RESTORING CONGRESSIONAL INTENT AND PROTECTING DISABLED WORKERS: THE AMERICANS WITH DISABILITIES ACT AMENDMENTS OF 2008

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I. INTRODUCTION

Congress concluded in 1990 that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[1]

As a result, it passed the Americans with Disabilities Act, heralded as comprehensive reform measure designed to champion the rights of disabled Americans, and to insure a more level playing field.[2] However, at least with respect to its employment provisions, it soon became clear that plaintiffs had a difficult time succeeding in lawsuits against their employers, with less than ten percent of plaintiffs prevailing in litigation.[3] Courts interpreted key terms of the statute narrowly,[4] frustrating its goals of integration and equality. This paper first will discuss the provisions of the 1990 legislation and the Supreme Court decisions that narrowed its coverage. It then will outline the provisions of the Americans with Disabilities Act Amendments of 2008 ("ADAAA")[5] enacted by Congress to reverse that trend, and to restore the rights envisioned in 1990 for disabled workers. Finally, the paper will comment on the likely effect of the ADAAA on employment policies.

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1 42 U.S.C. §12101 (a) (7) (2004).

[2] *See* Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans With Disabilities Act*, 56 U.C.L.A. L. REV. 451, 456-62 (2008) (discussing the history of the 1990 Act).

[3] Daniel O'Toole & Jovita Foster, *ADA amendment expands protection*, Mo. LAW. WKLY, Oct. 13,2008.

[4] *See infra* notes 68-104, and accompanying text

[5] Pub. L. No. 110-325, 122 Stat. 3553.

II. THE AMERICANS WITH DISABILITIES ACT of 1990

A. The Statutory Framework

Congress passed the Americans with Disabilities Act in 1990 to eliminate discrimination against individuals with disabilities.[6] Title I of the ADA prohibits discrimination in employment against qualified individuals with disabilities "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[7] The 1990 legislation defined the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires" with consideration being given to the employer's judgment as to what job functions are essential.[8] It defined disability with respect to such an individual as "a physical or mental impairment that substantially limits one or more major life activities, a record of such of such impairment, or being regarded as having such impairment."[9] The "regarded as" prong specifically aimed at invidious bias and erroneous stereotypical assumptions, not only about the abilities of persons with actual disabilities, but also relating to those persons who mistakenly were regarded as being disabled, such a bum victims, because of prejudicial misperceptions.[10]

EEOC regulations promulgated under the Act further defined the term "substantially limits" as being "unable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[11] The regulations defined "major life activities" to include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[12]

Employers owed an affirmative duty to make reasonable accommodations for employees with disabilities under Title I, defined as including

[6] 42 U.S.C. §12101 (b) (2004).

[7] *Id.* § 12112. A "covered entity" means "an employer, employment agency, labor organization, or joint labor- managcment committee." *Id.* § 1211(2).

[8] *Id. I* 12111(8).

9 Id. § 12102(2).

[10] For a discussion of implicit bias resulting in societal myths and fears about disability and disease, see Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans With Disabilities Act*, 56 UCLA L. REV. 451(2008).

[11] 29 C.F.R. § 1630.2© (2000).

[12] *Id.* § 1630.2(i) (2000).

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part time and modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[13]

A reasonable accommodation did not include a modification that would result in an *undue hardship*, defined as "an action requiring significant difficulty or expense"[14] when considering 1) the nature and cost of the accommodation, 2) the overall financial resources of the facility or entity involved including the number of persons employed, and 3) the type of operations of the entity including the composition, structure and functions the workforce.[15] The ADA also recognized an employer defense to an allegation of discrimination based upon a *qualification standard* that is "job related and consistent with business necessity,"[16] for example, "a requirement that an individual...not pose a direct threat to the health or safety of other individuals in the workplace."[17]

B. The ADA as Interpreted

1. Controlled Disabilities

Initially it was unclear under the 1990 legislation if persons were disabled if their impairments could be controlled by medication or treatment. The EEOC and the Department of Justice concluded that an individual's status should be made on a case by case basis without regard to the availability of mitigating measures.[18] Federal district and appellate courts, however, were divided on the issue, with some circuits refusing to consider the use of mitigating measures in determining whether or not an individual was disabled,[19] and others concluding that the determination should be

[13] 42 U.S.C. § 12111(9) (2004).

[14] *Id.* § 12111(10)(A).

[15] *Id.* § 12111(10)(B).

[16] *Id.* § 12113(a).

17 Id. § 12113(b).

[18] Specifically, the guidelines provided that "[T]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, *without regard to mitigating measures such as medicines, or assistive or prosthetic devices."* 29 C.F.R. pt 1630 app. § 1630.29(j) (1999) (emphasis added). In defining physical or mental impairment, the guidelines provided that the existence of an impairment was "to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.* pt. 1630app. § 1630.29(h) (1999).

[19] Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Roth v. Lutheran Gen Hosp.,
57F.3d 1446 (7th Cir. 1995); Baert v. Euclid Beverage Limited, 149 F.3d 626 (7th Cir. 1998); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); Holihan v. Lucky Stores, 87 F.3d 362 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996).

made considering mitigating measures.[20] In 1999 the Supreme Court addressed the significance of mitigating measures in three companion cases.

Sutton v. *United Airlines* involved severely myopic twin sisters, who were rejected as commercial airline pilots because of their failure to meet the minimum requirement of uncorrected visual acuity of 20/100 or better.[21] The Supreme Court held that because the term "substantially limits" as used in the statute appears in the present indicative verb form, the language requires persons to be evaluated in their actual state, and not in a hypothetical state or with a potential condition,[22] and that evaluating individuals in their hypothetical uncorrected state was "an impermissible interpretation of the ADA."[21] The Court also concluded that the definition of a disability under the statute requires that the evaluation be made "with respect to an individual", which by definition demanded an "individualized inquiry."[24] Finally, the Court determined that because the Act's Congressional findings declared that forty-three million Americans had one or more disabilities, Congress could not have intended to bring within the statutory protection all those persons with controlled impairments.[25]

Murphy v. United Parcel Service involved an employee who had been dismissed from his job as mechanic because of his high blood pressure, which precluded him from qualifying for Department of Transportation certification.[26] The Court held that plaintiffs high blood pressure, which was controllable by medication, should not be considered a disability under the Act.[27] Finally, *Albertsons, Inc.* v. *Kirkingburg*,[28] involved a discharged truck driver who had amblyopia, a condition which resulted in his monocular vision and commensurate inability to become

[20] Gilday v. Mecosta Cty., 124 F.3d 760, 766 (6th Cir. 1997); Murphy v. United Parcel Serv., 141 F.3d 1185 (10th Cir. 1998). The Fifth Circuit adopted a hybrid approach by which "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history-diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state." Washington v. HCA Health Servs. of Texas, 152 F.3d 464,470 (5th Cir. 1998).

