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Alex B. Long

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Alex B. Long

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INTRODUCING THE NEW AND IMPROVED AMERICANS WITH DISABILITIES ACT: ASSESSING THE ADA AMENDMENTS ACT OF 2008

Alex B. Long[*]

INTRODUCTION

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (ADAAA).[1] When the first President Bush signed the original Americans with Disabilities Act (ADA) into law in 1990, he said it was time "to rejoice in and celebrate another 'Independence Day,' one that is long overdue."[2] For the 43 million Americans with disabilities, the ADA was supposed to represent the opening of doors that had long been closed. Employers, state and local governments, and private businesses—from bowling alleys to restaurants—would now be required to make reasonable modifications to their facilities, policies, and procedures in order to allow full participation by individuals with disabilities. In short, expectations for the ADA were high.

This probably explains why the ADA is viewed so widely by disability rights advocates and its original authors as such a huge disappointment, especially in the employment context.[3] Studies consistently reveal that, despite the ADA, employees who claim to be the victims of disability discrimination in the workplace face long odds.[4] Plaintiffs outside the workplace have enjoyed more success in requiring government actors and private businesses to make changes to their existing structures and policies, but the reality is that many individuals with disabilities are still excluded from participating in activities most of us take for granted.

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[*] Associate Professor of Law, University of Tennessee College of Law.

[1] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3406enr.txt.pdf (to be codified in 29 U.S.C. § 705 and scattered sections of 42 U.S.C.) (link).

[2] President George H.W. Bush, *Remarks on Signing the Americans with Disabilities Act of 1990*, 2 PUB. PAPERS 1067, 1067 (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html (link).

[3] *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1812–13 (2005) (link).

[4] *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); John W. Parry, *Highlights & Trends*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 290, 294 (1999).

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The biggest limitation of the ADA has been its definition of "disability." In order to be protected by the Act, one must first show the existence of a disability.[5] To put it mildly, this has not been an easy task. As originally drafted, the definition was vague and courts tended to interpret the definition narrowly. People with a variety of serious physical or mental impairments, ranging from AIDS, to cancer, to bipolar disorder, have been found not to have disabilities under the ADA.[6] In one case, an individual with cancer brought suit against his employer and died before the resolution of the case, only to be told (posthumously) that his cancer was not limiting enough to amount to a disability under the Act.[7]

The ADA Amendments Act of 2008 sets out to address some of the more controversial and problematic aspects of the definition of disability. The Act starts with essentially the same basic three-pronged definition of disability that existed under the original ADA. According to the ADAAA:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment . . . .[8]

On closer examination it becomes clear that the Act includes some fairly dramatic changes to the definition. The following piece summarizes the provisions of the new law and offers some tentative predictions as to the effect of these changes on future cases. Part I discusses the changes to the ADA's definition of disability. Part II describes some of the other important changes to the Act. Finally, Part III identifies some of the issues left unresolved by these changes.

I. CHANGES TO THE DEFINITION OF DISABILITY

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

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[5] 42 U.S.C. § 12112(a) (2006).

[6] *See, e.g.*, Blanks v. Sw. Bell Commc'ns, Inc., 310 F.3d 398 (5th Cir. 2002) (HIV-positive status); Ellison v. Software Spectrum, 85 F.3d 187 (5th Cir. 1996) (breast cancer); Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350 (N.D.N.Y. 2000) (bipolar disorder).

[7] *See* Hirsch v. National Mall & Serv., Inc., 989 F. Supp. 977, 980–82 (N.D. Ill. 1997).

[8] ADA Amendments Act of 2008, *supra* note 1, § 4(a) (to be codified at 42 U.S.C. § 12102(1)).

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A. No More "Demanding Standards"

In 2002, the United States Supreme Court announced that the terms in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[9] Although the Court drew support for this conclusion from the Findings and Purposes that accompanied the Act, the Court's interpretive gloss was at odds with the traditional approach to interpreting remedial statutes. One longstanding canon of construction is that remedial statutes should be interpreted broadly.[10] Thus, the Supreme Court's instruction seemed to stand the traditional approach on its head.

The Findings and Purposes section introducing the ADA Amendments Act specifically rejects the Court's "demanding standard" gloss. The Act also includes a section setting forth rules of construction.[11] One rule requires that "[t]he definition of disability shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[12]

B. Redefining the "Substantially Limits" Language

In order to constitute an actual disability under the first prong of the Act's definition of disability, an impairment still must substantially limit a major life activity. However, the new amendments expand the meaning of the phrase "substantially limits" in several ways.

