ENFEEBLING THE ADA: THE ADA AMENDMENTS ACT OF 2008

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> [W]e could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because with medication they would be considered too functional to meet the definition of disabled. Nor could we have fathomed a situation where the individual may be considered too disabled by an employer to get a job, but not disabled enough by the courts to be protected by the ADA from discrimination. What a contradictory position that would have been for Congress to take.[1]

Introduction

The ADA Amendments Act of 2008 (ADAAA)[2] was passed to address two issues. First, the ADA's definition of "disability" had proved to be underinclusive. As the introductory passage notes, Congress never intended that people with very serious impairments (e.g., "diabetes, epilepsy, heart conditions, cancer, mental illness"[3]) would be denied ADA protection simply because they continued to function much as do people without such impairments.[4] Second, ADA litigation had become preoccupied with whether the plaintiff-employee was disabled as opposed to whether the defendant-employer had engaged in unlawful discrimination.[5]

The express goal of the ADAAA is "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990."[6] The ADAAA expresses the intent of Congress that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[7]

But can ADAAA restore the "intent"-or, more important, the "protections" of the ADA-simply by tinkering with the ADA's the definition of "disability?" This article argues that the ADAAA succeeds in strengthening the ability of ADA plaintiffs to move

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1. ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 18 (2007) (statement of Steny H. Hoyer, House Majority Leader)[hereinafter Hearing on H.R. 3195].
2. See Pub. L. No. 110-325, 122 State. 3553(2008)(to be codified in scattered sections of 42 U.S.C.)
3. Hearing on H.R. 3195, at 18.
4. See ADA Amendments Act of 2008, at sec. 2(b)(2)-(4), 122 Stat. at 3554.
5. Id. at sec. 2(b)(5), 122 Stat. at 3554.
6. ADA Amendments Act of 2008, 122 Stat. at 3553 (preamble).
7. Id. at sec. 2(b)(5), 122 Stat. at 3554.

past disability determinations to the issue of employer discrimination. However, the victory comes at a steep price: the coherence of "disability" as originally understood under the ADA itself.

Part I walks through the ADAAA, with commentary on the doctrinal ramifications of its amendments. The ADA has always defined actual "disability" as "a physical or mental impairment that substantially limits one or more major life activities."[8] The ADAAA maintains this wording but significantly alters the meaning of "substantial limitation" and "major life activity."[9] Specifically, it expands major life activities to include major bodily functions[10] and replaces the Supreme Court's restrictive interpretation of substantial limitation with a more flexible inquiry into the difficulties of performing major life activities experienced by an impaired person compared to those experienced by the "average" person.[11] Moreover, the ADAAA directs that mitigating measures—the use of corrective devices or other steps taken by an individual to reduce the practical effects of an impairment—not be considered in evaluating substantial limitation.[12]

I argue that the ADAAA's basic approach to substantial limitation is sound, but that its expansion of major life activity and elimination of mitigating measures redress the problem of underinclusiveness at the price of even greater, and largely counterintuitive, overinclusiveness. The result is that the new definition of "disability" is largely divorced from whether impairments experienced by particular individuals are sufficiently limiting to deserve the designation "disability." And, furthermore, that this result is out of line with the intent of the original ADA, which the ADAAA purports to "restore."

Part II discusses two likely consequences of ADAAA on employment law practice. First, because many state disability antidiscrimination laws are modeled after and interpreted in accordance with the ADA, the ADAAA will likely spur expansion of state law disability discrimination protections. Second, whether state or federal law, the ADAAA's primary effect on employment law practice will be to redistribute the leverage between defendant employers and plaintiff employees. As discussed below, the win rates in federal district and appellate courts for Title I ADA plaintiffs has always been extremely

8. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, sec. 3(2), 104 Stat. 327, 329-30 (codified as amended at 42 U.S.C. § 12102(2) (2006)).

9. See ADA Amendments Act of 2008, at sec. 4, § 3, 122 Stat. at 3555-56.

10. See id. at sec 4, § 3(2)(B), 122 Stat. at 3555.

11. See id. at sec. 2(b)(4)-(5), 122 Stat. at 3554.

12. See id. at sec. 4, § 3(4)(E)(I), 122 Stat. at 3556.

low.[13] If applied straightforwardly, the ADAAA will dramatically reduce the ability of employers to obtain summary judgment on the issue of existence of disability—previously a major hurdle to plaintiffs in ADA cases.[14] In practice, this means employers will face greater and more recurrent pressures to settle cases rather than risk large judgments and expenses at trial.

For two reasons, I argue that the likely improved outcomes for ADA plaintiffs is bittersweet. First, after the ADAAA, the doctrine relied for distinguishing disability from mere impairment is even less clear than before its passage. That means courts will have to just as much need as before the ADAAA to develop judicial tests for policing the lines between close disability determinations. But recall the ADAAA's finding that, "the question whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[15] This leads to my second point.

Second, the finding in the ADAAA that all disability determinations should be easy translates into a default rule for courts to follow: 'with regard to disability determinations that are close, courts should ignore doctrine and give plaintiffs a pass (rather than crafting judicial tests as with the Sutton case).' This opens the door to a multitude of conditions that may receive a 'pass' at the disability determination stage, only to deprive employers any meaningful chance of summary judgment on the issue of the existence of disability. It means further that employees who are in no way disabled, but who have experienced some kind of adverse employment action and also have a noted physical and mental impairment, have a decent shot at forcing an employer to the bargaining table. This will increase the win rate of plaintiffs in ADA Title I cases, but there should be less confidence that the individuals in such cases were intended to be protected by the ADA in the first place.

