, and a person with diabetes.[47] Courts are considering the negative side effects of mitigating measures when determining whether a plaintiff is substantially limited in a major life activity, such as the negative side effects of medication.[48] As a result, courts are dismissing fewer cases on issues related

[41]See, e.g., *Norton v. Assisted Living Concepts Incorporated,* 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011); *Hoffman v. Carefirst of Fort Wayne Incorporated*, 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010).

[42]ADA Amendments Act § 2(b)(3).

[43]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(4)(E)).

[44]*Id.* (codified as amended at 42 U.S.C. § 12102(4)(E)(i)).

[45]29 C.F.R. § 1630.2(j)(5)(v).

[46]*Id.* pt. 1630 app. § 1630.2(j)(1)(vi).

[47]See, e.g., *Orne v. Christie*, No. 12-cv-290, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013) (continuous positive airway pressure machine for sleep apnea); *Harty v. City of Sanford*, 11-cv-1041, 2012 WL 3243282, at *4–5 (M.D. Fla. Aug. 8, 2012) (compensatory strategies to overcome limitations from knee injury); *Kravtsov v. Town of Greenburgh*, 10-cv-3142, 2012 WL 2719663, at *10–11 (S.D.N.Y. July 9, 2012) (planning meals to mitigate impact of digestive disorder); *Molina v. DSI Renal Incorporated*, 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012) (pain medication for back impairment); *Berard v. Wal-Mart Stores East Limited Partnership*, 10-cv-2221, 2011 WL 4632062, at *2 (M.D. Fla. Oct. 4, 2011) (diabetes).

[48]See, e.g., *Wells v. Cincinnati Children's Hospital Medical Center*, 860 F. Supp. 2d 469, 481 n.5 (S.D. Ohio 2012); *Seim v. Three Eagles Communications Incorporated*, No. 09-cv-3071, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011).

to the definition of disability, and more individuals with disabilities are having their day in court.

Major Life Activities. ADA plaintiffs have to identify a "major life activity" in which they have a substantial limitation. When the ADA was passed, Congress did not provide a definition of major life activity, nor did it include any specific examples. Considerable litigation resulted about whether certain activities fell within the definition of major life activity. Congress rectified this problem in the ADA Amendments Act by listing numerous examples of major life activities in the statutory text and clarified that the examples were not an exhaustive list. The Act identifies 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.[49] The EEOC's regulations identify three additional major life activities: interacting with others, sitting, and reaching.[50] As a result, litigation on this issue has decreased dramatically.

For some impairments, such as cancer, diabetes, and heart disease, identifying a traditional major life activity that is substantially limited can be difficult. Consequently many of these serious impairments were frequently found not to be covered. To remedy this problem, Congress listed a number of "major bodily functions" in the ADA Amendments Act as part of the definition of major life activity: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine, and reproductive functions.[51] This is not an exhaustive list. The EEOC's regulations identified seven additional major bodily functions: special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, musculoskeletal, and individual organ operation.[52] The addition of major bodily functions is consistent with pre-ADA Amendments Act court decisions finding that substantial limitations of certain bodily functions qualified as a disability under the ADA.[53]

Courts have applied the ADA Amendments Act's concept of major bodily functions in numerous cases involving a variety of impairments, including digestive disorders (digestive and bowel), Graves' disease (endocrine system), renal cancer (normal cell growth), heart disease (circulatory), leukemia, and HIV (immune system).[54] As a result, many cases that would have been dismissed under the interpretation of the original ADA have been able to proceed under the ADA Amendments Act.

"Regarded as" Prong. The definition of disability under the original ADA included people who were "regarded as" having a substantial limitation in a major life activity. However, many plaintiffs were unsuccessful when bringing their cases under the "regarded as" prong because they were unable to meet the subjective requirement that defendants regarded them as being substantially limited in a particular major life activity. The "regarded as" problem was another issue that Congress sought to rectify with the ADA Amendments Act.

The Act states that individuals meet the "regarded as" prong if they establish that they have been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment, whether or not the im-

[49]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(2)(A)).

[50]29 C.F.R. § 1630.2(i)(1)(i).

[51]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(2)(B)).

[52]29 C.F.R. § 1630.2(i)(1)(ii).

[53]See, e.g., *Fiscus v. Wal-Mart Stores Incorporated*, 385 F.3d 378, 382 (3d Cir. 2004).

[54]See, e.g., *Kravtsov*, 2012 WL 2719663, at *10–11 (digestive disorders); *Seim*, 2011 WL 2149061, at *3 (Graves' disease); *Norton v. Assisted Living Concepts Incorporated*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (renal cancer); *Chalfont v. U.S. Electrodes*, No. 10-2929, 010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (heart disease; leukemia); *Horgan*, 704 F. Supp. 2d at 818–19 (HIV).

pairment substantially limits or is perceived to limit a major life activity.[55] In other words, "substantial limitation" and "major life activity" are now irrelevant to the analysis of a "regarded as" claim. Congress wants the focus to be on the alleged unequal treatment of people with disabilities rather than on the employer's specific perceptions.