[21] 527 U.S. 471,475 (1999).

[22] The Court stated:

A disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity.

Id. at 482-83.

[23] *Id.* at 482.

[24] *Id.* at 483.

[25] *Id.* at 484.

26 527 U. S. 516 (1999).

[27] *Id.* at 525. In *Murphy*, the Court noted that it did not consider the correctness of the court of appeals' conclusion that plaintiffs hypertension, when medicated, did not substantially limit him in any major life activity. "Because the question whether petitioner is 'disabled' when taking medication is not before us, we have no occasion here to consider whether petitioner is 'disabled due to limitations that persist despite his medication or the negative side effects of his medication." *Id.* at 521.

[28] 527 U. S. 555(1999).

certified under DOT standards. The Supreme Court held that the plaintiffs subconscious mechanisms for coping with his visual impairment must taken into account in judging whether or not he had a disability, stating that it failed to discern any "principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[29]

Thus, the Court asserted in *Sutton, Murphy* and *Albertsons* that, employees, whose actual disabilities were *controlled,* were not protected under the ADA; however, it remained unclear if an employer owed a duty to accommodate an employee who chose not to correct or control a disability.[30] Prior to the 1999 Supreme Court trilogy, decisions suggested that an employee must control a controllable impairment and utilize available mitigating measures, if a failure to do so could impact job performance.[31] Likewise, cases decided after the 1999 Supreme Court rulings also implied that employees could not be considered "qualified" under the statute if they fail to use corrective measures.[32] However, the issue was never resolved by the high Court, and the overall correctness of the Court's decision in the trilogy also was questioned by commentators.[33]

2. Key Phrases: "Regarded As" and "Substantially Limits One or More Major Life Activities"

The Court's interpretation of the "regarded as" prong in *Sutton* spawned criticism as well. The 1990 Act included within its definition of a disability an individual who is "regarded as having such an impairment."[34] In *Sutton* the Supreme Court concluded that were two ways in which an individual could be *regarded as* being impaired:

29 Id. at 565-66. The Court observed in dicta that "our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision 'ordinarily' will meet the Act's definition of disability" even though the brain can compensate in part. *Id.* at 567.

[30] Debra D. Burke & E. Malcolm Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?,* 38 Am. BUS. L.J. 785 (2001).

[31] Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1999); Van Stan v. Fancy Colours & Co. 125 F.3d 563 (7th Cir. 1997); Brundage v. Hahn, 57 Cal. App. 4th 228 (1997); Keoughan v. Delta Airlines, Inc., No. 96-4072, 1997 U.S. App. LEXIS 12232 (10th Cir. May 27, 1997) (unpublished opinion); Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998);Bowers v. Multimedia Cablevision, Inc., No. 96-1298-JTM, 1998 U.S. Dist. LEXIS 19319 (D. Kan. Nov. 3, 1998); Testerman v. Chrysler Corp., No. 95-240 MMS, 1998 U.S. Dist. LEXIS 1882 (D. Del. Feb. 11,1998); Pangalous v. Prudential Ins. Co., No. 9600167,1996 U.S. Dist. LEXIS 15749 (E.D. Pa. Oct. 16, 1996), *affd without opinion,* 118 F.3d 1577 (3d Cir. 1997).

[32] Tangires v. Johns Hopkins Hosp , 79 F. Supp. 2d 587 (D. Md. 2000); Williamson v. International Paper Co., 85F. Supp. 1184, 1190 (S.D. Ala. 2000). *But see* Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032 (D. Ariz. 1999) (denying employer's summary judgment motion because a reasonable jury could conclude that plaintiff, who refuse to wear hearing aids, was substantially limited in the major life activity was a qualified individual with a disability).

[33] Barbara M. Smith-Duer, Comment, *Too Disabled or Not Disabled Enough: Between a Rock and a Hard Place After Murphy v. United Parcel Service, Inc. [Murphy v. United Parcel Service, Inc, 119 S. Ct. 2133 (1999)],* 39 WASHBURN LJ. 255 (2000); Kirk W. Lowry, *Reflections: A Discrete and Insular Minority: Behind the Headlines of Murphy* v. *United Parcel Service, Inc.,* 39 WASHBURN L.J. 196 (2000); Stacie E. Barhorst, Note, *What Does Disability Mean: The Americans with Disabilities Act of 1990 in the Aftermath of Sutton, Murphy, and Albertsons,* 48 DRAKE L. REV. 137 (1999).

[34] 42 U.S.C. § 12102(2XC) (2004). *See also* 29 C.F.R. § 1630.2(gX3) (2000). The 1990 legislation covered an individual who has "a record of such an impairment," as well. 42 U.S.C. 12102(2)(B) (2004). *See also* 29C.F.R. § 1630.2(g)(2) (2000).

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment, when, in fact, the impairment is not so limiting.[35]

In other words, prior to *Sutton*, the inquiry focused on the discriminatory treatment or negative attitudes of the employer; after *Sutton*, the inquiry focused on the beliefs of the employer and any misconception that the employer entertained with respect to the employee's alleged impairment of a major life activity.[36]

Another decision of the Court also was viewed as undermining the purpose and intent of the Act because it narrowed the definition of key terms that defined the protected class. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[37] the Court, stated that the terms "substantially limited" and "major life activities," need to be "strictly interpreted to create a demanding standard for qualifying as disabled."[38] The Court further stated that "substantially limited" means having an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[39] The decision stirred criticism for its limiting construction.[40] Ultimately, judicial interpretations of key statutory provisions, which some commentators argued ran counter to the goals of the statute,[41] coupled with the uncertainties surrounding the interpretation of the ADA for controllable but not controlled disabilities, prompted Congress to amend the Act in 2008.[42]

[35] *Sutton*, 527 U. S. at 489.

[36] Larson, *supra* note 2, at 460.