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13. See infra, pp. ___. There is much less data on outcomes in state courts. But the fact that many state disability discrimination laws require interpretations consistent with the ADA supports the likelihood of results similar to federal outcomes. See infra, pp. ___.

14. See, most recently, Sharona Hoffman, Settling the Matter: Does Title I of the ADA Work?, 59 Ala. L. Rev. 305, 327-328 (2008)(hypothesizing that judicial discomfort with burdening employers has led to "courts' extremely narrow interpretation of the statutory term 'disability,' that "[c]ourts often find that a plaintiff is not sufficiently limited to meet the 'substantially limits' requirement or that the constraint in question affects a narrow area of functionality but not a 'major life activity,'" and, "[c]onsequently, plaintiffs encounter significant difficulty convincing the courts that they are entitled to ADA coverage by virtue of having a 'disability.'").

15. See supra, Note 6.

I. "Disability" After the ADA Amendments Act

The focus of this article is not the ADA or, for that matter the ADAAA, generally. The focus is upon the doctrinal coherence of the ADAAA's amended definition of "disability," and its impact upon ADA litigation.[16] An employee who wants to bring a disability discrimination claim under the ADA must first prove that he or she is an individual with a disability.[17] The ADA, originally and as amended by the ADAAA, defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[18] The reforms of the ADAAA pertain primarily to the first prong-actual disability. Therefore, the remainder of the article focuses upon actual disability.[19]

The ADA's definition of actual disability pyramids, with the major life activity and substantial limitation requirements acting as "statutory filters distinguishing those suffering from relatively serious impairments from those with minor, trivial impairments."[20] This section treats physical or mental impairment, major life activity, and

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16. For background on the Americans with Disabilities Act and information on other aspects of the ADA, see generally John Parry, Disability Discrimination Law, Evidence and Testimony: A Comprehensive Manual for Lawyers, Judges and Disability Professionals (2008); Ruth Colker, The Disability Law Pendulum: The First Decade of the Americans with Disabilities Act (2005);John Parry, Handbook of Disability Discrimination Law (2003); Employment, Disability, and the Americans with Disabilities Act: Issues in Law, Public Policy and Research (Peter David Blanck, ed. 2000).

17. See Fn. 9, supra.

18. Compare ADA Amendments Act of 2008, at sec. 4, § 3(1), 122 Stat. at 3555, with Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2006).

19. The ADAAA does not make an changes to the second prong - "record-of" impairment, And makes only a straightforward, but substantial, change to the third prong - "regarded-as" impairment. Compare ADA Amendments Act of 2008, at sec. 4, § 3(1), 122 Stat. at 3555, with Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2006). With respect to "regarded-as" impairment specifically, the ADAAA clarifies that an employee may be regarded as disabled "whether or not the impairment limits or is perceived to limit a major life activity." ADA Amendments Act of 2008, at sec. 4, § 3(3)(A), 122 Stat. at 3555. Yet the definition of "regarded as" impairment is not without limitation: it does "not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." Id. at sec. 4, § 3(3)(B), 122 Stat. at 3555.

20. Adams v. Rice, 531 F.3d 936, 944 (D.C. Cir. 2008)(citing H.R. Rep. No. 101-485, pt. 2, at 52 (1990), as reprinted in 1990 U.S.C.C.A.N. 267, 334). The broader passage cited by the court reads: "A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the

substantial limitation in turn. The gist of the argument is this: while the ADAAA makes little or no change to physical or mental impairment, it radically expands the scope of major life activity and dramatically lowers the threshold of substantial limitation. The result is that far more individuals with physical or mental impairments—even ones that would have been considered trivial pre-ADAAA—will be able to prove substantial limitation on a major life activity and thus qualify as disabled.

A. Physical or Mental Impairment

The ADAAA "does not [define] the terms 'physical impairment' or 'mental impairment.'"[21] Rather, the House "Committee [insert committee title here] expects that the current regulatory definition of such terms, as promulgated by . . . the [EEOC], will not change."[22] Consequently, this section briefly summarizes the law relating to physical and mental impairment under the ADA.

> The EEOC defines "physical or mental impairment" as follows:
> Physical or mental impairment means . . . [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or . . . [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[23]

As a matter of statutory construction, "physical or mental impairment" appears to encompass nearly any human dysfunction that is not expressly excluded from ADA coverage as nonimpairment.[24] The EEOC excludes homosexuality and bisexuality from

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conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort." H.R. Rep. No. 101-485, at 52, 1990 U.S.C.C.A.N. at 334.

21. H.R. Rep. No. 110-730, pt. 1, at 9 (2008).

22. Id.

23. 29 C.F.R. § 1630.2(h) (2008).

