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The Litigation Landscape Nearly One Decade After the Passage of the ADA Amendments Act

By Equip for Equality[1]

The Promise of the ADA Amendments Act

The Americans with Disabilities Act ("ADA") defines persons with disabilities as individuals who have: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such an impairment; or (3) been regarded as having an impairment.[2] When Congress passed the ADA in 1990, it adopted this definition from another federal anti-discrimination law, the Rehabilitation Act of 1973, with the intention of creating a law that provided broad coverage for people with disabilities.[3] Indeed, before Congress passed the ADA, the Supreme Court had interpreted the same definition of disability in a case brought under the Rehabilitation Act and had declared the definition to be "broad."[4]

Despite this previous declaration, to the surprise of Congress and people with disabilities, courts narrowly interpreted the definition of disability under the ADA. In 1999, three U.S. Supreme Court decisions commonly referred to as the *Sutton* trilogy confirmed that courts would take a narrow approach when deciding whether an individual would be deemed to have an ADA-covered disability.[5] And in 2002, the Supreme Court narrowed the definition of disability even further in *Toyota v. Williams*.[6] As a result, courts regularly found that plaintiffs could not establish an ADA-qualifying disability and dismissed their claims without ever analyzing if discrimination occurred.

For example, plaintiffs with the following impairments were commonly found not to have an ADA-qualifying disability and their cases were dismissed: intellectual disability,[7] epilepsy,[8] diabetes,[9] bipolar disorder,[10] multiple sclerosis,[11] hearing impairment,[12] back injury,[13] vision in only one eye,[14] post-traumatic stress disorder,[15] heart disease,[16] depression,[17] HIV,[18] asthma,[19] and cancer.[20]

In direct response to these court cases, Congress passed the ADA Amendments Act[21] ("ADAAA") in September of 2008 to "reinstat[e] a broad scope of protection" for people with disabilities diminished through erroneous judicial decisions.[22] Congress hoped that the ADAAA would provide the "clear and comprehensive national mandate for the elimination of discrimination" initially intended by the ADA.[23] People with disabilities and

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

Broad Interpretation of the Definition of Disability

The ADAAA mandates that the definition of disability "be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] Act."[25] The same sentiment is echoed in the regulations promulgated by both the Equal Employment Opportunity Commission ("EEOC") and the U.S. Department of Justice ("DOJ"), which state that "[t]he primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA."[26] The regulations also make clear that the focus should be "whether discrimination has occurred" instead of "whether the individual meets the definition of disability."[27] These statutory and regulatory requirements are intended to expressly reject the Supreme Court's 2002 decision in *Toyota*, which held that the definition of disability should be "interpreted strictly" to create a "demanding standard."[28]

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

- "[T]he ADAAA and accompanying regulations demand a generous view" of plaintiff's evidence regarding disability, also referring to "the ADAAA's plaintiff-friendly standard."[29]
- The "primary object of attention" in ADA cases is "whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."[30]
- The ADAAA "make[s] it easier for people with disabilities to obtain protection under the ADA." A principal way in which Congress accomplished that goal was to broaden the definition of "disability."[31]
- Congress enacted the ADAAA to construe the definition of "disability" in favor of broad coverage to the maximum extent permitted.[32]
- "The question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[33]

- "In 2008, Congress passed the ADA Amendments Act which relaxed this inquiry [whether an individual is disabled] significantly."[34]

Immediately after the passage of the ADAAA, it looked like courts were analyzing issues regarding disability in a precursory fashion without much evaluation. For example, in *Edwards v. Chevron U.S.A., Inc.*, a case decided in 2013, the plaintiff provided sworn statements that she had been diagnosed with a medical bowel disease that flares up from time to time, requiring her to take several months of medical leave.[35] Without making any other statements or describing the plaintiff's limitations in any detail, the court concluded that "[u]nder the amended ADA, that is sufficient."[36] While there are still many court cases with this type of short analysis, it appears that many courts have returned to a more thorough assessment of disability.

Broad Interpretation of the Substantial Limitation

In addition to rendering broad proclamations about the breadth of the definition of disability under the ADAAA, courts are also acknowledging the regulatory directive that "[w]hether an impairment 'substantially limits' a major life activity should not demand extensive analysis."[37] In *Gibbs v. ADS Alliance Data Sys., Inc.*, the court considered whether an employee's carpel tunnel syndrome constituted a disability.[38] The employee provided evidence that she underwent multiple surgeries and was unable to use her left hand for a few weeks. After "keeping in mind that this inquiry is not meant to be 'extensive' or demanding," the court concluded that the employee provided "some evidence that plaintiff's condition affected her ability to perform manual tasks" and allowed her case to proceed.[39]

While most courts continue to interpret the phrase "substantial limitation" broadly, as directed by the ADAAA, in recent years, there have been certain instances where district courts have too narrowly defined substantial limitation, requiring appellate court intervention. For instance, in *Cannon v. Jacobs Field Services North America, Inc.*, the Fifth Circuit reversed a district court's decision that a prospective employee with a rotator cuff injury was not disabled under the ADA.[40] The plaintiff could not raise his right arm above his shoulder and had difficulty lifting, pushing, or pulling objects with the affected arm. On appeal, the Fifth Circuit found that there was "ample evidence" that the employee's injury qualified as a disability under the ADAAA's "more relaxed standard."[41] The court noted that the ADA includes lifting and reaching as major life activities, and emphasized that the plaintiff was unable to lift his right arm above shoulder level. Accordingly, the court found these factors supported a conclusion that the injury was a qualifying disability.[42]

Another example comes from the Eleventh Circuit in *Mazzeo v. Color Resolutions International, LLC*.[43] In *Mazzeo*, the employee had a herniated disc and torn ligaments in

his back. As a result, he experienced pain down his lower back, which spread to his right leg, and impacted his ability to walk, sit, stand, bend, run, and lift heavy objects. Despite this, the district court found that the employee lacked a substantial limitation in a major life activity, a determination reversed by the appellate court. The Eleventh Circuit concluded that the plaintiff had an ADA-qualifying disability and cited evidence that the treating physician submitted an affidavit that the employee's disc herniation problems and resulting pain had existed for years, required surgery, and substantially limited his ability to walk, bend, sleep and lift over ten pounds. It concluded that under the ADAAA, there was no need for a more detailed discussion.

There are, however, other courts (both district court and appellate court) that emphasize the relaxed substantial limitation standard but then fail to apply it. For instance, in *Neely v. Benchmark Family Services*, the Sixth Circuit acknowledged the ADAAA's "relaxed standard" regarding substantial limitation while simultaneously concluding that having only two to three hours of restful sleep per night, falling into micro sleeps during the day, snoring and other difficulty breathing while sleeping fails to constitute a substantial limitation.[44] This case is also potentially problematic as relies on pre-ADAAA precedent, noting that the employee failed to articulate why the reasoning in these cases should not survive the ADAAA.

In another recent case, *Telemaque v. Marriott International, Inc.*, the court took a skeptical view regarding substantial limitation in the major life activity of working.[45] The employee asserted he had a number of disabilities, including arthritis and high blood pressure. He alleged that his arthritis restricted him from running or engaging in "fast motion" on a "regular basis," such as running or moving fast when responding to non-emergency calls. The court noted that "working" is specifically identified as a major life activity under the ADA, but explained that the employee's only alleged work-related limitation was that he could not run or move fast in some circumstances. It held that "an individual's inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Rather, there must be a significant restriction on employment generally… compared to an average person of comparable skills and training."[46]

Impairments that are Episodic or in Remission

In the ADAAA, Congress added a number of rules of construction to provide clear direction about how to properly interpret the definition of disability. Among the rules, Congress explained that impairments that are episodic or in remission can still be qualifying disabilities, as "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[47] The EEOC and DOJ regulations reiterate this statutory requirement.[48] The appendix to the regulations include the following non-exhaustive list of episodic impairments: epilepsy, hypertension, diabetes, asthma, multiple sclerosis, cancer, and mental health disabilities such as major depressive disorder, bipolar disorder, schizophrenia, and post-traumatic stress disorder.[49]

The vast majority of courts are properly evaluating whether an individual with an episodic condition has a disability. As one illustration, in *Jones v. Honda of America Manufacturing*, the court concluded that an employee's back pain could be substantially limiting despite its episodic nature because when the pain was active, it required the employee to miss work one to two times a year for five to six days each.[50] The court further clarified that an employee can still show an ADA-qualifying disability even if her impairment does not substantially limit a major life activity at the time of the adverse employment action.

Another example comes from *Gage v. Rymes Heating Oils, Inc.*, where the court allowed an employee's claim due to episodic migraines to proceed based on her testimony that focused on one severe episode where she experienced right-side weakness leaving her unable to dress herself, find words or compose a text message.[51] The court held that the plaintiff's condition—when active—could substantially limit her ability to feel, speak and communicate. In making this finding, the court noted that the evidence was "thin" but that the "[t]he substantial limitation standard is not meant to be… demanding."[52] Likewise, in *EEOC v. Aurora Health Care, Inc.*, the court noted that there is a general understanding that multiple sclerosis is a disability and "an ongoing condition that is episodic may constitute a disability if, even only at one time, the active symptoms of that condition substantially impaired a major life activity."[53]

Even courts that ultimately find an individual not to have an ADA-qualifying disability do not necessarily reject the requirement that the episodic condition be evaluated when active. For instance, in *Barlia v. MWI Veterinary Supply, Inc.*, a court granted an employer's motion for summary judgment for a claim concerning episodic impairments of

adrenal insufficiency, hypothyroidism, mastocytosis, and histamine release syndrome.[54] The decision, however, was based on the court's determination that the employee's evidence was insufficient—not on the episodic nature of the condition.

