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THE NEW ADA BACKLASH

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I. INTRODUCTION

The Americans with Disabilities Act ("ADA") was passed in 1990 with much fanfare and hopes for a successful future.[1] However, by almost universal consensus among disability rights advocates and scholars, the ADA has not lived up to its potential.[2] Through their interpretation of the definition of "disability," the federal courts have dramatically narrowed the class of individuals who are entitled to bring a claim under the ADA.[3] Thus, conditions such as diabetes, cancer,[4] AIDS,[5] bipolar disorder,[6] multiple sclerosis,[7] monocular vision, epilepsy,[8] cerebral palsy,[9] and mental retardation[10] were found not to be disabilities under the original ADA statute.[11] Several scholars referred to the United States Supreme Court's decisions (and subsequent lower court decisions) as a "backlash" against the ADA.[12] Congress became unhappy with this backlash and passed the

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1. *See, e.g.*, Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008) (stating that the expectations for the original ADA had been very high); *see also* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 5–6 (2005).

2. *See, e.g.*, Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 201 (2010) (discussing how difficult it was for an individual to prove that he had a disability); Ani B. Satz, *Symposium: Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 983–84 (stating that prior to the amendments, plaintiffs had a hard time proving they had an actual or perceived disability); Long, *supra* note 1, at 217, 228 (stating that studies reveal that surviving summary judgment on an ADA case is very difficult).

3. *See, e.g.*, Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 938 (2012) (stating that Congress enacted the amendments to overturn a set of United States Supreme Court decisions that narrowly interpreted the definition of disability); Long, *supra* note 1, at 218.

4. Satz, *supra* note 2, at 984; Long, *supra* note 1, at 218 (discussing one particularly egregious case where, despite the plaintiff's death from cancer, the court still decided that he was not substantially limited in a major life activity).

5. Long, *supra* note 1, at 218.

6. *Id.*

7. Satz, *supra* note 2, at 984.

8. *Id.*

9. Cox, *supra* note 2, at 200.

10. *Id.* (citing to an Eleventh Circuit case).

11. *See generally* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 9 (2013) (discussing amputations, HIV, schizophrenia, and vision impairments).

12. *See, e.g.*, Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash*

ADA Amendments Act of 2008 ("ADAAA" or the "Amendments") to overturn the courts' narrow interpretation of the term "disability" and contraction of the protected class.[13]

The ADAAA made significant (perhaps even drastic) changes to how the term "disability" should now be interpreted.[14] Several scholars have predicted that, under the new definition, many more individuals will be able to qualify as having a disability and will therefore have their cases proceed to the inquiry of whether the employer violated the statute.[15] I agree with that prediction. Thus, the first goal of this paper is to explore the body of cases decided since the Amendments have taken effect to demonstrate that far more plaintiffs are, in fact, meeting the definition of disability and having the merits of their cases decided by the courts. I will demonstrate that the Amendments have made it much easier for a plaintiff to satisfy the threshold question of whether the individual meets the statutory definition of disability, and therefore many more plaintiffs survive summary judgment.

But despite the expansion of the protected class, I am skeptical that courts will give the ADA, as amended, the broad interpretation that Congress intended.[16] My skepticism stems from the fact that courts that engaged in the backlash were not only concerned about a plaintiff falling into the ADA protected class. After all, every employee falls into a protected class under Title VII,[17] and many individuals fall into the protected class under the Age Discrimination in Employment Act (which covers employees forty years and older).[18] Instead, courts were reluctant to find that plaintiffs fall into the ADA protected class because doing so meant that plaintiffs would be entitled to the ADA's most unique feature—the reasonable accommodation provision.[19] Because courts and

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and the ADA Amendments Act, 55 WAYNE L. REV. 1267, 1268 (2009); Cox, *supra* note 2, at 200–01; *see also* COLKER, *supra* note 1, at 96–125; MATTHEW DILLER, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA 64–65 (Linda H. Krieger ed., 2006); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 48–58 (2005).

13. *See, e.g.*, Long, *supra* note 1, at 218.

14. *See* discussion *infra* Part II.B.1.

15. *See, e.g.*, Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2029 (2013); Cox, *supra* note 2, at 188; Nicole B. Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 543 (2013) [hereinafter Porter, Martin*izing*].

16. *See also* Befort, *supra* note 15, at 2030–31.

17. 42 U.S.C. § 2000e-2000e-17 (2012).

18. 29 U.S.C. §§ 623(a), 631(a) (2012).

19. *See infra* notes 20–21 and accompanying text.

employers see the ADA as giving preferential treatment to individuals with disabilities, they are reluctant to give those benefits to a large group of employees.[20] Thus, before I began this project, I suspected that because courts can no longer limit ADA protection using the definition of disability, they might feel compelled to limit protection in other ways—specifically, using the merits of the case.

Therefore, this paper explores whether courts are using the reasonable accommodation provision or the qualified individual inquiry[21] to limit the number of individuals entitled to the special protection of the ADA. Courts could do this in one of three ways. First, courts could broadly construe the "essential functions of the position," giving great deference to what the employer designates as the essential functions.[22] Second, courts could use the ambiguity of the word "reasonable" to hold that many accommodations are not reasonable.[23] Third, and less likely,[24] courts could limit the reasonable accommodation provision by holding that some accommodations pose an undue hardship on the employer. Thus, the second goal of this paper is to explore the body of cases that have been decided on the merits since the Amendments became effective to see if courts have found a new and more direct way to limit the number of plaintiffs entitled to the special treatment of accommodations in the workplace.

The results of this second issue are mixed. For cases that address the actual functions or tasks of the job, my analysis does not reveal that courts are using the merits of the case to limit those who are entitled to the protection of the ADA. However, there is a set of cases that do reveal a potential new backlash against the ADA. Post-ADAAA case law reveals that employers are more reluctant to provide accommodations that relate to the structural norms of the workplace (when and where the work is completed) than to provide accommodations that physically modify the job tasks or the

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20. Befort, *supra* note 15, at 2031; Porter, Martin*izing*, *supra* note 15, at 542.

21. As will be discussed below, these two provisions are linked because the statute defines a "qualified" individual as someone who can perform the essential functions of the job *with or without* reasonable accommodations. 42 U.S.C. § 12111(8) (2012); Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 88 (1st Cir. 2012) (stating that the "qualified individual" inquiry and the "reasonable accommodation" inquiry are related).

22. 42 U.S.C. § 12111(8) (2012).

23. *See id.*

24. I say "less likely" because there are few ADA cases where the result is dependent on the undue hardship analysis. *See, e.g.*, *EEOC Offers Practical Guidance on Amendment's Act Compliance*, 22 No. 10 ADA COMPLIANCE GUIDE NEWSLETTER (Oct. 2011).

workplace environment.[25] Not only are employers reluctant to provide these accommodations, but post-ADAAA case law demonstrates that courts are also reluctant to require employers to change these default rules of the workplace (hours, shifts, attendance policies, etc.). Because of this result, I also explore why the entrenchment of workplace norms exists—more specifically, why employers insist on the structural norms more than the actual tasks of the position and why courts generally acquiesce in those decisions.

This paper will proceed in five parts. Part II provides a brief history of the ADA, both of its structure and legislative history. It then proceeds to a discussion of the major Supreme Court cases that dramatically narrowed the coverage of the ADA through a narrow interpretation of what it means to be an individual with a disability. I will also discuss why courts may have narrowly construed the statute. Part II then turns to a discussion of the ADA Amendments Act's provisions.

Part III discusses the body of case law decided after the Amendments were adopted that addresses the issue of whether the plaintiff has a disability, exploring the question of whether courts are following Congress' mandate for broad coverage under the ADA. I argue that they are. Courts are interpreting the definition of disability much more broadly than they had been before the Amendments went into effect, and in most cases, interpreting it correctly.

Parts IV and V discusses the body of cases decided on the merits. Specifically, I explore how courts are deciding issues of whether the employee is qualified and whether the employee is entitled to a reasonable accommodation. Specifically, Part IV reviews cases where the issue is whether the employee can perform the physical functions of the job with or without reasonable accommodations. Although I predicted that these cases might reveal another backlash against the ADA, the case law does not demonstrate such a backlash. It might simply be too early to tell whether courts are going to be resistant to requiring employers to grant physical modifications to the workplace or job tasks.

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25. To be clear, this issue has also been discussed in the pre-ADAAA era. *See, e.g.*, Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3 (2005) [hereinafter Travis, *Recapturing*]. *See generally* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY & MEDICAL LEAVE ACT: RIGHTS ON LEAVE 75 (Cambridge Univ. Press 2010) (stating that employers are most likely to grant accommodations regarding the physical environment and less likely to grant accommodations to the social environment, such as schedule changes).

Finally, Part V discusses the body of post-ADAAA cases where the employee requests a variation of one of the structural norms of the workplace: the hours, shifts, schedules, attendance policies, etc. I argue that these cases reveal a new backlash against the ADA—courts are reluctant to require employers to provide accommodations when those accommodations are related to the structural norms of the workplace, as opposed to physical modifications to the job or the workplace environment. This Part also explores possible reasons why the entrenchment of workplace structural norms exists.

II. THE ADA AMENDMENTS ACT

A. Brief History of the ADA

1. Structure of the ADA

The ADA was passed in 1990 with overwhelming support in both the House and the Senate.[26] Congress did not have to reinvent the wheel when writing the ADA. It based many of its provisions, including the definition of disability, on the Rehabilitation Act of 1973, which prohibited discrimination based on disability by governmental entities and by private entities that receive federal financial assistance.[27] The ADA is made up of several titles, but of relevance here is Title I, which applies to employers with fifteen or more employees.[28]

There are two unique features of the ADA. First, unlike Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, and national origin,[29] and protects all individuals from discrimination based on those protected categories,[30] the ADA only provides protection to a narrow class of individuals: those who can show that they meet the definition of disability.[31] An individual with a "disability" is defined as someone

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26. Barry, *supra* note 11, at 5.

27. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012); Barry, *supra* note 11, at 7 (discussing the fact that Congress based the ADA on the Rehabilitation Act).

28. 42 U.S.C. § 12111(5)(A) (2012) (defining employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day . . .").

29. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1965) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

30. Porter, Martin*izing*, *supra* note 15, at 535–36.

31. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between the Disabled Employees and their Coworkers*, 34 FLA. ST. U. L. REV. 313, 316 (2007) [hereinafter Porter, *Reasonable Burdens*].

who has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment.[32] As will be discussed below, prior to the ADA Amendments Act, the courts narrowly interpreted the definition of disability, which resulted in a very restricted class of those who were entitled to coverage under the Act.[33]

The second unique feature of the ADA is the reasonable accommodation provision,[34] which requires employers to accommodate individuals with disabilities if those individuals need an accommodation to allow them to perform the essential functions of the position.[35] This affirmative obligation, rather than simply a negative prohibition against discrimination based on disability, is what makes the ADA unique.[36] However, it is likely that this same provision has caused courts to narrowly construe the definition of disability under the ADA. In previous work, I argued that the courts' reluctance to require employers to broadly restructure a job, or the job's physical workspace, and the difficulty in determining which accommodations are reasonable has contributed to courts narrowly construing the definition of disability.[37] In other words, if the plaintiff never gets past the coverage question, the court never has to answer the more difficult question of whether the plaintiff should succeed on the merits, which often involves a question of whether the employer was obligated to provide a reasonable accommodation to the employee.

2. The Courts' Narrow Construction of Disability under the ADA

There has only been one Supreme Court case interpreting the definition of disability that can fairly be interpreted as "plaintiff-friendly" or "pro-disability rights." I am referring to *Bragdon v.*

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32. 42 U.S.C. § 12102(2) (2012).

33. *See, e.g.*, sources cited *supra* note 3.

34. Porter, *Reasonable Burdens*, *supra* note 31, at 316. Title II and Title III of the ADA contain similar provisions, referred to as the "reasonable modification" provision.

35. 42 U.S.C. §§ 12112(a), 12112(b)(5)(A) (2012).

36. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 34 (2009); Nicole B. Porter, *Relieving (Most of) the Tension: A Review Essay of SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT*, 20 CORNELL J.L. & PUB. POL'Y 761, 777 (2011) [hereinafter Porter, *Relieving the Tension*].

37. Porter, Martin*izing*, *supra* note 15, at 542.

Abbott,[38] where the Court held that asymptomatic HIV could be a disability under the ADA.[39] Since that case was decided in 1998, subsequent Supreme Court cases defining what it means to be an individual with a disability have drastically narrowed the scope and size of the protected class under the ADA.

In what has been referred to as the *Sutton* trilogy of cases, the Court held that courts must consider the ameliorative effects of mitigating measures when deciding whether an individual has a disability.[40] *Sutton* involved twin sisters with severe myopia who applied for positions as global airline pilots for United Airlines.[41] They were both rejected because their vision, uncorrected, did not meet the job requirement of United Airlines, even though they both had 20/20 vision with glasses or contacts.[42] The Court held that the Sutton sisters did not have a disability because the disability determination needs to be made considering any mitigating measures, which in their case, included corrective eyewear.[43]

The Court decided two other cases on the same day as *Sutton*. In *Murphy v. United Parcel Service*,[44] the plaintiff was a mechanic for UPS who had high blood pressure. Because of his high blood pressure, he failed the medical exam for Department of Transportation ("DOT") certification, which was required because his mechanic job required that he drive the trucks.[45] The Court applied the mitigating measures rule it had just announced in *Sutton* and held that, in determining whether Murphy had a disability under the Act, he should be viewed in his mitigated state with the medication he takes for his high blood pressure.[46]

Finally, in *Albertson's, Inc. v. Kirkingburg*,[47] the third of the trilogy of cases, the Court considered whether the plaintiff's monocular vision constituted a disability. The plaintiff in this case, similar to the plaintiff in the *Murphy* case, had a job that required DOT certification.[48] The plaintiff had been certified as a driver, but after a leave of absence because of a workplace injury, he was

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38. Bragdon v. Abbott, 524 U.S. 624 (1998).

39. *Id.* at 641.

40. Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999), *overturned by legislative action* Act of Jan. 1, 2009, Pub. L. No. 110-325.

41. *Id.* at 475.

42. *Id.* at 476.

43. *Id.* at 488–89.

44. Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

45. *Id.* at 519–20.

46. *Id.* at 521.

47. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

48. *Id.* at 558.

required to undergo a fitness-for-duty physical exam.[49] The doctor noted that Kirkingburg had monocular vision and therefore did not meet the vision requirement for the DOT certification.[50] Even though Kirkingburg did not have eyeglasses, medication, or any other devices to assist with his monocular vision, the Court elaborated on its mitigating measures holding, stating that courts should not only look at artificial assistive devices but should also consider how Kirkingburg's brain can mitigate his vision impairment by developing techniques to cope with his monocular vision.[51] The Court also emphasized that the Ninth Circuit had erred in holding that monocular vision was a per se disability, stating instead that each person must be evaluated individually in determining whether he or she has a disability.[52]

As several scholars have discussed, after the Court's announcement of the mitigating measures rule, the lower courts used this rule to hold that many impairments were not disabilities because those impairments, in their mitigated state, did not cause a substantial limitation on any major life activities.[53] For instance, if an employee has diabetes and must regulate his blood sugar by a closely monitored dietary regimen, testing blood sugar levels, and occasionally using insulin to regulate the blood sugar, courts have held that this employee is not disabled because, in his mitigated state, his diabetes does not cause a substantial limitation on a major life activity.[54]

A few years after the *Sutton* trilogy of cases, the Court struck a final blow against ADA plaintiffs in *Toyota Motor Manufacturing v. Williams*.[55] In this case, the Court clarified the proper meaning of "substantially limits" and "major life activities."[56] The Court held that when looking at the major life activity of "manual tasks," those tasks have to be of "central importance to most people's daily

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49. *Id.* at 559.

50. *Id.*

51. *Id.* at 565-66.

52. *Id.* at 566.

53. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192-93 (2008); Long, *supra* note 1, at 220 (stating that, "[a]s a result of the mitigating measures rule, numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA"); Porter, *Relieving the Tension*, *supra* note 36, at 771.

54. *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (finding that plaintiff was not disabled despite being diagnosed with diabetes necessitating three daily insulin shots and a regimented diet).

55. 534 U.S. 184 (2002).

56. *Id.* at 195–97.

lives."[57] Furthermore, the Court defined "substantially limits" as "considerable" or "to a large degree,"[58] stating: "We therefore hold 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."[59]

Between the mitigating measures rule in *Sutton* and the more stringent test for substantially limiting a major life activity under *Toyota*, the protected class has been substantially narrowed. As stated above, conditions like diabetes, cancer,[60] AIDS,[61] bipolar disorder,[62] multiple sclerosis,[63] monocular vision, epilepsy,[64] cerebral palsy,[65] and mental retardation,[66] among many others, were not found to be disabilities under the original statute.[67] Furthermore, many, if not most, of these impairments had been considered disabilities under the Rehabilitation Act, which is the statute after which the ADA was modeled.[68] Disability advocates and Congress felt comfortable borrowing the definition of disability from the Rehabilitation Act because the courts had been broadly interpreting that statute.[69] In fact, during debates over the ADAAA, a chart was prepared of all of the impairments that had been considered disabilities under the Rehabilitation Act but not under the ADA.[70]

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57. *Id.* at 197.

58. *Id.* at 196.

59. *Id.* at 198.

60. Long, *supra* note 1, at 218 (discussing one particularly egregious case where, after the plaintiff had died from cancer, the court still decided that he was not substantially limited in a major life activity); Satz, *supra* note 2, at 984.

61. Long, *supra* note 1, at 218.

62. *Id.*

63. Satz, *supra* note 2, at 984.

64. *Id.*

65. Cox, *supra* note 2, at 200 (citing Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 766–67 (10th Cir. 2006)).

66. *Id.* (citing Littleton v. Wal-Mart Stores, Inc., 231 F. App'x 874, 875, 878 (11th Cir. 2007)).

67. Barry, *supra* note 11, at 9.

68. *Id.* at 3; *see also* Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLAMETTE L. REV. 357, 363 (2009) (stating that Congress meant to give the ADA at least as much coverage as had been given to the Rehabilitation Act of 1973).

69. Barry, *supra* note 11, at 9.

70. *Id.* at 3.

3. Why Have Courts Narrowly Construed the Statute?

There are various explanations for what went wrong—why the ADA was not interpreted as broadly as the Rehabilitation Act had been. One interesting idea was proposed by Professor Kevin Barry in his article, *Exactly What Congress Intended?*[71] Barry argues that the reason the courts have interpreted the ADA much more narrowly than the Rehabilitation Act is because the latter was a "delegation statute," and the ADA is a "micro-manager statute."[72] He explains that a micro-manager statute is very detailed, like the Internal Revenue Code, and thus Congress expects courts to rely only on the text of the statute when interpreting it.[73] Delegating statutes are written broadly and without much detail, thereby forcing courts to consult legislative history when interpreting them.[74] Barry argues that the Rehabilitation Act was a delegating statute, and therefore, courts were forced to turn to legislative history and agency guidance when interpreting it.[75] The ADA, in contrast, is a micromanager statute. It is much longer and more detailed than the Rehabilitation Act; therefore, courts rely on only the text itself when interpreting the statute rather than resorting to agency guidance or legislative history.[76] Barry argues that it is this difference between the ADA and the Rehabilitation Act that explains why the ADA has been interpreted much more narrowly than the Rehabilitation Act.[77]

Another theory posited for why the courts have interpreted the ADA much more stringently than the Rehabilitation Act is simply the coverage of the two statutes. The Rehabilitation Act only applies to governmental entities or entities that receive federal financial assistance,[78] so courts do not mind placing somewhat significant burdens on those entities. The ADA, on the other hand, applies to all private employers with fifteen or more employees.[79] Courts are

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71. *Id.* at 1.
72. *Id.* at 7.
73. *Id.* at 6–7.
74. *Id.* at 7.
75. *Id.*
76. *Id.*
77. *Id.*
78. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2012) (stating that no one shall be "subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service").
79. 42 U.S.C. § 12111(5)(A) (2012) (defining employer to include "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day").

perhaps more reluctant to impose what they believe to be significant burdens on these private employers.

Professor Samuel Bagenstos argues that the Supreme Court's narrow construction of the term "disability" in the ADA is not necessarily evidence of a backlash. Instead, he argues that the narrow construction makes sense in light of the minority group model.[80] According to Bagenstos, the minority group model defines disability as a discrete, stigmatized minority group.[81] The Supreme Court's decisions can be explained using that model. For instance, HIV is highly stigmatized, and the Court found it to be a disability in *Bragdon v. Abbott*.[82] But fully correctable vision and high blood pressure controlled by medication are not stigmatizing and the Court held they were not disabilities.[83]

Despite these alternative explanations, I do not think it is an exaggeration to suggest that the most common explanation (by far) for the courts' narrow construction of disability under the ADA is that the courts have affirmatively engaged in a backlash against the ADA.[84] An often-cited study demonstrates that employers have prevailed in ninety-two percent of ADA cases filed in court.[85] After exploring and dismissing other reasons for the poor results in ADA cases, such as weak claims, poorly drafted statutes, and confusion over a new statute, Professor Matthew Diller suggests that the higher failure rate is attributable to a judicial backlash against the ADA.[86] Professor Diller states, "The term backlash suggests a hostility to the statute and toward those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."[87] Other scholars have devoted entire books or sections of books discussing the backlash against the ADA, and there appears to be very little debate that the backlash does indeed exist.[88]

As a more specific backlash argument, I am fairly convinced that the failure of the ADA is largely because courts (and employers and

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80. BAGENSTOS, *supra* note 36, at 41–43.