[37] 534 U.S. 184(2002).

[38] *Id.* at 197.

[39] *Id.* at 198.

[40] Kathleen Hale, Note, *Toyota* v. *Williams: Further Constructing the Circle of Difference*, 4 J.L. Soc'Y 275 (2003); Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA. J. Lab. & Emp. L. 735 (2004); Andrea Kloehn Naef, Note, *Toyota Motor Manufacturing* v. *Williams: A Case of Carpal Tunnel Syndrome Weakens the Grip of the Americans with Disabilities Act*, 31 PEPP. L. REV. 575 (2004).

[41] Luther Sutter, *The Americans with Disabilities Act of1990: A Road Now Too Narrow*, 22 U. Ark. Little L. REV. 161 (2000); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997). *See also* Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241 (2008) (identifying specific issues with the courts' statutory interpretation of key provisions).

[42] Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of2008*, 13 Tex. J. ON C.L. & C.R. 187,234-40 (2008) (discussing the passage of the Act).

III. HEARINGS IN CONGRESS ON THE RESTORATION ACT

While Congress passed the amendments to the ADA in 2008, hearings were held before the House Committee on Education and Labor in 2007 on the then- proposed bill, the ADA Restoration Act of 2007, which was intended to create a legislative framework in which Americans with disabilities could realize their full potential, a goal Congress thought that it had achieved in the 1990 legislation. House Majority Leader Steny Hoyer began the hearings with his testimony, stating that the purpose of the legislation was not to expand the rights under the ADA, but restore the original intent of Congress in passing the ADA in response to the restrictions place on the ADA by court decisions.[43] Congress intentionally borrowed the definition of "disability" from the Rehabilitation Act of 1973 because of the courts' broad application of the term was seen as avoiding the politically divisive debates over its definition.[44] The U.S. Supreme Court's decisions misinterpreted the legislative intent to prevent discrimination because of a disability, not to limit the application of the ADA protections to those who had mitigated their impairments with medical devices or medications.[45]

Carey L. McClure, an electrician with muscular dystrophy, testified that he had a job offer by General Motors revoked upon the recommendation of the doctor conducting the pre-employment physical examination.[46] It made no sense to him that he was not protected by the ADA because he had adapted so well to his disability; however, he not only lost his case, but his house and two jobs as well.[47] The President and Chief Executive Officer of the American Association of People with Disabilities stated that the *Sutton* trilogy of cases made it more likely that disabled persons in the workplace would find themselves without the protection of the ADA.[48] He stated that the Restoration Act would "refocus the courts on an employee or applicant's qualifications and performance and away from intimate details about their disabilities that are irrelevant to the workplace and often unknown to their employer or prospective employer."[49] A law professor noted, however, that even if one had a minor disability which precluded the performance of an essential function of the job, the choice of an accommodation still was within the employer's purview.[50]

[43] *The ADA Restoration Act of 2007: Hearings on H.R. 3195 Before the H. Comm, on Education and Labor*, 110 Cong. (2008)(testimony of the Honorable Steny H. Hoyer, House Majority Leader), http://edlabor.house.gov/testimony/2008-01-29-StenyHoyer.pdf (last visited Sept. 27,2009).

[44] *Id.*

[45] *Id.*

[46] *The ADA Restoration Act of 2007: Hearings on H.R. 3195 Before the H. Comm, on Education and Labor*, 110 Cong. (2008)(testimony of Carey McClure, Plaintiff in ADA Lawsuit v. General Motors), http://edlabor.house.gov/testimony/2008-01-29-CareyMcClure.pdf (last visited Sept. 27,2009).

[47] *Id.*

[48] *The ADA Restoration Act of 2007: Hearings on H R. 3195 Before the H. Comm, on Education and Labor*, 110 Cong. (2008)(testimony of Andrew Imparato, President and CEO, American Association of People with Disabilities), http://edlabor.house.gov/testimony/2008-01-29-AndrewImparato.pdf (last visited Sept. 27,2009).

[49] *Id.*

[50] *The ADA Restoration Act of2007: Hearings on H R. 3195 Before the H. Comm, on Education and Labor*, 110

The Director of the ADA and Equal Employment Opportunity Services of the National Employment Institute reiterated the intended definition of "disability" in the employment provisions of the ADA.[51] He stated that the original intent was followed by the EEOC's instructions to employers, subsequent to the passage of the ADA, and followed by many of the federal circuit courts until the U.S. Supreme Court delivered its opinion in *Sutton.*[52] His testimony, nevertheless, warned of the consequences of the Restoration Act. Given that the ADA requires an impairment to limit a major life activity substantially, it would be incorrect to say that the ADA Restoration Act restores the ADA, rather, that in effect it is "vastly broader than the ADA."[53] An employer might be required to provide an accommodation for a sprained ankle or a bald employee for "time off to get a hair transplant."[54] The Restoration Act also removes the burden of proof from the plaintiff and shifts it to the employer to show that the employee is not qualified for the job.[55] The change in the definition of disability and the shift in the burden of proof could "dilute the importance of the law for people who have serious conditions, and could lead to a deluge of unintended consequences."[56]

Witnesses expressed similar sentiments in hearings on the legislation before the Senate Committee on Health, Education, Labor, and Pensions. Dick Thornburgh, former Attorney General of the United States, stated that the passage of the ADA in 1990 was the result of a cooperative effort of Republicans and Democrats, Congress and the White House.[57] The decisions in *Sutton, Murphy* and *Albertsons* restricted the protections of the ADA in opposition to its original intent.[58] John Kemp, cofounder of the American Association of People with Disabilities, gave the historical background of the Act, including the history of discrimination in health services and employment that supported the legislative intent of the Act.[59] He gave several case

Cong. (2008)(testimony of Robert L. Burgdorf, Professor of Law, University of the District of Columbia), http://edlabor.house.gov/testimony/2008-01-29-RobertBurgdorf.pdf (last visited Sept. 27,2009).

[51] *The ADA Restoration Act of 2007: Hearings on HR. 3195 Before the H. Comm, on Education and Labor,* 110 Cong. (2008)(testimony of David K Fram, Esq., Director, ADA and EEO Services, National Employment Law Institute, Washington, D.C.), http://edlabor.house.gov/testimony/2008-01-29- DavidFram.pdf (last visited Sept. 27,2009).