Courts have found a number of other episodic conditions to constitute disabilities because they are substantially limiting when active: kidney stones,[55] back conditions,[56] vocal cord enema,[57] multiple sclerosis,[58] sarcoidosis,[59] hypertension,[60] isolated bouts of depression, [61] Hepatitis C,[62] fibromyalgia,[63] and medical bowel disease.[64]

By including conditions that are episodic or in remission, the ADAAA has resulted in a marked difference in how courts assess cancer as a disability. Under the new rules, courts are consistently finding the ADAAA to cover individuals with cancer in remission. In *Ferrante v. Capitol Reg'l Educ. Council*, for example, the court considered whether the plaintiff's non-Hodgkin lymphoma qualified as a disability under the ADA even though it was in remission following chemotherapy, because when it was active, it substantially limited her normal cell growth, which caused her to experience fatigue and nausea, and substantially limited her ability to perform major life activities.[65] Another example comes from *George v. Fresenius Medical Care North America,* where the court held that "[t]here is no dispute that cancer and lymphedema qualify as disabilities under the ADA" even when in remission, although ultimately finding the plaintiff was not qualified.[66]

An interesting issue considered by at least one court is how to examine an impairment that may present itself as episodic, but is actually a new disability. In *Lang v. Oregon Shakespeare Festival Ass'n City of Ashland*, the plaintiff argued that his back pain was a disability and asserted that to determine the substantially limiting nature, the court should look at past episodes of back pain too, as it was an episodic condition.[67] The court, however, distinguished this case from others where plaintiffs had episodic conditions with symptomatic flare-ups. Here, the court concluded that the plaintiff had two discrete periods of back pain—the first instance was treated, successfully, by surgery, leaving him pain free, while the second was caused by new discrete events—namely, falling from a back deck, an injury working under a sink, and a fall while hiking. As a result, the court only examined the limiting nature of the plaintiff's current back condition.

Disregarding Ameliorative Effects of Mitigating Measures

The ADAAA rules of construction also require courts to evaluate whether an individual has a disability without considering the ameliorative effects of mitigating measures (except for ordinary eyeglasses and contact lenses).[68] Congress included examples of

mitigating measures in the ADAAA, such as: medication, equipment, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids and cochlear implants, mobility devices, use of assistive technology, reasonable accommodations or auxiliary aids or services, and learned behavioral or adaptive neurological modifications.[69] The EEOC and DOJ regulations identified three additional examples of mitigating measures: psychotherapy, behavioral therapy, and physical therapy.[70] Significantly, the EEOC and DOJ also stated that even though the mitigating measure itself cannot be considered, the negative side effects of mitigating measures may be considered in assessing disability.[71] In addition, the benefits of mitigating measures may be considered in showing the ability to perform essential job functions.[72]

Given the clarity of the statutory and regulatory text, it is not surprising that courts are largely applying this directive correctly and disregarding the ameliorative effects of mitigating measures. In *Ceska v. City of Chicago*, the plaintiff had an injured neck that rendered him unable to sleep as much as three to four hours per night even when he was taking medication.[73] When determining whether the plaintiff had a disability, the court, appropriately, considered the plaintiff's limitation on sleeping if the plaintiff was not taking his medication. Similarly, in *Orne v. Christie*, an employee was diagnosed with sleep apnea and began to treat this condition with a CPAP machine.[74] Although the employee previously struggled to stay awake and concentrate at work, once he started to use the CPAP machine, he no longer experienced these symptoms. As a result, the employer argued that the employee did not have a disability because the CPAP machine "cure[d]" or "relieve[d]" the employee.[75] Applying the ADAAA, however, the court found the employer's argument without merit and allowed the employee's claim to go forward.

Comparably, in *Suggs v. Central Oil of Baton Rouge, LLC*, the employee, who had a coronary/carotid artery disease, was able to show that he had a disability despite the fact that he mitigated the symptoms of his disability by taking prescription blood thinners and cholesterol controlling drugs and because of his two tents in his arteries to increase blood flow. The court held that the plaintiff's "disease is actually disabling in its unmitigated state" because it causes a build-up of plaque in the artery walls leading to blood clots, which can prevent blood from flowing to his brain or cause a stroke.

Although the ameliorative effects of mitigating measures must be disregarded under the ADAAA, the negative effects of mitigating measures must be considered,[76] and it appears that courts are complying with this requirement as well. In *Sanders v. Judson Ctr., Inc.*, the court found the plaintiff sufficiently alleged an ADA-disability in light of her sudden need to urinate, which was caused, in part, by the side effects of medication taken for a heart condition.[77] *See also Gipson v. Bear Commc'ns, LLC*, 2016 WL 3743106 (D. Kan.

July 13, 2016) ("The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.").

It is important for plaintiffs to remember that even though courts are disregarding the corrective effects of mitigating measures, plaintiffs must still demonstrate how their conditions substantially limit a major life activity absent the mitigating measures. In *Lloyd v. Housing Authority*, although the court recognized that the ADAAA required it to evaluate the plaintiff's condition in its unmitigated state, it concluded that the plaintiff failed to produce evidence about how his asthma and high blood pressure would affect him if left untreated.[78] *See also O'Donnell v. Colonial Intermediate Unit 20*, 2013 WL 1234813, at *6 (E.D. Pa. March 27, 2013) (granting defendant's motion to dismiss because plaintiff failed to identify how his "treated or untreated" mental health disorders were substantially limiting).

Other Considerations Regarding Substantial Limitation

Courts are also complying with the regulatory directives regarding the broadened interpretation of substantial limitation, including the requirement to consider the condition and manner in which major life activities are performed—including pain. For instance, in *Gaylor v. Greenbriar of Dahlonega Shopping Center*, a plaintiff with multiple sclerosis testified that he lives in pain, mostly in his legs, that makes it difficult (though not impossible) to walk.[79] In determining whether an individual is substantially limited, the court held that relevant considerations include "the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity…" *See also Howard v. Pennsylvania Dept. of Public Welfare,* 2013 WL 102662 (E.D. Pa. Jan. 9, 2013) (considering the pain a plaintiff with fibromyalgia experiences while performing activities and determining that the plaintiff presented sufficient evidence that she has a disability).

When analyzing whether a plaintiff's impairment is substantially limiting, the ADAAA directs courts to compare the plaintiff to most people in the general population. Recent cases demonstrate that this can be problematic for plaintiffs with disabilities in professional careers or advanced studies. A prime example comes from *Rawdin v. American Board of Pediatrics*, where a pediatrician with memory difficulties stemming from brain tumor was diagnosed with Cognitive Disorder NOS.[80] The district court found that despite relative weakness in overall IQ and results related to memory, he was not substantially limited in test-taking or working when compared to members of the general

population, especially as evidenced by his professional success. The doctor appealed this decision, and the DOJ filed a brief in support of the doctor; however, the appellate court choose not to address this issue by affirming the district court's decision on other grounds.

When courts compare a high-achieving individual to the general population, as opposed to his or her peer group, it is often more challenging to show a substantial limitation in light of the individual's relative abilities. Another example comes from *Bibber v. Nat'l Bd. of Osteopathic Med. Examiner*, where a medical school student with dyslexia sought accommodations on a licensing examination.[81] After a three-day hearing on the plaintiff's request for injunctive relief, the court held that she was not disabled under the ADA. In so finding, the court acknowledged that the plaintiff was diagnosed with dyslexia and that this impairment affected her ability to read and process information. It also acknowledged that the ADAAA broadened the phrase substantial limitation. Nonetheless, it held that the plaintiff's reading abilities were average when compared to most people in the general population. It noted that the plaintiff's psychometric tests show average results. It also referenced plaintiff's GRE and MCAT scores, where she scored average without accommodations, as well as her performance on predictive examinations. Finally, the court noted that the plaintiff was an avid reader with "no problem reading menus or traffic signs."[82] The court reached this conclusion despite the conflicting evidence that the plaintiff had trouble reading since her earliest days in formal education, had repeated kindergarten after struggling to learn the alphabet, had received extended time in high school, college, graduate and medical school, and had to study for more hours and had her friends read to her to help her increase speed. *See also Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112-13 (9th Cir. 2014) (cert denied by 135 S.Ct. 1500) (finding police officer with ADHD not to have a substantial limitation in working when compared to "most people in the general population" due to his professional successes).