81. *Id.* at 41.

82. *Id.*

83. *Id.*

84. Anderson, *supra* note 12, at 1268 (stating that the courts' strict interpretations were described as a backlash against the original ADA); *see also* sources cited in Porter, *Reasonable Burdens*, *supra* note 31, at 356–57.

85. COLKER, *supra* note 1, at 71–84; DILLER, *supra* note 12, at 62–63.

86. DILLER, *supra* note 12, at 64–65.

87. *Id.* at 64.

88. COLKER, *supra* note 1, at 96–125; DILLER, *supra* note 12, at 5–19; MEZEY, *supra* note 12, at 48–58.

society) believe that the ADA's reasonable accommodation provision confers special treatment on individuals with disabilities, and therefore, courts want to limit that special treatment to those who are considered truly deserving.[89] In addition, the reasonable accommodation provision is confusing, and courts seem reluctant to dive into that confusion.[90] Professor Alex Long agrees with this view, stating that "one of the more persuasive explanations as to why the federal courts initially made it so difficult for ADA plaintiffs to qualify as having a disability is that the courts sought to avoid having to deal with complex and messy reasonable accommodation issues."[91]

B. The ADA Amendments Act

Because of the backlash against the original ADA, Congress amended the statute to bring the coverage of the ADA into line with the high expectations for the original statute.[92] Although there were several attempts at amendments,[93] the ADAAA was signed into law by George W. Bush on September 25, 2008, and went into effect on January 1, 2009.[94] As summarized by Professor Long in one of the first articles written about the Amendments:

> The ADAAA's most important revisions involve the definition of disability. These revisions include instructions to the courts regarding how the terms of the Act should be interpreted; attempted clarification to the Act's "substantially limits" language; expansion of the "major life

89. ALBISTON, *supra* note 25, at 70 (stating that backlash results because employers and nondisabled workers perceive changes in established work practices to be unwarranted special treatment); Nicole B. Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099 (2014) [hereinafter Porter, *Mutual Marginalization*].

90. Porter, Martin*izing*, *supra* note 15 (using an entire article to try to ascertain the meaning of the word "reasonable" in the reasonable accommodation provision).

91. Long, *supra* note 1, at 228.

92. *Id.* at 217 (stating that expectations for the original ADA had been very high).

93. *See generally* Anderson, *supra* note 12 (discussing the differences between the earlier proposed amendments and the amendments that were ultimately enacted).

94. Long, *supra* note 1, at 217.

activities" concept; and dramatic changes to the Act's "regarded as" prong.[95]

This sub-part will first describe the statute's provisions and will then discuss the anticipated effects of the proposed changes.

1. The ADAAA's Provisions

The Amendments did not change the basic definition of actual disability: a physical or mental impairment that substantially limits one or more major life activities.[96] Instead, the Amendments include several rules of construction to help courts interpret the definition of disability.[97] The Amendments made clear that Congress disagreed with both the "demanding standards" language in *Toyota* as well as the mitigating measures rule announced in *Sutton* and its progeny. Congress also disapproved of the Court's interpretation of the "regarded as" prong in *Sutton*.[98]

The Amendments mandate that the Court's "demanding standards" language in *Toyota* was incorrect, and thus the Act should be interpreted in favor of broad coverage.[99] In *Toyota*, the Court defined "substantially limits" in the phrase "substantially limits one or more major life activities" as "prevents or severely restricts."[100] Although there was quite a bit of debate on how to define "substantially limits,"[101] Congress ultimately chose to leave the term undefined but deferred to the Equal Employment Opportunity Commission ("EEOC") to define this term with the admonition that it was Congress' expectation that the "EEOC will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this Act, including the Amendments made by this Act."[102]

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95. *Id.* at 218.

96. Anderson, *supra* note 12, at 1286.

97. *Id.* at 1287.

98. *Id.* at 1289–90.

99. Long, *supra* note 1, at 219.

100. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002).

101. Anderson, *supra* note 12, at 1286 (discussing the fact that the prior version of the Amendments, which would have been called the Americans with Disabilities Restoration Act, would have eliminated any reference to substantial limitation of major life activities). In other words, as long as the individual had an impairment, the individual would be considered to have met the definition of disability.

102. 42 U.S.C. § 12102(4)(B) (2012); Long, *supra* note 1, at 219–20.

The Amendments also overruled *Sutton* by expressly rejecting the mitigating measures rule announced in that case.[103] The ADAAA states that a court should determine whether an impairment substantially limits a major life activity without regard to the ameliorative effects of mitigating measures.[104] The one exception to that rule is that courts can consider the mitigating effects of ordinary eyeglasses or contact lenses.[105] However, Congress also added a section stating that if an employer has a qualification standard based on uncorrected vision, the employer must justify the standard as being job related and consistent with business necessity.[106]

The ADAAA also made changes to the major life activities provision. The original ADA did not define major life activities and the EEOC's promulgated list was very brief, leading to much litigation regarding what is or is not a major life activity.[107] The ADAAA made several changes. First, it clarified that if an impairment limits one major life activity, it need not limit other major life activities.[108] Second, the Amendments rejected the Supreme Court's demanding standard announced in *Toyota* in favor of a looser standard that "major" should not be interpreted strictly.[109] Third, the ADAAA provides a non-exhaustive list, but one that is much broader than the list in the EEOC's regulations; additions include: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.[110]

Very significantly, and also ingeniously (in my opinion), Congress defined major life activity to include "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[111] These bodily functions basically track many of the impairments that lower courts held were not disabilities under the original ADA: impairments such as diabetes (endocrine), HIV (immune system), cancer (normal cell growth), neurological (multiple sclerosis), and circulatory (high blood pressure).

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103. Long, *supra* note 1, at 220.
104. 42 U.S.C. § 12102(4)(E)(i); Long, *supra* note 1, at 220–21.
105. 42 U.S.C. § 12102(4)(E)(ii); Long, *supra* note 1, at 221.
106. 42 U.S.C. § 12113(c) (2012).
107. Long, *supra* note 1, at 222.
108. 42 U.S.C. § 12102(4)(C); Long, *supra* note 1, at 222.
109. 42 U.S.C. § 12102(4)(A); Long, *supra* note 1, at 222.
110. 42 U.S.C. § 12102(2)(A); Long, *supra* note 1, at 222.
111. 42 U.S.C. § 12102(2)(B); Long, *supra* note 1, at 222–23.

Congress also addressed the situation where an individual has an impairment that is episodic in nature. The Amendments state that if an impairment is substantially limiting when it is active, it is still considered substantially limiting even when in remission.[112] This is very significant for impairments like multiple sclerosis and cancer, which are both episodic in nature. Combined with the major bodily functions addition to major life activities, just discussed, this provision will likely make a big difference in courts finding impairments like cancer or multiple sclerosis to be disabilities.

All of these changes will most certainly affect the number of individuals who can prove that they have an "actual" disability. But Congress also made broad changes to the "regarded as disabled" prong of the definition.[113] The original language of the "regarded as" prong provided that an individual was only regarded as disabled "if the defendant regarded him as having 'such an impairment,' i.e., an impairment that substantially limits a major life activity."[114] Because of this language, courts concluded that an ADA plaintiff had to do more than show that a defendant based an adverse decision on unfounded stereotypes about the plaintiff's condition. The plaintiff also had to establish that a defendant mistakenly believed that the plaintiff's impairment substantially limited a major life activity of the plaintiff.[115] The ADAAA changed this significantly by stating that a plaintiff only has to establish that she was subject to an adverse action prohibited by the 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."[116] The focus is now on the employer's motivation for its adverse action,[117] rather than focusing on how serious the employer considered the plaintiff's condition. Although I think the changes to the "regarded as" prong are likely to be very significant—perhaps even more significant than the changes to the "actual" disability prong—they are not relevant to the subject of this paper because Congress also stated that plaintiffs are not entitled to reasonable accommodations under the "regarded as" prong.[118]

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112. 42 U.S.C. § 12102(4)(D); Long, *supra* note 1, at 221.
113. Long, *supra* note 1, at 223.
114. *Id.*
115. *Id.*
116. 42 U.S.C. § 12102(3)(A); Long, *supra* note 1, at 224.
117. Long, *supra* note 1, at 224.
118. 42 U.S.C. § 12201(h) (2012); Long, *supra* note 1, at 225.

2. Anticipated Effect of the Amendments

Virtually everyone who has spoken on the Amendments has agreed that the Amendments will likely have two interrelated effects. First, many more individuals will be considered disabled under the ADAAA.[119] Second, because many more plaintiffs will proceed past the initial step of proving they have a disability, many more cases will proceed to the merits, which will often involve either a determination of the essential functions of the job or whether a requested accommodation is reasonable.[120]

As stated above, these predictions are basically universal. But having said this, it does not tell us very much. The bigger questions remain unanswered. Even though more cases will proceed past the initial inquiry of whether the person has a disability, how broadly will courts interpret the Amendments? How are courts going to determine what are the essential functions of the job? Relatedly, how are courts going to interpret the reasonable accommodation provision? Are courts going to be reluctant to allow plaintiffs to have broad access to reasonable accommodations? Assuming there was a backlash against the original ADA, are we going to see another backlash against the ADA as amended? If so, how will it manifest

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119. Cox, *supra* note 2, at 204; Long, *supra* note 1, at 228; *cf.* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, 256 N.J. LAW. 37, 37 (2009) (stating that the new statute will open the floodgates for employees to bring lawsuits).

120. Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 472, 481 (2011) (stating that because the amendments expand the definition of who is disabled under the ADAAA, the focus will return to whether the individual is qualified to do the job with or without a reasonable accommodation); Cox, *supra* note 2, at 188 (stating that by enabling more plaintiffs to overcome the initial hurdle of establishing membership in the ADA's protected class, the Amendments will require courts to address many important questions, such as the scope of the amorphous reasonable accommodation provision); Long, *supra* note 1, at 228 ("By amending the ADA's definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff's requested accommodation was reasonable."); Porter, *Martinizing*, *supra* note 15, at 543; Satz, *supra* note 2, at 990 (stating that an emphasis will be placed on whether an individual with a disability is qualified for a position, meaning whether they can perform the essential functions with or without a reasonable accommodation); Travis, *supra* note 3, at 956–57 (stating that most people believe that the expanded definition of disability is broad enough to allow most individuals with disabilities to get the accommodation they need); Wilson & Krulewicz, *supra* note 119, at 40 (stating that the obligation to accommodate will become very important after the Amendments).

itself? Will courts give broad deference to what the employer says are the essential functions of the job, thereby causing more employees to be found unqualified for the position? Or will courts construe the reasonable accommodation provision in such a way that many or most accommodations are determined to be unreasonable? The next three parts will explore these questions.

III. DEFINITION OF DISABILITY AFTER THE AMENDMENTS

This Part will explore the case law interpreting the definition of disability since the Amendments were adopted.[121] The first sub-part will discuss cases where the plaintiffs survived summary judgment on the issue of whether they had a disability. The second sub-part will explore cases where courts dismissed plaintiffs' claims, holding that the plaintiffs are not disabled. I further divide this subset of cases into those I believe are correctly decided and those I think are not. The third sub-part will briefly provide my conclusions regarding courts' interpretation of "disability" after the Amendments. To be clear, this analysis is not an empirical one. While some quantitative studies exploring the issue of the definition of disability under the Amendments are available,[122] my goal here is a descriptive one.

A. Plaintiffs Survive Summary Judgment on Issue of Disability

In general, the cases below reveal that courts have taken Congress' mandate to broadly define "disability" seriously. Many of the courts specifically cite to the Amendments and to the EEOC regulations implementing the Amendments. Some courts seem reluctant to find that an individual has a disability[123] but feel compelled to follow the highly comprehensive language in the Amendments.

1. Mitigating Measures Rule

Courts have taken Congress' mandate to decide issues of disability without regard to the ameliorative effects of mitigating

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121. I have included every case I found that was decided under the Amendments up until December 31, 2013.

122. *See A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, National Council on Disability (July 23, 2013), www.ncd.gov/publications/2013/07232013/; Befort, *supra* note 15.

123. *See, e.g.*, Lloyd v. Hous. Auth. of Montgomery, 857 F. Supp. 2d 1252 (M.D. Ala. 2012) (hesitating to place a person with asthma and hypertension in the same category as someone who uses a wheelchair).

measures very seriously. Several cases exemplify this trend. In many of these cases, the plaintiffs had impairments that most likely would not have qualified as disabilities before the ADA was amended because, considering mitigating measures, those individuals would not be substantially limited in any major life activities. For instance, in *Howze v. Jefferson County Committee*, the court found that the plaintiff's bilateral hearing loss was a disability under the ADA even though her hearing was remedied by hearing aids.[124]

Another court made this point explicitly. In *Lloyd v. Housing Authority of the City of Montgomery*, the court acknowledged that the Amendments require "courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated," and that "the expanded definitions of 'disability' and 'major life activities' mean that treatable yet chronic conditions like hypertension and asthma render an affected person just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law."[125] With this understanding, the court concluded that a reasonable jury could find that the plaintiff's asthma and high blood pressure rose to the level of a disability.[126] The quoted language suggests that the court was opposed to finding asthma and hypertension to be in the same category as someone who uses a wheelchair. Yet the court felt obligated to follow Congress' mandate.

Diabetes is another mitigated impairment that many courts held was not a disability pre-ADAAA.[127] But in *Rohr v. Salt River Project Improvement Agricultural & Power District*, where the plaintiff had insulin-dependent Type 2 diabetes and claimed that this substantially limited him in the major life activity of eating,[128] the Ninth Circuit held that the plaintiff alleged sufficient facts to

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124. Howze v. Jefferson Cnty. Comm. for Econ. Opportunity, No. 2:11-CV-52-VEH, 2012 WL 3775871, at *8 (N.D. Ala. Aug. 28, 2012); *see also* Brown v. CVS Pharmacy, Inc., No. 6:12-CV-1193-Orl-31DAB, 2013 WL 3353323, at *3 (M.D. Fla. July 2, 2013) (holding that the plaintiff was disabled because she was deaf in one ear and had significant pain in the other ear).

125. *Lloyd*, 857 F. Supp. 2d at 1263.

126. *Id.* at 1264 (recognizing that "under *Sutton* [*v. United Air Lines*, 527 U.S. 471 (1998)], common maladies like asthma and hypertension would not likely, if ever, render a plaintiff disabled because readily available, inexpensive medication ameliorates the symptoms of these impairments so they would not substantially limit a major life activity"); *see also* Horne v. Clinch Valley Med. Ctr., No. 1:11CV00048, 2012 WL 4863791, at *4 (W.D. Va. Oct. 12, 2012) (finding plaintiff's insulin-dependent diabetes rendered her disabled under the ADAAA).

127. Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002).

128. Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 858 (9th Cir. 2009).

establish that his diabetes substantially limited his ability to eat.[129] The plaintiff could not eat large meals or skip meals, snacked every few hours, and scheduled each day's blood tests, medications, and food intake.[130] Failure to follow his diet regimen for more than two meals could result in an increase in blood sugar, aggravating his disease.[131]

The rule regarding viewing the plaintiff in his unmitigated state also helped the plaintiff in *Harty v. City of Sanford*. The plaintiff in *Harty* sustained a permanent knee injury in the Navy and "could not kneel, squat, run, jump, climb stairs or a ladder, or walk up or down inclines."[132] The plaintiff worked as an equipment operator and then as a foreman for the city and could perform all of the essential functions of the job by modifying the way he performed them.[133] In its motion for summary judgment, the city argued that even though the plaintiff had to modify his movements, he was not disabled because he could perform all of his tasks.[134] The court noted that, pursuant to the Amendments, an impairment is not supposed to be viewed with reference to any mitigating measures.[135] The court then looked at the plaintiff's impairment "in a hypothetical state where it remains untreated," and concluded that the plaintiff was disabled because without his self-corrected behavior, he could not perform some major life activities such as "walking, standing, lifting, bending, and performing manual tasks."[136]

In *Orne v. Christie*, the court held that sleep apnea, even when treatable with sleep disorder devices such as a Continuous Positive Airway Pressure machine, is still a disability because courts must regard all sleeping disorder devices as mitigating measures.[137] In a recent case discussing digestive issues, *Kravtsov v. Town of*

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129. *Id.* at 859.

130. *Id.*

131. *Id.* Although the Ninth Circuit decided this case based on the ADA because there was "sufficient evidence that [the plaintiff] was a 'qualified individual' with a 'disability' under the ADA," the Amendments "would provide additional support for [the plaintiff's] claims." *Id.* at 853.

132. Harty v. City of Sanford, No. 6:11-CV-1041-Orl-31KRS, 2012 WL 3243282, at *1 (M.D. Fla. Aug. 8, 2012).

133. *Id.* at *1.

134. *Id.* at *4.

135. *Id.*

136. *Id.* at *4, *5.

137. Orne v. Christie, No. 3:12-CV-00290-JAG, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013); *see also* Verhoff v. Time Warner Cable, Inc., 299 F. App'x 488, 492–94 (6th Cir. 2008) (stating that, under the original ADA, eczema was not a disability because plaintiff was able to sleep more than five hours with medication, but under the Amendments, the plaintiff's inability to sleep would be considered a disability).

Greenburgh, the plaintiff had dumping syndrome, explosive diarrhea, and other digestive problems as a result of a total gastrectomy (removal of the stomach).[138] In order "[t]o reduce the risk of cramping, pain, and explosive diarrhea," the plaintiff ate in a reclined position eight to ten times a day and remained reclined for up to fifteen minutes afterwards.[139] The defendant argued that the plaintiff's impairments were not disabilities because he could still work and could plan his meals around his daily work schedule.[140] Noting that the Amendments intended to provide "broad coverage," the court considered plaintiff's actions to be mitigating measures and found that the plaintiff's bowel impairments constituted a disability.[141] Similarly, in *Myles v. University of Pennsylvania Health System*, the court found that the plaintiff's irritable bowel syndrome could be a disability because it substantially limits bowel functions, even though the impairment could be controlled by medication.[142]

Some of the post-Amendments cases would likely have had the same disposition even if they had been decided under pre-ADAAA law where courts were required to consider mitigating measures. For instance, in *Barrett v. Bio-Medical Applications of Maryland, Inc.*, the plaintiff stated that she was substantially limited in the major life activity of walking because she "frequently used a cane and received a handicapped bus card."[143] The court assumed without deciding that the plaintiff was disabled but mentioned "[t]he relevant question is whether plaintiff's mobility would be substantially limited without a cane."[144] Even though the court (pre-Amendments) would have been required to consider whether the plaintiff was disabled considering her use of the cane, courts were also directed to consider whether, even with the effects of the mitigating measure, the impairment still caused a substantial limitation on a major life activity.[145] It seems likely to me that walking with a cane is still a substantial limitation on the major life activity of walking.

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138. Kravtsov v. Town of Greenburgh, No. 10-CV-3142CS, 2012 WL 2719663, at *1 (S.D.N.Y. July 9, 2012).

139. *Id.*

140. *Id.* at *11.

141. *Id.* at *10, *11.

142. Myles v. Univ. of Pa. Health Sys., No. 10-4118, 2011 WL 6150638, at *8 (E.D. Pa. Dec. 12, 2011).

143. Barrett v. Bio-Medical Applications of Md., Inc., No. ELH-11-2835, 2013 U.S. Dist. LEXIS 38596, at *4 (D. Md. Mar. 19, 2013) (quoting Amended Comp. (Feb. 8, 2012)).

144. *Id.* at *27–28.

145. *Id.* at 27 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999)).

Another example is *Eldredge v. City of St. Paul*, where the plaintiff had a progressive eye disease that caused a blind spot in the center of his vision.[146] The court found that plaintiff was disabled and noted that the use of mitigating measures, such as a "magnifying glass and/or a pocket telescope . . . is not part of the determination of whether a condition substantially limits a major life activity."[147] I believe this case would have come out the same way under pre-ADAAA law because having to use a magnifying glass or telescope to see is still a substantial limitation on the major life activity of seeing.

2. Expansion of the "Substantial Limitation" on "Major Life Activities"

Congress' expansion of the major life activities provision appears to have made a considerable difference in post-Amendments case law. As stated above, the original ADA did not define major life activities and the EEOC's promulgated list was very brief, leading to much litigation regarding what is or is not a major life activity.[148] The ADAAA provides a non-exhaustive list but one that is much broader than the list in the EEOC's regulations. Additionally, and probably more importantly, the Amendments reject the Supreme Court's demanding standard announced in *Toyota* in favor of a looser standard that "major" should not be interpreted strictly.[149]

a. Sleeping as a Major Life Activity

Several post-ADAAA cases dealt with the major life activity of sleeping. For instance, in *Howard v. Steris Corp.*, the plaintiff suffered from sleep apnea and Graves' disease.[150] Relying on the testimony of the plaintiff's doctors, the court concluded that a reasonable juror could find that the plaintiff's impairments constituted a disability.[151] In *Kravits v. Shinseki*, the court found

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146. Eldredge v. City of St. Paul, 809 F. Supp. 2d 1011, 1029 (D. Minn. 2011).

147. *Id.*

148. Long, *supra* note 1, at 221–27.

149. *Id.* at 222.