[52] *Id.*

53 Id.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearings Before the S. Comm, on Health, Education, Labor, & Pensions,* 110 Cong. (2008)(testimony of Dick Thornburgh, Counsel, Kirkpatrick & Lockhart, Preston, Gates, Ellis, LLP, Washington, D.C.), http://help.senate.gov/Hearings/2007_l 1 15 b Thornburgh.pdf (last visited Sept. 27,2009).

[58] *Id.*

[59] *Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearings Before the S. Comm, on Health, Education, Labor, & Pensions,* 110 Cong. (2008Xtestimony of John D. Kemp, Attorney, Powers, Pyles, Sutter & Verville, P.C., Washington, D.C.), http://help.senate.gov/Hearings/2007_l l_15_b/Kemp.pdf (last visited Sept. 27,2009).

examples to demonstrate the frustration of intent to afford protections to those who could not meet the requirements of the court decisions.[60]

Stephen Orr, a licensed pharmacist with Type 1 diabetes, testified that he was fired by Wal-Mart for taking time off during the middle of the day to manage his diabetes.[61] When he sued, the court viewed his case as if he had been allowed to manage his diabetes, and dismissed the suit.[62] Camille Olson, an attorney practicing in employment discrimination and defense litigation stated that the proposed changes would expand the ADA coverage and change the focus on *disability* and *impairment* without considering how an individual's life is limited by it.[63] Such amendments seemingly would give any employee a reasonable claim of accommodation, unless the employer could show an undue hardship, and disallowing mitigation would allow almost anyone to claim to have a disability.[64] Chai Feldblum, Professor of Law at Georgetown University, disagreed.[65] He concluded that the real impact of the shrinking coverage under the ADA is the number of cases in which real people with life limiting disabilities were denied relief because they were not considered disabled under the ADA as interpreted.[66]

While testimony supported the conclusion that the Supreme Court's interpretation of the Act frustrated its intent, and that persons with disabilities were unable to secure the meaningful employment envisioned as a result of the Court's narrow construction, certain witnesses voiced legitimate concerns that the proposed legislation would swing the pendulum too far in the opposite direction. After the hearings, various interest groups working in concert drafted a compromise version of the legislation, which was more limited in its coverage that the Restoration Act, but more expansive than the ADA.[67]

[60] *Id.* He concluded his remarks by noting that there would be a significant increase in the number of disabled veterans from Iraq and Afghanistan, thus placing more strain on the public commitment to the rights and promises of the ADA. *Id.*

[61] Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearings Before the S. Comm, on Health, Education, Labor, & Pensions, 110 Cong. (2008)(testimony of Steven Orr, Pharmacist, Rapid City, South Dakota), http://help.senate.gov/Hearings/2007_l l_15_b/Orr.pdf (last visited Sept. 27,2009).

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

[63] Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearings Before the S. Comm, on Health, Education, Labor, & Pensions, 110 Cong. (2008)(testimony of Camille Olson, Attorney, Seyfarth & Shaw, Chicago, Illinois), http://help.senate.gov/Hearings/2007_l 115 b/olson.pdf (last visited Sept. 27,2009).

[64] *Id.*

[65] Professor Feldblum has argued that a clear line should be drawn between persons who are disabled and those who are simply sick, with the former deserving the protection of the ADA, but not the latter. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. Emp. & LAB. L. 91 (2000).

[66] *Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearings Before the S. Comm, on Health, Education, Labor, & Pensions*, 110 Cong. (2008)(testimony of Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center, Washington, D.C.), http://help.senate.gov/Hearings/2007_l l_15_b/Feldblum.pdf (last visited Sept. 27,2009).

[67] David K. Fram, The ADA Amendments Act: Dramatic Changes in Coverage, 26 Hofstra Lab. & Emp. L.J. 193, 195 (2008). For example, the Restoration Act, would have changed the definition of disability to include all disabilities regardless of the seriousness of the impairment, while the Act as passed maintained the "substantially limit a major life activity" language of the ADA. Id.

IV. THE AD AAA of 2008

Congress passed the revised legislation the year following the hearings with broad bipartisan support, including that of the U.S. Chamber of Commerce and a number of individual trade organizations.[68] It made several important changes to the original ADA, many of them in response to what was characterized as an intention to reverse Supreme Court decisions and, as highlighted in the hearings, to expand the scope of employees who are protected by federal disability law.[69] The Act first and foremost emphasizes that the definition of *disability* should be interpreted broadly to extend to a wider class of individuals,[70] and that this new standard applies as to cases brought under the Rehabilitation Act as well.[71] While the Act retains the basic definition of disability as being an impairment that substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment,[72] it changes the way that these statutory terms should be interpreted in several ways.[73]

A. Mitigating Measures

With respect to the confusion over the employment of mitigating measures and whether or not a controllable disability was covered,[74] the amended act states that "[T]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[75] In contrast, "ordinary eyeglasses or contact lenses" may be considered in assessing whether an individual has a disability.[76] Thus, persons who use adaptive measures, medications and behavioral adaptations will no longer be excluded from the definition of "disabled."[77] In other words, persons with hypertension may be

[68] Edward G. Phillips, The Law at Work: The ADA Amendments Act of 2008: Who Isn't Disabled?, 45 Tenn. B.J. 33, 33 (Feb. 2009).

[69] O'Toole & Foster, *supra* note 3.

[70] "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 (a).

[71] *Id.* § 7.

[72] *Id.* § 4 (a).

[73] For an overview of the changes see *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act Of2008,* EEOC, http://www.eeoc.gov/ada/amendments_notice.html (last visited Sept. 27, 2009).

[74] *See supra* notes 30-33 and accompanying text.

[75] ADA Amendments Act of2008, Pub. L. No. 110-325, § 4 (a). By way of example, the statute lists measures that may not be considered, such as "medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies," as well as the use of assistive technology, reasonable accommodations, auxiliaiy aids or services and learned behavioral or adaptive neurological modifications. *Id.*

[76] *Id.* § 2(b).