First, past Supreme Court decisions had defined the term as an impairment that "*prevents or severely restricts* an individual from performing major life activities."[13] While Congress considered the ADAAA, it clearly sought to change this standard; however, it struggled to come up with a workable alternative. An earlier version of the bill provided that the term "'substantially limits' means 'materially restricts.'" Unfortunately, this new definition did little to clarify the meaning of substantial limitation.[14] Ultimately, Congress chose to punt and put the power to define the term "substantially limits" in the Equal Employment Opportunity Commission's (EEOC) hands. The Findings and Purposes section expresses "Congress'

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[9] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

[10] Sutton v. United Air Lines, Inc., 527 U.S. 471, 504 (1999) (Stevens, J., dissenting).

[11] ADA Amendments Act of 2008, *supra* note 1, § 4(a) (to be codified at 42 U.S.C. § 12102(4)).

[12] *Id.* (to be codified at 42 U.S.C. § 12102(4)(A)).

[13] *Toyota Motor Mfg.*, 534 U.S. at 198 (emphasis added).

[14] *See Defining Disability Down: The ADA Amendment Act's Dangerous Details, Hearing Before the Senate Committee on Health, Education, Labor, and Pensions* (July 15, 2008) (statement of Andrew M. Grossman, Heritage Foundation) (noting the lack of prior use of the phrase "materially restricts" and the conflicting dictionary definitions of the terms). *See generally* Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 227–29 (2008) (discussing an earlier version of the ADAAA, known as the ADA Restoration Act).

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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."[15] As both the Findings and Purposes section and Rules of Construction section indicate that Congress desired a broader definition, presumably the EEOC's ultimate definition will be less restrictive than the current "prevents or severely restricts" standard.

Second, the Act also expressly rejects the "mitigating measures" approach adopted by the Supreme Court in *Sutton v. United Air Lines, Inc.*[16] In *Sutton*, the Court held that the question of whether an individual has a disability must be determined with reference to any mitigating or corrective measures the individual uses to offset the effects of a physical or mental impairment.[17] When limited to the facts of *Sutton*, a case involving plaintiffs who were legally blind but used eyeglasses to achieve 20/20 vision, the mitigating measures rule did not seem particularly objectionable. However, when applied to other situations, such as individuals who employed prosthetic devices or who take medication to control the effects of epilepsy, diabetes, or bipolar disorder, the rule sometimes caused bizarre results.

In *Albertson's, Inc. v. Kirkingburg*,[18] decided the same day as *Sutton*, the Court declared that the mitigating measures rule applied not just to artificial measures, but to "measures undertaken, whether consciously or not, with the body's own systems."[19] Thus, an individual's natural or learned ability to compensate for the effects of an impairment was a "mitigating measure" that must be taken into account when deciding whether the individual had a disability. As a result of this mitigating measures rule, numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA.[20] Prior to the ADA Amendments Act, several states, either through legislation or judicial decision, had refused to use this standard in their own disability discrimination statutes.[21]

The ADA Amendments Act rejects this interpretation, specifically providing that a court must determine whether an impairment substantially limits a major life activity "without regard to the ameliorative effects of

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[15] ADA Amendments Act of 2008, *supra* note 1, § 2(b)(6).

[16] 527 U.S. 471 (1999).

[17] *See id.* at 482.

[18] 527 U.S. 555 (1999).

[19] *Id.* at 565–66.

[20] *See, e.g.*, Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 821–22 (8th Cir. 2003) (concluding that individual with epilepsy who took medication that limited the number and intensity of his seizures did not have a disability).

[21] *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963 (Mass. 2001) (rejecting *Sutton* for use in Massachusetts' antidiscrimination statute); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 634–35 (2004) (discussing California's and Rhode Island's statutes).