The EEOC regulations state that, under the ADA Amendments Act, 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.[56]

Since the enactment of the ADA Amendments Act, courts have applied the new version of the "regarded as" prong. Courts agree that a plaintiff "no longer is required to prove that the employer regarded her impairment as substantially limiting a major life activity."[57] Courts have acknowledged that now "an individual who is 'regarded as having … an impairment' is not subject to a functional test."[58]

When the ADA Amendments Act was being debated, the business community did not want the ADA to be amended to expose businesses to liability for minor and temporary impairments. For this concern, Congress provided in the ADA Amendments Act that the "regarded as" prong did not apply to impairments both transitory and minor. The Act defines a transitory impairment as having an actual or expected duration of six months or less.[59] Courts have made clear that whether an impairment is temporary and minor is an objective test, and the plaintiff does not have the burden of proof on this defense but can defeat it by showing that the impairment was nontransitory or was more than minor.[60]

The ADA Amendments Act clarifies that individuals who qualify only under the "regarded as" prong are not entitled to a reasonable accommodation.[61] Prior to the enactment of the ADA Amendments Act, a majority of courts had ruled that people covered by the "regarded as" prong were not entitled to a reasonable accommodation. However, a minority of courts had held that reasonable accommodations should be provided to people who qualified under the "regarded as" prong. The ADA Amendments Act resolves this conflict.

Regulatory Authority. The Court in *Sutton* failed to give any deference to federal agency interpretations of the definition of disability. Justice O'Connor stated that because Congress had not expressly given any federal agency authorization to interpret the definition of disability, federal agencies' interpretations were not entitled to deference.

Congress answered with the ADA Amendments Act's express grant of authority to the EEOC, the U.S. Department of Justice, and the U.S. Department of Transportation to issue regulations interpreting the definition of disability under the ADA.[62] The ADA Amendments Act expressly re-

[55]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(3)(A)).

[56]29 C.F.R. § 1630.2(g)(3).

[57]*Wells*, 860 F. Supp. 2d at 478.

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

[59]ADA Amendments Act § 4(a) (codified as amended at 42 U.S.C. § 12102(3)(B)).

[60]See, e.g., *Dube v. Texas Health and Human Services Commission,* No. 11-cv-354, 2011 WL 3902762, at *4–5 (W.D. Tex. Sept. 6, 2011).

[61]ADA Amendments Act § 6(a) (codified as amended at 42 U.S.C. § 12201(h)).

[62]*Id*. (codified as amended at 42 U.S.C. § 12205a).

pudiates the Supreme Court's ruling in *Sutton*, which had allowed courts to ignore federal regulations interpreting the definition of disability.[63]

Consistency Between the ADA and the Rehabilitation Act. As noted above, in *Arline,* the Rehabilitation Act case predating the ADA, the Court held that the definitio n of disability should be interpreted broadly. In the ADA Amendments Act, Congress sought to restore *Arline*'s interpretation of the definition of disability.[64] The ADA Amendments Act applies to the Rehabilitation Act, and the two Acts should be read consistently, Congress clarified.[65] Reading the acts together ensures that federal employees have the same rights and protections as other employees.

Retroactivity of the ADA Amendments Act. When Congress passed the ADA Amendments Act in September 2008, it listed an effective date of January 1, 2009. Courts soon began considering whether the Act would apply retroactively. In other words, would an alleged discriminatory act occurring before January 1, 2009, be covered by the more narrowly interpreted original ADA or the more expansive ADA Amendments Act? The ADA Amendments Act was silent on this issue, and the EEOC had not yet issued its regulations.

The general rule is that statutes are not applied retroactively because holding a covered entity responsible for actions taken before the statute's effective date would be unfair.[66] However, some argued that the ADA Amendments Act should be applied retroactively, its "restorative purpose" reflecting Congress' original intent that the Supreme Court did not follow.[67] Case law is now well settled that the ADA Amendments Act does not apply retroactively.[68]

Ramifications of the ADA Amendments Act. As a result of confusing and often conflicting court rulings on who has a disability, the definition of disability has been the most heavily litigated area of the ADA.[69] Litigation resulting from a lack of legal clarity benefits neither individuals with disabilities nor covered entities such as employers or businesses.

Before the enactment of the ADA Amendments Act, human resources personnel, managers, supervisors, and other professional staff were forced to make medical judgments on which employees were covered by the ADA. For such an assessment, employers had to understand a maze of legal rulings. Employers often requested medical records to help assess whether impairments were substantially limiting, and their requests for medical records potentially exposed them to liability for violations of the confidentiality provisions of the ADA, Health Insurance Portability and Accountability Act, and other federal and state confidentiality laws. Now, under the ADA Amendments Act, employers can focus more on workplace issues and less on medical ones.

The ADA Amendments Act clarifies, for the business and disability community, Congress' intentions and should make life easier for both the people it protects and the entities it covers. The ADA Amendments Act allows human resource personnel and business managers to make the workplace decisions they are qualified to make and saves them from having to perform complex legal and medical analyses. Most significant, the

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[63]ADA Amendments Act § 2(b)(2).

[64]*Id*. § 2(a)(3).

[65]*Id*.

[66]*Landgraf v. USI Film Products,* 511 U.S. 244, 265 (1994).

[67]See *Rivers v. Roadway Express Incorporated*, 511 U.S. 298, 311 (1994).

[68]See, e.g., *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).

[69]See Kathryn Moss & Scott Burris, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, *in* The Future of Disability in America 453, 465 (Marilyn J. Field & Alan M. Jette eds., 2007), http://1.usa.gov/1aAcaSG.

ADA Amendments Act brings the ADA in line with other civil rights laws with little litigation over who is covered by the law and lets the primary focus be on whether discrimination occurred and what the appropriate remedies are.

■ ■ ■

The ADA Amendments Act is a congressional effort to restore the civil rights protections originally intended under the ADA. In the five years since the ADA Amendments Act's enactment, courts have generally complied with the Act's requirements and have broadly interpreted the definition of disability. As a result, many individuals with disabilities have had the opportunity to challenge discriminatory conduct with courts analyzing the merits of their case instead of assessing their qualifications for ADA protections. Individuals with disabilities, advocates, and others in the legal community must understand the changing face of the ADA Amendments Act and use the statute as it was intended—to prevent discrimination.

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