[77] Reiss & Scofield, *infra* note 87, at 41. Such aids could include medication for bipolar disorder or HIV, insulin used by diabetics, walking canes, prosthetic limbs, hearing aids, wheelchairs and oxygen therapy. *Id.*

covered, notwithstanding that medication alleviates the potentially debilitating symptoms of such a condition. Now more employees should qualify for coverage under the Act, and more plaintiffs should be able to survive their employer's motion for summary judgment because the employer will no longer be able to argue that the disability as corrected is not a recognized disability.[78]

B. "Substantially Limits" and "Major Life Activities"

The AD AAA rejected the limiting construction of *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams.*[1'] The Act expressly admonishes that courts interpreted "substantially limits" in a manner that "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[80] Commensurately, Congress in the ADAAA intends "to convey...that the primary object of attention...should be whether entities covered under the ADA have complied with their obligations... the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[81] Significantly, the Act directs the Equal Employment Opportunity Commission ("EEOC") to revise that portion of its regulations defining the term *substantially limits* as meaning *significantly restricted*,[82] Because the Act is to be construed liberally, cases previously decided on the ground that the impairment was not serious enough could produce an entirely different result under the 2008 legislation.[83]

The Act also expands the definition of *major life activities* by including two non-exhaustive lists. The first list includes many activities that the EEOC has recognized, such as walking, as well as activities that EEOC has not specifically recognized, such as reading, bending, and communicating.[84] The fairly comprehensive enumerated lists implicitly suggest a broad interpretation for those tasks not included, meaning that what other activities may qualify, such as sexual relations, driving, and using computers, will need to be resolved through litigation.[85] Because many more activities will likely be covered by the ADA, such as reading, concentrating and thinking, persons with dyslexia and attention deficit disorder may be covered as well.[86] The second list of *major life activities* includes major bodily functions, such as "functions of the immune system, normal cell growth, digestive,

[78] Id.

[79] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4). For a discussion of *Toyota*, 534 U.S. 184 (2002), see *supra* notes 37-40, and accompanying text.

[80] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5).

81 Id.

[82] *Id* § 2(b)(6).

[83] Fram, *supra* note 67, at 202.

[84] [MJajor 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." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a).

[85] Fram, *supra* note 67, at 202.

[86] Philip A. Kilgore & John T. Merrell, Redefining "Disabled": The ADA Amendments Act of 2008, 21 S. Carolina Law. 24, 27 (2009).

bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."" Therefore, persons with conditions that affect internal body functions such as cancer, HIV/AIDS and multiple sclerosis, may now be covered,[88] as well as conditions such as irritable bowel syndrome.[89] The Act as amended also clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,[90] such as certain cancers.

C. "Regarded As " Prong

The Act also addresses the *regarded as* prong, the application of which under the original legislation had been a source of controversy and confusion.[91] The purpose of the provision under the 1990 legislation was to guard against invidious bias based upon inaccurate stereotypes of the disabled.[92] The 2008 legislation provides that 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,"[93] unless the impairment is transitory and minor.[94] Before the amendments, the "regarded as" prong was interpreted to mean that an employer must regard or perceive an individual as being substantially limited in a major life activity, whereas now an individual is protected under this prong if the individual establishes that the employer discriminated because of an actual or perceived impairment, without regard to whether or not the impairment actually limits, or is perceived to limit, a major life activity.[95]

In other words, the employer's perception of the degree to which the impairment may limit a major life activity is now irrelevant.[96] As a result, coverage

[87] *Id.* Thus, pulmonary diseases, asthma, and sterility issues could be considered disabilities. Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act,* 70 ALA. LAW. 38,42 (2009).

[88] Kilgore & Merrell, supra note 86, at 27.

[89] Green v. Am. Univ., No. 07cv52 (RBW), 2009 U.S. Dist. LEXIS 74386, at *18 (D. D.C. Aug. 21,2009).

90 Id.

[91] For a discussion of this prong of the 1990 legislation and its limited effectiveness and uncertain meaning see Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent,* 42 Vill. L. REV. 587 (1997); Thomas Simmons, *"Working" With the ADA's "Regarded as " Definition of a Disability,* 5 Tex. F. on C.L. & C.R. 27 (2000).

[92] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (identifying goal of the predecessor to the ADA, the Rehabilitation Act as being to protect "handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear.")

[93] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 (a). An action prohibited by the statute could be a failure to hire, for example.

[94] "A transitory impairment is an impairment with an actual or expected duration of 6 months or less. *Id.*

[95] Schmitz v. Louisiana, No. 07-891-SCR, 2009 U.S. Dist. LEXIS 5495, at *8-9 (M.D. La. Jan. 27, 2009).

[96] *Id.* Whether or not the focal point of the refined prohibition will center on proof of either a specific impairment or a general one, or instead on the proof of the alleged discriminatory actions, has yet to be determined. Larson, *supra* note 2, at 485.

under the "regarded as" prong is expanded, and its meaning restored to include discrimination based upon "myths, fears, and stereotypes."[97] Further, the legislation, in clarifying that individuals covered only under this prong are *not* entitled to reasonable accommodation,[98] settled what had been a split in the circuit courts on this issue under the 1990 Act.[99] Therefore, this "regarded as" prong will only be helpful to individuals with an adverse action claim.[100]

D. "Reverse" Discrimination

Finally, the Act clarifies that the theory of reverse discrimination is unavailable under the ADA by providing that ''nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."[101] This modification is in contrast to Title VII, which has been interpreted as extending protection to Caucasian males,[102] but is aligned with the Supreme Court's refusal to recognize the applicability of the theory of reverse discrimination under the Age Discrimination in Employment Act.[103] Nevertheless, it can be argued that, even without the recognition of a cause of action for reverse discrimination, there are varied and significant ways in which the ADA benefits individuals without disabilities and aligns their interests with their disabled coworkers, such as through enhanced medical privacy requirements and the institutionalization of interactive accommodation processes in the workplace.[104]

[97] Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of2008,* 103 Nw. U. L. Rev. COLLOQUY 217 (2008).

[98] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6, 122 Stat. 3553, 3558 (2008) (amending 42 U.S.C. § 12201(h) to read: "A covered entity . . . need not provide a reasonable accommodation ... to an individual who [is merely regarded as disabled].").

[99] The majority view held that there was no obligation to provide an accommodation to an employee regarded as having a disability. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231-32 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998). Other circuits, however, concluded that there was a duty to accommodate. D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1240 (11th Cir. 2005); Kelly v. Metallics West, Inc., 410 F.3d 670, 675 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 772-76 (3d Cir. 2004); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996). For a discussion of the issue see Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why "No" Should Not Be the Answer,* 36 SETON HALL L. Rev. 895 (2006); Kristopher J. Ring, Note, *Disabling the Split: Should Reasonable Accommodations Be Provided to "Regarded as" Disabled Individuals Under the Americans with Disabilities Act (ADA)?,* 20 WASH. U. J.L. & POL'Y 311 (2006).