Not all courts have reached similar conclusions, however. In *Floyd v. Lee*, a plaintiff with monocular vision was able to demonstrate a substantial limitation in reading based on disability verification form submitted for a bar examination saying that her disability causes her to take 20-30 percent longer than the general population for any given reading task.[83]

Expanded Definition of "Major Life Activities"

Before the ADAAA, litigation regularly focused on the definition of "major life activity," which caused a great deal of uncertainty. In response, Congress included examples of

major life activities in the ADAAA, and stated that its list was not exhaustive.[84] Specifically, the ADAAA identified the following major life activities: caring for oneself, walking and standing, performing manual tasks, reading, seeing, lifting, hearing, bending, eating, speaking, sleeping, breathing, learning, communicating, concentrating and thinking, and working.[85] Further, the EEOC's regulations identified three additional major life activities: interacting with others, sitting, and reaching.[86] Further, the recently issued DOJ regulations added "writing" as a major life activity, in addition to the activities identified in the ADA and the three activities identified by the EEOC.[87]

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

"interacting with others" was a major life activity under the ADAAA pursuant to the EEOC regulations.[88] Similarly, in *Jacobs v. N.C. Administrative Office of the Courts*, the court deferred to the EEOC's determination that "interacting with others" was a major life activity, and consequently found that the plaintiff's social anxiety disorder qualified as a disability under the broader definition of the ADAAA.[89] In *Jacobs*, the court found that the plaintiff presented sufficient evidence to establish a substantial limitation in interacting with others even though her anxiety was limited to performance situations, such as answering questions at the front counter of her job. The court emphasized that a "person need not live as a hermit … to be substantially limited" and that someone could have a substantial limitation if they avoid social situations or even simply endure them with intense anxiety.[90]

However, the *Weaving* case, discussed above, examines the scope of the major life activity of interacting with others.[91] In *Weaving*, the court found that a police offer with personality conflicts with colleagues and who had a childhood diagnosis of ADHD was not substantially limited in the ability to interact with others and reversed a jury verdict for the plaintiff. In so doing, it distinguished getting along with others from interacting with others. In this case, the plaintiff could engage in normal social interactions and had little difficulty getting along with supervisors; however, he had significant interpersonal problems with peers and subordinates. Said the court: A "cantankerous person" who has "trouble getting along with coworkers" is not disabled under the ADA."[92]

Another indication that courts are unlikely to delve into the question of major life activity comes from a district court case, *Thomas v. Bala Nursing & Retirement Center*.[93] In *Thomas*, the plaintiff asserted that she was substantially limited in sleeping because her

anemia caused her to sleep up to twelve hours per day. The defendant asserted that this limitation should be "characterized as 'waking up' instead of 'sleeping,' and that sleeping longer than the average individual is hardly a substantial *limitation* in sleeping."[94] The court rejected this argument, finding that it cannot conclude as a matter of law that "waking up" is not a major life activity.[95]

Over the past few years, courts have also confirmed that climbing can be a major life activity,[96] as well as physical activities, such as well as crawling, reaching, balancing, kneeling, carrying, pushing, and pulling.[97]

Although not described by the court as a major bodily function, a court in Texas concluded that thermogulation is a major life activity in light of the ADAAA's broadened standards. In *McCollum v. Livingston*, an individual with depression, diabetes, and high blood pressure died during his incarceration in a Texas prison.[98] His estate and family brought this case and asserted that he was substantially limited in the major life activity of thermoregulation—the ability to maintain a body temperature of 98.6 degrees. The court agreed, emphasizing the fact that the individual's inability to thermoregulate led to his death.

However, not all life activities are considered major. In *Telemaque v. Marriott, International, Inc.*, the employee asserted, among other things, that both his arthritis and high blood pressure restricted his ability to engage in daily exercise.[99] Specifically, he alleged that he was prevented from running, weight lifting, and jumping rope on a regular basis and because "those activities can cause chest pain and shortness of breath, which are hypertensive emergencies that can be life threatening."[100] The court rejected all of these exercise-related claims, and cited several other courts that have explicitly rejected exercise as a major life activity under the ADA.[101] This is one example of a court citing pre-ADAAA cases in reaching its conclusion.

Major Bodily Functions

Congress greatly expanded ADA coverage by broadening the definition of "major life activities" to include the concept of "major bodily functions."[102] The ADAAA defines major bodily functions to include: immune system, neurological, normal cell growth, brain, digestive, respiratory, bowel, circulatory, bladder, endocrine, and reproductive functions, and clarified that this is not an exhaustive list.[103] In its regulations, the EEOC identified seven additional major bodily functions: special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, musculoskeletal, and individual organ operation.[104] The DOJ regulations identify the same major bodily functions noted in the EEOC regulations.[105]

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

- Arterial conditions substantially limit the cardiovascular system[106]
- Kidney failure substantially limit the cleansing of the individual's blood and processing of waste[107]
- Muscular dystrophy substantially limits neurological functioning
- Diabetes substantially limits the endocrine function[108]
- Cancer substantially limits normal cell growth[109]
- HIV substantially limits the immune system[110]
- Heart disease substantially limits circulatory function[111]
- Irritable bowel syndrome substantially limits bowel functions[112]
- Graves' Disease substantially limits immune, circulatory and endocrine functions[113]
- Multiple Sclerosis substantially limits normal neurological functions[114]
- Muscular Dystrophy is presumed to substantially limit neurological functions[115]
- Brain tumor substantially limits brain functions and normal cell growth[116]
- Spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limit operation of the musculoskeletal system[117]
- Removal of stomach and other parties of gastrointestinal system substantially limit bowel and digestive bodily functions[118]
- Post Traumatic Stress Disorder substantially limits brain function[119]
- Hepatitis C substantially limits the immune system, digestive, bowel and bladder function[120]
- Coronary disease substantially limits the cardiovascular system[121]
- Sleep apnea substantially limits sleeping or breathing[122]

The case law regarding major bodily functions raises an interesting issue: what evidence must a plaintiff have to demonstrate a substantial limitation in a major bodily functions. Although the ADA says that plaintiff's need not have scientific and medical evidence, courts have explained that they need medical testimony because a lay person lacks the personal knowledge to testify about the operation of certain major bodily functions.

For instance, in *Scavetta v. Dillon Companies, Inc.*, an employee with rheumatoid arthritis lost a jury trial and appealed the jury instructions which focused only on whether she was limited in the traditional life activities but did not direct the jury to consider whether she was limited in any major bodily functions, including the musculoskeletal system.[123] The Fourth Circuit affirmed the decision and explained that the plaintiff had presented testimony only about her functional (not medical) limitations. Specifically, the plaintiff testified that she was limited in her ability to perform manual tasks, including opening prescription bottles, retracting needles, walking and lifting, but the only medical testimony was about arthritis generally, not as it applied to her. Consequently, because she had not provided evidence at trial, the court did not error in failing to instruct the jury about the concept of major bodily functions.

Similarly, in *Felkins v. City of Lakewood*, the plaintiff asserted that she had avascular necrosis, a rare condition that causes bone tissue to die from poor blood supply.[124] The court barred her from testifying about how avascular necrosis limits her as that is clearly "beyond the realm of common experiences."[125] Instead, she was permitted to testify only about her injuries, symptoms (such as pain) and difficulty walking, standing and lifting. *See also Grabin v. Marymount Manhattan College*, 2015 WL 4040823 (S.D.N.Y. July 2, 2015) (explaining that in certain situations, like this one where the plaintiff asserted that she had thalassemia, an immune disorder but offered no medical testimony in support, that proving substantial limitation may require scientific, medical, or statistical analysis because not all major life activities are comprehensible through lay person testimony).

At least one court, unfortunately, has failed to apply the concept of major bodily functions, reminding all plaintiffs litigating ADA cases to include a clear articulation of the relevant major life activity and/or major bodily function. In *Fierro v. Knight Transportation*, a *pro se* plaintiff brought an ADA claim and asserted that his cancer rendered him disabled under the ADAAA.[126] Relying on pre-ADAAA precedent, the court rejected the plaintiff's argument and stated that "merely having cancer-which, though, may be an 'impairment,'" is insufficient to establish a disability.[127] Without mentioning the concept of major bodily functions or cancer's impact on normal cell growth, the court dismissed the plaintiff's claim. Similarly, in cases involving rheumatoid arthritis and the immune disorder thalassemia, courts have declined to consider them inherently substantially limiting absent evidence that the employees at issue were actually impaired in one or more major bodily functions.[128]

EEOC's Regulatory Discussion of Specific Impairments

The EEOC regulations include a list of eighteen impairments that should easily be found to substantially limit a major life activity: deafness, blindness, mobility impairments requiring wheelchair, intellectual disability, partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, human immunodeficiency virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[129]

Courts are generally deferring to this list and finding plaintiffs with such impairments to be covered without engaging in a detailed analysis. As an example, in *Franklin v. City of Slidell*, the court stated: "Considering . . . that the EEOC regulations interpreting the ADA indicate that post-traumatic stress disorder is an impairment that should easily be concluded to substantially limit brain function, the Court finds that Plaintiff has adequately pleaded that he is disabled within the meaning of the ADA."[130] *See also Yanoski v. Silgan White Cap Americas, LLC*, 179 F.Supp.3d 413 (M.D. Penn. 2016) (emphasizing that "muscular dystrophy . . . is presumed under ADA regulations to substantially limit neurological function" when rejecting the defendant's argument that Plaintiff's muscular dystrophy did not rise to the level of an ADA disability because Plaintiff's evidence was based on "conclusory testimony and self-reported limitations"); *Jeffries v. Wal-Mart Stores E.,* 2016 WL 3771241 (D. Md. July 11, 2016) (citing 2012 case concluding that 'cancer will virtually always be a qualifying disability'); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013) ("The EEOC has advised that diabetes 'will, as a factual matter, virtually always be found to impose a substantial limitation' on endocrine function.").

Nonetheless, even with this list, most courts continue to hold that there are no *per se* disabilities and plaintiffs must offer some proof. For instance in *Kravits v. Shinseki*, the court noted that while post-traumatic stress disorder will "virtually always" be found to impose a substantial limitation on a major life activity, here, the plaintiff "identified no evidence" that he lived with post-traumatic stress disorder.[131] *See Son v. Baptist Healthcare Affiliates, Inc.*, 2015 WL 5305235 (W.D. Ky. Sept. 10, 2015) (epilepsy is not a *per se* disability).