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mitigating measures."[22] This includes medication, artificial aids, assistive technology, reasonable accommodations, and "learned behavioral or adaptive neurological modifications."[23] However, the Act excepts eyeglasses and contact lenses from this rule. According to the Act, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses" must be considered in determining whether an impairment substantially limits a major life activity.[24] That said, the Act goes on to provide that if an employer uses a qualification standard based on an individual's uncorrected vision, the employer must show that the standard is job-related and consistent with business necessity.[25]

Finally, the Act gives new hope to potential plaintiffs whose impairments are episodic in nature or in remission. Some plaintiffs have had difficulty establishing that an impairment is substantially limiting when the condition is in remission or episodic because one must focus on the overall effects of an impairment, not just the effects when they are most severe.[26] The amendments provide that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[27] This represents a subtle, but fairly substantial change in meaning. The Supreme Court has repeatedly emphasized that courts should refrain from engaging in hypothetical inquiries as to the severity of impairments and instead must focus on the individual in his or her present state.[28] By directing courts to consider whether an impairment *would* substantially limit a major life activity if it were active, the ADA Amendments Act allows courts to engage in this once-prohibited type of hypothetical inquiry, at least in this one instance.

C. Expanding the List of Major Life Activities

In order to constitute an actual disability, an impairment must substantially limit one or more major life activities of an individual. The original version of the ADA did not contain a definition of the term "major life activities." Instead, the task of defining this concept was left to the agencies charged with enforcing the various titles of the Act. The EEOC, for example, chose not to define the term, but instead issued an illustrative list of

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[22] ADA Amendments Act of 2008, *supra* note 1, § 4(a) (to be codified at 42 U.S.C. § 12102(4)(E)(i)).

[23] *Id.*

[24] *Id.*

[25] *See id.* § 5(b).

[26] *See, e.g.*, Walker v. Town of Greeneville, 347 F. Supp. 2d 566, 572–73 (E.D. Tenn. 2004) (concluding that individual with episodic, intermittent claustrophobia was not substantially limited in a major life activity).

[27] ADA Amendments Act of 2008, *supra* note 1, § 4(a) (to be codified at 42 U.S.C. § 12102(4)(D)).

[28] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

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major life activities.[29] The relative brevity of this list led to numerous questions over the years as to whether certain activities, such as lifting, qualify as major life activities. In addition, most of the activities listed in the regulations—e.g., caring for oneself, performing manual tasks, and walking—involve volitional behavior to some extent. This led to some dispute whether nonvolitional bodily activities, such as eliminating waste from one's blood, amounted to a major life activity.[30]

For its part, the Supreme Court defined the term "major life activities" narrowly. In keeping with its belief that the terms in the ADA's definition of disability should be interpreted strictly, the Court held in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[31] that the term "major life activities" referred to those activities that are of "central importance to most people's daily lives."[32]

The ADA Amendments Act makes several changes to the concept of major life activities. First, it clarifies what has always been implicit: an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.[33] Second, it rejects the Supreme Court's "demanding standard" in favor of a looser standard According to the Findings and Purposes section, one of the purposes of the Act is to reject the notion that the term "major" in the definition of major life activities needs to be interpreted strictly.[34]

Instead of offering an actual definition, the Act includes a nonexhaustive list of major life activities as illustration. Aside from the fact that this list is now in the actual statute, rather than the accompanying regulations, the list is significant because it contains several new additions. The Act states that: "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[35]

Eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating are all new additions to the list of major life activities. The Act also clarifies that the term "major life activities" includes the operation of "major bodily function[s], including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel,

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[29] According to the regulations, "[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i) (2008) (link).

[30] *See, e.g.*, Fiscus v. Wal Mart Stores, Inc., 385 F.3d 378, 384 (3d Cir. 2004); Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 785 (8th Cir. 2004).

[31] 534 U.S. 184 (2002).

[32] *Id.* at 198.

[33] ADA Amendments Act of 2008, *supra* note 1, § 4(a) (to be codified at 42 U.S.C. § 12102(5)(B)).

[34] *Id.* § 2(b)(4).

[35] *Id.* § 4(a) (to be codified at 42 U.S.C. § 12102(2)(A)).

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bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[36] Thus, an impairment that substantially limits nonvolitional bodily functions can qualify as a disability.

D. Major Changes to the "Regarded as" Prong

One of the most significant changes to the ADA involves the third prong in the ADA's definition of disability. Under the original definition, one did not actually have to have an impairment that substantially limits a major life activity in order to have a disability.[37] Instead, a person who was regarded as having such an impairment qualified as having a disability, even if the individual had no impairment at all. Similarly, an individual who had an impairment, but one that was not substantially limiting, would be covered if the defendant incorrectly believed that the impairment was substantially limiting.