[100] Fram, *supra* note 67, at 220.

[101] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6, 122 Stat. 3553, 3558 (2008).

[102] Affirmative action plans are scrutinized under Title VII because that statute protects white males as well as minorities and women. *See* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979) (upholding affirmative action plan as a temporary measure to correct historical imbalances).

[103] General Dynamics Land Sys., Inc v. Cline, 540 U.S. 581, 600 (2004) ("[T]he statute does not mean to stop an employer from favoring an older employee over a younger one.").

[104] Michelle A. Travis, Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities, 76 Tenn. L. Rev. 311, 331-78 (2009).

V. CASE LAW UNDER THE AMENDMENTS

A. Effective Date

Because the Act's effective date was January of 2009[105] pending cases should be governed by the well-settled jurisprudence of the 1990 Act,[106] which is less favorable to plaintiffs. Although the Act is silent on the question of prospective versus retroactive application, most courts have not interpreted the Amendments as applying retroactively to pending cases in the absence of any clear Congressional intent.[107] In contrast, Congress recently provided clear intent that the Fair Pay Act of 2009 apply retroactively: "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation...that are pending on or after that date."[108] No such language exists in the ADA Amendments.

Moreover, in the absence of clear Congressional intent, retroactive application is not favored "because the ADA Amendments Act broadens the definition of 'disability' and who may have a cause of action under the 'regarded as' prong of the Act, the amended Act would potentially increase...liability for past conduct."[109] "With no clear evidence of retroactive intent, the fact that Congress passed the amendments to counteract Supreme Court decisions and restore the intended scope of the ADA is not sufficient to overcome the presumption against retroactive application."[110] Federal circuit courtsthat have interpreted the 2008 Amendments as not being retroactive in application for claims seeking damages for unlawful discrimination, include the United States Courts of Appeals for the Fifth Circuit,[111] the Sixth Circuit,[112] the Seventh Circuit,[113] and the District of

[105] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 8.

[106] Courts generally apply the laws and interpretations in force when the acts, which are the basis of the complaint, occurred. Landgraf v. USI Film Prods., 511 U.S. 244 (1994). In *Landgraf*, the Court held that the first step in a retroactivity analysis "is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If the statute contains no such express command, the court must determine whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Id.* If so, then it should "not govern absent clear congressional intent favoring retroactive application. *Id.*

[107] Kiesewetter v. Caterpillar, Inc., 295 Fed. Appx. 850, 851 (7th Cir. 2008); Supinski v. United Parcel Serv., Inc., No. 3:CV-06-0793, 2009 U.S. Dist. LEXIS 3143, at *5 n.6 (M.D. Pa. Jan. 16, 2009); Hays v. Clark Prods., Inc., No. l:07-CV-328, 2008 U.S. Dist. LEXIS 102626, at *6 n.3 (S.D. Ind. Dec. 18, 2008);. Knox v. City of Monroe, No. 07-606, 2008 U.S. Dist. LEXIS 102920, at *5 n.10 (W.D. La. Dec. 9, 2008), Gibbon v. City of New York, No. 07-Civ-6698, 2008 U.S. Dist. LEXIS 106671, at *5 n.47 (S.D.N.Y. Nov. 25, 2008).

[108] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 6(2009).

[109] Rudolph v. U.S. Enrichment Corp., Inc., NO. 5:08-CV-00046-TBR, 2009 U.S. Dist. LEXIS 2653, at *14 (W.D. Ky. Jan. 14, 2009).

[110] Schmitz v. Louisiana, No. 07-891-SCR, 2009 U.S. Dist. LEXIS 5495, at *8-9 (M.D. La. Jan. 27, 2009).

111 EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009).

[112] Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 565 (6th Cir. 2009).

[113] Fredricksen v. UPS, Inc., 2009 U.S. App. LEXIS 20817, at *9 n.l (7.h Cir. Sept. 8, 2009).

Columbia.[114] While the other circuits have not yet entertained this issue squarely on its merits,[115] lower courts in these circuits, for the most part, have determined that retroactive application is inappropriate in such claims,[116] as has the EEOC.[117] However, some federal courts have held that claims seeking prospective *injunctive* relief under the ADAAA, which were pending at the time the amendments became effective, are governed by the ADA as amended, because no injustice would result from applying the amended law.[118] Nevertheless, because the Act likely applies only to cases seeking damages filed *after* January of 2009, it may be years before the real impact of the 2008 legislation is known.

B. Decisions After the Amended Act

Under the 1990 legislation as interpreted, plaintiffs often faced a catch-22 in their attempt to establish that they were *qualified* individuals because the bar was set so high for establishing a substantial limitation that it would be counterintuitive to argue that they could perform the essential functions of the job.[119] Presumably, the ADAAA mitigates that situation with its modified definition of *substantial limitation.* However, one court since has stated in dicta that applying the provisions of the ADAAA would not change the outcome of the plaintiffs claim because he was not qualified.[120] The court asserted that, even assuming that lifting is a major life activity,

[114] Lytes V. DC Water & Sewer Auth., 572 F.3d 936, 939-42 (D.C. Cir. 2009).

[115] The Second Circuit presumed in dicta that the application was to be prospective. Cody v. County of Nassau, No. 08-5127-cv, U.S. App. LEXIS 20662, at *7 (Sept. 16, 2009) (commenting that it was unlikely that the ADAA applies to conduct that occurred before the Act's effective date of January 1, 2009) (unpublished opinion). The Eleventh Circuit suggested the same conclusion, although the plaintiff did not raise the issue. Fikes v. Wal-Mart, Inc., No. 08-12773, 2009 U.S. App. LEXIS 7669, at *1 n.l (11th Cir. Apr. 10, 2009). The Ninth Circuit concluded the Act was to be applied prospectively in an unpublished slip opinion. Barnes v. GE Sec., Inc., 2009 U.S. App. LEXIS 13129, at *4 (9th Cir. June 18, 2009).