As a result of the EEOC's list of predictable assessments, litigants are spending less time arguing about whether impairments found on the EEOC's list are ADA qualifying disabilities. It is possible the majority of litigation involving the definition of disability will involve impairments not specifically included in the EEOC's list, such as such as learning disabilities,[132] arthritis, anxiety and back injuries.

Transient or Short Term Impairments

Courts have had occasion to consider whether people with transient or short term impairments qualify as disabled under the "actual disability" or "record of" prong. According to EEOC and DOJ regulations, short term impairments can be substantially limiting, and the exception discussed below regarding temporary impairments under the "regarded as" prong does not apply to the other two methods of proving disability.[133] Indeed, the EEOC and DOJ confirmed that "the effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting within the meaning" of the definition of actual disability and record of disability.[134]

A handful of cases have addressed this issue thus far, and have different interpretations of this provision, making this area another one that is ripe for future litigation. In *Summers v. Altarum Institute, Inc.*, an employee sustained severe knee injuries from a fall resulting in a fractured left leg and right ankle as well as a torn meniscus tendon in his knee that required surgery and left him unable to walk "normally" for seven months.[135] The district court had held that despite the severe nature of the plaintiff's injury, it did not qualify as a disability because it was temporary and expected to heal within a year. On appeal, the Fourth Circuit reversed and held that it was "clear" that the plaintiff's impairment was severe enough to qualify as a disability. The court stated that while this holding was "an entirely reasonable interpretation of *Toyota* and its progeny," it was at odds with the broader standards of the ADAAA, under which the employee had "unquestionably" alleged a disability.[136] The court also found that the EEOC's determination that the ADAAA included severe temporary impairments was reasonable, because "[t]he stated goal of the ADAAA is to expand the scope of protection available under the Act as broadly as the texts permits", and "[t]he EEOC's interpretation… advances that goal."[137] *See also Benson v. Tyson Foods Inc.*, 2016 WL 3617803 (E.D. Tex. July 6, 2016) (rejecting employer's argument that the plaintiff lacked an ADA disability because there was no evidence of permanent or long-term impact when the plaintiff experienced a workplace injury requiring her to take medical leave and working with restrictions on bending, twisting, squatting and kneeling); *Bob-Manuel v. Chipotle Mexican Grill, Inc.,* 10 F.Supp.3d 854 (N.D. Ill. 2014) (noting that temporary impairments can be disabilities under the ADA, such as the case here, where the employee had a hernia causing extreme pain making it difficult to lift).

Still, courts are unlikely to find individuals with ailments that are both temporary and not severe to be covered by the ADA. In *Lewis v. Florida Default Law Group, P.L.*, the court found that a plaintiff who contracted the H1N1 virus and could not perform various major life activities for a period of one to two weeks did not have an ADA qualifying disability because the plaintiff's inability to perform functions for this "extremely short duration" is

not a substantial limitation.[138] Similarly, in *Willis v. Noble Environmental Power, LLC*, a district court found that a one time incident of dehydration and possible heat stroke which lasted for a few hours did not qualify an employee as disabled as it was quick and not severe.[139] However, another Texas district court found that an employee who had a medical restriction for around one year following a work injury had raised a triable issue of fact that she had an impairment that substantially limited one or more major life activities. *See also Baum v. Metro Restoration Servs., Inc*., 2017 WL 939012 (W.D. Ky. Mar. 9, 2017) (finding heart diagnosis was not substantially limiting as it only prevented plaintiff from lifting for one week).

There is at least one troublesome case regarding non-permanent impairments. In *Green v. DGG Properties Co., Inc.*, a *pro se* plaintiff brought a claim under Title III following his experience at an inaccessible hotel.[140] Although the plaintiff permanently lacked complete mobility and had undergone three surgeries, in his complaint, he qualified such allegations and pled that he used a walker and wheelchair *at the time of his visit*. The court interpreted this pleading to imply that the plaintiff's need for a mobility device was temporary. Perhaps due to the plaintiff's inadequate pleading, or possibly due to error in light of the modified legal standards, the court, citing a wide range of pre-ADAAA cases, concluded that the plaintiff was not covered by the ADAAA because "even under the ADAAA's broadened definition of disability, short term impairments would still not render a person disabled within the meaning of the statute."[141]

Broad Definition of "Regarded As"

The ADAAA redefined the "regarded as" prong of the definition of disability by significantly broadening who is eligible for coverage. Specifically, the ADAAA removed the requirement that an individual demonstrate that he was regarded as having an impairment that substantially limits a major life activity. Now, under the ADAAA, an individual only needs to show that he is regarded as having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially limiting.[142]

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

an impairment."[143] This principle has been reiterated in the case law. For instance, in *Alexander v. Wash. Metro. Area Transit Authority*, the D.C. Circuit Court stated that the "'regarded-as-prong' has become the primary avenue for bringing" most claims of discrimination.[144]

Most courts are properly applying this new iteration of the "regarded as" prong. In *Alexander v. Washington Metropolitan Area Transit Authority*, for example, an employee with alcoholism was suspended for using alcohol at work, but then permitted to return subject to periodic alcohol testing. After failing a test, he was fired but told that he could reapply after one year if he completed an intensive alcohol dependency treatment program. The employee did that but was not rehired. He filed a lawsuit and the issue before the court was whether he was a person with a disability. The district concluded that he was not because the plaintiff's alcoholism did not substantially limit one or more major life activities. The D.C. Circuit Court reversed the decision, and made a number of strong statements about the breadth and scope of the "regarded as" clause. It reasoned that here, there was no dispute that alcoholism is an impairment under the ADAAA and that all the plaintiff needed to do was show that the employer took action against an employee because of a perceived impairment, which he did.

Another example can be found in *Cannon v. Jacobs Field Services*, where an employee with a torn rotator cuff received a conditional job offer and had a pre-employment exam.[145] He was cleared for work with certain accommodations, including no driving company vehicles, no lifting, pushing, or pulling over ten pounds, and no working with his hands above shoulder level. The Fifth Circuit found that the employee's regarded as claim "easily passes muster under the revised standard" due to, among other things, that he was cleared to work but then the manager said that the employee would not be able to meet the project needs due to the job requirements.[146] Similarly, in *Burton v. Freescale Semiconductor*, the court again explained that the plaintiff only needs to show the perception of an impairment.[147] Here, the employer knew of the plaintiff's impairment as the employee reported an injury to the personnel department, had disclosed palpitations and had sent emails about the need "to sit down for a bit," "chest pains," and trouble breathing. *See also Stragapede v. City of Evanston*, 69 F. Supp. 3d 856 (N.D. Ill. 2014) (finding that the employee was deemed "regarded as" disabled when he was fired because of his perceived mental impairment following a head injury and that no substantial limitation is necessary).

In other words, courts are finding that whether an individual is regarded as having an impairment is "not subject to a functional test."[148] *See Saley v. Caney Fork, LLC*, 886 F.Supp.2d 837, 851 (M.D. Tenn. 2012) (finding employee to be regarded as having a

disability and noted that an employee with hemochromatosis "may recover under the 'regarded as' prong in the absence of visible symptoms, or any symptoms at all"); *Johnson v. Farmers Insurance Exchange*, 2012 WL 95387, at *1-2 (W.D. Okla. Jan. 12, 2012) (rejecting defendant's argument that plaintiff was not regarded as having a disability because her sleep apnea did not substantially limit a major life activity).

The stark difference between the pre-ADAAA and post-ADAAA standards required to satisfy the "regarded as" prong is clearly illustrated in *Wolfe v. Postmaster General*.[149] In *Wolfe*, an individual with ADHD alleged that he endured discrimination both before and after the ADAAA's effective date. The individual argued that his supervisors perceived his ADHD to substantially limit his ability to work. With respect to the pre-ADAAA allegations, the court disagreed. The court explained that although some of the employee's supervisors testified that they believed the individual's limited attention span occasionally affected his ability to stay in his work area, there was no evidence that they perceived his impairment to foreclose or substantially limit his ability to work in a "broad class of jobs," which was required to show a substantial limitation in the major life activity of working. However, with respect to the individual's post-ADAAA allegations, the court came to a different conclusion. Explaining that that under the ADAAA, "a plaintiff need demonstrate only that the employer regarded him as being impaired, not that the employer believed the impairment prevented the plaintiff from performing a major life activity," the court quickly concluded that the plaintiff "carried his burden of showing that [his employer] regarded him as disabled."[150] Note, however, that the court still granted the employer's motion for summary judgment because the employee failed to provide sufficient evidence that he was discriminated against because of his perceived disability.

"Transitory and Minor"

To address concerns from the business community regarding the breadth of the new "regarded as" prong, Congress created an exception for impairments that are both transitory and minor. The ADAAA defines a transitory impairment as one that has an actual or expected duration of six months or less, but it does not define the term "minor."[151]

Some defendants have argued that cases should be dismissed because the plaintiff's impairment was either transitory *or* minor. These types of assertions have mostly failed, as most courts are complying with the ADAAA's language that requires an impairment to be *both* temporary and minor to fall within the scope of its exemption. In *Davis v. NYC Dept. of Education*, the court found that an employee sufficiently pled that she was regarded as having a disability, even though her back and shoulder impairments may

have been "transitory," because there was nothing to suggest that her impairments were "minor."[152]

Courts have found the flu and non-episodic anemia to be objectively both transitory and minor. *See Lewis v. Florida Default Law Group*, 2011 WL 4527456, at *5-7 (M.D. Fla. 2011) (H1N1 virus); *LaPier v. Prince George's County, Maryland.*, 2011 WL 4501372, at *5 (D. Md. Sept. 27, 2011) (non-episodic anemia lasting one week). These decisions appear to be consistent with the plain language of the ADAAA and the EEOC's regulations. Similarly, a one-time instance of dehydration and heat stroke, which only lasted for a few hours was considered to be transitory and minor. *See Willis*, 143 F.Supp.3d at 484.