150. Howard v. Steris Corp., 886 F. Supp. 2d 1279, 1285, 1288 (M.D. Ala. 2012).

151. *Id.* at 1291–92 (acknowledging that the ADAAA rejected *Toyota Motor Mfg., Ky., Inc. v. Williams*'s definition of "major life activities" as those activities of "central important to most people's daily lives"); *see also* Seim v. Three Eagles Commc'ns, Inc., No. 09-CV-3071-DEO, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (denying defendant's motion for summary judgment because a reasonable juror could find that plaintiff Graves' disease constituted a disability because the plaintiff

that sleep apnea might be a disability because it limits the ability to sleep even though the plaintiff could still go about normal activities.[152] Similarly, a court held that sleep apnea causing a plaintiff to wake up two to five times per night and get only one to two hours of sleep three to four times per month, constituted a disability even though the sleep apnea did not impact the plaintiff's ability to do his job.[153]

In *Calvert v. AmeriCold Logistics, LLC*, the magistrate judge recommended that the plaintiff's interstitial cystitis, which she claimed limited her ability to control her bladder and sleep, should not be considered a disability because the impairment was only an inconvenience.[154] The district court declined to follow this recommendation acknowledging that the plaintiff presented evidence showing how the impairment "affected her ability to sleep, work, and control her bladder."[155] The district court found a substantial impairment on these major life activities because interstitial cystitis allegedly woke her up "to urinate two to three times per night."[156]

In *Wirey v. Richland Community College*, the court held that the plaintiff's chronic fatigue syndrome (CFS) constituted a disability.[157] The court reasoned that the plaintiff's inability to feed her dogs, bring in the mail, do laundry, and stay awake and alert were all major life activities limited by her impairment.[158]

b. Back Impairments

Because of the expansion of the major life activities provision, many courts have found that one of the most controversial impairments before the Amendments—back injuries—can be disabilities after the Amendments.

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claimed the disease substantially limited him in performing certain "major life activities" such as sleeping, speaking, communicating, and "the functions of his immune, circulatory, and endocrine systems").

152. Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *6 (W.D. Pa. Feb. 24, 2012).

153. Karr v. Napolitano, No. C-11-02207-LB, 2012 U.S. Dist. LEXIS 137529, at *29 (N.D. Cal. Sept. 25, 2012).

154. Calvert v. AmeriCold Logistics, LLC, No. 2:10-CV-02765-AJK-dkv, 2012 WL 4343774, at *4 (W.D. Tenn. June 26, 2012).

155. Calvert v. AmeriCold Logistics, LLC, No. 10-02765, 2012 WL 4343772, at *1 (W.D. Tenn. Sept. 21, 2012).

156. *AmeriCold*, 2012 WL 434774 at *4.

157. 913 F. Supp. 2d 633, 642 (C.D. Ill. 2012).

158. *Id.* at 641–42.

For instance, in *George v. Roush & Yates Racing Engines, LLC*, the plaintiff ruptured a disc in his lower spine in a car accident.[159] The injury required multiple surgeries and "impaired [p]laintiff's ability to walk, sit, sleep, and bend."[160] The court held that these impairments were sufficient to give plaintiff a plausible claim for relief.[161] Similarly, in *Molina v. DSI Rental, Inc.*, the plaintiff had a medical condition that caused "intermittent back pain, as well as pain, numbness and tingling in her right leg."[162] The court found that even though the plaintiff learned to cope with her pain and could still perform regular tasks, she may nonetheless remain disabled because of the pain she experienced in performing her major life activities.[163]

In another case, the court held that the plaintiff's back injury, which substantially "limited his ability to sit, work, sleep, walk, and concentrate," was a disability.[164] The defendant's main argument in response was that the plaintiff's impairments were not permanent.[165] Because the court was correctly applying post-ADAAA law, it noted that the fact that plaintiff's impairment is not permanent does not mean it does not qualify as a "substantially limiting" impairment.[166]

In *Josey v. Wal-Mart*, the plaintiff, Torrey Josey, was injured while riding a moped.[167] Josey alleged that he was disabled based on his resulting back injury.[168] Although Josey provided no information regarding the severity or duration of his injury the court concluded that, under the less restrictive standards of the Amendments, the court is constrained to find that Josey offered sufficient factual allegations to adequately plead that he was disabled.[169] Similarly, in *Lee v. Harrah's New Orleans*, the court held that plaintiff's severe back pain and fibromyalgia substantially limited her ability to stand

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159. George v. Roush & Yates Racing Engines, LLC, No. 5:11CV00025-RLV, 2012 WL 3542633, at *1 (W.D.N.C. Aug. 16, 2012).

160. *Id.*

161. *Id.* at *5.

162. Molina v. DSI Rental, Inc., 840 F. Supp. 2d 984, 994 (W.D. Tex. 2012).

163. *Id.* at 995 (analyzing the Texas Commission on Human Rights Act based on the ADAAA).

164. Hodges v. District of Columbia, 959 F. Supp. 2d 148, 151 (D.D.C. 2013).

165. *Id.* at 154.

166. *Id.*

167. Josey v. Wal-Mart Stores East, L.P., No. 0:11-2993-CMC-SVH, 2013 WL 5566305, at *1 (D.S.C. April 9, 2012).

168. *Id.*

169. *Id.* at *4.

and thus was sufficient to withstand defendant's motion for summary judgment.[170]

Finally, in *Rico v. Xcel Energy, Inc.*, the plaintiff, an employee at Southwestern Public Service Company, had back surgery and was allowed to resume employment with "modest lifting restrictions" and "no utility pole climbing."[171] The court acknowledged the broadened standards of the Amendments and found that the plaintiff pled sufficient facts to establish that he could be disabled under the new standards.[172]

c. *Lifting as a Major Life Activity*

Prior to the Amendments, lifting restrictions did not usually lead to a finding that the plaintiff had a disability.[173] However, "[g]iven the expansion of the definition of disability," weight lifting restrictions may now be considered a disability "or at least sufficient to avoid summary judgment on the issue."[174] Similarly, in *Lohf v. Great Plains Manufacturing*, the plaintiff had spondylolisthesis, a lower back condition.[175] Because of his condition, the plaintiff could not lift more than twenty-five or thirty pounds.[176] The court, noting that it was a "close question," determined that "under the less restrictive standard of the ADAAA" the plaintiff raised "a genuine issue of fact as to whether he was disabled."[177]

While at work, the plaintiff in *Mills v. Temple University* suffered a back injury that grew increasingly severe.[178] The plaintiff claimed that her injury substantially limited her ability to lift anything over three pounds.[179] The court, acknowledging that plaintiff's lifting restriction would not be a disability under the original ADA, found sufficient evidence under the less restrictive

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170. Lee v. Harrah's New Orleans, No. 11-570, 2013 WL 3899895, at *1, 5 (E.D. La. July 29, 2013).

171. Rico v. Xcel Energy, Inc., 893 F. Supp. 2d 1165, 1166 (D.N.M. 2012).

172. *Id.* at 1170.

173. *See, e.g.*, Tate v. Sam's East, Inc., No. 3:11-CV-87, 2013 U.S. Dist. LEXIS 45213, at *32–33 (E.D. Tenn. Mar. 29, 2013).

174. *Id.* (finding a twenty to twenty-five pound lifting restriction constituted a disability at the summary judgment stage).

175. Lohf v. Great Plains Mfg., No. 10-1177-RDR, 2012 WL 2568170, at *2 (D. Kan. July 2, 2012).

176. *Id.*

177. *Id.* at *5–6 (recognizing that "prior to the adoption of the ADAAA, plaintiff's lifting restrictions may not have sufficed to establish him as disabled.").

178. Mills v. Temple University, 869 F. Supp. 2d 609, 614–15 (E.D. Pa. 2012).

179. *Id.* at 621–22.

ADAAA standard to raise a genuine issue of fact as to whether the plaintiff was disabled.[180] Similarly, the court assumed in *Anderson v. United Parcel Service, Inc.* that plaintiff's permanent lifting restrictions—no repetitive lifting above shoulder height, no lifting over forty-five pounds, a maximum pushing capacity of thirty-five pounds, and a maximum pulling capacity of forty-five pounds—constituted a disability.[181]

Finally, in contrast to the Court's opinion in *Toyota*, the court in *Gibbs v. ADS Alliance Data Systems, Inc.* found that carpal tunnel syndrome might constitute a disability, especially if it affects an employee's ability to perform manual tasks.[182] Fibromyalgia may also be a disability when it limits the ability to walk, sleep, and perform routine tasks.[183]

d. Working as a Major Life Activity

Although working is still a disputed major life activity, as will be discussed below, some cases alleging a substantial limitation on this activity succeed. In *Chicago Regional Council of Carpenters v. Thorne Associates, Inc.*, the plaintiff, a journeyman carpenter, failed a physical exam that purported to measure all aspects of carpentry, including lifting, pushing heavy objects, and climbing ladders.[184] The court concluded that if the plaintiff was "unable to perform lifting tasks that really [were] required for journeyman carpentry work . . . he [was] limited in a broad range of jobs."[185]

In *Hutchinson v. Ecolab, Inc.*, the plaintiff experienced dizziness, memory loss, joint pain, and work-induced stress.[186] He was diagnosed with syncope and memory loss and therefore could not drive, which was an important part of his job.[187] The court,

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180. *Id.*

181. Anderson v. United Parcel Service, Inc., No. 09-25-26-KHV, 2011 WL 4048795, at *4, *11 (D. Kan. Nov. 22, 2010) (recognizing that the defendant did not contest whether the plaintiff had a disability).

182. Gibbs v. ADS Alliance Data Sys., Inc., No. 10-2421-JWL, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011) (acknowledging that "the court must consider the evidence of plaintiff's alleged disability through the lens of the less demanding standard of disability set forth in the ADAAA").

183. Howard v. Pa. Dep't of Pub. Welfare, No. 11-1938, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013).

184. Chicago Reg'l Council of Carpenters v. Thorne Assocs., Inc., 893 F. Supp. 2d 952, 956 (N.D. Ill. 2012).

185. *Id.* at 962.

186. Hutchinson v. Ecolab, Inc., No. 3:09CV1848(JBA), 2011 WL 4542957, at *2 (D. Conn. Sept. 28, 2011).

187. *Id.* at *1, *8. Plaintiff's job required him to drive approximately 500 to 1,000

recognizing the ADAAA's mandate to expand the definition of disability, found that the plaintiff's restriction from driving could constitute a "broad range or class of jobs,"[188] and that there was a genuine dispute of fact as to whether the plaintiff was limited in the major life activity of working.[189]

e. Major Bodily Functions

As discussed above, one of the most creative changes Congress made in the Amendments was to define major life activities to include major bodily functions, including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[190] In *Meinelt v. P.F. Chang's China Bistro, Inc.*, the defendant used pre-ADAAA precedent to argue that the plaintiff's brain tumor did not constitute a disability because it did not substantially limit a major life activity.[191] The court rejected the defendant's argument and found that a brain tumor may constitute a disability under the Amendments because of the possibility that it would limit a major life activity such as "the operation of a major bodily function, including . . . normal cell growth . . . [and] brain . . . functions."[192]

One court even held that abnormal non-cancerous cell growth can constitute a disability.[193] In *Coker v. Enhanced Senior Living, Inc.*, the plaintiff suffered from a breast disease that required multiple surgeries.[194] Based on the plaintiff's doctor's testimony that the breast disease was "the result of abnormal cell growth and abnormal endocrine and reproductive functioning," the court concluded that the plaintiff suffered from a disability as a matter of law.[195]

Finally, based on the addition of the major bodily functions provision, the Equal Employment Opportunity Commission has

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miles per week to meet with clients. *Id.* at *1.

188. *Id.* at *8.

189. *Id.* at *9.

190. 42 U.S.C. § 12102(2)(B) (2012); Long, *supra* note 1, at 222–23.

191. Meinelt v. P.F. Chang's China Bistro, Inc., 787 F. Supp. 2d 643, 651 (S. D. Tex. 2011).

192. *See id.* at 651–52 (quoting 42 U.S.C. § 12102(2)(B)).

193. Coker v. Enhanced Senior Living, Inc., 897 F. Supp. 2d 1366 (N.D. Ga. 2012).

194. *Id.* at 1368.

195. *Id.* at 1375–76 (acknowledging that whether an impairment is a disability under the ADAAA does not require an in-depth analysis).

proposed that Human Immunodeficiency Virus (HIV) or AIDS should consistently be viewed as a disability because of the substantial limitations these diseases have on the functioning of the immune system.[196] Citing this new definition of a major life activity, courts have concluded that HIV may constitute a disability.[197]

3. Episodic or Short-term Impairments

a. Episodic Impairments

Congress overturned the ruling in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that an "impairment's impact must also be permanent or long term."[198] Now, even "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[199]

For instance, the plaintiff in *Carbaugh v. Unisoft International, Inc.*, had multiple sclerosis (MS), the symptoms of which would flare up about four times per year.[200] When active, the plaintiff's symptoms included severe fatigue, inability to control balance, short-term memory deficiency, as well as other physical and psychological issues.[201] The court found that whether MS is a disability was a genuinely disputed fact and denied defendant's motion for summary judgment.[202] Similarly in *Feldman v. Law Enforcement Associates Corp.*, the court found that MS could be a disability because it impaired the plaintiff's neurological functions when active.[203]

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196. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 29 C.F.R. § 1630, app. (2014).

197. *See* Horgan v. Simmons, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010); *see also* Alexiadis v. N.Y. Coll. of Health Professions, 891 F. Supp. 2d 418, 428-29 (E.D.N.Y. 2012).

198. 534 U.S. 184, 198 (2002).

199. 42 U.S.C. § 12102(4)(D) (2012); *see also* Carmona v. Southwest Airlines Co., 604 F.3d 848, 855 (5th Cir. 2010) (acknowledging that the "amendments would be very favorable to [plaintiff's] case . . . because they make it easier for a plaintiff with an episodic condition like [plaintiff's psoriasis] to establish that he is an individual with a disability"). However, plaintiffs must still show how the impairment substantially limits a major life activity. *See* Butler v. BTC Foods Inc., No. 12-492, 2012 WL 5315034, at *3 (E.D. Pa. Oct. 19, 2012) (holding that a hernia was not a disability because plaintiff failed to show he was substantially limited in the major life activity of working).

200. Carbaugh v. Unisoft Int'l, Inc., No. H-10-0670, 2011 WL 5553724, at *7 (S.D. Tex. Nov. 15, 2011).

201. *Id.*

202. *Id.* at *8.

203. Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472, 483–84

The court in *Norton v. Assisted Living Concepts, Inc.* acknowledged that renal cancer is "capable of qualifying as a disability under the [amended] ADA."[204] The fact that the cancer may have been in remission at the time of the adverse employment action against plaintiff was inconsequential, as the court found that the cancer substantially limits the major life activity of normal cell growth when active.[205] The court reached a similar conclusion in *Hoffman v. Carefirst of Fort Wayne, Inc.*, finding that the plaintiff did "not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action" because his Stage III Renal Cancer constituted a disability when active.[206] In *Chalfont v. U.S. Electrodes*, the court found plaintiff's remitted leukemia to be a disability.[207] Similarly, in *Katz v. Adecco USA, Inc.*, the court noted "[a]s a result of the amendments to the ADA, it appears not to matter that [plaintiff's breast] cancer was in remission at the time of the alleged discrimination" for purposes of determining whether or not the plaintiff could establish a prima facie case of discrimination.[208] Hepatitis C may also be a disability under the Amendments even if it is episodic or in remission.[209]

In *Medvic v. Compass Sign Co., LLC*, the court held that even stuttering could be a disability.[210] The court found that the plaintiff's stuttering was severe, "at times rendering him incapable of verbally communicating for himself," and that stuttering is a lifelong impairment.[211] The court held that "even if he is able to communicate at times without limitation" a jury could find that his stutter, when active, "substantially limits his ability to communicate."[212]

(E.D.N.C. 2011).

204. Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011).

205. *Id.* at 1185 (citing 29 C.F.R. § 1630.2(j)(3)(ii)–(iii) (2011), stating that cancer is almost always a disability).

206. 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010).

207. Chalfont v. U.S. Electrodes, No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010).

208. Katz v. Adecco USA, Inc., 845 F. Supp. 2d 539, 548 (S.D.N.Y. 2012).

209. Hardin v. Christus Health Se. Tex. St. Elizabeth, No. 1:10-CV-596, 2012 WL 760642, at *5–6 (E.D. Tex. Jan. 6, 2012) (acknowledging that the ADAAA's definition should be read in favor of broad coverage).

210. Medvic v. Compass Sign Co., No. 10-5222, 2011 WL 3513499, at *5 (E.D. Pa. Aug. 10, 2011).

211. *Id.* at *7.

212. *Id.* (noting "[o]ur analysis . . . has been altered by the 2008 ADA Amendments Act of 2008, which rejected the 'permanent' and 'long term'

In *Negron v. City of New York*, the plaintiff had "bullet fragments lodged in her left hand and chest as a result of a firearm accident," which caused her pain and inflammation.[213] The court found that when the inflammation was active, it substantially limited the plaintiff's ability to perform manual tasks and work.[214] Finally, the court in *Gogos v. AMS Mechanical Systems, Inc.* held that vision and circulatory problems caused by high blood pressure could constitute a disability even though they were episodic.[215]

b. Short-Term Impairments

There have also been several cases discussing short-term impairments. For instance, in *Cohen v. CHLN, Inc.*, the court found that the plaintiff's back injury that lasted for four months prior to his termination, and that impacted his ability to walk, climb stairs, and sleep, may be a disability under the ADA as amended.[216] Recognizing that the question of whether an impairment is substantially limiting is "not meant to be a demanding standard," and that an impairment lasting for a short period of time may nevertheless be substantially limiting, the court rejected the defendant's argument that the plaintiff was not disabled because of the short duration of the impairment.[217]

Similarly, in *Patton v. eCardio Diagnostics LLC*, the court found that two broken femurs that substantially limited the plaintiff in the major life activity of walking could reasonably be considered a disability even though the plaintiff walked unassisted with a limp a year and a half after the injury.[218] The court in *Esparza v. Pierre Foods* found that the plaintiff's kidney stones, allegedly limiting the major life activities of standing, lifting, bending, driving, and working, met the "minimal threshold" of pleading requirements for making an ADA claim.[219]

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requirement embodied in the original Act and stated that '*episodic* or *in remission* fits within the definition of disability if it would substantially limit when active"').

213. Negron v. City of New York, No. 10CV2757(RRM)(LB), 2011 WL 4737068, at *10 (E.D.N.Y. Sept. 14, 2011).

214. *Id.* at *12.

215. Gogos v. AMS Mech. Sys., Inc., 737 F.3d 1170, 1173 (7th Cir. 2013).

216. Cohen v. CHLN, Inc., No. 10-00514, 2011 WL 2713737, at *7–8 (E.D. Pa. July 13, 2011).

217. *Id.* at *8.

218. Patton v. eCardio Diagnostics LLC, 793 F. Supp. 2d 964, 968-69 (S.D. Tex. 2011).

219. Esparza v. Pierre Foods, 923 F. Supp. 2d 1099, 1106 (S.D. Ohio 2013).

Finally, in a recent Fourth Circuit case, the court held that a sufficiently severe short-term impairment could be a disability.[220] The plaintiff severely injured himself exiting from a commuter train.[221] He fractured his left leg and tore the meniscus tendon in his left leg.[222] He also fractured his right ankle and ruptured a tendon in the quadriceps of his right leg.[223] After two required surgeries, the plaintiff was not expected to walk for at least seven months, and only then after a great deal of physical therapy.[224] The employer gave him short-term disability leave but would not discuss reduced hour or work-at-home options while he transitioned back to full-time employment.[225] Instead, the employer terminated him.[226] The lower court granted the defendant's motion for summary judgment, stating that the plaintiff was not disabled because of the short-term nature of his impairments.[227] The Fourth Circuit criticized the district court for relying on pre-ADAAA cases and for holding that the plaintiff was not disabled because he could have worked in a wheelchair.[228] The court held that the district court had inverted the inquiry.[229] The fact that he might have been able to work while in a wheelchair does not matter for the issue of whether or not he has a disability under the statute.[230] It only matters for purposes of whether he was qualified.[231] Consequently, the Fourth Circuit gave deference to the EEOC regulations and held that short-term impairments can be disabilities if they are sufficiently severe—these injuries certainly qualified as sufficiently severe.[232]

4. Specific Impairments

Since the implementation of the Amendments, there have been many impairments that courts have held are disabilities despite the

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220. Summers v. Altarum Inst., Corp., 740 F.3d 325, 327 (4th Cir. 2014). I have violated my own cut-off date of December 31, 2013 by including this case because it is a court of appeals opinion, rather than a district court case.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 327–28.

227. *Id.* at 328.

228. *Id.* at 329–30.

229. *Id.* at 330–31.

230. *See id.* at 331.