24. See H.R. Rep. No. 101-485, pt. 2, at 51, as reprinted in 1990 U.S.C.C.A.N. at 333 [hereinafter H.R. Rep. No. 101-485] ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments

the definition of "physical or mental impairment."[25] EEOC regulations also exclude from the definition of "disability" illegal drug use,[26] as well as three other classes of behavior: "(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) Compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs."[27]

The EEOC points to further exclusions in its regulatory appendix:

> [P]hysical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. . . . characteristic predisposition to illness or disease. . . . conditions, such as pregnancy, that are not the result of a physiological disorder . . . . common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. . . . [e]nvironmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record . . . . [and] [a]dvanced age, in and of itself . . . .[28]

Because the ADA means to capture the widest possible scope of human dysfunction not statutorily excluded,[29] the existence of mental or physical impairment has not been a source of much litigation. Unless an employer has reason to suspect that an employee is faking dysfunction, it is difficult to conceive of any legal advantage from contesting that an employee with muscle sprain, cold, vertigo, backache, recurring headaches, anxiety, limp, less than 20-20 vision, claustrophobia, skin rash, stress, glandular complications, etc., is not in fact impaired. Following the regulatory framework for "physical or mental impairment" summarized above, the rare findings against the existence of impairment are on the basis that a plaintiff-employee's alleged dysfunction is

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because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.").

25. 29 C.F.R. § 1630.3(e).
26. Id. § 1630.3(a).
27. Id. § 1630.3(d).
28. Id. app. § 1630.2(h).
29. See H.R. Rep. No. 101-485, supra note 30, at ___.

actually a condition or characteristic rather than an impairment.[30]

B. The New Major Life Activity of "Normal Functioning"[31]

In order for a physical or mental impairment to qualify as a disability under the ADA, the impairment must affect one or more major life activities.[32] The requirement that an accepted impairment affect one or more major life activities is one statutory filter that is supposed to distinguish legal disabilities from unprotected "minor, trivial impairments."[33] In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, the U.S. Supreme Court defined "major life activities" as activities that are "of central importance to daily life."[34]

The EEOC regulations provide a nonexhaustive list of major life activities that includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working,"[35] "mental and emotional processes [like] thinking, concentrating, and interacting with others,"[36] and "sitting, standing, lifting and reaching."[37]

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30. See, e.g., Mehr v. Starwood Hotels & Resorts Worldwide, Inc., 72 F. App'x 276, 286-87 (6th Cir. 2003) (shortness not the result of a physiological disorder is not an impairment); Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999) ("'paranoid,' 'disgruntled,' 'oppositional,' 'difficult to interact with,' 'unusual,' 'suspicious,' 'threatening,' and 'distrustful'" are behavioral characteristics, not mental impairments); Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1059 (7th Cir. 1998) ("mere temperament and irritability" are not impairments); Lucas v. K.O.A. Residential Cmty., No. 2:06CV992 DAK, 2008 WL 80407, at *3 (D. Utah Jan. 4, 2008) (neither homelessness nor poverty qualifies as a physical or mental impairment); Greenberg v. New York State Dep't of Corr. Services, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (poor judgment is a personality trait, not impairment); Gerben v. Holsclaw, 692 F. Supp. 557, 563-64 (E.D. Pa. 1988) (infancy not a physical or mental impairment).

31. This section and the next are indebted to Professor Ani Satz's article, A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disability Analysis, 6 Yale J. Health Pol'y L. & Ethics 221 (2006).

32. 42 U.S.C. § 12102(1)(A) (2006).

33. See H.R. Rep. No. 101-485, pt. 2, at 52 (1990) as reprinted in 1990 U.S.C.C.A.N. 267, 334; supra note 12.

34. 534 U.S. 184, 197 (2002), superceded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

35. 29 C.F.R. app. § 1630.2(i).

36. Equal Employment Opportunity Commission, Compliance Manual § 902.3(b) (1995), available at http://www.eeoc.gov/policy/docs/902cm.html.

37. 29 C.F.R. app. § 1630.2(i). According to David K. Fram, the EEOC has also advocated in amicus briefs to include as major life activities ordinary household activities (changing tires on cars, moving furniture, and "other household items often associated with maintaining a home and raising children"), waste elimination, moving, bending, twisting, stooping, squatting, proper

Courts have liberally added to the list of major life activities, which now includes, among other things, cognitive functions, waste functions, eating, sleeping, reading and writing, sexual activity, and reproduction.[38]

It remains the case that not every activity qualifies as "major" under the ADA, as construed by the courts.[39] And despite broad findings of major life activity by the EEOC and courts, the same activity may qualify as major in some cases but not others. For example, while courts have held that reading is generally a major life activity,[40] in Szmaj v. American Telephone & Telegraph Co., the Seventh Circuit held that the ability to read all day long is not.[41] Judge Posner, writing for the panel, added that the situation might be

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nutrition (defined as "one's ability to assimilate food and use it for growth and maintenance"), depth perception (as contrasted with seeing), communicating through writing, eating, sleeping, and the ability to control basic functions as bowel movements. David Fram, Resolving ADA Workplace Questions: How Courts and Agencies are Dealing with Evolving Employment Issues, at I-5 through I-13 (National Employment Law Institute 2007).

38. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 638-39 (1998)(reproduction); Adams v. Rice, 531 F.3d 936, 947 (D.C. Cir. 2008)(engaging in sexual relations); Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378, 385-86 (4th Cir. 2008)(reading and writing); Battle v. United Postal Serv., Inc., 438 F.3d 856, 862 (8th Cir. 2006)(thinking and concentrating); Heiko v. Colombo Sav. Bank, F.S.B., 434 F.3d 249, 255 (4th Cir. 2006)(ability to eliminate waste); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1061-62 (9th Cir. 2005)(reading); Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 385 (3d Cir. 2004)(elimination of waste); Fraser v. Goodale, 342 F.3d 1032, 1040 (9th Cir. 2003)(eating); Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 569 (3d Cir. 2002)(concentrating and remembering); Brown v. Lester E. Cox Med. Ctrs., 286 F.3d 1040, 1044-45 (8th Cir. 2002)(cognitive functions).