Courts found the following conditions to be both transitory and minor:

- Broken finger[153]
- Broken bones that healed within two months[154]
- Dehydration episode lasting only a few hours[155]
- Injuries from a car accident that were recovered within a week[156]
- Flu / H1N1[157]
- Non-episodic anemia lasting one week[158]

Courts are also concluding that whether an impairment is "transitory and minor" is an objective determination.[159] In *Suggs v. Central Oil of Baton Rouge, LLC*, the court held that the defendant must *objectively* show that an impairment is both transitory and minor.[160] In this case, it found that the defendant failed to provide any evidence or argument that the employee's carotid artery disease was both transitory and minor, and noted that the employee had produced evidence that his carotid artery disease was substantially limiting and had been treated with prescription medication for well over six months.

That said, if the employer's perception is that the impairment is not transitory and minor, that too can be sufficient to establish a regarded as claim. In *Odysseos v. Rine Motors, Inc.*, the plaintiff had a biopsy incision, which became infected and he had to be questions such as: Will your infection come back? How is your heart? Do you still have a fast heartbeat? The court concluded that these questions suggested that the defendant believed the plaintiff's diagnostic heart monitoring to be symptomatic of a disabling impairment and therefore, did not perceive the plaintiff to have an impairment that was transitory and minor—even if it was objectively minor.

Case Law on Reasonable Accommodations and "Regarded As"

The ADAAA's other significant revision to the "regarded as" prong is that individuals that qualify for coverage under the "regarded as" prong are not entitled to a reasonable accommodation under Title I.[161]

Courts are following the ADAAA's language requirement that employees covered by the ADAAA's "regarded as" prong no longer may bring a claim for failure to accommodate. In *Ryan v. Columbus Regional Healthcare System*, the plaintiff worked as an operating room nurse and had a degenerative joint disease and arthritis in her knee.[162] After exhausting her FMLA leave, the plaintiff requested a number of accommodations including limited standing, stooping, kneeling and crouching. The employer denied these requests, and the employee filed suit, alleging that she was regarded as having a disability. Because the ADAAA does not require employers to accommodate employees who are regarded as disabled, the court dismissed the claim.

This new provision can have implications for individuals who are trying to prove that they are "qualified" under the ADA. For instance, in *Walker v. Venetian Casino Resort, LLC*, a cocktail server at the Venetian Casino Restaurant was injured on the job and subsequently terminated.[163] She brought a claim alleging that she was regarded as disabled, and in response, her former employer argued that she was not qualified to do her job. The employee agreed that she was not qualified without a reasonable accommodation, but asserted that she would have been qualified under an accommodated reassignment. Because the ADAAA does not require employers to accommodate individuals under the "regarded as" prong, and because the plaintiff could not demonstrate that she was qualified absent a reasonable accommodation, the court found that the plaintiff failed to properly allege the elements of her ADA claim. *See Chamberlain v. Securian Fin. Grp., Inc*., 180 F. Supp. 3d 381, 405 (W.D.N.C. 2016) ("Because the court has found that Plaintiff has only presented evidence that he meets the definition of disabled by virtue of being regarded as disabled, Plaintiff's failure to accommodate claim must fail.")

Regulatory Authority

In the ADAAA, Congress expressly granted authority to the EEOC, DOJ, and Department of Transportation to issue regulations interpreting the definition of disability under the ADA.[164] It did this in response to the Supreme Court decision declining to give deference to the definition of disability as set forth by federal agencies.[165] So far, there has been no real question as to whether courts should afford deference to agency regulations. In the few cases that have acknowledged this statutory provision, they have simply cited it in conjunction with the federal agency regulations.

In *Floyd v. Lee*, for example, the court cited the EEOC's regulations regarding the term "substantially limits," giving it controlling weight and stating: "Congress expressly delegated to the EEOC "the authority to issue regulations implementing the definitions of disability."[166] Similarly, in *Kravits v. Shinseki*, the court cited the EEOC's regulations regarding the term "substantially limits" and noted the statutory rule of construction regarding regulatory authority.[167] *See also Rodríguez-Álvarez v. Díaz*, 2017 WL 666052 (D.P.R. Feb. 17, 2017) ("This Court relies on the expertise of the EEOC and defers to its well-considered regulations" regarding HIV as a disability).

On August 11, 2016, the DOJ published a Final Rule in the Federal Register containing its regulations under the ADAAA. Because these regulations took effect as of October 11, 2016, it is too soon to know how the courts will interpret the DOJ regulations. Thus far, the Department of Transportation has not issued new regulations under the ADAAA.

Retroactivity of ADA Amendments Act

In the first few years following the ADAAA's enactment, a significant number of cases assessed whether the ADAAA applied to claims that arose before January 1, 2009, the ADAAA's effective date.[168] Courts nearly universally held that the ADAAA should not be applied retroactively.[169] In fact, twelve of the thirteen circuit courts to consider this issue held that the ADAAA should not be applied retroactively.[170] These courts applied the general rule that absent clear congressional intent, statutes are not applied retroactively because it is unfair to hold a defendant liable for a standard articulated after it engaged in the alleged conduct.[171] In addition to the courts, the EEOC also opined that the ADAAA does not apply retroactively in its *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*.[172]

However, at least one court applied the ADAAA retroactively when the plaintiff sought prospective injunctive relief. In *Jenkins v. National Board of Medical Examiners*, the Sixth Circuit reversed the district court's decision that held that the plaintiff did not have an ADA-qualifying disability.[173] The appellate court explained that because the plaintiff

sought "the right to receive an accommodation on a test that will occur in the future, well after [the ADAAA's] effective date," the new and broader standard should apply.

Although courts declined to apply the ADAAA retroactively, many still noted the new law in its decisions or used it to bolster their holding. *See*, *e.g.*, *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 862 (9th Cir. 2009) ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions."); *Cook v. Equilon Enterprises, L.L.C.*, 2010 WL 4367004, *7 (S.D. Tex. 2010) (noting that while conduct occurring prior to January 1, 2009 would be governed by the ADA and pre-ADAAA case law, "events that occurred after the ADAAA's effective date must be evaluated in light of Congress's significant alterations to courts' 'disability' inquiry.").

Hot Topic: Obesity as a Disability

Whether obesity can be a disability under the ADA is a question that has continued to challenge the courts and has resulted in diverging decisions throughout the circuits. The root of this issue is whether obesity is in of itself an impairment.

The EEOC has taken the position that being overweight is not necessarily an impairment, but that "severe obesity" defined as "body weight more than 100% over the norm," is an impairment.[174] The EEOC's position is based on its regulatory guidance, which provides that an "'impairment' does not include physical characteristics such as . . . weight . . . that are within 'normal' range and are not the result of a physiological disorder."[175] Accordingly, it has concluded that "severe obesity" or "body weight more than 100% over the norm" is a disability in and of itself and does not require an additional physiological impairment.[176]

Agreeing with the EEOC's position, the court in *Whittaker v. America's Car-Mart, Inc.*, found that an employee with severe obesity had plead sufficient facts to support a legal conclusion that he was disabled within the meaning of the ADA.[177] In reaching this decision, the court emphasized that the ADAAA was intended to provide broad coverage by construing the meaning of disability to the maximum extent permitted by the law. *See also EEOC v. Res. For Human Development, Inc.,* 827 F.Supp.2d 688, 694 (E.D. La. 2011) (concluding that the requirement for a physiological cause is only required when a

charging party's weight is within the normal range and that there is no explicit requirement that obesity be based on a physiological impairment.").

However, a recent Eighth Circuit decision, *Morriss v. BNSF Railway Company*, rejected this interpretation when considering an appeal by a prospective employee who alleged discrimination after his prospective employer revoked his conditional offer of employment following a medical examination.[178] The company had a requirement that applicants for a safety sensitive job must have a body mass index (BMI) under 40. The plaintiff was 5'10," 270 pounds, and had a BMI of 40.9. While the court acknowledged the conflicting case law, it disagreed with the EEOC's position, as stated in its compliance manual, as well as the way its regulatory interpretation had been understood. Instead, the court concluded that under the plain language of the regulations, obesity cannot qualify as a physical impairment unless it is a physiological disorder or condition that affects a major body system.[179] Moveover, the court relied on pre-ADAAA opinions from the Sixth and Second Circuits, which had concluded that obesity is not a physical impairment unless it results from a physiological condition.[180] When the plaintiff challenged the relevance of these cases as pre-ADAAA, the court noted that "the ADAAA did not alter" the definition of "impairment" and thus "pre-ADAAA caselaw holding that obesity qualifies as a physical impairment only if it results from an underlying physiological disorder or condition remains relevant and persuasive."[181] A striking element of the *Morriss* opinion is the extent to which the court reached a result which they acknowledge is at odds with the EEOC's statutory interpretation and to a lesser extent, the stated purpose of the ADAAA. Also striking is the court's reliance on pre-ADAAA cases (some 20 years old), on the basis that they were not expressly abrogated. Thus, it will be instructive to watch for subsequent court interpretations of obesity as a physical impairment, to see if they defer to the EEOC's interpretation and take a more skeptical view toward pre-ADAAA rulings. The Supreme Court denied the petition for cert in this case, so there is not likely to be a final determination on this issue in the near future.