231. *Id.*

232. *See id.* at 332.

fact that these impairments were highly unlikely to be considered disabilities before the Amendments.

a. Pregnancy

One impairment, if it can even be called that, which courts routinely said was not a disability was routine pregnancy. Since the Amendments, a couple of pregnancy cases have survived summary judgment. For instance, in *Mayorga v. Alorica, Inc.*, the court denied defendant's motion to dismiss because the plaintiff pled sufficient facts to require an individualized factual inquiry into whether "the nature, duration, and severity of th[e] [plaintiff's] complications and symptoms [during pregnancy] qualif[ied] as a disability."[233] The plaintiff suffered from a breech presentation that would exist throughout her pregnancy and "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions," requiring three trips to the emergency room.[234]

In *Nayak v. St. Vincent Hospital and Health Care Center, Inc.*, the court found that the plaintiff's pregnancy constituted a disability, distinguishing the case from a Seventh Circuit pre-ADAAA case that held that pregnancy-related complications were not substantially limiting.[235] The plaintiff's pregnancy in *Nayak* constituted a disability because her pregnancy related symptoms lasted for eight months, and she suffered symphysis pubis dysfunction post-partum for approximately two months.[236]

b. Vision Impairments

Obviously, seeing is considered a major life activity, but a plaintiff must also show that the impairment substantially limits his or her ability to see.[237] The court in *Gil v. Vortex, LLC* believed the plaintiff pled sufficient facts to survive a motion to dismiss under the relaxed standards of the Amendments when the plaintiff merely

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233. Mayorga v, Alorica, Inc., No. 12-21578-CV, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012).

234. *Id.* at *1.

235. Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc., No. 1:12-CV-0817-RLY-MJD, 2013 WL 121838, at *2–3 (S.D. Ind. Jan. 9, 2013).

236. *Id.*

237. 29 C.F.R. § 1630.2(i)(1)(i) (2014).

stated that he had monocular vision inhibiting the major life activities of seeing and working.[238]

Although mitigating measures are not considered in assessing an impairment post-ADAAA, the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.[239] When eyeglasses do not correct a vision impairment, however, an individual may still be considered disabled.[240] In *Smith v. Valley Radiologists, Ltd.*, the plaintiff wore powerful glasses to read and to use a computer.[241] Even with the glasses, however, the court determined the plaintiff's ability to see was substantially limited because she suffered from ocular toxoplasmosis, a condition that blinded the central spots in her eyes and that could not be completely corrected by glasses.[242]

In *Markham v. Boeing Co.*, the plaintiff had a deformity in his right eye that affected his depth perception.[243] Noting that the Amendments "lowered the bar on the disability inquiry" and relying on the plaintiff's testimony that he had "no depth perception and that he [had] to turn his head 180 degrees to see to his right," the court found genuine issues of material fact "as to whether plaintiff's blindness [constituted] a disability within the meaning of the ADA."[244] A court has also said that glaucoma may be a disability, especially when a plaintiff loses peripheral vision, bumps into people and objects, and must extend her arm when moving from place to place.[245]

c. Mental Impairments

Mental impairments were frequently litigated before the Amendments and courts often found that they were not disabilities. Several cases after the Amendments have discussed mental impairments. One court has stated that anxiety, depression, and suicidal thoughts may rise to the level of a disability even if a doctor

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238. Gil v. Vortex, LLC, 697 F. Supp. 2d 234, 239–40 (D. Mass. 2010).

239. 42 U.S.C. 12102(4)(E)(ii) (2012).

240. Smith v. Valley Radiologists, Ltd., No. CV11-0599-PHXDGC, 2012 WL 3264504, at *4 (D. Ariz. Aug. 9, 2012).

241. *Id.*

242. *Id.*

243. Markham v. Boeing Co., No. 10-1363-MLB, 2011 WL 6217117, at *1 (D. Kan. Dec. 14, 2011).

244. *Id.* at *4.

245. Bordonaro v. Johnston Cnty. Bd. of Educ., 938 F. Supp. 2d 573, 578–79 (E.D.N.C. Apr. 11, 2013).

does not diagnose the impairments or the impairments are episodic in nature.[246] Likewise, severe brain damage may be considered a disability.[247] Depression that causes sleep deprivation one to two nights a week and that lasts up to seventeen months may constitute a disability.[248] In *Diaz v. City of Philadelphia*, the court found that the plaintiff's post-traumatic stress disorder, depression, anxiety, insomnia, panic attacks, and irritable bowel syndrome rose to the level of a disability because the impairments substantially limited her ability to sleep, concentrate, and work.[249]

In *Dentice v. Farmers Ins. Exchange*, the plaintiff suffered from depression, general anxiety disorder, panic disorder, and carpal tunnel.[250] He argued that his impairments limited the major life activities of "thinking, concentrating, learning, interacting, and communicating with others, caring for oneself, eating, sleeping, performing manual tasks, and marital relations."[251] The court found that in light of the expansive scope of the definition of "substantial limitation," a reasonable jury could find the plaintiff disabled.[252] Similarly, in *Gesegnet v. J.B. Hunt*, the court assumed that the plaintiff's bipolar disorder and his anxiety over being in confined areas constituted a disability even though the plaintiff did not provide medical evidence that "precisely define[d]" the extent of his disability.[253]

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246. Wright v. Stark Truss Co., No. 2:10-2427-RMG-BM, 2012 WL 3029638, at *6–7 (D.S.C. May 10, 2012) (denying defendant's motion for summary judgment because plaintiff's anxiety, depression, and suicidal thoughts substantially limited his ability to sleep, eat, think, and concentrate and plaintiff attempted suicide).

247. Graham v. St. John's United Methodist Church, No. 12-cv-0297-MJR, 2012 WL 5298156, at *4 (S.D. Ill., Oct. 25, 2012) (holding that brain damage limiting ability to articulate thoughts and comprehend was plausibly a disability).

248. Naber v. Dover Healthcare Assocs, 765 F. Supp. 2d 622, 627, 647 (D. Del. 2011) (denying defendant's motion for summary judgment because question of fact existed as to whether plaintiff's depression caused sleeping impairments that were substantially limiting compared to the average person in the general population).

249. Diaz v. City of Philadelphia, No. 11-671, 2012 WL 1657866, at *9 (E.D. Pa. May 10, 2012); *see also* Franklin v. City of Slidell, No. 12-1940, 2013 U.S. Dist. LEXIS 43455, at *44–45 (E.D. La. Mar. 27, 2013) (liberally construing plaintiff's pleadings to find that his post-traumatic stress disorder constituted a disability).

250. Dentice v. Farmers Ins. Exch., No. 10-C-113, 2012 WL 2504046, at *11 (E.D. Wis. June 28, 2012).

251. *Id.*

252. *Id.*

253. Gesegnet v. J.B. Hunt Transp., Inc., No. 3:09-CV-828-H, 2011 WL 2119248, at *4 (W.D. Ky. May 26, 2011). The court stated that "the medical forms fall far short of what is necessary . . . [n]evertheless, given the broad definition of disability Congress intended, the Court will assume that the Plaintiff has a disability under

After concerns with her employment as an art teacher, the plaintiff in *Huiner v. Arlington School District* was diagnosed with anxiety and depression.[254] Shortly after she was diagnosed and sought reasonable accommodations, the employer decided not to renew her contract.[255] In response to the employer's argument that she is not disabled, the plaintiff argued that her anxiety limited her ability to maintain nutrition, care for her children, and sleep. The court held that plaintiff could survive summary judgment on the disability issue, noting that the plaintiff lost over thirty pounds from fatigue and lack of appetite.[256]

Although the court in *Blackard v. Livingston Parish Sewer District* originally and erroneously used pre-ADAAA precedent to find the plaintiff not disabled,[257] the court eventually corrected the mistake and held that plaintiff's bipolar disorder, depression, anxiety, and ADHD are disabilities.[258] The court stated that it was incorrect to use pre-ADAAA law, and because the EEOC regulations state that certain impairments should easily be considered disabilities, the plaintiff can survive summary judgment.[259]

Plaintiffs with depression fare better after the Amendments than they did before the Amendments. In *Palacios v. Cont'l Airlines, Inc.*, the court found that the plaintiff's depression, which allegedly limited his ability to sleep, eat, and his ability to take basic care of himself, was sufficient to "at least raise a fact issue that Plaintiff had a disability" under the "more lenient standard of the ADAAA."[260] Similarly, in *Holland v. Shinseki*, the court found that the plaintiff's anxiety and depression limited her ability to sleep when she often only slept one hour per night.[261] Even in isolated or infrequent

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the ADAAA." *Id.*

254. Huiner v. Arlington Sch. Dist., No. CIV. 11-4172-KES, 2013 WL 5424962, at *2 (D.S.D. Sept. 26, 2013).

255. *Id.* at *3.

256. *Id.* at *5.

257. Blackard v. Livingston Parish Sewer Dist., No. 12-70a4-SDD-RLB, 2013 WL 5176460, at *2–4 (M.D. La. Sept. 12, 2013) (using the standard from *Toyota* that the impairment must "prevent or severely restrict" a major life activity, and therefore holding that plaintiff's sleeping and working were not substantially limited and thus, plaintiff was not disabled).

258. Blackard v. Livingston Parish Sewer Dist., No. 12-704-SDD-RLB, 2014 WL 199629, at *1–3 (M.D. La. Jan. 15, 2014).

259. *Id.* at *1–3.

260. Palacios v. Cont'l Airlines, Inc., No. H-11-3085, 2013 U.S. Dist. LEXIS 17881, at *12 (S.D. Tex. Feb. 11, 2013).

261. Holland v. Shinseki, No. 3;10-CV-0908-B, 2012 WL 162333, at *6 (N.D. Tex. Jan. 18, 2012) (using ADAAA to interpret the Rehabilitation Act).

episodes, depression that requires inpatient treatment may be a disability.[262]

In one unusual case, the court held that the plaintiff had sufficiently pled that she had a disability because of anxiety, depression, and extreme stress. What is unusual about this case is that the court did not even mention the ADA Amendments Act, despite the fact that the events in the case did not occur until 2012, after the Amendments were clearly applicable.[263] The court cited pre-ADAAA cases using the standard that major life activities must be activities that are of central importance to daily life and then proceeded to analyze the case under the major life activity of working.[264] Surprisingly, despite analyzing the case under pre-ADAAA law, the court held that there was sufficient evidence to show that her depression and anxiety did substantially limit her major life activity of working because she could only work six hours per day, two hours fewer than what the average person would be able to work on a daily basis.[265]

Even when the record linking a plaintiff's depression to his or her substantial limitations of a major life activity is "incredibly sparse," courts may consider the depression a disability.[266] In *Estate of Murray v. UHS of Fairmount, Inc.*, the only evidence submitted by the plaintiff to establish that her depression limited her eating, sleeping, and thinking was in her deposition when she said "she experienced symptoms such as '[n]ot eating, not sleeping, having racing thoughts . . . [and] just feeling hopeless, helpless, sad.'"[267] The court noted that there was no evidence indicating "the severity, duration, or frequency" of the symptoms or whether or not the plaintiff's major life activities were substantially limited.[268] Recognizing that under pre-ADAAA law, the plaintiff's lack of evidence would fail to demonstrate a substantial limitation, the court nonetheless declined to grant defendant's motion for summary judgment on the issue of whether the plaintiff was disabled.[269]

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262. Kinney v. Century Servs. Corp. II, No. 1:10-cv-00787-JMS-DML, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011).

263. Herbig v. Lockheed Martin, No. PWG-12-3398, 2013 WL 3146937 (D. Md. June 18, 2013).

264. *Id.* at *6.

265. *Id.* at *7. Of course, what is even more surprising is that the court did not cite to post-ADAAA law.

266. Estate of Murray v. UHS of Fairmount, Inc., No. 10-2561, 2011 WL 5449364, at *8 (E.D. Pa. Nov. 10, 2011).

267. *Id.*

268. *Id.* at *7.

269. *Id.* at *8 (recognizing that the inquiry into substantial limitation "should

d. Obesity

Under the pre-ADAAA law, obesity was rarely considered a disability.[270] In *Lowe v. American Eurocopter* however, the court denied the defendant's motion to dismiss when plaintiff claimed she was disabled due to her weight.[271] The court reasoned that due to the expansive interpretation of "substantially limits" and "major life activities" under the Amendments, obesity should not automatically be considered NOT a disability.[272] The plaintiff claimed that she was substantially limited in the major life activity of walking due to her weight.[273]

The court in E.*E.O.C. v. Resources for Human Development, Inc.*, even more explicitly endorsed the view that obesity is a disability after the Amendments. That court found that severe obesity, defined as weighing more than 100% over the normal range, is a disability even if the obesity is not based on a physiological impairment.[274] However, severe obesity may also be considered a disability because it is accompanied by other disorders such as diabetes, congestive heart failure, and hypertension.[275]

e. Miscellaneous Impairments

Courts have also found the following impairments to be disabilities: strokes,[276] an ankle injury that limited the individual's ability to walk for more than an hour without a break,[277] alcoholism, causing difficulty "thinking, concentrating, communicating, and interacting with others,"[278] and anemia.[279] Perhaps the most

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not demand extensive analysis").

270. Lowe v. Am. Eurocopter, LLC, No. 1:10CV24-A-D, 2010 WL 5232523, at *7 (N.D. Miss. Dec. 16, 2010).

271. *Id.* at *8.

272. *Id.*

273. *Id.*

274. E.E.O.C. v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 694 (E.D. La. 2011) (finding person weighing in excess of 500 pounds to have an actual disability).

275. *Id.*

276. Sickels v. Cent. Nine Career Ctr., No. 1:10-cv-00479-SEB-DKL, 2012 WL 266945, at *7 (S.D. Ind. Jan. 30, 2012).

277. Fleck v. Wilmac Corp., No. 10-05562, 2012 WL 1033472, at *1, 7 (E.D. Pa. Mar. 27, 2012).

278. Sechler v. Modular Space Corp., No. 4:10-CV-5177, 2012 WL 1355586, at *11 (S.D. Tex. Apr. 18, 2012).

279. Thomas v. Bala Nursing Ret. Ctr., No. 11-5771, 2012 WL 2581057, at *11 (E.D. Pa. July 3, 2012) (acknowledging that under the ADAAA, whether an impairment is a disability "should not demand extensive analysis").

surprising of all, one court denied the defendant's motion to dismiss in favor of the plaintiff, who alleged that her short stature—4'10"—was a disability.[280] The court recognized that height is not a "typical impairment," but stated that it is "plausible that 'short stature' could, in some contexts," substantially limit a major life activity.[281]

B. Plaintiffs Who Are Not Disabled

Of course, not every plaintiff who claims to be disabled is found to have a disability under the Amendments. Some plaintiffs still lose on this initial question, sometimes because they have weak cases; sometimes because their cases were not plead or litigated well; and sometimes because the courts were erroneously falling back on old standards. I divide this subset of cases into cases that I believe were correctly decided, cases I think were incorrectly decided, and cases that were poorly litigated.

1. Courts Correctly Decided Plaintiffs Are Not Disabled

While there is no explicit minimum duration for an impairment to be considered a disability, short-term impairments that are not "substantially limiting" are not disabilities.[282] I believe the following cases were decided correctly because of the short-term, non-substantially limiting nature of the impairments. For instance, in *Zurenda v. Cardiology Associates, P.C.*, Jennifer Zurenda had knee surgery that required six weeks of leave.[283] She claimed that she was disabled because her knee surgery limited her in the major life activity of working.[284] The court noted that temporary medical conditions are normally not disabilities and pointed to the fact that Zurenda continued to work on a part-time basis after surgery to conclude that she was not disabled.[285]

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280. McElmurry v. Arizona Dept. of Agric., No. CV-12-02234-PHX-GMS, 2013 WL 2562525, at *4 (D. Ariz. June 11, 2013).

281. *Id.* at *4.

282. Sam-Sekur v. Whitmore Grp., Ltd., No. 11-cv-4938 (JFB)(GRB), 2012 WL 2244325, at *7 (E.D.N.Y. June 15, 2012); *see also* 29 C.F.R. § 1630, app. (2014) ("The duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe.").

283. Zurenda v. Cardiology Assocs., P.C., No. 3:10-CV-0882, 2012 WL 1801740, at *4 (N.D.N.Y. May 16, 2012).

284. *Id.* at *7.

285. *Id.* at *8.

In *Sam-Sekur v. Whitmore Group, Ltd.*, the court dismissed the plaintiff's discrimination claim finding that the plaintiff's pregnancy, breast cancer scare, appendectomy, gall bladder removal, and infections from an IUD and oral implants failed to amount to a disability because each illness was of a very short duration.[286]

In *Lewis v. Florida Default Law Group, P.L.*, the plaintiff had a highly contagious flu for approximately a week.[287] Even though the plaintiff was bedridden, felt drained and dizzy, had shortness of breath and diarrhea, and vomited, the court found that her impairments were not sufficiently severe to constitute a disability because of their short-term duration.[288]

One court stated that there is a difference between a legal impairment, one that substantially limits a major life activity, and a mere inconvenience. In *Brtalik v. South Huntington Union Free School Dist.*, the court stated that the plaintiff's attempt to characterize colonoscopy, "a routine, diagnostic, out-patient procedure, or any related minor discomfort," as a disability was "simply absurd."[289] Another court stated that short term, post-surgery difficulty staying awake and concentrating does not rise to the level of a substantially limiting impairment.[290]

Finally, the plaintiff in *Chicago Regional Council of Carpenters v. Berglund Construction Co.* was held not to be disabled because the only limitation caused by his impairment was the inability to lift sixty-eight pounds, which was a job requirement.[291] Because he could not prove that most people in the general population can lift sixty-eight pounds, plaintiff's claim was dismissed.[292]

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286. Sam-Sekur, 2012 WL 2244325, at *7, *9 (allowing plaintiff leave to amend her complaint so that she can state with greater specificity how her chronic cholecystitis was linked to her pregnancy and the duration of her pregnancy).

287. Lewis v. Fla. Default Law Grp., P.L., No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at *2 (M.D. Fla. Sept. 16, 2011).

288. *Id.* at *4.

289. Brtalik v. South Huntington Union Free Sch. Dist., No. CV-10-0010, 2010 WL 3958430, at *4 (E.D.N.Y. Oct. 6, 2010).

290. Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502, 513 (E.D. Pa. Feb. 28, 2012) (denying plaintiff's discrimination claim even though plaintiff had trouble staying awake, concentrating, moving, and driving and he came to work late on the days he had therapy for two weeks after his knee surgery).

291. Chicago Reg'l Council of Carpenters v. Berglund Constr. Co., No. 12 C 3604, 2012 WL 3023422, at *2 (N.D. Ill. July 24, 2012).

292. *Id.*

2. Courts Incorrectly Concluded that Plaintiffs Are Not Disabled

Despite my overall conclusion that courts seem to be following Congress' mandate for broad coverage under the ADAAA, there are a few cases that I believe were incorrectly decided by the courts. For instance, one court held that complete hearing loss in one ear does not constitute a disability, because even though the plaintiff had difficulty hearing in noisy environments such as the newsroom in which she worked, she testified that she was still able to hear.[293] Thus the court stated that she failed to prove that her hearing loss "substantially limited her hearing."[294]

Two courts held that monocular vision was not a disability. In *Knutson v. Schwan's Home Service*, the plaintiff's employment was conditioned on being able to pass Department of Transportation commercial vehicle fitness test.[295] An eye injury caused the plaintiff to lose most of his sight in his left eye, rendering him unable to pass the DOT's tests.[296] Even though the plaintiff could not drive commercial vehicles because of his inability to pass the DOT's tests, the court found that his vision impairment did not constitute a disability.[297] I believe, based on the expansive interpretation of the Amendments, plaintiff's monocular vision should have allowed the court to consider him substantially limited in the major life activities of seeing or working.[298]

Similarly, the plaintiff in *Mota v. Aaron's Sales and Lease Ownership* had monocular vision, but the court held that it was not a disability.[299] The plaintiff admitted that his vision did not affect his daily life, and the plaintiff was only limited from the narrow class of jobs of driving commercial vehicles.[300] The court granted defendant's motion for summary judgment because the plaintiff's impairment did not substantially limit him in the major life activity of working.[301] What was troubling about this case is that the court

293. Mengel v. Reading Eagle Co., No. 11-6151, 2013 WL 1285477, at *3 (E.D. Pa. March 29, 2013).

294. *Id.* at *4.

295. Knutson v. Schwan's Home Serv., 870 F. Supp. 2d 685, 687 (D. Minn. 2012).

296. *Id.* at 688.

297. *Id.* at 690.

298. 29 C.F.R. § 1630, app (2014) (mentioning that vision in only one eye should be considered a disability).

299. Mota v. Aaron's Sales and Lease Ownership, No. 11-4298, 2012 WL 3815332, at *1 (E.D. Pa. Sept. 4, 2012).

300. *Id.* at *4.

301. *Id.* at *3–5.

never mentioned the amendments and cited and relied upon pre-Amendment case law.

In another case, the court held that plaintiff's attention deficit disorder (ADD) was not a disability.[302] The court stated that there was no evidence that her performance problems at work were caused by her ADD, stating that she has managed to hold down employment for thirteen years at the university; she took college-level classes; and was able to perform her duties.[303] The court also stated that if plaintiff is alleging that her ADD had gotten worse, there was insufficient evidence that making mistakes, forgetting things, and being overwhelmed at work was caused by her ADD, as most people get overwhelmed at work.[304] Although this is a close case, my reading of the facts made me believe that plaintiff's ADD had become worse, and that her problems at work were not ones that most people experience.