39. See, e.g., Storey v. City of Chicago, 263 F. App'x 511, 514 (7th Cir. 2008) (cooking); Singh v. George Washington Univ. Sch. of Med., 508 F.3d 1097, 1104 (D.C. Cir. 2007) (test taking); Walton v. U.S. Marshals Serv., 492 F.3d 998, 1010-11 (9th Cir. 2007) (localizing sound); Gretillat v. Care Initiatives, 481 F.3d 649, 654 (8th Cir. 2007) (crawling, kneeling, crouching, squatting); Equal Employment Opportunity Comm'n v. Schneider Nat'l, Inc., 481 F.3d 507, 511 (7th Cir. 2007) (truck-driving); Rossbach v. City of Miami, 371 F.3d 1354, 1358 n.6 (11th Cir. 2004) (weightlifting, playing in parks); McGeshick v. Principi, 357 F.3d 1146, 1150-51 (10th Cir. 2004) (ladder work, window cleaning); Boerst v. Gen. Mills Operations, Inc., 25 F. App'x 403, 406 (6th Cir. 2002) (concentrating, maintaining stamina); Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944, 951 (7th Cir. 2000) (bowling, camping, car restoration, lawn mowing); Weber v. Strippit, Inc., 186 F.3d 907, 913-14 (8th Cir. 1999) (shoveling, gardening, lawn mowing, playing tennis, fishing, hiking); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (shopping, skiing, golfing, painting, plastering); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996) (climbing stairs); Thompson v. Rice, 422 F. Supp. 2d 158, 171 (D.D.C. 2006) (working abroad); Piascyk v. City of New Haven, 64 F. Supp. 2d 19, 26 (D.Conn. 1999) (running, jumping).

40. See Fn. 38, supra p. __.

41. 291 F.3d 955, 956 (7th Cir. 2002).

different if America were "a society of bookworms."[42] Similarly, in Marinelli v. City of Erie, Pennsylvania, the Third Circuit held that cleaning is only "a major life activity to the extent that [it] is necessary for one to live in a healthy or sanitary environment."[43]

Under major life activity, the ADAAA does two things. First, it codifies of the EEOC's updated sample list of major life activities, with the addition of activities that courts have routinely recognized as major life activities.[44] Second, and fundamentally important, is the addition of "major bodily functions" as major life activities: "[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[45]

The addition of major bodily functions to the ADAAA's definition of "major life activity" was in response to court opinions like Furnish v. SVI Systems, Inc.[46] Plaintiff Furnish was Director of Technical Operations for Defendant SVI Systems.[47] Furnish was "responsible for pre-installation technical work and for installing SVI's video systems in hotels," which required regular travel.[48] In August 1995 Furnish was diagnosed with Hepatitis B and cirrhosis of the liver, which affected his liver's ability to eliminate toxins and maintain proper glucose levels.[49] In January 1996 Furnish informed his supervisor that the disease and the prescribed medications would require him to miss work in coming months.[50] According to Furnish, he would suffer loss of "sleep, nausea, mood swings . . . irritability," and flu-like symptoms in addition to absences for doctor appointments.[51] In March 1996 Furnish "told his supervisor that his health prevented him from traveling to [installation jobs] far from [his home]."[52] In the same month Furnish missed an

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42. Id.
43. 216 F.3d 354, 362-63 (3d Cir. 2000).
44. The nonexhaustive list of major life activities now includes, but is 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, sec. 4, § 3(2)(A), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(3)(2)(A))(emphasis added).
45. Id. sec. 4, § 3(2)(B), 122 Stat. at 3555 (to be codified at 42 U.S.C. § 12102(3)(2)(B)).
46. 270 F.3d 445 (7th Cir. 2001).
47. [cite]
48. Id. at 446-47.
49. Id. at 447.
50. [cite]
51. Id.
52. Id.

appointment with an installer "because he had vomited and [gone] home to rest."[53] "By June . . . 1996, Furnish had fallen behind on" the installation schedule.[54] In response, Furnish's supervisor relieved him of his former installation duties and limited him to preinstallation work[55] SVI terminated Furnish less than a month later for "unsatisfactory work performance."[56]

Furnish filed suit under the ADA, but the district court granted summary judgment in favor of SVI because Furnish's disease did not substantially limit a major life activity.[57] The Seventh Circuit Court of Appeals affirmed.[58] In explaining why liver function was not a major life activity, the Seventh Circuit first observed that "'liver function' bears little resemblance to the major life activities enunciated in the ADA regulations"[59] ("caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").[60] The Seventh Circuit then turned to Supreme Court jurisprudence on major life activity, observing that the activity must be "integral to one's daily existence."[61] Here, the Seventh Circuit distinguished between the characteristics of an impairment and activities that are impacted because of an impairment.[62] It found that diminished liver function was a characteristic of Hepatitis B-induced liver cirrhosis and not an activity in its own right, major or otherwise.[63]