Hot Topic: Pregnancy as a Disability

Courts have consistently held that pregnancy itself does not qualify as a disability because while pregnancy is a physiological condition, it is not an impairment. Even before the ADAAA, courts had noted that pregnancy-related conditions and complications could potentially qualify for coverage.[182] *See Darian v. Univ. Mass. Boston*, 980 F.Supp. 77, 85-86 (D. Mass. 1997); *Gorman v. Wells Mfg. Corp.*, 209 F.Supp.2d 970, 975–76 (S.D. Iowa 2002) (noting that "a majority of federal courts hold

that absent unusual circumstances, pregnancy-related medical conditions do not constitute a disability").

However, the broadened interpretation of terms like substantial limitation, and clarification about short term impairments under the ADAAA, make it easier for plaintiffs with pregnancy-related impairments to seek coverage.[183] In *Price v. UTI*, an employee brought a case after she was terminated following FMLA leave taken for severe pregnancy complications for a high-risk pregnancy requiring bed-rest.[184] The employer asserted that pregnancy is not a disability because it is temporary. This reasoning was rejected by the court, which cited the ADAAA and regulations and found that an impairment need not be permanent or long term, and that complications related to pregnancy can qualify as a physiological disorder affecting the reproductive system. Similarly, in *Alexander v. Trilogy Health Systems, LLC*, a court found that the pregnancy-related condition preeclampsia qualified as a disability under the ADAAA, as it was a physiological disorder affecting the cardiovascular and urinary systems.[185]

Unsurprisingly, plaintiffs with severe complications are more likely to be covered by the ADA. In *Mayorga v. Alorica, Inc.*, the court found that an employee with 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 had stated a plausible claim for relief.[186] In *Nayak v. St. Vincent Hosp. & Health Care Ctr.*, a court rejected an employer's motion to dismiss the complaint of a pregnant employee who had experienced severe morning sickness, and after losing one fetus and giving birth to another, experienced severe pelvic pain, and was fired when she could not return to work.[187] The court based its decision to allow the claim to proceed on the ADAAA, holding that pre-ADAAA cases concerning pregnancy were no longer persuasive. *See also Alexander v. Trilogy Health Systems, LLC*, 2012 WL 5268701 (S.D. Ohio Oct. 23, 2012) (pregnancy-related preeclampsia is a disability as it is a physiological disorder affecting cardiovascular/urinary systems).

In contrast, not all courts have viewed the protections as broadly. In *Jeudy v. Holder*, a court considered a Rehabilitation Act claim brought by a federal employee with severe pain, including thyroid pain, due to pregnancy-related complications.[188] The court dismissed the plaintiff's case, finding that while the employee experienced limitations from her pregnancy complications (including a doctor's note stating she should not repetitively climb stairs), she was not substantially limited in a major life activity compared with the general population.

As with other ADAAA claims, those involving pregnancy will necessarily depend on the facts of the individual case. Nevertheless, there does appear to be a shared awareness in post-ADAAA cases considering pregnancy that employee disability discrimination claims were to be interpreted in light of the broader definition of disability and more lenient pleading standards implemented under the statute.

Conclusion

Nine years ago, Congress passed the ADAAA in attempt to significantly expand the ADA's coverage for people with disabilities. As analyzed in this Legal Brief, courts are generally complying with this directive and broadly interpreting the definition of disability. Perhaps most successful at broadening coverage are the regulatory list of predictable assessments list, clarification about conditions that are episodic or in remission, and the new concept of major bodily functions. Advocates should remember that despite the ADAAA, plaintiffs must still provide proof to substantiate their claims. As a general matter, the ADAAA has effectively broadened protections for people with disabilities, just as Congress intended, and successfully focused the judicial analysis away from whether an individual has a disability, and toward whether discrimination occurred.

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[1] This legal brief was updated in 2018 by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline, and Jordan Silver, Contract Attorney, with Equip for Equality. This legal brief was initially written in 2013 by Barry C. Taylor and Rachel M. Weisberg. Equip for Equality is the protection and advocacy system for the State of Illinois, and is providing this information under a subcontract with Great Lakes ADA Center, funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DP0091-02-00).

[2] Americans with Disabilities Act, 42 U.S.C. §§ 12102(2), 12112(B)(4).

[3] 42 U.S.C. § 12102(1); Rehabilitation Act of 1973, Pub. L. No. 93-112 §§ 7(6), 504, 87 Stat. 355, 361, 394 (1973).

[4] *School Bd. of Nassau County, v. Arline*, 480 U.S. 273, 285 (1987).

[5] *Sutton v. United Air Lines Inc*., 527 U.S. 471 (1999); *Murphy v. United Parcel Service Inc*., 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that the effects of corrective measures must be taken into account when determining if plaintiff has an ADA disability and refusing to give deference to regulations on this issue).

[6] *Toyota Motor Manufacturing, Kentucky, Incorporated v. Williams*, 534 U.S. 184, 197-98 (2002) (deviating from traditional civil rights jurisprudence and holding that the elements of the definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled").

[7] *Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874 (11th Cir. 2007).

[8] *Todd v. Academy Corp*., 57 F.Supp.2d 448 (S.D. Tex. 1999).

[9] *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

[10] *Johnson v. North Carolina Dep't of Health and Human Services* (M.D.N.C. 2006).

[11] *Sorensen v. University of Utah Hosp*., 194 F.3d 1084 (10th Cir. 1999).

[12] *Eckhaus v. Consolidated Rail Corp*., 2003 WL 23205042 (D.N.J. 2003).

[13] *Wood v. Crown Redi-Mix, Inc*., 339 F.3d 682 (8th Cir. 2003).

[14] *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

[15] *Rohan v. Networks Presentations LLC,* 375 F.3d 266 (4th Cir. 2004).

[16] *Epstein v. Kalvin-Miller Intern., Inc*., 121 F.Supp.2d 742 (S.D.N.Y. 2000).

[17] *McMullin v. Ashcroft,* 337 F.Supp.2d 1281 (D. Wy. 2004).

[18] *Cruz Carrillo v. AMR Eagle, Inc*., 148 F.Supp.2d 142 (D.P.R. 2001).

[19] *Tangires v. Johns Hopkins Hosp.,* 79 F.Supp.2d 587 (D. Md. 2000).

[20] *Burnett v. LFW, Inc.,* 472 F.3d 471 (7th Cir. 2006).

[21] ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[22] 42 U.S.C. § 12101 note (b)(1) (2013).

[23] 42 U.S.C. § 12101 note (b)(1) (2013); *see also* Joint Remarks of Rep. Steny Hoyer and Rep. Jim Sensenbrenner on *S. 3406*, 154 Cong. Rec. H8294 (daily ed. Sept. 17, 2008) ("With the passage of the [ADAAA], we ensure that the ADA's promise for people with disabilities will be finally fulfilled. Our expectation is that this law will afford people with disabilities the freedom to participate in our community, free from discrimination and its segregating effects, that we sought to achieve with the original ADA.")

[24] *See* National Council on Disability, Righting the ADA (Dec. 1, 2004). Available at: http://www.ncd.gov/publications/2004/Dec12004 (last accessed September 4, 2013); National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, 17 (July 23, 2013). Available at: www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb (last accessed August 13, 2013).

[25] 42 U.S.C. § 12102(4)(A).

[26] 29 C.F.R. § 1630.1(c)(4) (EEOC); 28 C.F.R. Parts 35 and 36 § 35.101 (a) (2016) (DOJ).

[27] 29 C.F.R. § 1630.1(c)(4).

[28] *Toyota Motor Manufacturing*, 534 U.S. at 197–98.

[29] *Gage v. Rymes Heating Oils, Inc.,* 2016 WL 843262 (D.N.H. Mar. 01, 2016).

[30] *Yanoski v. Silgan White Cap Americas, LLC*, 179 F.Supp.3d 413 (M.D. Penn. 2016).

[31] *Cannon v. Jacobs Field Servs.,* 813 F.3d 586 (5th Cir. 2016).

[32] *Matthews v. Penn. Dep't of Corr.*, 613 F. App'x 163 (3d Cir. 2015).

[33] *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015).

[34] *Ceska v. City of Chicago*, 2015 WL 468767 (N.D. Ill. Feb. 3, 2015).

[35] *Edwards v. Chevron U.S.A., Inc.,* 2013 WL 474770, at *2 (S.D. Tex. Feb. 7, 2013).

[36] *Id*.; *see also McLean v. Abington Memorial Hospital*, 2015 WL 5439061 (E.D. Pa. Sept. 15, 2015) (the entire disability analysis: "McLean suffers from sleep apnea, an agreed disability under the ADA").

[37] *See, e.g., Kravits*, 2012 WL 604169, at *5 (citing 29 C.F.R. § 1630.2(j)(1)(i), (iii)).

[38] *Gibbs v. ADS Alliance Data Sys., Inc.*, 2011 WL 3205779, at *1-3 (D. Kan. July 28, 2011).

[39] *Id*. at *3.

[40] *Cannon v. Jacobs Field Services North America, Inc.*, 813 F.3d 586, 590-91 (5th Cir. 2016)

[41] *Id.*

[42] *Id*. at 591.

[43] *Mazzeo v. Color Resolutions International, LLC,* 746 F.3d 1264 (11th Cir. 2014).

[44] *Neely v. Benchmark Family Servs.*, 640 F. App'x 429 (6th Cir. 2016).

[45] *Telemaque v. Marriott International, Inc.*, 2016 WL 406384, *7-8 (S.D.N.Y. February 02, 2016).

[46] *Id*. at *7.