In many ways, the "regarded as" prong represents the essence of the ADA. The ADA's definition of disability was based on a nearly identical definition contained in the Rehabilitation Act of 1973.[38] In addressing the "regarded as" prong of that act, the Supreme Court wrote in *School Board of Nassau County v. Airline*, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[39] Thus, the EEOC originally took the position that an individual who was rejected from a job because of the "myths, fears, and stereotypes" associated with an impairment would be covered by the ADA under the "regarded as" prong.[40]

Over time, however, it became clear that this was not how the "regarded as" prong operated in practice. Instead, courts took a more literal approach to the language. The literal language of the Act provided that an individual was covered under the "regarded as" prong only if the defendant regarded the individual as having "such an impairment," i.e., an impairment that substantially limits a major life activity. Based on this language, courts concluded that it was not enough for an ADA plaintiff to show that a defendant based an adverse decision on uninformed stereotypes about the plaintiff's condition. Instead, a plaintiff had to establish that a defendant mistakenly believed that an impairment substantially limited a major life activity of the plaintiff. As a result of Congress' decision to link the "regarded as" to the Act's definition of an actual disability, ADA plaintiffs

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[36] *Id.* (to be codified at 42 U.S.C. § 12102(2)(B)).

[37] *See supra* note 8 and accompanying text.

[38] 29 U.S.C. § 706 (2006).

[39] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[40] 29 C.F.R. app. § 1630.2(l) (2008).

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proceeding under the "regarded as" prong were frequently disqualified by the restrictive interpretive rules associated with the actual disability prong.[41]

The ADAAA takes a new approach. According to the Findings and Purposes section, one of the purposes of the Act is "to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, . . . which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973."[42] In keeping with that purpose, the Act sets forth a separate definition for the "regarded as" prong:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this 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.[43]

Thus, an ADA plaintiff no longer faces the difficult task of proving that a defendant's misperception of his or her condition was *so* severe as to amount to a belief that the condition substantially limited a major life activity. Instead, the new amendments place the focus on the employer's motivation. If a plaintiff has a physical or mental impairment and can show that the impairment motivated the defendant's adverse action, the plaintiff can claim coverage under the "regarded as" prong, regardless of how limiting the impairment actually is. Likewise, if the plaintiff can show that the defendant, rightly or wrongly, perceived the plaintiff as having an impairment, and that this perception motivated the adverse action, the plaintiff is covered under the "regarded as" prong, regardless of how limiting the defendant perceives the impairment to be.

This represents a dramatic change. If courts give effect to the literal language of the definition, the meaning of the "regarded as" prong has effectively been restored to something approaching the "myths, fears, and stereotypes" standard. As a result, the new amendments may greatly expand coverage under the "regarded as" prong.

Perhaps to compensate for this expansion, the Act singles out "transitory and minor" impairments for special treatment under the "regarded as" prong. An individual who is subjected to an adverse action because of an actual or perceived impairment is not covered under the "regarded as" prong if the impairment is transitory and minor. "A transitory impairment," the Act explains, "is an impairment with an actual or expected duration of [six] months or less."[44] The Act fails, however, to explain what qualifies as a "minor" impairment.

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[41] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 491–93 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521–22 (1999).

[42] ADA Amendments Act of 2008, *supra* note 1, § 2(b)(3).

[43] *Id.* § 4(a) (to be codified at 42 U.S.C. § 12102(3)(A)).

[44] *Id.* (to be codified at 42 U.S.C. § 12102(3)(B)).

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II. OTHER CHANGES

In addition to the changes to the definition of disability, the ADAAA contains several other fairly significant changes. These include a new provision concerning the duty of a covered entity to accommodate an individual the covered entity regards as having a disability and an express statement concerning the authority of various federal agencies to issue regulations concerning the definition of disability.

A. Accommodation of Individuals Who are Regarded as Having a Disability

One of the most fundamental components of the ADA is the reasonable accommodation requirement. Employers and other defendants are required to provide reasonable accommodations for the known physical or mental impairments of qualified individuals with disabilities. Reasonable accommodations are a means of eliminating the unnecessary barriers that exclude full participation by individuals with disabilities.[45] Generally speaking, reasonable accommodations include modifications to the work environment or to the manner in which a job is customarily performed.[46]

One issue that has recently divided the courts is whether an employer must provide a reasonable accommodation to an individual whom it merely regards as having a disability. An employee with an impairment that substantially limits a major life activity (like lifting, hearing, or walking) may be unable to perform the essential functions of a position unless the employer somehow modifies the way the job is normally performed. However, if an employer merely regards an individual as having a disability, the individual may have no need for any type of accommodation. In addition, courts have expressed concern over the possibility that such employees will gain a "windfall" that their nondisabled coworkers are not entitled to.[47] On the other hand, some have argued that requiring employers to provide accommodations for individuals whom it believes have a disabling impairment may help "ferret[] out" disability discrimination.[48]

The ADAAA takes the side of defendants in this instance. The Act provides that employers and other covered entities "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets" the "regarded as" definition.[49] Thus, the new amendments effectively end the ongoing dispute among the courts on this issue.