According to the House Committee on Education and Labor (the Committee), the addition of "major bodily function" to the definition of "major life activities" "was needed to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside the definition of 'major life activities' under the ADA,"[64] as the Committee claimed to have happened in Furnish.[65] According to the Committee, "[a]n impairment can materially restrict the operation of a major bodily function if it causes the operation to over-produce or under-produce in some harmful

53. Id.
54. Id.
55. Id.
56. Id.
57. Id. at 448.
58. Id. at 451.
59. Id. at 449.
60. Id. (quoting 29 C.F.R. § 1630.2(I) (2008) (internal quotation marks omitted)).
61. Id. (internal quotation marks omitted).
62. Id. at 450.
63. Id.
64. H.R. Rep. No. 110-730, pt. 2, at 16 (2008).
65. Id. at 17.

fashion."[66]

The Committee describes the addition of major bodily function as a "clarification" rather than an expansion of the scope of major life activity.[67] It is much more. In fact, the addition radically changes the definition of disability under the ADA. In many cases the symptoms, side effects, or other manifestations of a physical impairment will themselves qualify as major life activities. This, I will show, effectively merges what, before the ADAAA, were separate inquiries into the existence of physical impairment and impact on major life activity. In short, part of what it now means to suffer certain physical impairments is to be substantially limited in having normal bodily functions.[68] Thus, a person suffering the physical impairment of liver cirrhosis (like the plaintiff in Furnish) is necessarily "disabled" under the ADAAA because that person is substantially limited in the major life activity of having a normal functioning liver.

The ADAAA's rationale for treating Furnish as substantially limited in a major life activity is not merely an extension of pre-existing ADA doctrine. Rather, it represents a whole new theory of disability: deviation from the major life activity of normal functioning.[69]

As used here, "normal functioning" is an umbrella term into which any bodily function can be stuffed, and against which the medical documentation of—or deviate functioning created by—an impairment will serve as primary proof of limitation. On its face, linking physical or mental impairment with major bodily function is conceivably much easier than linking physical or mental impairment to traditional major life activities. For example, it likely is easier to show that a physical impairment (e.g., asthma) affects the normal operation of one's circulatory or respiratory system than to show that the same impairment limits the major life activity of walking. It should be easier to prove that an impairment (e.g., chronic acid reflux) affects the normal operation of one's digestive system than to show that it limits the major life activity of eating.

The impairment-major bodily function link created by the ADAAA, and the new major life activity of normal functioning, run counter to ADA's stated goals. Those goals

66. Id. at 17.
67. Id. at 17.
68. [See cite to session law text here.]
69. [Note to Editors: I agreed with your comment here, but I've decided not to add a supporting citation. This is the introduction of an idea that is supported by the arguments in subsequent paragraphs. Please leave as is. Thank you.]

are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities.[70] There is a reason why, from its inception, the ADA always required substantial limitation on major life activity in addition to mere physical or mental impairment for a person to qualify as disabled.[71] The former requirements connect the importance of personal action and interaction with the aforementioned goals of the ADA. The ADA does not protect individuals with substantially limiting physical and mental impairments in anything they are doing or might choose to do, as evidenced by the fact that not everything qualifies as a major life activity.[72] Rather, at least to this point under the ADA, major life activities were limited those "of central importance to daily life,"[73] or "those basic activities that the average person in the general population can perform with little or no difficulty."[74]

In linking impairment with major bodily function, the ADAAA confuses two ideas. It confuses the ADA's concern for particular outcomes-equality of opportunity, full participation, independent living, economic self-sufficiency for people with disabilities[75]-with a concern that persons with disabilities function normally.[76] Professor Satz observes that in thinking about normal species functions, we may be concerned about one of three different categories of action: standardizing biological states, promoting familiar modes of functioning, or striving for particular outcomes.[77]

"Standardizing biological states involves accommodations that allow individuals to

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70. 42 U.S.C. § 12101(a)(7) (1990). The Findings and Purposes of the ADAAA reiterate these goals. See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(a)(2), 122 Stat. 3553, 3553.

71. [Note to Editors: I don't think a citation is needed here, but if you absolutely want one feel free to refer to footnote 22 above. I'm confident that this is something that anyone interested in the article will know. If the didn't know it before, I think they will know it from having read up to this point.]

72. See, for example, Gretillat v. Care Initiatives, 481 F.3d 649, 654-55 (8th Cir. 2007) (crawling, kneeling, crouching and squatting are not major life activities); Holt v. Grand Lake Mental Health Center, Inc., 443 F.3d 762, 767 (10th Cir. 2006)(chewing and swallowing are not major life activities); Marinelli v. City of Erie, 216 F.3d 354, 362 (3d Cir. 2000)(cleaning and doing housework are not major life activities).

73. Kania v. Potter, 2009 WL 4918013, at *3 (3d Cir.(Pa.), Dec. 22, 2009)(citing to Toyota Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195-96 (2002).

74. 29 C.F.R. pt. 1630, App., 1630.2(j)(2009).