In one of the Court of Appeals cases, *Allen v. SouthCrest Hospital*, the plaintiff suffered from migraine headaches, varying in degrees of severity from discomfort to debilitation.[305] The plaintiff's migraines often caused her to return home from work and immediately go to bed, skipping "the routine matters of caring for [her]self."[306] The court held that the plaintiff's impairment did not substantially limit her in caring for herself or working, the major life activities she claimed were substantially limited by her migraines.[307] First, the court held that the plaintiff failed to present evidence that she was substantially limited in her ability to care for herself.[308] The evidence that would have been useful was absent from the plaintiff's testimony, according to the court.[309] Additionally, the plaintiff failed

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302. Fuoco v. Lehigh Univ., No. 11-CV-6117, 2013 WL 5964016, at *10 (E.D. Pa. Nov. 8, 2013).

303. *Id.* at *9.

304. *Id.* at *10.

305. Allen v. SouthCrest Hosp., 455 F. App'x 827, 829 (10th Cir. 2011).

306. *Id.* at 832.

307. *Id.* at 835.

308. *Id.* at 833.

309. The court suggested that

> factors [such] as how much earlier she went to bed than usual, which specific activities of caring for herself she was forced to forego as the result of going to bed early, how long she slept after taking her medication, what time she woke up the next day, whether it was possible for her to complete the activities of caring for herself the next morning that she had neglected the previous evening, or how her difficulties in caring for herself on days she had a migraine compared to her usual routine

to show how her restrictions compared to that of the average person, and the court noted that although the average person "presumably[] does not have to go to bed immediately upon returning from work . . . this fact alone does not meet Ms. Allen's burden, since the average person also sleeps each evening and cannot care for herself while asleep, and sometimes goes to bed early."[310]

The court in *Allen* also discussed the major life activity of working. Prior to April 4, 2012, the Equal Employment Opportunity Commission ("EEOC") narrowly defined the term "substantially limits" as it applied to the major life activity of working, requiring the plaintiff to prove that she was restricted in the ability to perform a broad class of jobs.[311] Effective April 4, 2012, the EEOC eliminated the restrictive language and instead demanded that "[t]he term "substantially limits" [be] construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."[312] Allen was heard before the Equal Employment Opportunity Commission revised the regulatory language governing working as a major life activity. Based on the older definition, the court held that since the plaintiff's migraines only limited her from performing a single job, she was not substantially limited in the major life activity of working.[313]

Relying on the same, older, regulations, the court in *Azzam v. Baptist Healthcare Affiliates* found that the plaintiff's stroke did not amount to a disability because it did not limit her in the major life activity of working.[314] The plaintiff failed to link how her fatigue, resulting from her neurological impairment, "substantially affected her ability to work in comparison to most people in the general population" when the plaintiff could still perform her job as a nurse.[315] Because this case was decided before the change in the EEOC regulations, the court's result on the working issue is not that

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were all relevant in determining whether the plaintiff's migraines substantially limited her ability to care for herself. *Id.*

310. *Id.*

311. 29 C.F.R. § 1630.2(j)(3)(i) (2014) ("The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

312. 29 C.F.R. § 1630.2(j)(1)(i) (2014).

313. Allen, 455 F. App'x at 834–35 (10th Cir. 2011).

314. Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 661 (W.D. Ky. 2012).

315. *Id.* at 660–61.

controversial. But the plaintiff in this case had also alleged that her neurological functions and ability to concentrate were also substantially limited following her stroke. Nevertheless, the court held that she did not introduce enough evidence in support of these limitations.[316]

In *Flynt v. Biogen Idec, Inc.* the plaintiff was diagnosed with depression and anxiety.[317] The plaintiff asked for a new supervisor, and when his employer refused his request, he sued.[318] The court found that the inability to work with a particular supervisor did not constitute a substantial limitation on the major life activity of working.[319] The problem with this case is not the conclusion regarding the major life activity of working, but rather, the problem is that the court completely ignored that depression and anxiety can constitute disabilities because they frequently limit other major life activities besides working. The court erroneously only cited to pre-ADAAA law.

3. Poorly Litigated Cases

Some cases where the plaintiff did not succeed can properly be classified as poorly litigated cases. In other words, the plaintiffs in these cases might have been able to survive summary judgment if they had plead sufficient facts and/or used all of the interpretive tools possible after the Amendments.

For instance, the court dismissed the plaintiff's ADA claim in *Brandon v. O'Mara* because the plaintiff failed to provide any facts indicating how her cancer treatment that occurred eighteen months prior to the suit limited her ability to lift.[320] The court acknowledged that under the new ADA standards, whether an impairment substantially limits a major life activity should not require much scrutiny, "but the pleading standards recognized in Iqbal demand some analysis."[321] Not only could the plaintiff have come forward with additional facts regarding the effects of her cancer treatment,

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316. *Id.* at 559.

317. Flynt v. Biogen Idec, Inc., No. 3:11-cv-22-HTW-LRA, 2012 WL 4588570, at *3 (S.D. Miss. Sept. 30, 2012).

318. *Id.*

319. *Id.* at *4.

320. Brandon v. O'Mara, No. 10 Civ. 5174(RJH), 2011 WL 4478492, at *7 (S.D.N.Y. Sept. 28, 2011); *see also* LaPier v. Prince George's Cnty., Md., No. 10-CV-2851AW, 2011 WL 4501372, at *5 (D. Md. Sept. 27, 2011) (finding that plaintiff failed to provide evidence showing that his blood disorder "affected him beyond the week of light duty").

321. Brandon, 2011 WL 4478492, at *7.

but she also could have used the new "major bodily function" provision in the ADA. She could have alleged that the cancer substantially limited her major bodily function of "normal cell growth."[322]

In *Wanamaker v. Westport Board of Education*, the court held that the plaintiff's pregnancy and transverse myelitis, a spinal injury, did not constitute a disability in large part because she did not plead any facts to connect her impairment with the limitation of any substantial limitation on a major life activity.[323]

Although most courts have determined that cancer is a disability under the Amendments, in *Fierro v. Knight Transportation*, the court concluded that "merely having cancer—which, though, may be an 'impairment' as defined under the EEOC regulations—is not enough to support an inference that Fierro has an actual disability."[324] Instead, the court said that the plaintiff must "plead facts giving rise to an inference that cancer substantially limits one or more of his 'major life activities.'"[325] Again, it seems as if plaintiff would have been more successful using the major bodily function provision (normal cell growth). This provision, along with the provision that states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,[326] should lead to the conclusion that cancer is almost always considered a disability.

The plaintiff in *Davis v. CEVA Logistics*, failed to adequately allege that he had a disability when he only stated: "[w]hen Plaintiff had his gall bladder surgery, because of his disability, he was unable to return to work."[327] Similarly, in *O'Donnell v. Colonial Intermediate Unit 20*, the plaintiff was diagnosed with a long list of disorders including major depressive disorder, anxiety disorder with features of panic disorder and post-traumatic stress disorder, avoidant personality disorder, refractory hypertension, and morbid obesity.[328] Despite these impairments, the court found that the plaintiff failed to state a claim upon which relief can be granted

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322. 42 U.S.C. § 12102(2)(B) (2012).

323. Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193, 210–12 (D. Conn. 2012).

324. Fierro v. Knight Transp., No. EP-12-CV-00218-DCG, 2012 WL 4321304, at *3 (W.D. Tex. Sept. 18, 2012).

325. *Id.*

326. 42 U.S.C. § 12102(4)(D).

327. Davis v. CEVA Logistics, No. 1:12-cv-351, 2013 WL 434051, at *3 (S.D. Ohio Feb. 5, 2013).

328. O'Donnell v. Colonial Intermediate Unit 20, No. 12-6529, 2013 U.S. Dist. LEXIS 43103, at *4 (E.D. Pa. Mar. 27, 2013).

because he did not plead facts sufficient to link his disorders with a limitation on a substantial life activity.[329]

In *Neumann v. Plastipak Packaging, Inc.*, the plaintiff claimed that his back injury was a disability.[330] The court was unconvinced, however, because the plaintiff failed to provide any evidence showing that his impairment was severe enough to substantially limit him in any daily activity including working.[331] Additionally, the plaintiff's doctor certified that the plaintiff's back injury was "short-lived" and was corrected by surgery.[332]

In *Aguirre v. W.L. Flowers Machine & Welding Co., Inc.*, the plaintiff alleged that he had "a medical condition that limited him to working no more than forty-five hours per week" but failed to state the nature of the impairment or how it substantially limited any major life activity.[333] The court concluded "[w]ithout alleging the nature of his disability or level of impairment, it cannot be determined whether Plaintiff is 'disabled' as that term is defined in the ADA, and Plaintiff has therefore failed to state a claim."[334]

Finally, the plaintiff in *Broderick v. Research Foundation of State University of New York* also failed to adequately plead her case. The court dismissed without prejudice the plaintiff's ADA claim because, although the plaintiff alleged a disability (injury to her hip and lower back), she failed to allege any facts explaining how she was substantially limited in a major life activity.[335]

C. Courts Are Following Congress' Mandate

The cases discussed in this Part represent strong evidence that, as suspected, courts have followed Congress' mandate to broadly interpret the definition of disability under the ADA. Even though this is not an empirical analysis, anyone who has studied disability law cases can easily ascertain a clear distinction between pre-ADAAA cases, where courts went out of their way to find that various impairments were not disabilities, and post-ADAAA cases,

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329. *Id.* at *19–20. The court did, however, permit the plaintiff to file another amended complaint to cure the defects in his first amended complaint.

330. Neumann v. Plastipak Packaging, Inc., No. 1:11-CV-522, 2011 WL 5360705, at *9 (N.D. Ohio Oct. 31, 2011).

331. *Id.* at *10.

332. *Id.*

333. Aguirre v. W.L. Flowers Mach. & Welding Co., No. C-11-158, 2011 WL 2672348, at *2 (S.D. Tex. July 7, 2011).

334. *Id.* at *3 (allowing plaintiff to file an amended complaint).

335. Broderick v. Res. Found. of State Univ. of N.Y., No. 10-CV-3612 (JS)(ETB), 2010 WL 3173832, at *2 (E.D.N.Y. Aug. 11, 2010).

where at least some courts seem to be bending over backward to find individuals disabled (or at least allow those plaintiffs to survive summary judgment on the issue).[336]

This conclusion is supported by the empirical work analyzing this issue. For instance, in Professor Stephen Befort's empirical piece, *An Empirical Analysis of Case Outcomes under the ADA Amendments Act*,[337] the author compared the pre-ADAAA win rate for employers on the issue of coverage with the post-ADAAA win rate for employers on the issue of coverage.[338] His research revealed that courts granted summary judgment to employers on the issue of disability in 74.4% of the cases decided before the Amendments, whereas the win rate in the post-Amendments cases was only 45.9%.[339] He also states that the data might understate the actual expansion in coverage because, in many cases, the employer does not even contest disability status.[340] Similarly, the July 23, 2013 report of the National Council on Disability establishes that plaintiffs are definitely faring better on getting past the coverage question under the ADAAA.[341]

IV. POST-ADAAA CASES INVOLVING THE PHYSICAL FUNCTIONS OF THE JOB

The next two Parts will discuss cases where the plaintiff succeeded on the initial claim of establishing that she had a disability and the case proceeded to the merits of the discrimination claim. I reviewed every district court and circuit court of appeals opinion that I could find[342] that survived the initial inquiry of

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336. *See also* Michael Ashley Stein, Anita Silvers, Bradley Areheart, & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 719–21 (2014) (stating that plaintiffs have fared remarkably better than pre-ADAAA plaintiffs on the determination of whether they can prove that they have a disability under the statute).

337. Befort, *supra* note 15.

338. *Id.* at 2050–51.

339. *Id.*

340. *Id.* at 2051.

341. National Council on Disability, *supra* note 122, at 13 (stating that the ADAAA has had a dramatic impact in improving the success rates of plaintiffs establishing disability).

342. I have included only federal court cases, both district courts and federal courts of appeals, and both unpublished and published, but I only used traditional legal research tools, Westlaw and LEXIS. I am aware that using tools that allow the reader to see docket entries that never make their way into Westlaw or LEXIS would have undoubtedly revealed a much larger sample size. However, I have no reason to believe that the sample size would have been qualitatively different.

disability and decided the summary judgment motion on the merits of the case. This Part will not discuss cases where the issue was whether the disability caused the adverse employment action. Causation issues are, of course, very common, but they are common in all kinds of employment discrimination cases, so they do not address the issues unique to the ADA. Instead, this Part discusses the cases where the court addresses the issue of whether the plaintiff is qualified to perform the physical functions or tasks of the job with or without reasonable accommodations. The next Part discusses cases where the issue is whether the employer should have to modify its default structural norms to accommodate the plaintiff.

The Amendments did not change the definition of "qualified individual." A qualified individual "means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[343] Essential functions are "fundamental job duties" but do not include "marginal functions of the position."[344] A function may be essential if the position exists to perform that function, if the function can only be distributed among a limited number of employees, or if the function is highly specialized.[345] Whether a function is essential should be determined by the employer's description of what is essential, "written job descriptions," the time spent performing the function, the consequences of not performing the function, collective bargaining agreements, past workers' experience in the job, and current workers' experience in similar jobs.[346] Employers' judgments of an essential function receive a "significant degree of deference."[347]

Because the qualified inquiry (whether the employee can perform the essential functions of the job with or without reasonable accommodations) necessarily implicates the reasonable accommodation inquiry,[348] some of these cases include an accommodation issue.[349] The ADA requires employers to make

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343. 42 U.S.C. § 12111(8) (2012).

344. 29 C.F.R. § 1630.2(n)(1) (2014).

345. *Id.* § 1630.2(n)(2).

346. *Id.* § 1630.2(n)(3). *But see* Brackin v. Int'l Paper, No. CV-10-03444-CLS, 2012 WL 4815525, at *16–17 (N.D. Ala. Oct. 10, 2012) (disagreeing with the employer and finding that traveling to Memphis for job training was not an essential function of the job because plaintiff received permission to train remotely and plaintiff's work performance did not suffer after non-attendance).

347. Jones v. Walgreen Co., 679 F.3d 9, 14 (1st Cir. 2012).

348. 42 U.S.C. § 12111(8) (2012); Jones v. Nationwide Life Ins. Co, 696 F.3d 78, 88-89 (1st Cir. 2012).

349. Of course, a plaintiff can bring an accommodation claim without it

"reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship."[350] Reasonable accommodations may include making facilities accessible to employees with disabilities, restructuring the job, modifying the work schedule, reassigning to a vacant position, or modifying exams, policies, or training materials.[351] This Part first discusses cases where the plaintiff survives summary judgment, either because the court determines that the plaintiff can perform the essential functions of the job without an accommodation or because the court determines that the employer should have accommodated the plaintiff. The second sub-part discusses the cases where the court held that the plaintiff is not qualified to perform the essential functions of the job with or without a reasonable accommodation. The third sub-part will offer my brief conclusion regarding what this body of case law tells us about a new or renewed backlash against the ADA.

A. Plaintiff Survives Summary Judgment

Several cases decided after the Amendments have held that the plaintiff may be a qualified individual and/or that the employer might be required to provide a reasonable accommodation. One court held that if an individual with a hearing impairment can perform the essential function of his or her job with the help of hearing aids, then the individual is a qualified individual.[352] Similarly, in *Keith v. County of Oakland*, the Court of Appeals for the Sixth Circuit held that the plaintiff, who was deaf, could possibly be qualified for a lifeguard position.[353]

The manner in which the essential function of the job is performed may vary as long as the employee accomplishes the tasks assigned to him or her. For example, in *Harty v. Sanford*, the plaintiff, a foreman, could not "kneel, squat, run, jump, climb stairs

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necessarily implicating the "qualified individual" inquiry. For instance, in *Feist v. La. Dept. of Justice, Office of the Atty. Gen.*, 730 F.3d 450 (5th Cir. 2013), the court held that the plaintiff can be entitled to a reasonable accommodation (in this case, a free, on-site parking spot) even though the accommodation is not necessary to enable her to perform the essential functions of her job. *Id.* at 453–54.

350. 42 U.S.C. § 12112(b)(5)(A) (2012).

351. 29 C.F.R. § 1630.2(o)(2) (2014).

352. Howze v. Jefferson Cnty. Comm., for Econ. Opportunity, No. 2:11-CV-52-VEH, 2012 WL 3775871, at *11 (N.D. Ala. Aug. 28, 2012).

353. Keith v. Cnty. of Oakland, 703 F.3d 918 (6th Cir. 2012).

or a ladder, or walk up or down inclines" because of knee injury.[354] The job description required many of these movements.[355] Despite the apparent discrepancies in the plaintiff's abilities and the job requirements, the court found that the plaintiff might still have been qualified for the position because the facts regarding which tasks were essential and whether they could be performed with modifications was in dispute.[356]

Similarly, in *Brown v. CVS Pharmacy, Inc.*, the court held that a reasonable jury could find that the plaintiff was able to perform the essential functions of the job by varying the way that the plaintiff talked on the phone.[357] The plaintiff was deaf in her right ear and after a surgery to remove a potentially cancerous lesion on her salivary gland, she had a wound and resulting pain in her left ear, making talking on the phone to pharmacy customers very difficult. She first used the speakerphone, but after her employer became concerned with patient confidentiality, the employer fired her.[358] The court held she was qualified because she could use the phone by holding the handset to her temple, which allowed her to hear with her left ear without violating patients' confidentiality.[359]

In *Nelson v. PMTD Restaurants, LLC*, despite the fact that plaintiff's cerebral palsy, which caused a weakened left hand, made it difficult for her to pack meals at a Kentucky Fried Chicken franchise, the court stated that she was hired as a cashier, and therefore the packing functions were not essential functions of the job.[360] The court held that the defendant did not give her a chance to learn the cashier functions before it terminated her, and thus the court denied the defendant's motion for summary judgment.[361]

1. Courts Require Defendants to Prove the Essential Functions

In many cases, courts seem to be making defendants actually prove the essential functions of the job, rather than just allowing the defendant to allege which functions are essential. For instance, in

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354. Harty v. City of Sanford, No. 6:11-cv-1041-Orl-31KRS, 2012 WL 3243282, at *1 (M.D. Fla. Aug. 8, 2012).

355. *Id.*

356. *Id.* at *6.

357. Brown v. CVS Pharm., No. 6:12-CV-1193-Orl-31DAB, 2013 WL 3353323, at *3 (M.D. Fla. July 2, 2013).

358. *Id.* at *1.

359. *Id.* at *4.

360. Nelson v. PMTD Rests., LLC, No. 3:12-cv-369-MEF, 2013 WL 4045086, at *2–3, *7 (M.D. Ala. Aug. 8, 2013).

361. *Id.* at *7.

Hoppe v. Lewis University,[362] the plaintiff, a tenured philosophy professor, suffered from severe anxiety that, at times, rendered her fully "unable to communicate in any manner for an entire week," including responding to emails and phone calls from students.[363] The district court found that "[c]ommunication with students, fellow professors, and administrators are a necessity for a teaching position, where the object of the profession is to communicate and pass on knowledge."[364] Thus, the district court concluded that the plaintiff was not qualified to perform the essential functions of her job.[365] On appeal, however, the Court of Appeals for the Seventh Circuit held that there was "no evidentiary basis for concluding" that communication with students, faculty, and the administration was an essential function of the plaintiff's job.[366] Furthermore, the court relied on the university's admission that the plaintiff could perform the essential functions of her job, that the plaintiff remained employed by the university, and that the university did not contradict the plaintiff's statement that she could perform the essential functions of her job.[367] The court concluded that it was error for the district court to find that the plaintiff was not qualified for her position.[368]

In *Barlow v. Walgreen Co.*, the plaintiff worked for Walgreens as a senior beauty advisor.[369] Her job required her to perform administrative duties, provide assistance to customers in the cosmetics department, maintain cosmetic department displays, and clean and stock the shelves.[370] The plaintiff suffered from several musculoskeletal disorders making it difficult for her to lift and bend, both of which were necessary (according to the defendant) to perform tasks such as unloading merchandise from delivery trucks, helping customers with heavy items, and restocking merchandise.[371] Nevertheless, the court denied defendant's motion for summary judgment because the plaintiff presented evidence that she had

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362. Hoppe v. Lewis Univ., No. 09 C 03430, 2011 WL 4578352 (N.D. Ill. Sept. 30, 2011).

363. *Id.* at *9.

364. *Id.*

365. *Id.*

366. Hoppe v. Lewis Univ., 692 F.3d 833, 839 (7th Cir. 2012).

367. *Id.* at 839–40.

368. *Id.* at 839 (affirming district court's grant of summary judgment for defendant on other grounds).