[47] 42 U.S.C. § 12102(4)(D).

[48] 29 C.F.R. § 1630.2(j)(1)(vii) (EEOC); 35.108(d)(1)(iv) and 36.105(d)(1)(iv) (DOJ).

[49] 29 C.F.R. Pt. 1630 App., § 1630.2(j)(1)(vii) (EEOC); 28 C.F.R. Pt. 35, App. C, § § 35.108(d)(1)(iv) and 36.105(d)(1)(iv) (DOJ).

[50] *Jones v. Honda of America Mfg.*, 2015 WL 1036382 (S.D. Ohio Mar. 9, 2015).

[51] *Gage v. Rymes Heating Oils, Inc.*, 2016 WL 843262, *7-8 (D.N.H. Mar. 01, 2016).

[52] *Id*.

[53] *EEOC v. Aurora Health Care, Inc.,* 2015 WL 2344727 (E.D. Wis. May 14, 2015).

[54] *Barlia v. MWI Veterinary Supply, Inc.*, 2017 WL 345644, *5-8 (E.D. Mich. Jan. 24, 2017).

[55] *Esparza v. Pierre Foods,* 923 F.Supp.2d 1099, 1103-06 (S.D. Ohio 2013).

[56] *Molina v. DSI Renal, Inc.,* 840 F. Supp. 2d 984, 993-96 (W.D. Tex. 2012) (finding that whether lumber internal disc derangement, lumbar radiculopathy, and lumbago, all causing periodic bouts of severe pain in plaintiff's pelvis, thighs, feet, and back, substantially limited plaintiff's ability to stand, sit, and walk were substantially limiting when active).

[57] *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *10-11 (W.D. Pa. June 11, 2012) (caused plaintiff to experience "losing voice" and pain in speaking).

[58] *Carbaugh v. Unisoft Int'l, Inc.*, 2011 WL 5553724 at *8 (S.D. Tex. Nov. 15, 2011) (finding that Multiple Sclerosis is substantially limiting when active).

[59] *Allen v. Baltimore Cty., Md.*, 91 F.Supp.3d 722 (D. Md. 2015)

[60] *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170 (7th Cir. 2013).

[61] *Kinney v. Century Services Corp. II,* 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011).

[62] *Hardin v. Christus Health Southeast Texas St. Elizabeth*, 2012 WL 760642 (E.D. Tex. Jan. 6, 2012).

[63] *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013).

[64] *Edwards v. Chevron U.S.A., Inc.,* 2013 WL 474770 (S.D. Tex. Feb. 7, 2013).

[65] *Ferrante v. Capitol Reg'l Educ. Council*, 2015 WL 1445206 (D. Conn. Mar. 30, 2015).

[66] *George v. Fresenius Med. Care N. Am.,* 2016 WL 4944130 (M.D. La. Sept, 15, 2016).

[67] *Lang v. Oregon Shakespeare Festival Ass'n City of Ashland*, 2016 WL 1465086 (D. Or. Apr. 12, 2016).

[68] ADA Amendments Act § 2(b)(3).

[69] *Id*. at §§ 12102(4)(E)(i).

[70] 29 C.F.R. § 1630.2(j)(5)(v) (EEOC); 28 C.F.R. § § 35.108(d)(4), 36.105(d)(4) (DOJ)

[71] 29 C.F.R. § 1630.2(j)(1)(vi) (EEOC); 28 C.F.R. Pt. 35, App. C, § § 35.108(d)(1)(viii) and 36.105(d)(1)(viii) (DOJ).

[72] 29 C.F.R. Part 1630 app. § 1630.2(j)(1)(vi).

[73] *Ceska v. City of Chicago*, 2015 WL 468767 (N.D. Ill. Feb. 3, 2015).

[74] *Orne v. Christie*, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013).

[75] *Id*.

[76] 29 C.F.R. Part 1630 app. § 1630.2(j)(1)(vi).

[77] *Sanders v. Judson Ctr., Inc.*, 2014 WL 3865209 (E.D. Mich. Aug. 6, 2014).

[78] *Lloyd v. Housing Authority*, 857 F.Supp.2d 1252, 1263-64 (M.D. Ala. 2012).

[79] *Gaylor v. Greenbriar of Dahlonega Shopping Center,* 975 F. Supp. 2d 1374 (N.D. Ga. 2013).

[80] *Rawdin v. American Board of Pediatrics,* 985 F.Supp.2d 636 (E.D. Pa. 2013); *Rawdin v. American Board of Pediatrics*, 582 Fed.Appx. 114 (3d Cir. 2014).

[81] *Bibber v. Nat'l Bd. of Osteopathic Med. Examiner* 2016 WL 1404157 (E.D. Pa. 2016).

[82] *Id*.

[83] *Floyd v. Lee,* 85 F. Supp. 3d 482 (D.D.C. 2015).

[84] 42 U.S.C. § 12102(2)(A).

[85] *Id*.

[86] 29 C.F.R. § 1630.2(i)(1)(i).

[87] *See* 29 C.F.R. Parts 35 and 36 §§ 35.108(c), 36.105(c) (2016).

[88] *Bar-Meir v. Univ. of Minnesota*, 2012 WL 2402849, at *2-3 (D. Minn. June 26, 2012) (dismissing case because plaintiff failed to show causation between disability and adverse employment action).

[89] *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 572-75 (4th Cir. 2015)

[90] *Id*.

[91] *Weaving v. City of Hillsboro*, 763 F.3d at 1112-15 (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999)).

[92] *Id.*

[93] *Thomas v. Bala Nursing & Ret. Ctr.,* 2012 WL 2581057, n. 14 (E.D. Pa. July 3, 2012).

[94] *Id*.

[95] *Id*.

[96] *Rosa v. City of Chicago*, 2014 WL 1715484 (N.D. Ill. May 1, 2014).

[97] *Maxwell v. County of Cook*, 2014 WL 3859981 (N.D. Ill. Aug. 4, 2014).

[98] *McCollum v. Livingston*, 2017 WL 608665 (S.D. Tex. Feb. 3, 2017).

[99] *Telemaque v. Marriott International, Inc.*, 2016 WL 406384, *7-9 (S.D.N.Y. Feb. 2, 2016).

[100] *Id*.

[101] *See id*. at *7-8. *See also Schroeder v. Suffolk Cty. Cmty. Coll.*, 2009 WL 1748869, at *6 n.2 (E.D.N.Y. June 22, 2009) ("[A]ctivities such as running and jumping have been held to not constitute major life activities within the meaning of the ADA."); *Johns-Davila v. City of New York*, 2000 WL 1725418, at *6 (S.D.N.Y. Nov. 20, 2000) (collecting cases holding that exercise is not a major life activity).

[102] 42 U.S.C. § 12102(2)(B).

[103] *Id*.

[104] 29 C.F.R. § 1630.2(i)(1)(ii).

[105] 28 C.F.R. Parts 35 and 36 §35.108(c)(1)(ii) (2016).

[106] *Daniels v. Texas Dep't of Transportation*, 2016 WL 7188836 (E.D. Tex. Dec. 10, 2016).

[107] *Arroyo-Ruiz v. Triple-S Mgmt. Grp*., 206 F. Supp. 3d 701 (D.P.R. 2016).

[108] *Szarawara v. Cnty. of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013*). See also Tadder v. Board of Regents of University of Wisconsin System*, 15 F.Supp.3d 868, 881-86, n. 5-9 (W.D. Wisc. 2014) ("Post-ADAAA, the endocrine system is expressly listed as a 'major bodily function'…").

[109] *Punt v. Kelly Servs.,* 2016 WL 67654 (D. Colo. Jan. 6, 2016); *Haley v. Community Mercy Health Partners,* 2013 WL 322493, at *10 (S.D. Ohio Jan. 28, 2013) (breast cancer); *Angell v. Farmount Fire Protection Dist.*, 907 F.Supp.2d 1242, 1250-51 (D. Colo. 2012) (cancer in remission); *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (renal cancer); *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (heart disease and leukemia). *See also Katz v. Adecco USA, Inc.*, 845 F.Supp.2d 539, 548 (S.D.N.Y. 2012) ("Cancer will virtually always be a qualifying disability").

[110] *Horgan v. Simmons*, 704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010).

[111] *Chalfont*, 2010 WL 5341846, at *9 (heart disease and leukemia).

[112] *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638, at *7-8 (E.D. Pa. Dec. 12, 2011).

[113] *Seim*, 2011 WL 2149061, at *3.

[114] *Feldman v. Law Enforcement Assoc. Corp.*, 779 F.Supp.2d 472, 483-84 (E.D.N.C. 2011).

[115] *Yanoski v. Silgan White Cap Americas, LLC*, 179 F.Supp.3d 413, 427-28 (M.D. Penn. 2016).

[116] *Meinelt v. P.F. Chang's China Bistro*, 787 F.Supp.2d 643, 651-52 (S.D. Tex. 2011).

[117] *Barlow v. Walgreen Co*., 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012).

[118] *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10-11 (S.D.N.Y. July 9, 2012).

[119] *Franklin v. City of Slidell*, 2013 WL 1288405, at *10-11 (E.D. La. Mar. 27, 2013).

[120] *Hardin v. Christus Health Se. Texas St. Elizabeth*, 2012 WL 760642, at *6 (E.D. Tex. Jan. 6, 2012).

[121] *Hafermann v. Wisconsin Department of Corrections*, 2016 WL 206484, *4 (W.D. Wis. Jan. 15, 2016).

[122] *Id*.