75. See supra note 70.

76. See Satz, supra note 31 at 241-243.

77. Id. at 241-42 (citing Ani B. Satz & Anita Silvers, Disability and Biotechnology, in Encyclopedia of Ethical, Legal, and Policy Issues in Biotechnology 173, 183 (Thomas J. Murray & Maxwell J. Mehlman eds., 2000)).

function in biologically similar ways to other individuals. In other words, the mode of functioning is emphasized over the result of the functioning."[78] "Promoting familiar or normal modes of functioning entails accommodations that allow individuals to execute functions in ways that are most familiar, while not necessarily involving biological standardization."[79] According to Professor Satz, both of these categories of action "emphasize a manner or mode of functioning" rather than functional outcomes.[80] The ADAAA's impairment–major bodily function link is just this kind of error because it focuses on standardizing biological states instead of alternative modes of functioning that may obtain the states goals of the ADA.

Return to Furnish. A person who has liver cirrhosis presumably has a liver that is not functioning normally. Such a person has a condition that has affected the major bodily function of toxin elimination. But there is no necessary connection between that condition and those activities "of central importance to daily life" or "those basic activities that the average person in the general population can perform with little or no difficulty."[81] A full examination of Furnish's life might reveal that he can walk, talk, see, care for himself, perform manual tasks, etc. Nor is there an obvious connection between liver cirrhosis, per se, and equality of opportunity, full participation, independent living, or economic self-sufficiency.

If Congress believed that cases like Furnish were wrongly decided, there were two other, more coherent routes to crafting a legislative solution. First, the ADAAA's reinstatement of a broad view of disability and its call for the Equal Employment Opportunities Commission to craft a more relaxed standard for disability determinations, alone, might have produced a different outcome in the Furnish case.[82] Second, rather extending major life activities to cover bodily functions, Congress could have instructed the EEOC to expand the list of major life activities to expressly include the kinds of daily restrictions that Furnish actually faced (loss of sleep, nausea, mood swings, irritability, flu-like symptoms).[83] Either course of action would have lowered the threshold for establishing the existence of disability in a manner that preserved the traditional link between impairment and major life activity, and so between disability and the goals of the ADA.

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78. Id. at 241.
79. Id.
80. Id. at 241.
81. See supra notes 73-74.
82. See supra note 6 at sec. 2(b)(4)-(6).
83. See supra note 51.

What, ultimately, does the ADAAA do on the subject of major life activity? It partially collapses major life activity into physical and mental impairment.[84] In doing so, it lowers the threshold of proof for the existence of disability, but only by making less coherent the definition of disability itself.

C. Redefining "Substantial Limitation"

Before passage of the ADAAA, "substantially limits" meant "[u]nable to perform a major life activity that the average person in the general population can perform; or . . . [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular 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."[85] In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, the U.S. Supreme Court defined "substantially limits" to mean "'considerable' or 'to a large degree,'"[86] and reasoned that the term needed "to be interpreted strictly to create a demanding standard for qualifying as disabled . . . ."[87] The Court then held that "to be substantially limited" in a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[88]

The ADAAA expressly rejects the "severely restricts" standard announced in Toyota Manufacturing because it required "a greater degree of limitation than was intended by Congress."[89] In debating S. 3406, the Senate version of the ADAAA that became law, the Senate Committee deliberated extensively about whether a new term, other than "substantially limits," should be used in the ADAAA.[90] The Senate decided against a new

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85. 29 C.F.R. § 1630.2(j)(i)-(ii) (2001).

86. 534 U.S. 184, 196-97 (2002).

87. Id. at 197.

88. Id. at 198.

89. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(a)(7), 122 Stat. 3553, 3553-54. See also id. sec. 2(a)(8) and sec. 2(b)(4)-(6).

90. 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of Managers). H.R. 3195, the House version of the ADAAA, would have defined the new standard for substantial limitation for the EEOC and courts to mean materially restricts:

> ;bWhile the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity in order to qualify as a disability. In the range of

term because "[t]he resulting need for further judicial scrutiny and construction [would] not help move the focus from the threshold issue of disability to the primary issue of discrimination."[91] Instead, the Senate reaffirmed that the proper question is "whether a person's activities are limited in condition, duration and manner."[92] It was careful to note, however, that courts must apply a lower standard than Toyota that "will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications."[93]

The ADAAA further prohibits considering the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity.[94] It is also meant to remove the "penalty" of being less eligible for protection under the ADA by virtue of receiving accommodations or adopting adaptive strategies that lessen the deleterious effects of a disability.[95] As a result of these changes the Senate expects that "some individuals previously found not disabled will now be able to claim the ADA's protection against discrimination."[96]

But who are the newly protected individuals? Recall that the ADAAA was passed to expand coverage of people with disabilities and focus attention upon the issue of

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> severity of the limitation, "materially restricted" is meant to be less than a severe or significant limitation and more than a moderate limitation, as opposed to a minor limitation. The level of the restriction created by the impairment must be the determining factor—not the severity of the impairment itself. For example, an individual with mild mental retardation (intellectual disability) would be considered materially restricted in the major life activities of learning and thinking. Multiple impairments that combine to materially restrict a major life activity also constitute a disability.

H.R. Rep. No. 110-730, pt. 1, at 9-10 (2008).

91. 154 Cong. Rec. S8841.

92. 154 Cong. Rec. S8842.

93. Id.

94. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3(4)(E)(I), 122 Stat. 3553, 3556 (to be codified at 42 U.S.C. § 12102(4)(E)(i)). In Sutton v. United Air Lines, Inc., 527 U.S. 471, 472 (1999), the Supreme Court ruled that the effect of mitigating measures must be taken into account when judging whether a person is disabled.