[116] Thom v. Bae Sys. Hawaii Shipyards, Inc., No. 08-00058 JMS/BMK, U. S. U.S. Dist. LEXIS 8058; (Haw. Feb. 11, 2009); Levy ex rel. Levy v. Hustedt Chevrolet, No. 05-4832 (DRH)(MLO), 2008 U.S. Dist. LEXIS 101701, at *3 n.2 (E.D.N.Y. Dec. 17, 2008); Walstrom v. City of Altoona, No. 3:2006-81, 2008 U.S. Dist. LEXIS 104479, 2008, at *5 n.3 (W.D. Pa. Dec. 29, 2008). McCormick v. Verizon Md., Inc., Civil Case No. 07-2399-RWT, U.S. Dist. LEXIS 69220, at *32 (D. Md. Aug. 7, 2009); Rickert v. Midland Lutheran College, No. 8:07CV334, 2009 U.S. Dist. LEXIS 78886, at *30 (D. Neb. Sept. 2, 2009); Labrue v. GAB Robins N. Am., Case No. 08-1264-JTM, 2009 U.S. Dist. LEXIS 65570, at * 9 (D. Kan. July 29, 2009).

[117] The U.S. Equal Employment Opportunity Commission, *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, http://www.eeoc.gov/policy/docs/qanda_adaaa nprm.html (last visited September 26, 2009).

[118] Jenkins v. Nat'l Bd. of Med. Exam'rs, No. 08-5371, 2009 U.S. App. LEXIS 2660, at *1 (6th Cir. Feb. 11, 2009). *See also* Brodsky v. New England Sch. of Law, 617 F. Supp. 2d (D. Mass. 2009) (suggesting in dicta that the ADA amendments may not apply to claims for damages, but may apply to claims for injunctive relief).

[119] "The disabled employee who requires accommodations may walk a fine line between proving that a disability is quite severe but not so severe that it prevents essential work requirements if accommodations are provided." John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting From the ADA's Disability Definition*, 11 PSYCH. PUB. POL. & L. 83, 89 (2005).

[120] Shannon v. Postmaster General of the U.S. Post Office, No. 08-16827, 2009 U.S. App. LEXIS 12472 (11th Cir. June 9, 2009) (unpublished opinion).

the plaintiff was not a qualified individual with a disability because he failed to establish that with a reasonable accommodation he could perform the essential functions of the job.[121] To a certain degree, then, employers potentially could manipulate job descriptions with the aim of eliminating challenges by persons with recognized disabilities under the AD AAA[1-2] unless there is also an ethical commitment by employers to facilitate a dialogue concerning the genuine feasibility of providing a reasonable accommodation.

Other courts also have stated in dicta that applying the provisions of the AD AAA would not change the outcome of the litigants' claims because the plaintiffs failed to establish that that their termination was because of a disability.[123] One court observed in dicta, that "even under the more liberal standard [of the ADAAA], the plaintiff still must offer some evidence that his condition resulted in a disability, or that he was regarded as disabled," and also suggested that, on the facts, "[t]here [was] no evidence that the plaintiffs diabetes affected a major life activity."[124]

Thus far, only one district court has applied the provisions of the Act to the merits of the case. Without discussing the retroactive versus prospective application issue, a district court in Arizona applied the Act as amended to a previously pending case. In denying the defendant's motion for summary judgment, the district court in *Menchaca v. Maricopa Community College District*[125] acknowledged that the Act was to be construed in favor of broad coverage to the maximum extent permitted by its terms.[126] Plaintiff in the case alleged a mental impairment, a traumatic brain injury, exacerbated by unpredictable psychosocial stresses which impaired her ability to regulate her emotional responses.[127] The court noted that working and caring for oneself constitute major life activities, and that a jury reasonably could conclude that the performance of those functions was impaired as a result of the disability.[128] It further concluded that her emotional outbursts were not episodic as defined by the

[121] *Id.* at *7-* 10.

[122] For example, a perceived reliance on teamwork suggests that persons who are unable to be on site, potentially due to medical treatments, might not be qualified.

[123] Brown v. Bd. of Regents Okla. Ag. & Mech. Coll. Langston Univ., No. CIV-07- 1240-C, 2009 U.S. Dist. LEXIS 14453, at *6, *9 (D. Okla. Feb.24, 2009) (finding that plaintiff failed to meet her burden of demonstrating that termination from her grant-funded position was due to her disability); Pacenza v. IBM Corp., No. 04 Civ. 5831 (PGG) 2009 U.S. Dist. LEXIS 29778, at *28 (S.D. N.Y. April 2, 2009) (finding that plaintiff did not demonstrate that his employer was aware of his alleged PTSD disability so as to discriminate based upon it). *See also* Wisbey v. City of Lincoln, No. 4:08CV3093, 2009 U.S. Dist. LEXIS 30819 (D. Neb. Apr. 10, 2009) (concluding that the plaintiff failed to establish liability under the "regarded as" prong because there was no evidence her termination was based on archaic and erroneous beliefs regarding those inflicted with anxiety, insomnia, depression).

[124] Hammond v. Dept, of Veterans Affairs, No. 08-10922, 2009 U.S. Dist. LEXIS 66296, at *22-*23 (S.D. Mich. July 30, 2009).

[125] Menchaca v. Maricopa Comm. College Dist., No. CV-07-1970-PHX-GMS, 2009 U.S. Dist. LEXIS 5510 (Jan. 23,2009).

[126] *Id.* at *12.

127 Id. at *3.

128 Id. at *14.

amended Act,[129] because there was ample evidence in the record from which a reasonable jury could conclude that her mental impairment, when activated by sufficient stressors, substantially limited the her ability to interact at work and to care for herself.[130] As a result, the court also determined that a jury could conclude that a job coach might be a reasonable accommodation to assist her with her communication skills.[131]

VI. IMPACT OF THE ADAA

As evidenced by the decision in *Menchaca*, ADA plaintiffs now should be able to survive the defendant-employer's motion for summary judgment, a result that was much more unlikely under the 1990 legislation.[132] Although it is questionable why the court applied the ADAAA to the dispute, the result in the case likely concerns those witnesses at the Congressional hearings who feared a flood of litigation over disability claims and requests for accommodations. Indeed, critics of the ADAA Amendments Act of 2008 argue that the legislation will be costly for employers, and will precipitate an increase in litigation because the statute by its terms covers more potential plaintiffs, in addition to making it more difficult for defendant employers to win motions for summary judgment.[133]

The subtle triumph of the Amendments, nevertheless, will likely be the ability to get a jury to adjudicate these claims on their merits, a right that previously escaped most ADA plaintiffs. The jury, presumably in most cases composed of people who have worked or currently do work, or who currently hire employees, should prevent numerous unwarranted claims of impairments from prevailing, and should view what constitutes a reasonable accommodation from a fairly rational perspective. For example, query whether or not a jury would concur with the requirement of hiring a job coach for someone for an extensive period of time as being a reasonable accommodation. Ultimately, in cases that are litigated, juries must insure that the ADAAA does not become either a surrogate for disability insurance, or a guarantee of employment for all disabled persons, even those who are unqualified for the position in the absence of accommodations that are overly burdensome for employers.