[123] *Scavetta v. Dillon Companies, Inc.*, 569 Fed.Appx. 622 (10th Cir. 2014).

[124] *Felkins v. City of Lakewood*, 774 F.3d 647 (10th Cir. 2014).

[125] *Id*.

[126] *Fierro v. Knight Transp.*, 2012 WL 4321304, at *3 (W.D. Tex. Sept. 18, 2012).

[127] *Id*.

[128] *See Scavetta v. Dillon Companies, Inc.*, 569 Fed.Appx. 622 (10th Cir. 2014) and *Grabin v. Marymount Manhattan College Eyeglasses*, 2015 WL 4040823 (S.D.N.Y. 2015).

[129] 29 C.F.R. § 1630.2(j)(3)(iii).

[130] *Franklin v. City of Slidell*, 2013 WL 1288405, at *11 (E.D. La. Mar. 27, 2013).

[131] *Kravits*, 2012 WL 604169, at *5 (surviving summary judgment because plaintiff successfully established different disabilities).

[132] *See Healy v. National Board of Osteopathic Medical Examiners*, 870 F.Supp.2d 607, 620-21 (N.D. Ind. May 3, 2012) (finding the plaintiff's reading disorder not to be substantially limiting when compared to the general population).

[133] 29 C.F.R. § 1630.2(j)(1)(ix) (EEOC); 35.108(d)(1)(ix) and 36.105(d)(1)(ix) (DOJ).

[134] *Id*. (EEOC); 28 C.F.R. Parts 35 and 36 §35.108(c)(2)(d)(ix) (2016) (DOJ).

[135] *Summers v. Altarum Institute Corp.*, 740 F.3d 325, 329-330 (4th Cir. 2014).

[136] *Id.* at 329-332.

[137] *Id*. at 332.

[138] *Lewis v. Florida Default Law Grp., P.L.*, 2011 WL 4527456, at *5 (M.D. Fla. Sept. 16, 2011).

[139] *Willis v. Noble Environmental Power, LLC*, 143 F.Supp.3d 475, 480-83 (N.D. Tex. 2015).

[140] *Green v. DGG Properties Co., Inc.*, 2013 WL 395484, at *11 (D. Conn. Jan. 31, 2013).

[141] *Id*.

[142] 42 U.S.C. § 12012(3).

[143] 29 C.F.R. § 1630.2(g)(3).

[144] *Alexander v. Wash. Metro. Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016).

[145] *Cannon v. Jacobs Field Services*, 813 F.3d 586 (5th Cir. 2016).

[146] *Id*.

[147] *Burton v. Freescale Semiconductor*, 798 F.3d 222 (5th Cir. 2015).

[148] *Id*.

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

[150] *Id*. at 468.

[151] 42 U.S.C. § 12102(3)(B).

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

[153] *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245 (3d Cir. 2014).

[154] *Ashby v. Amscan, Inc.,* 2017 WL 939324 (W.D. Ky. Mar. 9, 2017).

[155] *Willis v. Noble Environmental Power, LLC*, 143 F.Supp.3d 475 (N.D. Tex. 2015).

[156] *Percoco v. Lowe's Home Centers, LLC*, 2015 WL 5050171 (D. Conn. Aug. 25, 2015).

[157] *Lewis v. Florida Default Law Group*, 2011 WL 4527456 (M.D. Fla. 2011).

[158] *LaPier v. Prince George's County, Maryland.*, 2011 WL 4501372 (D. Md. Sept. 27, 2011).

[159] *See*, *e.g*., *Davis*, 2012 WL 139255, at *5-6.

[160] *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, *5 (M.D. La. July 3, 2014).

[161] *Odysseos v. Rine Motors, Inc.*, 2017 WL 914252 (M.D. Pa. Mar. 8, 2017).

[162] 42 U.S.C. § 12201(h).

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

[164] *Walker v. Venetian Casino Resort, LLC*, 2012 WL 4794149, at *14-15 (D. Nev. Oct. 9, 2012).*Id*. at § 12205a.

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

[166] ADA Amendments Act § 2(b)(2);

[167] *Floyd v. Lee*, 85 F. Supp. 3d 482 (D.D.C. 2015).

[168] *Kravits*, 2012 WL 604169, at *5. ADA Amendments Act, Pub. L. No. 110-325 § 8, 122 Stat. 3553 (2008) ("[The ADAAA] shall become effective on January 1, 2009").

[169] *Kravits*, 2012 WL 604169, at *5.

[170] *See, e.g., Thornton v. United Parcel Serv., Inc.,* 587 F.3d 27, 35 n.3 (1st Cir. 2009), *Milholland v. Sumner County Board of Education,* 569 F.3d 562, 565–67 (6th Cir. 2009); *Kiesewetter v. Caterpillar Incorporated,* 295 F. App'x 850, 851 (7th Cir. 2008); *EEOC v. Agro Distribution, Limited Liability Company,* 555 F.3d 462, 469 n.8 (5th Cir. 2009). *See* National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act, 20 (July 23, 2013). Available at: www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb (last accessed August 13, 2013).

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

[172] *See Landgraf v. USI Film Products,* 511 U.S. 244, 264, 273 (1994). Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, Question 1. Available at: www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last accessed August 13, 2013).

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

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

[175] EEOC Compliance Manual, Section 902.2(c)(5), www.bna.com/eeoc-commissioner-feldblum-n17179876987/Appendix to Part 1630—Interpretive Guidance on Title I of the ADA (interpretive guidance), 29 C.F.R. Pt. 1630, App'x § 1630.2(h).

[176] Appendix to Part 1630—Interpretive Guidance on Title I of the ADA (interpretive guidance), 29 C.F.R. Pt. 1630, App'x § 1630.2(h).

[177] EEOC Compliance Manual, Section 902.2(c)(5), www.bna.com/eeoc-commissioner-feldblum-n17179876987/

[178] *Whittaker v. America's Car-Mart, Inc.*, 2014 WL 1648816, *2-3 (E.D. Mo. Apr. 24, 2014). *Morriss v. BNSF Railway Co.*, 817 F.3d 1104, 1107-08 (8th Cir. 2016).

[179] *Morriss v. BNSF Railway Co.*, 817 F.3d 1104, 1107-08 (8th Cir. 2016).

[180] *Id*. at 1108.

[181] *See id*. at 1109 (citing *EEOC v. Watkins Motorlines, Inc.*, 463 F.3d 436, 442-43 (6th Cir. 2016) and *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997)). *Morriss*, 817 F.3d at 1111.

[182] *Morriss*, 817 F.3d at 1111. *See also Villarreal v. J.E. Merit Constructors, Inc.*, 895 F.Supp. 149 (S.D. Tex. 1995); *Patterson v. Xerox Corp.*, 901 F.Supp. 274 (N.D.Ill.1995); *Garrett v. Chicago Sch. Reform Bd.*, No. 95–C–7341, 1996 WL 411319 (N.D. Ill. July 19, 1996); and *Hernandez v. City of Hartford*, 959 F.Supp. 125 (D. Conn.1997).

The ADAAA did not change the statutory or regulatory definition of impairment, nor did it change in the EEOC regulatory definition of impairment. Indeed, the 2011 interpretative guidance explicitly excludes pregnancy as an impairment while noting that "a *pregnancy-related impairment* that substantially limits a major life activity is a disability." As a result, the basic rule that while pregnancy itself is not an ADA-disability, pregnancy-related impairments can be disabilities remains good law. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir.2011) ("pregnancy, absent unusual circumstances, is not a physical impairment"); *Lang v. Wal-Mart Stores E., L.P.*, 2015 WL 1523094, at *2 (D.N.H. Apr. 3, 2015) ("[P]regnancy is not an actionable disability, unless it is accompanied by a *pregnancy-related* complication.")

[183] *See also Villarreal v. J.E. Merit Constructors, Inc.*, 895 F.Supp. 149 (S.D. Tex. 1995); *Patterson v. Xerox Corp.*, 901 F.Supp. 274 (N.D.Ill.1995); *Garrett v. Chicago Sch. Reform Bd.*, No. 95–C–7341, 1996 WL 411319 (N.D. Ill. July 19, 1996); and *Hernandez v. City of Hartford*, 959 F.Supp. 125 (D. Conn.1997).

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[184] As a separate issue from the specific disability context, the Supreme Court recently bolstered protections under the Pregnancy Discrimination Act in *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015)..

[185] *Price v. UTI*, 2013 WL 798014, *3 (E.D. Mo. March 5, 2013). At the subsequent trial, the jury found against the employee. *See Price v. UTi Integrated Logistics, LLC*, 2013 WL 5500102 (E.D. Mo. Oct. 3, 2013)

[186] *See Alexander v. Trilogy Health Systems, LLC*, 2012 WL 5268701, *11, n. 10 (S.D. Ohio Oct. 23, 2012). *See Mayorga v. Alorica, Inc.*, 2012 WL 3043021, *5-9 (S.D. Fla. July 25, 2012).

[187] *See Alexander v. Trilogy Health Systems, LLC*, 2012 WL 5268701, *11, n. 10 (S.D. Ohio Oct. 23, 2012). *Nayak v. St. Vincent Hosp. & Health Care Ctr.*, 2013 WL 121838, *2-3 (S.D. Ind. Jan. 9, 2013).

[188] *See Alexander v. Trilogy Health Systems, LLC*, 2012 WL 5268701, *11, n. 10 (S.D. Ohio Oct. 23, 2012).

[189] *Jeudy v. Holder*, 2011 WL 5361076, *4-6 (S.D. Fla. Nov. 7, 2011).