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[45] 29 C.F.R. app. § 1630.9 (2008).

[46] 29 C.F.R. § 1630.2(o)(1)(ii) (2008).

[47] Webber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999).

[48] Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc).

[49] ADA Amendments Act of 2008, *supra* note 1, § 6(a)(1).

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B. Power to the Agencies

One concern about the ADA has been the authority that the various agencies charged with enforcing the Act have with respect to defining the terms within the definition of disability. The EEOC, Attorney General, and Secretary of Transportation are all charged with the enforcement of different titles of the ADA. However, the definition of disability does not appear in any of those titles. Instead, the definition appears in the general provisions of the Act.[50] This fact led the Supreme Court in *Sutton* to question what degree of deference the EEOC's interpretations of the definition of disability were due.[51] This lack of express authority may also help explain why the Court refused to defer to the EEOC's interpretation of the definition of disability in *Sutton*.[52] The ADA Amendments Act resolves the question by specifically providing that "the authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under the Act includes the authority to issue regulations implementing the definition of disability."[53]

III. UNRESOLVED ISSUES

Despite the numerous changes to the language of the ADA, the ADA Amendments Act fails to address a number of controversial and potentially contentious issues.

A. The Single-Job Rule

The Act does not address one of the more limiting interpretations of the definition of disability: the so-called "single-job rule." Under this rule, in order to be substantially limited in the major life activity of working, it is not enough that an individual's impairment preclude him or her from a single job or narrow category of jobs. Instead, the individual must be precluded from a class of jobs or a broad range of jobs.[54] As a result of this rule, ADA plaintiffs have had great difficulty establishing that they were actually disabled when working was the major life activity in question.[55] The new amendments do not explicitly change this rule.[56] However, by expanding

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[50] 42 U.S.C. § 12102(2) (2006).

[51] Sutton v. United Air Lines, Inc., 527 U.S. 471, 479–80 (1999).

[52] *See id.* 481–84 (refusing to defer to the EEOC's view on the question of whether mitigating measures should be considered in determining whether an individual has a disability).

[53] ADA Amendments Act of 2008, *supra* note 1, § 6(a)(2).

[54] *Sutton*, 527 U.S. at 91–92.

[55] *See, e.g.*, *id.* at 493 (concluding that plaintiffs were not substantially limited in the major life activity of working because there visual impairment only precluded them from holding the single job of global airline pilot).

[56] It is conceivable, however, that the EEOC will revisit the issue when it revises the definition of disability as instructed by Congress. *See supra* note 15 and accompanying text. It is also worth noting that in *Sutton* the Supreme Court raised some concerns about whether "working" qualifies as a major life activity, despite the EEOC's inclusion of working in its list of major life activities. *Sutton*, 527 U.S. at

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the coverage of the "regarded as" prong, the single-job rule is unlikely to have quite the same preclusive effect it has had in the past.[57]

B. Short-Term Impairments

In *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, the Supreme Court held that in order to constitute a disability, the impact of an impairment *must* be permanent or long-term.[58] To some extent, this holding conflicts with the position taken by the EEOC. Under the EEOC's approach, the permanent or long-term impact of an impairment was simply one factor to consider in making the disability determination. Other factors included the nature and severity of the impairment and the duration or expected duration of the impairment.[59] As mentioned, under the ADAAA, the "regarded as" prong does not cover actual or perceived impairments that are transitory in nature.[60] However, the amendments do not explain how transitory impairments should be assessed under the actual disability definition.