369. Barlow v. Walgreen Co., No. 8:11-cv-71-T-30EAJ, 2012 WL 868807, at *1 (M.D. Fla. Mar. 14, 2012).

370. *Id.*

371. *Id.* at *2.

exceeded her former boss's work expectations, she had worked in the position for years without incident, and that other employees were able to assist her.[372] Plaintiff's arguments raised a genuine issue of material fact as to whether lifting and bending were essential functions of the job.[373]

Likewise, in *Bamrick v. Sam's West, Inc.*, the plaintiff had a lower back injury that prevented her from lifting more than thirty pounds.[374] The plaintiff was terminated from her position as a manager of the Photo Lab, which according to her employer, required being able to lift between forty or fifty pounds, which the plaintiff could not do.[375] Employees were required to dispose of the liquid chemical waste that drained from photo processing equipment into five-gallon buckets. The defendant argued that the five-gallon bucket weighed up to fifty pounds when full.[376] The plaintiff, however, stated that the buckets could be emptied when they were three to four gallons full, thereby decreasing the weight of the buckets.[377] The court agreed with the plaintiff that lifting fifty pounds was not an essential function of the job.[378]

In *Molina v. DSI Rental, Inc.*, the plaintiff worked as a patient care technician and could not lift more than twenty pounds due to a medical restriction for back pain.[379] The plaintiff's employer presented three items, including two position descriptions and one affidavit from the plaintiff's supervisor, stating that lifting twenty pounds was an essential function of the job.[380] The plaintiff, however, presented evidence that she was able to overcome her lifting restrictions with the help of a lift or a coworker.[381] Another supervisor testified that the plaintiff was able to perform the essential functions of her job when she had a ten-pound lifting

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372. *Id.*

373. *Id.*

374. Bamrick v. Sam's West, Inc., No. C 11-2050, 2013 WL 427399, at *1 (N.D. Iowa Feb. 4, 2013).

375. *Id.*

376. *Id.* at *3.

377. *Id.*

378. *Id.* at *4.

379. Molina v. DSI Rental, Inc., 840 F. Supp. 2d 984, 996 (W.D. Tex. 2012) (noting that at the time of trial, plaintiff's back pain had been ongoing for approximately eight years).

380. *Id.* at 997.

381. *Id.*

restriction in 2006.[382] Based on the factual dispute, the court denied the defendant's motion for summary judgment.[383]

The court in *Dunlap v. Liberty Natural Products, Inc.* was willing to separate the essential functions of the plaintiff's shipping clerk position (which involved, among other things, shipping boxes) from how that function is accomplished (generally, lifting the boxes).[384] The court stated that what the employer said was an essential function, lifting heavy boxes, is just one way that the essential function of moving things from point A to point B gets accomplished.[385] Instead, the court separated the actual job function from the historical practice of how the job was typically performed and held that the plaintiff could be qualified if there was an accommodation that would help her lift. The court suggested possible pneumatic lifting devices as a possible reasonable accommodation.[386]

2. Drawing Inferences in Plaintiff's Favor

Some courts have demonstrated a willingness to decide these issues by drawing inferences in the plaintiff's favor. For instance, in *Smith v. Valley Radiologists, Ltd.*, the plaintiff worked as a mammography technologist.[387] The position required employees "to produce digital images with the technical quality needed for accurate mammography analysis.[388] However, the plaintiff suffered from ocular toxoplasmosis, an impairment that blinded the central spots in her eyes and limited her to peripheral vision.[389] Although the plaintiff frequently produced low quality images, the court denied defendant's motion for summary judgment because there was a genuine issue of fact as to whether the plaintiff was capable of performing the essential functions of the job.[390] Every technician produced some low quality images, and the plaintiff's quantity of low quality images could have been attributed to the overall volume of images she produced.[391]

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382. *Id.* at 998.
383. *Id.* at 999.
384. No. 3:12-cv-01635-SI, 2013 WL 6177855, at *1, *4–5 (D. Or. Nov. 25, 2013).
385. *Id.* at *5.
386. *Id.* at *5–6.
387. Smith v. Valley Radiologists, Ltd., No. CV11-0599-PHX DGC, 2012 WL 3264504, at *1 (D. Ariz. Aug. 9, 2012).
388. *Id.* at *5.
389. *Id.* at *1.
390. *Id.* at *7.
391. *Id.*

In *Chicago Regional Council of Carpenters v. Thorne Associates, Inc.*, the plaintiff, a journeyman carpenter, failed a fitness-for-hire exam that included physical tests that were related to all of the necessary movements of carpentry.[392] Despite the plaintiff's failure, the court denied the defendant's motion to dismiss because the plaintiff had twenty-nine years of experience as a carpenter and worked periodically for the defendant from 1995 to 2008, demonstrating that he was qualified to perform the job for which he applied.[393] In another case, a court held that length of employment could be used as an inference that an individual is a qualified individual.[394] Hiring an individual may also be evidence of that individual's ability to perform the essential functions of the job.[395]

Even though the court in *Henschel v. Clare County Road Commission* recognized that employer's judgment as to what the essential functions are is entitled to some weight, the court stated that it is only one factor to be considered in determining the essential functions.[396] In this case, the plaintiff, who was an excavator operator, had part of his left leg amputated after a motorcycle accident.[397] He was cleared to return to work as long as he only drove an automatic transmission truck, not a manual transmission.[398] He could operate the excavator with one leg, but the employer objected, stating that transporting the excavator to the worksite involved driving a manual transmission vehicle, something plaintiff could not do with his prosthetic leg.[399] The court held that, because in the past other employees had helped with hauling the excavator, and that the excavator often stayed at the worksite for long periods of time, hauling the excavator was not an essential function of the job.[400]

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392. Chicago Reg'l Council of Carpenters v. Thorne Assocs., Inc., 893 F. Supp. 2d 952 (N.D. Ill. 2012) (noting that the exam included lifting objects to prescribed heights, climbing ladders, and pushing carts).

393. *Id.* at 8.

394. Socoloski v. Sears Holding Corp., No. 11-3508, 2012 WL 3155523, at *4 (E.D. Pa. Aug. 3, 2012) (inferring that plaintiff was a qualified individual based on his thirty-five years of employment as a preventative maintenance technician).

395. Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012).

396. Henschel v. Clare Cnty. Rd. Comm., 737 F.3d 1017, 1022 (6th Cir. 2013).

397. *Id.* at 1019–20.

398. *Id.* at 1021.

399. *Id.* at 1020–21.

400. *Id.* at 1023–24.

3. Reasonable Accommodations

Many reasonable accommodation cases involve an employee's request for the acquisition or modification of equipment or devices. These cases seem to be the easiest for courts to decide. In *Dentice v. Farmers Ins. Exchange*, the plaintiff, Alex Dentice, asked for voice-activated software to accommodate his carpal tunnel syndrome and anxiety.[401] At the request of his employer, Dentice submitted two notes from his doctors indicating that the voice recognition software would help accommodate Dentice's carpal tunnel syndrome and reduce the anxiety he experienced due to his limited typing skills.[402] Rather than fulfilling this request, Farmer's continued to ask for physician's notes explaining Dentice's need for an accommodation.[403] The court held that the plaintiff presented enough evidence to survive the defendant's motion for summary judgment on the plaintiff's failure to accommodate claim.[404]

In *Kravits v. Shinseki*, David Kravits worked as a temporary human resources specialist.[405] Kravits suffered from sleep apnea and made frequent mistakes at work.[406] Prior to his termination, Kravits requested an ergonomic keyboard and step-by-step instructions for how to complete his projects, but both of these requests were denied.[407] The court found that these accommodations seemed facially reasonable, and that the additional expense and time required for the accommodations would likely be outweighed by the benefits to the plaintiff.[408]

Even though the statute clearly lists the acquisition of equipment as a possible reasonable accommodation, some employers still initially refuse to provide such accommodations. For instance, in *Josey v. Wal-Mart*, after Torrey Josey was injured in a moped accident, he requested to be moved from his manual labor job as a backroom associate at Wal-Mart to a light-duty job as a phone operator.[409] Josey also asked for and was initially given a chair to

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401. Dentice v. Farmers Ins. Exch., No. 1-C-113, 2012 WL 2504046, at *19 (E.D. Wis. June 28, 2012).

402. *Id.*

403. *Id.*

404. *Id.* at *20.

405. Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *1 (W.D. Pa. Feb. 24, 2012).

406. *Id.* at *1, *6.

407. *Id.* at *7.

408. *Id.*

409. Josey v. Wal-Mart, No. 0:11-2993-CMC-SVH, 2012 U.S. Dist. LEXIS 49337, at *4 (D.S.C. Feb. 16, 2012).

use as a phone operator.[410] However, two managers removed Josey's chair after nearly a month of using it.[411] The court denied Wal-Mart's motion to dismiss because Josey could perform the essential functions of his job with a reasonable accommodation, his chair, and Wal-Mart refused to continue to provide the reasonable accommodation.[412]

In *George v. Roush & Yates Racing Engines LLC*, the plaintiff ruptured a disc in his spine that required multiple surgeries.[413] The plaintiff claimed that the injury limited his ability to walk, sleep, sit, and bend, and asked for and received several accommodations during his recovery.[414] These accommodations included "working from lobby sofas so that he could sit upright," using an office chair to roll around the building, and to come in two hours late and stay later to make up for the missed hours.[415] Although the court did not address whether these accommodations were reasonable, it denied the defendant's motion to dismiss, implying that the requests were reasonable.[416]

Similarly, in another case, the court denied the defendant's motion for summary judgment, holding that there was a material issue of fact regarding whether the plaintiff, who had a prosthetic leg, could perform the essential functions of his job with the breaks he requested to adjust his prosthesis.[417] Interestingly, the plaintiff was never able to complete the training for the position, which required a physically demanding twelve-hour shift, without the help of a trainer.[418] In other words, it would not have been surprising for the court to decide that a couple of short breaks would not allow him to accomplish the essential functions that he was having so much difficulty accomplishing.

The plaintiff in *Seim v. Three Eagles Communication*, suffered from Graves' disease, and his medication limited several major life activities including speaking and thinking.[419] When he took the

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410. *Id.*

411. *Id.*

412. *Id.* at *15.

413. George v. Roush & Yates Racing Engines, LLC, No. 5:11CV00025-RLV, 2012 WL 3542633 at *1 (W.D.N.C. Aug. 16, 2012).

414. *Id.*

415. *Id.*

416. *Id.* at *6.

417. Morton v. Cooper Tire & Rubber Co., No. 1:12CV028-SA-DAS, 2013 WL 3088815, at *4–5 (N.D. Miss. June 18, 2013).

418. *Id.* at *1–2.

419. Seim v. Three Eagles Commc'ns, Inc., No. 09-CV-3071-DEO, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011).

medication, he became drowsy and confused and slurred his speech.[420] Because of the side effects of his medication, Seim asked for a chair, time off for medical treatment, and a later shift.[421] Seim worked as an on-air radio personality.[422] He argued that he was initially denied use of a chair as most radio personalities stood during broadcasts; he was required to present unique amounts of documentation for his time off; and he was denied broadcasts later in the day.[423] The court found that there were genuine issues of material fact as to whether the radio station fulfilled its obligation to accommodate the plaintiff.[424]

The plaintiff in *Berard v. Wal-Mart Stores East, L.P.*, had Type I diabetes, a form of diabetes that can cause ketoacidosis with high blood sugar or diabetic seizures with low blood sugar.[425] The plaintiff was initially allowed to keep her diabetes testing kit and insulin at her desk, but after several months of working, Wal-Mart required her to keep her medical supplies in a locker at the back of the store.[426] Her supervisor told her that she would be terminated if she left her desk during working hours to retrieve her medical supplies.[427] The plaintiff asked if she could keep her medical supplies in a refrigerator closer to her desk, but this request was denied.[428] During one of plaintiff's shifts, she suffered a diabetic event and began vomiting and had a seizure.[429] She brought a failure to accommodate claim against Wal-Mart,[430] and the court denied the defendant's motion for summary judgment.[431]

In *Mills v. Temple University, Mills*, a secretary, suffered a back injury that limited her ability to file papers, which occupied approximately an hour of her workdays.[432] After her injury, Mills proposed that student interns help her file, but the employer refused this request.[433] The court found a genuine issue of fact as to whether

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420. *Id.* at *1.
421. *Id.* at *3.
422. *Id.* at *1.
423. *Id.* at *3.
424. *Id.*
425. Berard v. Wal-Mart Stores East, L.P., No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at *1, *3 (M.D. Fla. Oct. 4, 2011).
426. *Id.* at *1.
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.* at *3.
432. Mills v. Temple Univ., 869 F. Supp. 2d 609, 613 (E.D. Penn. 2012).
433. *Id.* at 615–17.

this accommodation was reasonable because Mills used interns in the past, her office regularly hired interns, and interns were paid between seven and ten dollars per hour, a rate within the budget of her office.[434]

Finally, in *Gooden v. Consumers Energy Co.*, the plaintiff was an insulin-dependent diabetic who performed service calls to homes all day. He requested to either be only required to go on service calls close to his home or to have an air-conditioned car to be able to keep cool himself and to keep his diabetes supplies cool.[435] The court held that the air-conditioned truck was a reasonable accommodation because the plaintiff could not take frequent enough breaks in air-conditioned establishments to keep cool.[436]

4. Reassignment to a Vacant Position

In some cases, if the employee can no longer perform the essential functions of the position, the employee might request "reassignment to a vacant position," an accommodation specifically referenced in the statute.[437] In *E.E.O.C. v. United Airlines*, the Court of Appeals for the Seventh Circuit overruled its earlier precedent and held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, [even if there is another, more qualified employee seeking the position] provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."[438] Despite the Seventh Circuit overruling its earlier opinion in *EEOC v. Humiston-Keeling, Inc.*,[439] there is still a circuit split on this issue.[440]

In *Williams v. United Parcel Services, Inc.*, the plaintiff, Andrew Williams, an employee who worked as a package car driver, asked for an accommodation for his work-related knee injury.[441] Williams

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434. *Id.* at 625.

435. Gooden v. Consumers Energy Co., No. 12-11954, 2012 WL 4805061, at *1 (E.D. Mich. Sept. 9, 2013).

436. *Id.* at *5. Although the court also held that the employer did not need to provide him the accommodation of being able to work closer to his home, citing the familiar rule that an employer need not provide an accommodation of the employee's choosing. *Id.* at *4, 6.

437. 42 U.S.C. § 12111(9)(B) (2012).

438. E.E.O.C. v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), *cert denied*, United Airlines, Inc. v. EEOC, 133 S. Ct. 2734 (2013).

439. 227 F.3d 1024, 1028 (7th Cir. 2000).

440. *See* Porter, Martin*izing*, *supra* note 15, at 538–41.

441. Williams v. United Parcel Serv., Inc., No. 2:10-1546-RMG, 2012 WL 601867,

asked for a number of accommodations, and the court evaluated each one based on its reasonableness.[442] First, Williams asked for reinstatement as a package car driver, but the court found this unreasonable because of Williams' lifting restrictions and the cost of overcoming those restrictions.[443] Second, Williams asked to be a full-time supervisor, but the court found this unreasonable because it involved a promotion.[444] The court also noted that an employer is not obligated to create a new position.[445] However, the court found a genuine dispute of material fact regarding whether reassignment to several other positions might have been reasonable.[446]

Finally, in *Craddock v. Lincoln Nat. Life Ins. Co.*, the court held that summary judgment was not appropriate because the plaintiff might have been qualified to perform the position to which she sought transfer if the employer had allowed her to be trained for the position, just as other employees had been trained for the position.[447]

5. Direct Threat

Direct threat issues involve a slightly different analysis. Even if the plaintiff can perform all of the physical functions of the job, if the employer thinks that the plaintiff poses a risk to herself or others because of her disability, the employer can allege that the plaintiff is a "direct threat" as a defense to a disability discrimination claim. In *EEOC v. Rexnord Industries, Inc.*, the court held that the plaintiff could survive summary judgment because the defendant had not met the difficult burden of proving that the plaintiff was a direct threat to herself or others when she experienced a few incidents of either "blacking out" or having seizures.[448]

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at *2 (D.S.C. Feb. 23, 2012).

442. *Id.* at *4.

443. *Id.*

444. *Id.* at *5.

445. *Id.* at *6.

446. *Id.* at *4–7.

447. Craddock v. Lincoln Nat. Life Ins. Co., No. 13-1123, 2013 WL 3782786, at *4 (4th Cir. July 22, 1013).

448. EEOC v. Rexnord Indus., Inc., No. 11-CV-777, 2013 WL 4678626, at *4–8 (W.D. Wis. Aug. 30, 2013).

B. Plaintiff Cannot Survive Summary Judgment

1. Correctly Decided

The plaintiff in *Anderson v. UPS* worked as a package car driver, a position that requires drivers to move equipment weighing up to seventy pounds, move packages weighing up to one hundred and fifty pounds, and lift packages above shoulder height.[449] After surgeries and doctor's visits to repair her torn right rotator cuff,[450] the plaintiff's doctor permanently restricted her from "repetitive lifting above [her] right shoulder," lifting more than forty-five pounds and pushing more than thirty-five pounds.[451] The court concluded that the plaintiff could not perform the essential functions of the job, and there were no reasonable accommodations available.[452] This result seems correct because this job is one where employees work alone; thus, it would seemingly be impossible to accommodate plaintiff's lifting restrictions unless there was a different position available.

In another case that I believe was correctly decided, the Court of Appeals for the Second Circuit held that direct patient care, including being able to "attend to the needs of patients at all times while on duty, to move and transport patients, and to respond to medical emergencies," were essential functions of a nurse's job.[453]

The plaintiff's impairments prevented her from lifting patients, pushing or pulling wheelchairs, stretchers, or heavy carts, and standing for more than thirty minutes. The court concluded she could not perform the essential functions of her position as a nurse.[454] Assuming there were no other positions for which she was qualified, this case appears correct.

Similarly, the plaintiff in *Ivey v. First Quality Retail Service* worked as a production technician on a diaper assembly line.[455] The position required the ability to constantly use one's hands, to lift more than fifty pounds, and to frequently move and assemble boxes

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449. Anderson v. United Parcel Serv., Inc., No. 09-2526-KHV-DJW, 2010 WL 4822564, at *2 (D. Kan. Nov. 22, 2010).

450. *Id.* at *4.

451. *Id.*

452. *Id.* at *12.

453. Davis v. New York City Health and Hosp. Corp., No. 11-4473-cv, 2013 WL 276076, at *1 (2nd Cir. Jan. 25, 2013).

454. *Id.*

455. Ivey v. First Quality Retail Serv., No. 11-12294, 2012 WL 4219941, at *1 (11th Cir. Sept. 21, 2012).

and pick up diaper bags.[456] The plaintiff's carpal tunnel syndrome prevented her from performing these tasks, and the court held that placing the plaintiff on permanent light duty would alter the essential functions of the production technician job.[457] Because it is a well-established rule that courts are not required to create a new position for an employee with a disability, the court's conclusion was correct.

The plaintiff in *Moore v. Nissan North America, Inc.*,[458] who had multiple sclerosis (MS), was deemed not qualified because numbness and weakness in his legs made him unable to perform several functions of his manufacturing job that the court believed were essential functions, including kneeling, standing, squatting, and climbing.[459] The court also held that based on his doctor's restrictions, the accommodations requested of a stool and frequent breaks were not sufficient to allow him to perform the essential functions.[460] As discussed, this case seems correct. His doctor admitted that his deficits were permanent.[461]

The plaintiff in *Otto v. City of Victoria* was also asking for permanent light-duty work when he sustained workplace injuries to his back.[462] The court said that the essential functions of the position include few sedentary duties and frequent lifting of objects weighing fifty pounds. Because he was limited to four hours of sedentary work per day and unable to engage in any heavy lifting, he was not qualified for the position.[463] Similar to the *Ivey* case discussed above, this case also appears to have been correctly decided.

Another lifting issue is present in *Griffin v. Prince William Health System*, where the plaintiff suffered from back problems that prevented her from lifting more than twenty-five pounds.[464] The court found that this lifting restriction disqualified the plaintiff from her position as a registered nurse because lifting forty pounds was listed as an essential function of the job, and registered nurses were required to move heavy patients.[465]

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456. *Id.* at *2.

457. *Id.* at *5.

458. Moore v. Nissan N. Am., Inc., No. 3:10-cv-569-DPJ-FKB, 2012 WL 2608792 (S.D. Miss. July 5, 2012).

459. *Id.* at *6–8.

460. *Id.*

461. *Id.* at *6.

462. Otto v. City of Victoria, 685 F.3d 755, 757 (8th Cir. 2012).

463. *Id.* at 758.

464. Griffin v. Prince William Health Sys., No. 01:10-cv-359, 2011 WL 1597508 at *2 (E.D. Va. Apr. 26, 2011).

465. *Id.* at *4.

Although not a physical qualification of the job, in *Jones v. Nationwide Life Ins. Co.*, the plaintiff worked as a retirement program services director, a position that required successful completion of a certification exam allowing employees to sell a new retirement package.[466] Because of medications and pain related to his disability, the plaintiff failed the exam twice and was fired from his position after his second failure.[467] Because passing the exam was an essential function of his job, the court held that the plaintiff was not a qualified individual.[468] Other than the possible consideration of a leave of absence to hopefully allow the plaintiff to recover from the pain related to his disability, I believe the case was correctly decided.

The plaintiff in *Hill v. Walker* asked to be removed from one of her cases as a family service worker because the case was exacerbating her depression and anxiety.[469] The employer refused but offered her assistance with the client. She took a leave of absence without the employer's permission and was terminated.[470] In response to plaintiff's argument that the one case she refused to handle was not an essential function, the court stated that she could not pick and choose her caseload—if this were allowed, it would wreak havoc with the management of the agency, especially since the agency was short-staffed.[471] Although this is a close call, I believe that the court got it right. The employer was sympathetic to the fact that the client was difficult and offered assistance with dealing with the client. This latter fact is what makes this case correctly decided, in my opinion—employees are not entitled to the accommodation of their choice.