95. 154 Cong. Rec. S8842 ("The Committee believes that an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.")

96. Id.

employer compliance.[97] The above two changes to the meaning of "substantial limitation" are the central tools of this strategy. However, in the next two subsections, I argue that the ADAAA's amendments to substantial limitation stand at cross-purposes with the ADA. On the one hand, the ADAAA's less restrictive understanding of "substantial limitation" is a sound strategy for correcting the problem of underinclusiveness. On the other hand, the near wholesale rejection of mitigating measures undermines the logical consistency and common sense of the ADA, and opens the door to protection of many people who should not qualify as disabled.

1. The Proper Measure of Substantial Limitation

Courts have taken at least two approaches to measuring "substantial limitation." First, some courts have measured substantial limitation in terms of the severity of an individual's impairment. A good example of this approach is found in Littleton v. Wal-Mart Stores, Inc.[98] "Littleton [was] a 29-year-old man . . . with mental retardation. . . . [He] receive[d] social security benefits because of his disability and live[d] . . . with his mother. He graduated from high school . . . with a certificate in special education."[99] Through an Alabama state employment agency, Littleton applied for a job as a cart pusher with Wal-Mart.[100] According to Littleton, he requested to bring the state employment coordinator to his interview, but Wal-Mart denied this request.[101] Littleton's interview went poorly and he "was not offered a position."[102] Littleton sued, claiming to be "substantially limited in the major life activities of learning, thinking, [and] communicating," among others.[103] The district court granted summary judgment to Wal-Mart, finding that Littleton was not substantially limited in those major life activities because he could read, drive a car, and communicate effectively with words.[104] The Eleventh Circuit affirmed.[105] The analysis of substantial limitation in Littleton focused on the severity of his impairment: how severe Littleton's impairments were in relation to major life activities that most people perform.[106] Since Littleton could (to a significant degree) do many of the major life activities that nondisabled people could, the court found

97. See supra notes 2-4 and accompanying text.
98. See 231 F. App'x 874 (11th Cir. 2007).
99. Id. at 875.
100. Id.
101. Id.
102. Id.
103. Id. at 876.
104. Id. at 876-77.
105. Id. at 878.
106. Id. at 877.

that he was not substantially limited.[107]

Other courts have measured substantial limitation, not in terms of severity of impairment, but rather in terms of level or restriction. A good example of this approach is found in Price v. National Board of Medical Examiners.[108] Price, Singleton, and Morris were medical students with diagnosed learning disorders who were refused special testing accommodations by their medical school.[109] The medical school denied the requests based on the determination that none of the plaintiffs was substantially limited in the major life activity of learning as a result of his impairment.[110] Mr. Price had "graduated from high school with a 3.4 grade point average and from Furman University with a 2.9 grade point average."[111] There was little evidence that Price had been ever substantially limited in "home, school or work functioning," although he had received testing accommodations for the MCATs.[112] Mr. Singleton "[had been] in a gifted program from second grade through his high school graduation. He had graduated from high school with a 4.2 grade point average and had been the state debate champion."[113] He then had been admitted to the U.S. Naval Academy, had "graduated from Vanderbilt University, [with] a degree in physics," and had been "admitted to medical school."[114] Singleton had done all of this "without any accommodation for his alleged disability."[115] Mr. Morris "[was] a National Honor Student" who had "graduated from [Virginia Military Institute] with average grades."[116] Morris had attended another institution to fulfill some medical school prerequisites, where he had "maintained a 3.5 grade point average."[117] "He [then] [had been] admitted to medical school."[118] Morris had done all of this without any accommodation for his alleged disability.[119] The district court held that the plaintiffs were not substantially limited in the major life activity of learning.[120] In explaining the holding, the district court gave the following hypothetical:

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107. Id. at 877-78.
108. 966 F. Supp. 419 (S.D.W. Va. 1997).
109. Id. at 422.
110. Id. at 422, 424.
111. Id. at 423.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 424.
117. Id.
118. Id.
119. Id.
120. Id. at 427-28.

> Take, for example, two hypothetical students. Student A has average intellectual capability and an impairment (dyslexia) that limits his ability to learn so that he can only learn as well as ten percent of the population. His ability to learn is substantially impaired because it is limited in comparison to most people. Therefore, Student A has a disability for purposes of the ADA. By contrast, Student B has superior intellectual capability, but her impairment (dyslexia) limits her ability so that she can learn as well as the average person. Her dyslexia qualifies as an impairment. However, Student B's impairment does not substantially limit the major life function of learning, because it does not restrict her ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[121]

According to the Price court, what determines whether a person is substantially limited is whether the impairment restricts the person's ability to perform at the level of an average person in society, as opposed to the severity of the impairment in and of itself.

One virtue of the ADAAA is that it resolves that the proper measure of substantial limitation is level of restriction (Price), not severity of impairment (Littleton).[122] The ADAAA's formal adoption of level of restriction as the proper measure of substantial limitation comports with much prior ADA policy. For instance, the Senate maintains that after the ADAAA it will remain true that "[a] person who can walk for 10 miles

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121. Id. at 427.