C. The Forgotten "Record of" Prong

The vast majority of ADA plaintiffs proceed under the actual or "regarded as" prongs of the definition of disability. There is a third option, however. The "record of" prong was designed to cover individuals who had recovered, in whole or in part, from a once substantially-limiting impairment or who had been misclassified as having a disability.[61] Despite the extensive revisions to the actual disability and "regarded as" prongs in the ADA's three-pronged definition of disability, the ADA Amendments Act does not address the "record of" prong. For a variety of reasons, plaintiffs do not often rely on this part of the definition of disability. When they do, however, they are sometimes confronted with interpretive rules that limit the scope of this part of the definition. For example, some courts have concluded that that an employer must rely on an actual tangible "record" indicating the existence of disability in order for a plaintiff to be covered under the "record of" prong.[62] The new amendments do nothing to breathe new life into the forgotten "record of" prong, nor do they provide any clarification as to any of the interpretive issues surrounding this portion of the definition of disability.

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492. The ADAAA resolves any uncertainty on this point by including "working" in its list of major life activities. ADA Amendments Act § 4(a).

[57] *See supra* notes 37–44 and accompanying text (discussing changes to the "regarded as" prong).

[58] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).

[59] 29 C.F.R. § 1630.2(j)(2) (2008).

[60] *See supra* note 44 and accompanying text.

[61] Alex B. Long, *(Whatever Happened To) The ADA's "Record of" Prong(?)*, 81 WASH. L. REV. 669, 681 (2006).

[62] *Id.* at 689–90

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D. Interacting with Others as a Major Life Activity

Courts have split on the questions of whether interacting with others qualifies as a major life activity and what it takes for one to be substantially limited in this activity.[63] These issues have proven particularly problematic for the courts. Despite its inclusion of several new major life activities, the ADA Amendments Act is silent on whether interacting with others qualifies as a major life activity. Arguably, its inclusion of "communicating" might conceivably cover "interacting with others," but there is no express resolution of this question.

E. Limited Guidance on Reasonable Accommodations

With the exception of the amendment concerning the accommodation of "regarded as" plaintiffs and interpretative power of the EEOC, nearly all of the focus of the ADAAA is on the definition of disability. In order to be protected by the ADA, one must be a qualified individual with a disability. In the employment context, this means an individual with a disability who, with or without reasonable accommodation, is capable of performing the essential functions of the position the individual holds or desires. 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.

Unfortunately, Congress has done little to assist courts in devising a clearer standard regarding what qualifies as a "reasonable" accommodation. The original version of the ADA did little to define the concept, leaving it to the courts to flesh out its contours. Unfortunately, the few times the Supreme Court has addressed the concept of reasonable accommodation or reasonable modification, the cases have been so fact specific as to provide little guidance for future cases.[64]

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. By adopting a strict definition of disability, courts were able to avoid dealing with accommodation issues that, due to their fact-specific nature, were not easily decided on a motion for summary judgment and that had the potential to place significant bur-

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[63] *Compare* Jacques v. DiMarzio, Inc., 386 F.3d 192, 202 (2d Cir. 2004) (concluding that interacting with others is a major life activity) *with* Soileau v. Guilford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (expressing great doubt as to whether getting along with others is a major life activity).

[64] *See* US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); PGA Tour, Inc. v Martin, 532 U.S. 661 (2001).

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dens on employers.[65] Regardless of the reason, the end result has been a marked lack of clear rules on the subject of reasonable accommodation.

The new amendments do virtually nothing to assist courts and potential litigants in this regard. The amendments leave a host of reasonable accommodation issues unresolved, such as whether an employer must, as part of its duty of reasonable accommodation, reassign an individual with a disability to a vacant position when there is another, more qualified applicant[66] and whether there should be a presumption that allowing an employee to work from home is not a reasonable accommodation.[67] Instead of taking the opportunity to resolve the conflicting standards on these points, by relaxing the standard for qualifying as having a disability, Congress may have actually made the job of courts tougher.

CONCLUSION

The ADA Amendments Act of 2008 represents a fairly dramatic change in disability law. Despite the skepticism of some (myself included) that Congress would enact any meaningful changes to the ADA in the near term, Congress has produced legislation that addresses some of the more pressing and controversial issues associated with the ADA. Although there are still numerous issues that remain unresolved, many of the changes that Congress did make were long overdue and are likely to provide greater coverage at the initial stage of determining whether an individual has a disability than existed previously under the Act. Whether these amendments will produce dramatic changes in terms of the overall effectiveness of the ADA, however, remains to be seen.

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[65] *See* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 336–37 (2001) (discussing this theory).

[66] *See, e.g.*, EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

[67] *See, e.g.*, Van Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("[I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.").

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