In *Lloyd v. Housing Authority of the City of Montgomery, Ala.*, the plaintiff worked as a city maintenance mechanic for the city.[472] The plaintiff had high blood pressure and asthma, preventing him from being exposed to the sun or cleaning chemicals.[473] The court found that sun exposure and tolerating cleaning chemicals were essential functions of a city maintenance mechanic.[474] Because the plaintiff's disability was not linked to a particular property, the court

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466. Jones v. Nationwide Life Ins. Co, 696 F.3d 78, 83 (1st Cir. 2012).

467. *Id.* at 85–86.

468. *Id.* at 88–89.

469. Hill v. Walker, 737 F.3d 1209, 1213–14 (8th Cir. 2013).

470. *Id.* at 1214.

471. *Id.* at 1217.

472. Lloyd v. Hous. Auth. of Montgomery, 857 F. Supp. 2d 1252, 1258 (M.D. Ala. 2012).

473. *Id.* at 1260.

474. *Id.* at 1264.

found that an accommodation was impossible and that he was not a qualified individual.[475] Although the court did not explore any alternative accommodations, it appears that the plaintiff did not raise any arguments in that regard; thus, this case appears to have been fairly decided.

In *Walter v. Wal-Mart Stores Inc.*, the plaintiff worked as a people greeter at Wal-Mart,[476] which required him to help customers with merchandise returns.[477] The plaintiff used a wheelchair, had poor eyesight, and was substantially limited in his ability to perform fine motor activities. When the plaintiff began working at Wal-Mart, his job required him to place a pink sticker on returned merchandise and direct customers to the service desk.[478] However, this procedure frequently resulted in fraud so Wal-Mart replaced the pink stickers with a Telxon, a hand-held scanner.[479] Due to the plaintiff's impairments, he was unable to see the buttons and type the requisite information into the Telxon.[480] The court found that the plaintiff was not a qualified individual,[481] and that the plaintiff's requested accommodation, to be able to continue using the pink sticker procedure,[482] was unreasonable because Wal-Mart eliminated that procedure to reduce fraud.[483] Here, I agree that the employer should not have to revert back to a policy that was facilitating fraud and theft to accommodate the plaintiff. Assuming there were no other possible accommodations, this case seems correctly decided.

Courts are inclined to find accommodations unreasonable when the accommodation would endanger the health or safety of others because of the nature of the employee's disability and his or her position. In *Mashek v. Soo Line R. Co.*,[484] the court held that a plaintiff is not qualified because the plaintiff's disability represents a safety risk. In this case, the court determined that the plaintiff was not a qualified individual for the position of locomotive engineer.[485]

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475. *Id.* at 1264–65.

476. Walter v. Wal-Mart Stores, Inc., No. 4:09-CV-15JD, 2011 WL 4537931, at *2 (N.D. Ind. Sept. 28, 2011).

477. *Id.*

478. *Id.*

479. *Id.*

480. *Id.* at *3.

481. *Id.* at *11.

482. *Id.*

483. *Id.* (quoting Gratzl v. Office of Chief Judges of 12th, 18th, 19th, and 22d Judicial Cirs., 601 F.3d 674, 679 (7th Cir. 2010)).

484. Mashek v. Soo Line R.R. Co., No. 11-487 (MJD/JJG), 2012 WL 6552795 (D. Minn. Dec. 14, 2012)

485. *Id.* at *6.

The plaintiff suffered a seizure, and the risk of recurrence prevented him from ensuring the safe operation of trains, the essential function of his job.[486] Although I do not think the risk of seizures disqualifies all employees, it seems sensible in a case where the plaintiff is employed as a locomotive engineer.

In *Wells v. Cincinnati Children's Hospital Medical Center*, the plaintiff worked as a nurse, a job that required her to document patient records, administer medication, care for the patient, and brief the incoming nurse about the status of the patient.[487] The defendant, a hospital, had a policy that allowed employees to take prescription medication so long as it did not affect their ability to do their job.[488] After a series of surgeries, Wells began taking morphine and Lotronex, which caused her to "black out" and feel "like [she] was out of [her] body."[489] The court held that the hospital did not have to accommodate these effects of her medication because it was "self-evident that there are no circumstances under which a nurse experiencing these problems can be safely or reasonably accommodated to treat patients.[490] I agree.

The court in *Olsen v. Capital Region Medical Center* held that the plaintiff, a mammography technician, was not qualified for the position because she frequently had seizures while at work, including at least one seizure when she was with a patient.[491] The court stated that an essential function of the plaintiff's job included "insuring patient safety," and that nothing in the record "establishes [plaintiff] could adequately perform that function during the indefinite periods in which she was incapacitated."[492] The combination of the fact that the employee had fourteen seizures while at work, and that the employer did assign her to another position that did not involve patient care makes me conclude that this case was correctly decided.

Similarly, in *Diaz v. City of Philadelphia*, Diaz worked as a police officer but suffered from anxiety, depression, panic attacks, and post-traumatic stress disorder due to events that occurred on the job.[493] Diaz requested to be transferred to work in the closed

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486. *Id.*

487. Wells v. Cincinnati Children's Hosp. Med. Ctr., 860 F. Supp. 2d 469, 472 (S.D. Ohio 2012).

488. *Id.* at 472–73.

489. *Id.* at 473.

490. *Id.* at 483.

491. Olsen v. Capital Region Med. Ctr., 713 F.3d 1149 (8th Cir. 2013).

492. *Id.* at 1154.

493. Diaz v. City of Philadelphia, No. 11-671, 2012 WL 1657866, at *1, *6 (E.D. Pa. May 10, 2012).

circuit television unit where she would monitor prisoners.[494] Because of her ongoing mental impairments, the court found that moving Diaz to that position was not a reasonable accommodation.[495] The court stated that "[e]mployment by a police department inevitably involves close proximity to criminal suspects, dangerous weapons and substances, and a number of other concerns."[496] Although I think this is a close call, I ultimately agree with the court that the plaintiff's disability prevented her from being a police officer. The defendant did give her unpaid leave to let her recover but she did not return from that leave.[497]

2. Courts Erroneously Hold that the Plaintiff Is Not Qualified

The plaintiff in *Majors v. General Electric Company* was deemed not qualified because of a lifting restriction.[498] The plaintiff suffered a work-related injury to her right shoulder that left her unable to lift more than twenty pounds and prevented her from performing work above shoulder level with her right arm.[499] Pursuant to the collective bargaining agreement, which requires a transfer be given to the most senior eligible bidder, the plaintiff applied for a "purchased material auditor" position, which required the "intermittent movement of heavy objects."[500] The court agreed with the defendant that the intermittent heavy lifting was an essential function of the job and stated that it is not a reasonable accommodation to require someone else to perform an essential function of the job.[501] The EEOC regulations state that, when determining if a function is essential, courts should consider (among other factors) the time spent performing the function.[502] It is unclear from the opinion why heavy lifting is an essential function when it is performed only infrequently.

In *Yovtcheva v. City of Philadelphia Water Dept.*, the court held that the employer was not required to offer any other accommodations for the plaintiff's asthma when it offered an accommodation that the employee refused to try.[503] When the

494. *Id.* at *4.
495. *Id.* at *11.
496. *Id.*
497. *Id.*
498. Majors v. Gen. Elec. Co., 714 F.3d 527 (7th Cir. 2013).
499. *Id.* at 530–31.
500. *Id.* at 531.
501. *Id.* at 534.
502. 29 C.F.R. § 1630.2(n)(3) (2014).
503. Yovtcheva v. City of Philadelphia Water Dept., 518 F. App'x 116, 121 (3d

plaintiff's asthma began causing problems for her when she was working with certain chemicals, the employer initially offered her a full-face respirator. However, the respirator caused plaintiff to become claustrophobic and have panic attacks.[504] The plaintiff then refused the employer's offer of a partial-face respirator. The court stated that the plaintiff was not qualified because she refused to try or accept an accommodation that would have allowed her to perform the essential functions of her job.[505] The court pointed to the often-cited rule that an employer is not obligated to provide an employee with the accommodation she requests or prefers, only an accommodation that is reasonable.[506] I agree with this rule but am sympathetic to plaintiff's position—a person who is claustrophobic will likely experience distress with even a partial-face respirator.

In *Knutson v. Schwan's Home Services*, Jeff Knutson sustained an eye injury that prevented him from passing the Department of Transportation's (DOT) minimum eyesight requirements for commercial driving.[507] Knutson argued that driving a delivery truck was not an essential function of the general manager position because he had not driven a commercial truck in over a year and other managers were allegedly not DOT certified.[508] Other employees stated that general managers were required to drive trucks, and Knutson's employment was conditioned on meeting the DOT standards.[509] The court held that driving was an essential function of the job, and therefore granted the defendant's motion for summary judgment.[510] The court stated that the plaintiff's own experience as a manager (which he successfully performed even without having to drive a truck) does not matter for purposes of determining the essential functions of the job.[511] This case appears to be incorrectly decided because this is a perfect example of a dispute over a material fact, and yet the court granted defendant's motion for summary judgment.

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504. *Id.* at 118.

505. *Id.* at 121.

506. *Id.* at 122.

507. Knutson v. Schwan's Home Serv., 870 F. Supp. 2d 685, 688 (D. Minn. 2012).

508. *Id.* at 691–93.

509. *Id.*

510. *Id.* at 691.

511. *Id.* at 692.

C. No Evidence of Another Backlash

With a sample size this small, it is impossible to draw any definitive conclusions from these cases. They are useful, however, in getting a feel for what the courts are doing in this post-ADA Amendments era. As the reader can see from the above descriptions, in more than half of the cases studied, the plaintiff survived summary judgment. To be clear, considering the way some of the opinions are worded, some of these cases that survived summary judgment might be unlikely to win in a trial. But as most employment litigators know, when a plaintiff survives summary judgment, the chance of settlement increases dramatically, as does the settlement amount.[512] Although there were a number of cases that were decided incorrectly, in my opinion, I do not think the number is high enough to warrant a conclusion that courts are the qualified inquiry or reasonable accommodation issue to unduly restrict protection of the Act.[513] It is possible that, in the future, we might see more of a backlash against the ADA as amended, but we do not have compelling evidence of that now.[514]

Interestingly, when I first began this project, I suspected that I would see many courts granting employers' motions for summary judgment on the reasonable accommodation inquiry. In other words, I suspected courts would frequently hold that the accommodation requested by the employee was not reasonable. And yet I found very few cases where I believed that the court improperly granted summary judgment to the employer on the accommodation claim.

Instead, the reasonable accommodation cases had a much higher rate of surviving summary judgment than the cases addressing whether the plaintiff is qualified. Upon further reflection, this is actually not surprising at all. As I stated earlier, one reason courts were interpreting the definition of disability so narrowly is because they did not want to deal with the thornier issue of deciding when anaccommodation should be required.[515] This is made obvious by the

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512. ALBISTON, *supra* note 25, at 195 (stating that defeating a defendant's motion for summary judgment is a success for the plaintiff because it preserves the case for trial and often produces a settlement).

513. *But see* Stein, Silvers, et al., *supra* note 336, at 722–26 (stating that there are some signals in the case law post-ADAAA that courts might be shifting their hostility towards the ADA from the definition of disability to the qualified inquiry and issues of causation).

514. *But see* Befort, *supra* note 15, at 2067 (noting that his empirical study revealed that employers have achieved more favorable outcomes on the qualified issue post-Amendments than they had been pre-Amendments).

515. Porter, Martin*izing*, *supra* note 15, at 542.

fact that courts rarely addressed the accommodation argument as an alternative argument, instead simply relying on their decision that the plaintiff cannot meet the definition of disability.[516]

I believe that courts are reluctant to address accommodation issues because the word "reasonable" is so vague; it is not defined in the statute, and the regulations do not explicitly define it.[517] The statute provides examples of reasonable accommodations, but courts generally refuse to hold that an accommodation listed in the statute will always be a reasonable accommodation.[518] Despite my effort to provide a working framework for deciding reasonable accommodation cases,[519] as of yet we do not have such a framework. We have only one Supreme Court reasonable accommodation case, which provided the burdens of proof in reasonable accommodation cases but very little guidance for deciding such cases, especially because the issue in that case was a fairly narrow one: whether the employer has to accommodate a disabled employee's request for reassignment to another position if there are other employees with more seniority under a bona fide seniority system.[520] Furthermore, the vagueness of the word "reasonable" makes it difficult for courts to say that an accommodation is "unreasonable" as a matter of law.

In contrast to the reasonable accommodation inquiry, the qualified inquiry has more structure to it. The EEOC's regulations elaborate on how to determine the essential functions of the job. First, the regulations define "essential functions" as the "fundamental job duties of the employment position the individual with a disability holds or desires." The regulations also state that the term "essential functions" does not include the marginal functions of the position.[521] The regulations give guidance to courts on some of the main reasons a function might be determined essential: because the reason the position exists is to perform the function, because of the limited number of employees available to

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516. *But see* Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) (stating that the court will not reach the issue of whether the plaintiffs meet the definition of disability under the ADA because the plaintiffs cannot prove that they are qualified individuals with disabilities).

517. Porter, Martin*izing*, *supra* note 15, at 543–44; *see also* Stein, Silvers, et al., *supra* note 336, at 713–14 (stating that because pre-ADAAA, judges focused on the definition of disability and avoided ruling on whether an accommodation is reasonable, there is little precedent discussing reasonable accommodations).

518. Porter, Martin*izing*, *supra* note 15, at 536–37.

519. *Id.*; *see also* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010).

520. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

521. *Id.*

perform the function, and because the function is highly specialized so that the plaintiff was hired for his or her expertise or ability to perform the particular function.[522] Finally, the regulations give guidance on what evidence to consider when determining which functions are essential, including:

> (i) The employer's judgment as to which functions are essential;
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
> (iii) The amount of time spent on the job performing the function;
> (iv) The consequences of not requiring the incumbent to perform the function;
> (v) The terms of a collective bargaining agreement;
> (vi) The work experience of past incumbents in the job; and/or
> (vii) The current work experience of incumbents in similar jobs.[523]

Because this qualified inquiry is much more structured and detailed than the reasonable accommodation inquiry, courts appear more willing to rely on the qualified inquiry rather than the reasonable accommodation inquiry when they prefer to grant summary judgment to the employer. They can often look no further than the first piece of evidence when determining essential functions—the employer's judgment as to which functions are essential.[524]

Furthermore, the qualified inquiry is tied up with the reasonable accommodation inquiry. The question courts ask is whether the employee can perform the essential function of the job with or without reasonable accommodations. It is usually not in dispute whether the plaintiff can perform a particular function;[525] thus the issue is whether the particular function is essential. If the court determines that the function is essential, the court can give just a cursory analysis to whether a reasonable accommodation would help the employee perform the essential function. From there, it is an

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522. 29 C.F.R. § 1630.2(n)(2) (2014).

523. *Id.* § 1630.2(n)(3).

524. *Id.* § 1630.2(n)(3)(i). However, Professor Travis argues that Congress did not intend for the employer's judgment about which job functions are essential to be the only evidence or even the prevailing evidence of the essential functions of the job. Courts should be looking at the actual work performed. Travis, *Recapturing*, *supra* note 25, at 53.

525. *But see supra* notes 373–79 (discussing cases where it was in dispute whether the employee could perform the function).

easy jump to the conclusion that elimination of an essential function is not a reasonable accommodation. Alternatively, the court latches on to functions for which it is impossible to find a reasonable accommodation apart from eliminating the function, which is not required.[526] The most common example of this situation is the set of cases where the plaintiff is not looking for a modification to the physical aspects of the job (acquisition or modification of equipment, for example) but instead is asking for an accommodation to the structural norms of the workplace, the "when" and "where" the work is performed. I turn to that next.

V. REVEALING THE NEW BACKLASH: STRUCTURAL NORMS OF THE WORKPLACE

At the commencement of this project, I suspected that employers would be more willing to provide, and courts would be more willing to require, accommodations that modified the physical aspects of the job rather than the structural norms of the workplace, the "when" and "where" the work was performed.[527] Although I believe my suspicion was correct, I was wrong about the way courts would handle these cases. Instead of holding that modifying the shift or hours is not a reasonable accommodation, the courts generally hold that a particular schedule or shift is an essential function of the job. Because the only way to accommodate an employee who cannot work a particular schedule or shift is to eliminate the requirement that the employee must work the particular schedule or shift, the courts then conclude that accommodation is not required because it is never an appropriate accommodation to eliminate an essential function of the job.[528]

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526. *See, e.g.*, Blackard v. Livingston Parish Sewer Dist., No. 12-704-SDD-RLB, 2014 WL 199629, at *8 (M.D. La. Jan. 15, 2014) (stating that the elimination of an essential function is not a reasonable accommodation).

527. I am not the first person to have made this observation, although to my knowledge, I am the first person who is analyzing this issue since the Amendments were passed. Professor Travis has discussed in detail how judges often confuse the physical task of the workplace with the organizational structures of the workplace, the when and where the work is performed. Travis, *Recapturing*, *supra* note 25, at 6. Because judges assume that jobs are defined by the structural norms and often hold that those norms are "essential functions" of the job, employers are never required to defend their default structures, *id.* at 23, and they are never required to explain why giving an employee an accommodation from the default structures would cause an undue hardship. *Id.* at 58. Similarly, Professor Albiston has also discussed these issues. *See generally* ALBISTON, *supra* note 25.

528. *See, e.g.*, Hill v. Walker, 737 F.3d 1209, 1217 (8th Cir. 2013) (stating that employers need not eliminate essential functions of the job to accommodate an

This Part will discuss the cases decided post-ADAAA that involve the structural norms of the workplace. I first discuss the cases where courts denied employers' motions for summary judgment, allowing the case to go to a jury on the issue of whether the employer should be required to modify the default organizational norms of the workplace. I then turn to cases where courts quite easily determined that schedules, shifts, hours, and attendance policies were all essential functions of the job and thus, no reasonable accommodation was required. Because I argue that these cases reveal a new backlash against the ADA, I also explore why the entrenchment of workplace norms exists—why employers insist on their structural norms more than the actual tasks of the position and why courts generally acquiesce in those decisions.

A. Employers Are Required to Modify Their Structural Norms

Certainly, some courts have required employers to provide some changes to the structural norms of the workplace.[529] For instance, although regular, punctual attendance at a job is an essential function of many, if not most, jobs, in *Coker v. Enhanced Senior Living, Inc.*, the court denied defendant's motion for summary judgment even though the defendant alleged that the plaintiff was absent forty-two times in less than nine months because the plaintiff disputed many of the absences.[530]

Although courts are often unwilling to require employers to modify working hours, a couple of post-ADAAA courts did. For

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employee with a disability); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1229 (11th Cir. 2005); Blackard v. Livingston Parish Sewer Dist., No. 12-704-SDD-RLB, 2014 WL 199629, at *8 (M.D. La. Jan. 15, 2014) (stating that the elimination of an essential function is not a reasonable accommodation); Nelson v. PMTD Rests., LLC, No. 312CV369, 2013 WL 4045086, at *7 (M.D. Ala. Aug. 8, 2013) (holding that the ADA does not require employers to eliminate essential functions as a reasonable accommodation); *see also* ALBISTON, *supra* note 25, at 103 (stating that courts get around the requirement to accommodate employees by holding that particular job requirements are essential functions of the job and therefore not subject to accommodation).

529. This is also true of pre-ADAAA cases. *Some* courts recognize that the structural norms of the workplace are not job functions or tasks. Travis, *Recapturing*, *supra* note 25, at 50–51 (discussing these cases); *id.* at 55 (stating that some courts are willing to recognize that structural norms are malleable rather than a given). But as Professor Travis notes in her pre-ADAAA article, most courts hold that the structural norms are essential job functions as long as the employer can point to a job description. *Id.* at 51–52.

530. Coker v. Enhanced Senior Living, Inc., 897 F. Supp. 2d 1366, 1379 (N.D. Ga. 2012).

instance, the plaintiff in *Hochstetler v. International Business Machines, Inc.* was able to survive the defendant's motion for summary judgment because the court held that the employer had not reasonably accommodated the plaintiff's disability.[531] Because of the plaintiff's medication schedule, she was only able to work forty-five hours per week.[532] The employer agreed to the forty-five-hour workweek but then terminated her when she could not meet all of the goals the employer set for her. The court held the employer did not reasonably accommodate her when it agreed to a reduction in hours but did not reduce her workload.[533] Because the employer had not demonstrated that all of the goals set for the plaintiff were essential functions of the job, the court denied the plaintiff's motion for summary judgment.[534]

Similarly, in *Thomas v. Bala Nursing & Retirement Center*, Aqila Thomas worked as a licensed nurse practitioner.[535] Thomas suffered from anemia and was fired for her frequent tardiness.[536] Her employer had a policy of gradual discipline if an employee was tardy three times within a single pay period.[537] The court found a genuine dispute of fact as to whether it would pose an undue hardship on the defendant to accommodate the plaintiff's tardiness.[538]

The court in *Fleck v. Wilmac Corp.* denied summary judgment on the issue of whether it was a reasonable accommodation to allow the employee to work part-time instead of full-time.[539] And the court in *Hoffman v. Carefirst of Fort Wayne, Inc.* denied summary judgment on the issue of whether the plaintiff could work from home.[540] In *Peirano v. Momentive Specialty Chemicals, Inc.*, the court said that it was reasonable for the employer to give the plaintiff a flexible start time.[541]

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531. Hochstetler v. Int'l Bus. Machs., Inc., No. 12-10735-NMG, 2013 WL 6909430, at *1, *9 (D. Mass. Dec. 31, 2013).