[129] "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4.

[130] Menchaca v. Maricopa Comm. College Dist., No. CV-07-1970-PHX-GMS, 2009 U.S. Dist. LEXIS 5510, at *17 (Jan. 23,2009).

[131] *Id.* at *23.

[132] Louis S. Rulli, *Developing Law Over a Decade: Employment Discrimination Litigation Under the ADA From the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade'*!, 9 Temp. Pol. & Civ. RTS. L. Rev. 345, 362-65 (2000).

[133] Lauren Siber, ADA Amendments Act of 2008: New Hope for Individuals with Disabilities, 3 Rutgers L. Rec. 65, 72 (2009). See also Christopher Snow & Sarah Campbell, Recent Changes to Federal Employment Laws Will Affect Utah Companies: Examining the ADA Amendments and New FMLA Regulations, 22 Utah Bar J. 18, 19 (2009) ("Employers should expect a decrease in the number of ADA cases dismissed on summary judgment on the basis that the plaintiffs impairment does not qualify as a disability.").

In fact, the ultimate legacy of the Amendments will likely be the promotion of reasonable settlement agreements, and the fostering of mediated agreements for accommodations. It may be a wise course for employers to assume that the impairment is a disability and to act based upon whether or not the impairment, even with a reasonable accommodation, actually prevents the employee from performing the essential functions of the job.[134] This determination, according to EEOC guidelines, should be resolved through an interactive process involving both the employer and the employee in which the employer 1) analyzes the job to determine its purpose and essential functions, 2) consults with the employee to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation, 3) identifies potential accommodations and assesses the effectiveness of each in consultation with the employee, and 4) selects and implements the accommodation that is most appropriate for the parties, considering the preferences of the individual.[135]

Predictably then, a greater emphasis may be placed on this interactive process with respect to providing a reasonable accommodation.[136] It is unclear whether or not the failure to engage in this interactive process states a separate legal claim against an employer, although a few courts and scholars have suggested that the interactive process is or should be mandatory.[1,7] Nevertheless, the amended Act may make it genuinely attractive to engage meaningfully in that process, even if it is not obligatory, as a preemptive strike to litigation. Because the plaintiff is on more equal footing under the AD AAA, such a step is now strategically aligned with the interests of both parties.

VII. Conclusion

As the original legislation took years to clarify through the court system, so too it is likely that this legislation will take time to evolve and, as a result, will provide a degree of uncertainty for human resource managers as litigants look to the courts for guidance.[138] The identification of members of the protected class in other anti-discrimination laws is easily established. Characteristics such as race, sex, and age are obvious. In contrast, the identification of that class of persons, who are disabled and deserving of protection from the effects of irrational discrimination based upon non-performance based criteria, is much more elusive. Additional

[134] Phillips, *supra* note 68, at 40. As a result, the refinement of what constitutes essential job functions will be crucial to the process.

[135] Travis, *supra* note 104, at 357 (citing ADA regulations and the interpretive guidance of the EEOC).

[136] Reiss & Scofield, *supra* note 87, at 43. "Management should engage in the interactive process to determine whether a requested accommodation is reasonable, and whether the employee is qualified to do the job." Snow & Campbell, *supra* note 133, at 20.

[137] Travis, *supra* note 104, at 358.

[138] Sandra K. Dielman, Michelle A. Morgan, & C. Lee Winkelman, *The Year in Review 2008: Labor and Employment Law,* Tex. BAR J„ Jan. 2009, at 28; O'Toole & Foster, *supra* note 3. *See also* Phillips, *supra* note 68, at 40 (asserting that the ambiguities created by the Act will occupy courts for years).

questions that remain unresolved under the ADAAA also include exactly how transitory impairments should be assessed under the actual disability definition, how the record of prong now should be interpreted, what now qualifies as a reasonable accommodation given the relaxed standard for having a disability, as well as, such definitional refinements, such as if "interacting with others" qualifies as a major life activity with the statutory inclusion of "communicating" as a major life activity.[139] Arguably, the Amendments should have incorporated stricter and broader affirmative action programs, as well as specific restrictions against hostile workplace environments to stem or reverse implicit bias in the workplace.[140] Nevertheless, the ADAAA serves as a testament to the resolve of Congress to alter the trend of judicial construction that is perceived to be contrary to its intent,[141] to protect the opportunities that disabled Americans have for gainful employment, and to eradicate employment actions based upon stereotypes rather than an ability to perform the job.

[139] Long, *supra* note 97, at 226-29.

[140] Larson, *supra* note 2, at 486-88. Some circuits recognized hostile work environments under the 1990 legislation. Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001); Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001). For a discussion of the application of the theory to the ADA see Lisa Eichhom, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy- and Paste Function,* 77 WASH. L. Rev. 575 (2002); S. Elizabeth Wilbom Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different,* 33 CONN. L. REV. 603 (2001); Melinda Slusser, Note, *Flowers* v. *Southern Regional Physician Services: A Step in the Right Direction,* 33 U. TOL. L. Rev. 713(2002).

[141] Such a willingness to reverse judicial decisions in the area of employment law was evidenced most recently in the Lilly Ledbetter Fair Pay Act of 2009. Pub. L. No. 111-2, 123 Stat. 5 (2009). That statute allows a claim for discriminatory compensation under the federal anti-discrimination statutes regardless of when the discrimination began. *Id.* at §§ 3, 4 & 5 (2009). As such, it supersedes the Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (holding that ongoing effects of past discrimination resulting form previous, uncharged sex discrimination was time-barred because subsequent effects of past discrimination did not restart clock for filing EEOC charge).