532. *Id.* at *3.

533. *Id.* at *3, *9 (stating that agreeing to a reduction in hours but refusing to reduce the workload amounts to a failure to accommodate).

534. *Id.* at *9.

535. Thomas v. Bala Nursing Ret. Ctr., No. 11-5771, 2012 WL 2581057, at *1 (E.D. Pa. July 3, 2012).

536. *Id.* at *2.

537. *Id.* at *4.

538. *Id.* at *9.

539. Fleck v. Wilmac Corp., No. 10-05562, 2012 WL 1033472, at *19 (E.D. Pa. Mar. 27, 2012).

540. Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976, 987 (N.D. Ind. 2010).

541. Peirano v. Momentive Specialty Chems., Inc., No. 2:11-CV-00281, 2012 WL 4959429, at *12–13 (S.D. Ohio Oct. 17, 2012).

Leaves of absence are frequently requested and often disputed accommodations. Generally, leaves of absence are a reasonable form of accommodation, even when those leaves exceed allowed leave under the Family and Medical Leave Act (FMLA),[542] which allows twelve weeks of leave per year for (among other things) an employee's own serious health condition.[543] Several post-ADAAA cases held that a leave of absence might be a reasonable accommodation.[544]

B. Employers Are Not Required to Modify Structural Norms of the Workplace

In contrast to the cases above, where courts required employers to make accommodations to the structural norms of the workplace,[545] this part discusses the many cases where courts did not require employers to modify their structural norms. As others have argued, and as I will discuss below, most judges assume that jobs are defined by their structural norms, which leads judges to hold that the structural norms are essential functions.[546] Although this sub-part discusses cases decided since the Amendments went into effect, there are many similar cases decided under the original ADA.[547]

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542. 29 U.S.C. §§ 2601–2654 (2012); Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L. J 327, 359–60 (2014).

543. 29 U.S.C. § 2612 (2012).

544. *See, e.g.*, Martin v. Yokohama Tire Corp., Nos. 7:11-CV-00244, 7:11-CV-00467, 2013 WL 6002344, at *13 (W.D. Va. Nov. 12, 2013); Kesecker v. Marin Comm. Coll. Dist., No. C-11-4048 JSC, 2012 WL 6738759, at *8–9 (N.D. Cal. Dec. 31, 2012); Coffman v. Robert J. Young Co., 871 F. Supp. 2d 703, 715 (M.D. Tenn. 2012); Negron v. City of N.Y., No. 10 CV 2757(RRM)(LB), 2011 WL 4737068, at *13 (E.D.N.Y. Sept. 14, 2011); Hutchinson v. Ecolab, Inc., No. 3:09cv1848(JBA), 2011 WL 4542957, at *9–10 (D. Conn. Sept. 28, 2011).

545. *See supra* Part III.B.1.c.

546. Travis, *Recapturing*, *supra* note 23, at 25.

547. *See generally* ALBISTON, *supra* note 25, at 113 (stating that despite specific language in the ADA allowing for accommodations regarding schedules, courts often reject as unreasonable any accommodations that might modify "institutionalized time standards" without looking at whether they can be accomplished easily); *id.* at 113 (stating that courts have had difficulty dealing with unpredictable absences, leaves of absence, and requests for part time schedules, all of which undermine the core institutionalized expectations about time and work); Travis, *Recapturing*, *supra* note 25, at 24–36 (discussing cases where courts held that full-time schedules, excessive hours, mandatory overtime, being present at work (rather than working from home), set starting and ending times, and regular attendance are all essential functions of the job).

Several post-ADAAA cases discussed whether working a certain shift or working a rotating shift was an essential function of the job. For instance, in *Tucker v. Missouri Dept. of Social Services*, the plaintiff could not work the night shift because of the effects of his migraine medicine, and was fired from his job.[548] The court held that he was not qualified because working all shifts was an essential function of the job.[549]

Similarly, the plaintiff in *Azzam v. Baptist Healthcare Affiliates* worked as a surgical registered nurse and suffered a stroke.[550] After her stroke, her doctor restricted her to light duty, no nights, no weekends, and five-hour workdays.[551] The court concluded that the plaintiff was not a qualified individual.[552] The court cited the hospital's scheduling policy, which noted that nurses must be on call to provide health care in emergency situations.[553]

In *Kallail v. Alliant Energy Corporate Services, Inc.*, the plaintiff was employed as a resource coordinator, a position that worked rotating schedules between eight and twelve hour shifts during either the day or night in order to provide twenty-four-hour customer service. [554] After returning to work following a surgery, the plaintiff requested a permanent eight-hour day shift schedule, but her request was denied.[555] The court held that working rotating shifts was an essential function of the job because it was listed in the job description, and because it fulfilled several important company objectives.[556]

The hours an employee works is also one of the structural norms of the workplace. In *White v. Standard Insurance Co.*, the court held that full-time employment was an essential function of the job, and therefore the plaintiff, whose back pain limited her ability to work more than four hours per day, was not qualified.[557] The court relied on the employer's evidence that it had never employed someone in

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548. Tucker v. Mo. Dept. of Soc. Servs., No. 2:11-CV-04134-NKL, 2012 WL 6115604, at *1 (W.D. Mo. Dec. 10, 2012).

549. *Id.* at *4, *6.

550. Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 655 (W.D. Ky. 2012).

551. *Id.* at 656.

552. *Id.* at 662.

553. *Id.* at 661–62.

554. Kallail v. Alliant Energy Corp. Servs., Inc., 691 F.3d 925, 927 (8th Cir. 2012).

555. *Id.* at 928.

556. *Id.* at 931.

557. White v. Standard Ins. Co., No. 12-1287, 2013 WL 3242297, at *2–3 (6th Cir. June 28, 2013).

plaintiff's position on a part-time basis, its written job description stated that the position was full time,[558] and the fact that other employees were assigned on a rotating basis to cover her accounts for the remaining four hours.[559]

Several post-ADAAA cases held that attendance is an essential function of the job.[560] One court stated that a business does not have to endure "erratic, unreliable attendance by its employees" even when that conduct is due to an alleged disability.[561] In *Brown v. Honda of America*, the defendant alleged that the plaintiff's "inability to reliably attend work" rendered her unable to perform the essential functions of her job in Honda's factory.[562] Plaintiff had frequently asked for and received excused absences from work for her depression, anxiety, and migraines.[563] Defendant eventually fired plaintiff after she exceeded the frequency limitation on her medically approved leaves.[564] The court found that she was not qualified for her position because the frequency of her absences caused her to be an erratic, unreliable worker.[565] Similarly, in *Lewis v. New York City Police Dept.*, the court found that the plaintiff's regular absences established that she was not a qualified individual.[566]

In Blackard v. Livingston Parish Sewer District, the court held that the plaintiff was not qualified because of his attendance problems, noting that regular attendance is an essential function of most jobs.[567] The court also held that the plaintiff's request to be taken off the night shift as an accommodation for his bipolar,

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558. *Id.* at *2.

559. *Id.*

560. As stated above, there were also several attendance cases decided before the Amendments. *See, e.g.*, ALBISTON, *supra* note 25, at 114 (stating that courts follow a "common sense" standard that attendance is an essential function of the job despite the fact that the statute, regulations, and the EEOC guidance all state that changes in schedules are supposed to be reasonable accommodations). Professor Albiston states that regular attendance has been taken for granted so long that no one can imagine work in any other way. *Id.* at 114–15 (discussing pre-Amendments attendance cases). *But see id.* at 117 (discussing some cases pre-Amendments where courts were willing to hold that attendance is not an essential function of the job).

561. Brown v. Honda of Am., No. 2:10-CV-459, 2012 WL 4061795, at *4–6 (S.D. Ohio Sept. 14, 2012).

562. *Id.* at *4.

563. *Id.* at *1–2.

564. *Id.* at *3.

565. *Id.* at *5.

566. 98 F. Supp. 2d 313, 326 (E.D.N.Y. 2012).

567. No. 12-704-SDD-RLB, 2014 WL 199629, at *3–5 (M.D. La. Jan. 15, 2014).

depression, anxiety, and ADHD was an unreasonable accommodation.[568]

I agree that an employer should not have to continue to employ an employee who misses an excessive amount of work. If an employee misses too much work because of a disability, there are two possible accommodations that would allow the employee to eventually perform the essential functions of the job. First, depending on the employee's job and the severity of the employee's disability, the employee might be able to work from home. Second, and more likely, some employees who miss too much work because of their disabilities simply need time to heal or time to get their medical issues resolved. Thus, the attendance issue often coincides with working from home and leaves of absence as possible accommodations.

For instance, in a working from home case, the court held that the plaintiff's absences because of medical problems (irritable bowel syndrome) could not be accommodated.[569] The plaintiff requested that she be permitted to telecommute four days per week as an accommodation for her irritable bowel syndrome.[570] Because the court deferred to the employer's statement that in-person attendance was an essential function of the job, the court held that it was not a reasonable accommodation to allow her to work at home.[571]

The remainder of the cases in this sub-part involves plaintiffs' requests for leaves of absence to allow them to recover enough to return to work.[572] In *Robert v. Board of County Commissioners of Brown County*, the plaintiff was terminated because she could not perform her regular duties after a surgery she had.[573] The court held that the plaintiff was not a qualified individual because she could not perform the essential functions of the job, and her requested accommodation, a leave of absence, was unreasonable because her employer "did not have a reasonable estimate of when she would be able to resume all essential functions of her employment."[574]

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568. *Id.* at *6–8.

569. E.E.O.C. v. Ford Motor Co., No. 11-13742, 2012 WL 3945540 (E.D. Mich. Sept. 10, 2012), *rev'd* 752 F.3d 634 (6th Cir. 2014), *opinion vacated en banc.*

570. *Id.* at *2.

571. *Id.* at *5.

572. Similarly, courts before the Amendments also held that indefinite leaves of absence are not reasonable accommodations. ALBISTON, *supra* note 25, at 113 (stating that courts have held that granting long leaves of absence or leaves of unpaid durations are not reasonable accommodations).

573. Robert v. Bd. of Cnty. Com'rs of Brown Cnty., Kans., 691 F.3d 1211, 1215–16 (10th Cir. 2012).

574. *Id.* at 1217–18.

Similarly, the court in *Fuentes v. Krypton Solutions, LLC*[575] stated that regular attendance is an essential function of most jobs, and because plaintiff had requested and was granted time off for his diabetes,[576] he was not qualified to perform his job without a reasonable accommodation.[577] The court summarily held that "indefinite leave is not a reasonable accommodation."[578]

In one of the most surprising cases I read, the Court of Appeals for the Seventh Circuit held that the plaintiff was not qualified when she violated the employer's very stringent attendance policy (allowing only eight absences in a year) while she was going through numbness and weakness related to an eventual diagnoses of multiple sclerosis.[579] Because she had not been employed for more than one year, she was not entitled to FMLA leave.[580] The employer had a policy of offering a thirty-day leave in some circumstances but the court held that there was not any evidence that thirty days would be enough time for the plaintiff to recover enough to return to work, so the court granted defendant's motion for summary judgment.[581] Even though there was no evidence that a thirty-day leave would have been a hardship to the employer, the court held the employer was not required to give plaintiff thirty days to get a diagnosis and begin treatment.

Finally, the court in *Brangman v. AstraZeneca, LP* followed an often-stated rule that an indefinite leave of absence is not a reasonable accommodation.[582] Plaintiff had exhausted her short-term disability benefits when the employer refused to extend her leave.[583] The court stated that because she had applied for long-term disability benefits, there is no evidence that any additional leave would have been temporary. Although the court noted that federal courts have permitted a leave of absence as a reasonable accommodation under the ADA if it allows the plaintiff to perform her essential functions in the near future, the ADA does not require employers to grant indefinite or open-ended leave under the ADA.[584]

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575. Fuentes v. Krypton Solutions, LLC, No. 4:11CV581, 2013 WL 1391113 (E.D. Tex. Apr. 4, 2013).

576. *Id.* at *1.

577. *Id.* at *3–4.

578. *Id.* at *4.

579. Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1036 (7th Cir. 2013).

580. *Id.* at 1039.

581. *Id.* at 1037.

582. Brangman v. AstraZeneca, LP, 952 F. Supp. 2d 710, 723 (E.D. Pa. 2013).

583. *Id.* at 719.

584. *Id.*; *see also* Forgione v. City of N.Y., No. 11-CV-5248, 2012 WL 4049832, at *8–9 (E.D.N.Y. Sept. 13, 2012) (acknowledging that plaintiff's request for an

The cases above demonstrate what might become the new backlash against the ADA. Employers and courts are more reluctant to accommodate when those accommodations involve the structural norms of the workplace than when the accommodation requested involves physical functions of the job. Although cases like the ones above also appeared in the pre-ADAAA case law,[585] we saw relatively few of these cases (compared to all disability cases adjudicated) because so many cases were dismissed solely on the issue of disability. The expanded definition of disability means that many more plaintiffs will survive the hurdle of proving they have a disability; thus, we can expect to continue to see more cases addressing the issue of whether an employee is qualified in light of the structural norms of the workplace. If the above cases are indicative of a trend, we should expect to see more and more plaintiffs who need variations of the structural norms in the workplace losing their ADA claims. The next sub-part will explore the reasons why employers and courts are more likely to prefer and defer to the structural norms of the workplace.

C. Explaining the Preference for Employers' Structural Norms

1. Preferring Structural Norms Is Counterintuitive

Before attempting to explain why employers and courts give more deference to structural norms, I briefly demonstrate that employers' and courts' preference for the structural norms of the workplace is counter-intuitive. First of all, it is often easier and cheaper to accommodate an employee's request for a variation in the hours or schedule of the workplace. Some accommodations involve the acquisition or modification of equipment to allow the employee to continue to perform the job. Modifying an employee's hours is usually logistically easier and cheaper than modifying the physical tasks of the job or the tools used to complete the job.[586]

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indefinite leave of absence, which failed to indicate whether the limitations would be resolved, or if plaintiff could perform the job upon return, was an unreasonable accommodation); *see also* Molina v. DSI Rental, Inc., 840 F. Supp. 2d 984, 1002 (W.D. Tex. 2012) (stating that an employer is not required to allow "extended indefinite medical leave" in cases where the employee had not yet scheduled a date for surgery).

585. *See generally* Travis, *Recapturing*, *supra* note 25.

586. *See also* ALBISTON, *supra* note 25, at 29 (stating that despite the accommodation mandate, ADA plaintiffs have had little success obtaining changes to work schedules even though schedule changes are far less expensive than changes to physical structures).

Second, courts' refusal to require employers to provide accommodations to the structural norms of the workplace is contrary to the plain language of the statute. As stated above, in order to be considered a "qualified" individual with a disability, the employee must be able to perform the essential functions of the position with or without reasonable accommodations.[587] It is illogical to consider the hours, shift, or schedule an employee works as a function or task of the job. The hours and schedule of a job are when those functions must be performed but are not themselves functions of the position. As Professor Michelle Travis has argued, EEOC Guidance supports the argument that the essential functions of the job are the actual job tasks and not the default organizational structures (what I call the structural norms).[588]

Furthermore, the statute explicitly defines "reasonable accommodation" to include modifications to hours and schedules.[589] If the structural norms were considered "essential functions" of the job, then modifications to those structural norms would never be considered reasonable accommodations.[590] Clearly, Congress intended for employers to make changes to the structural norms of the workplace. Thus, I now turn to why employers are reluctant to do so.

2. Possible Explanations for Deference Given to Structural Norms

a. Effect on Other Employees

One possible explanation for employers' and courts' tendency to give greater deference to the structural norms of the workplace is because accommodations given regarding hours, shift, or schedule worked often have tangible effects on other employees. This is

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587. A qualified individual "means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2012).

588. Travis, *Recapturing*, *supra* note 25, at 58–60 (quoting the EEOC Guidance as stating: "Default organizational structures simply do not meet the threshold definition of a function, essential or otherwise"). Instead the EEOC recommends that if an employee can prove that he can perform the actual job tasks that are essential with or without a reasonable accommodation, the employer should have to prove that modifying its rules regarding hours, shifts, etc. would cause an undue hardship. *Id.* at 62; *see also* ALBISTON, *supra* note 25, at 104–05 (stating that courts are skeptical of proposed accommodations that change time standards even though the statute contemplates modifications to time standards).

589. Travis, *Recapturing*, *supra* note 25, at 62.

590. *Id.*

contrary to most other accommodations, which often do not affect other employees. For instance, an employee in a wheelchair might need modifications made to the restroom or his cubicle. An employee with some type of disability affecting his ability to stand for long periods of time might need a stool to sit on while working or might need machinery modified so that the employee can reach the work station while sitting. A visually impaired individual might need text-enlarging software or a machine designed to enlarge printed text. None of these accommodations affect other employees.[591]

But most accommodations to the structural norms of the workplace will affect other employees. If one employee cannot work overtime, takes time off of work because of a disability, or must work a reduced-hour schedule, it is likely that the other employees will be called upon to pick up the slack. If an employee with a disability asks to work a straight shift instead of a rotating shift, or the day shift instead of the night shift, it is likely that the non-disabled coworkers will be called upon to work the less desirable shift more often. As I have discussed elsewhere,[592] employers are reluctant to allow one employee's accommodations to place burdens on other employees. Thus, precisely because accommodations to the structural norms of the workplace do place burdens (albeit, in my opinion, relatively minor burdens) on other employees, employers are reluctant to grant accommodations that involve hours, shifts, schedules, or time away from work.

b. Special Treatment Stigma

A second reason employers might be reluctant to provide accommodations to the structural norms of the workplace is because of the "special treatment stigma"[593] that will likely result from such accommodations.[594] Special treatment stigma is the resentment that other employees feel when some employees are given special

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591. Of course, as I have argued elsewhere, all accommodations have some indirect effect on other employees. Even for an accommodation that only costs money (and therefore would seemingly only affect the employer), money the employer has to spend on one employee's accommodation is money that cannot be spent on other employees. Porter, *Reasonable Burdens*, *supra* note 31, at 318–19.

592. *Id.* at 344–45; Porter, *Relieving the Tension*, *supra* note 36, at 801–03.

593. I first coined this phrase in Nicole Buonocore Porter, *Why Care About Caregiver: Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 KAN. L. REV. 355, 359 (2010).

594. ALBISTON, *supra* note 25, at 70 (stating that backlash against individuals with disabilities results in part because nondisabled workers perceive changes in work practices to be illegitimate special treatment).

treatment in the workplace.[595] Most accommodations given to employees with disabilities can be viewed as special treatment. But, as stated above, most accommodations to the physical functions of the job are not accommodations that other employees would desire. Thus, an employee who does not need a modification of the physical environment or equipment is relatively indifferent to an employee with a disability receiving that accommodation. But many employees want or need accommodations to the hours, shift, or schedule worked.[596] These employees are likely to be extremely resentful if the employer has very strict hour, schedule, attendance requirements, and only individuals with disabilities are able to get alterations of those requirements. Furthermore, non-disabled employees might express this resentment to the employer, and many employers do not like to create this kind of discord in the workplace.[597] Thus, if given the choice between making one employee unhappy (by not providing the accommodation) or making many more employees unhappy (by providing the accommodation), many employers choose not to accommodate.

c. Slippery Slope

Finally, because other employees are likely to be resentful if individuals with disabilities are given accommodations to the structural norms of the workplace, those employees might also begin asking for or demanding similar accommodations. It is easy to imagine a caregiver making a compelling argument for a flexible schedule because of caregiving responsibilities once that employee realizes that an individual with a disability has been given a flexible schedule as an accommodation for his disability. Many employers are uncomfortable making judgment calls regarding which reasons for scheduling accommodations are the most compelling. Thus, they are worried that granting accommodations to some employees (even if required by law) will open the doors to similar accommodation requests from many others.

All of these explanations likely contribute to employers' tendency to disfavor accommodations that are seeking modifications of the structural norms of the workplace. Of course, that does not answer the question of why courts so routinely affirm employers' decisions in this regard, and why they are more likely to force employers to accommodate individuals with disabilities when those

595. *Id.* at 359.

596. This is, of course, especially true with respect to employees with caregiving responsibilities. Porter, *Mutual Marginalization*, *supra* note 89.

597. *Id.* at 1113; Porter, *Reasonable Burdens*, *supra* note 31, at 344–45.

accommodations are modifications of the physical aspects of the job. My sense is that courts are sympathetic to the slippery slope argument. There also seems to be something qualitatively different about structural norms in the workplace. For instance, a judge might be able to easily imagine obtaining text-enlarging software for a visually impaired judicial clerk but might be very troubled by another judicial clerk asking for reduced or modified hours. The structural norms of the workplace are simply more entrenched than the manner in which the physical tasks of a job are performed.

VI. CONCLUSION

The ADA Amendments Act has made it much easier for plaintiffs to prove that they have a disability as defined in the statute. Considering that most cases decided before the Amendments never made it past the initial inquiry of whether the plaintiff has a disability and is therefore covered by the statute, this is definitely progress. But it remains to be seen whether courts will continue to be reluctant to give the ADA the full transformative potential that Congress and disability rights activities envisioned it having. Although courts seem willing (in many cases) to require employers to grant accommodations to the physical functions of the job, the new backlash is revealed when we view cases where employees are requesting modifications to the structural norms of the workplace. As employers begin demanding longer and more stringent hours in the workplace, this trend could have troubling consequences.