122. The House Committee on Education and Labor Report on H.R. 3195 explains why: "The level of the restriction created by the impairment must be the determining factor—not the severity of the impairment itself. For example, an individual with mild mental retardation (intellectual disability) would be considered materially restricted in the major life activities of learning and thinking. . . . When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking or speaking. . . . [t]he Committee believes that the comparison of individuals with specific learning disabilities to "most people" is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life." H.R. Rep. No. 110-730, pt. 1 (2008).

continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."[123] Also, the EEOC takes the position that "an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed."[124]

Unlike the ADAAA's addition of bodily functions to "major life activity," the ADAAA's take on substantial limitation remains true to the integrative goals of the ADA. It's approach to substantial limitation also preserves the ADA's focus on the abilities of disabled people rather than the conditions that make them different (though not necessarily less functional) than nondisabled people.

2. The Rejection of Mitigating Measures

The same cannot be said of the ADAAA's near-wholesale rejection of considering of mitigating measures.[125] The irrationality of this amendment is made plain when compared with the lone exception to the rule:

> The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.[126]

Congress' rationale for this lone exception is "that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA."[127] Can it be that poor eyesight is the only impairment so remediable to be disqualified as disability? The same seems true of other impairments that, for mild instances, enjoy widely accessible, effective mitigating measures. Hearing impairments treatable with hearing aids are the most sharp and intuitive comparison. But other conditions treatable with medication or assistive technology-asthma, diabetes,

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123. 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of Managers) (citing S. Rep. No. 101-116, at 23 (1989)).

124. 29 C.F.R. app. § 1630 (2008).

125. See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3(4)(E), 122 Stat. 3553, 3556 (to be codified at 42 U.S.C. § 12102(4)(E)).

126. Id. at sec. 4, § 3(4)(E)(ii), 122 Stat. at 3556.

127. 154 Cong. Rec. S8842.

hypertension-could also qualify for exception.

One explanation for why Congress singled out vision but no other impairments is that vision impairments have a unique and well-developed factual and legal history under the ADA. That is so because of longstanding vision requirements for driving positions with federal and state departments of transportation and private employers.[128] The ADAAA's permission to consider mitigating measures with respect to vision impairments probably has more to do with this than with the fact that vision is an especially remediable type of impairment.

However substantially limiting impairments may be in their corrected states, the former simply are not disabilities in a practical sense when effective and readily available treatments exists. We do not prohibit individuals from obtaining driver's licenses simply because their uncorrected vision would leave them unfit to be on the roads. They are allowed to drive upon show that corrective glasses or lenses give them safe road vision. They are allowed because, in fact, they are able to drive safely. Ignoring this information in assessing level of restriction creates an artificially high level of restriction that bears no true relationship to what an impaired individual is actually able to do in the way of major life activities.

The ADAAA's rejection of mitigating measures serves to exclude essential evidence of functionality. In some cases the exclusion will render the element of substantial limitation rather meaningless. If, in evaluating an asthmatic or a person with a hearing impairment, the law must ignore that the conditions are normalized over-the-counter inhalers or standard hearing aids, there is hardly a point to claiming genuine inquiry into substantial limitation. In such cases the "requirement" of substantial limitation is straw; it is reached by counterfactual inference.

* * *

A caveat: I have argued that the ADAAA's rejection of mitigating measures disconnects substantial limitation from an individual's true functionality, and therefore

128. The leading cases are—or were—Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) superceded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. More recently, see Buboltz v. Residential Advantages, Inc., 523 F.3d 864 (3d Cir. 2008); Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006); EEOC v. United Parcel Serv., Inc., 424 F.3d 1060 (9th Cir. 2005); Shannon v. N.Y. City Transit Auth., 332 F.3d 95 (2d Cir. 2003).

one's actual (dis)ability. Even before the ADAAA's passage, however, some scholars disputed whether our disability law should impose a legal duty to take reasonable care to prevent treatable conditions from becoming disabilities.[129] Whether individuals should carry duties of reasonable care to prevent disability is related to, but distinct from, the broader issue of voluntariness, for example, as treated in the EEOC Compliance Manual Section 902.2(e):

> ;bVoluntariness -- Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops lung cancer as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment. The cause of a condition has no effect on whether that condition is an impairment. See House Judiciary Report at 29 (noting that "[t]he cause of a disability is always irrelevant to the determination of disability"); see also Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosp., 10 F.3d 17, 63 EPD ¶ 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). Further, the voluntary use of a prosthetic device or other mitigating measure to correct or to lessen the effects of a condition also has no bearing on whether that condition is an impairment.[130]

The foregoing rejects making poor choices causally related to a disability relevant to obtaining the law's protection. If such were the case, voluntariness would function as an affirmative defense to evidence that would otherwise establish physical or mental impairment. Voluntariness in this sense is, and should be, irrelevant to the determination of disability.

This does not preclude a duty of reasonable care in disability law, however. Pre-ADAAA scholarship relating to a duty to mitigate severe impairment written in response to Sutton v. United Air Lines.[131] Sutton instructed courts to consider mitigating

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129. See infra note 112 and accompanying text.

130. Equal Opportunity Employment Commission, Compliance Manual §902.2(e) (1995), available at http://eeoc.gov./policy/docs/902cm.html.

131. 527 U.S. 471 (1999) superceded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Of the scholars writing such pieces, most appear to have viewed with great skepticism the propriety of any duty of mitigation at the disability determination stage. See, e.g., Melissa Cole, The Mitigation Expectation and the Sutton Court's Closeting of Disabilities, 43 How. L.J. 499 (2000)(characterizing Sutton as creating a repressive "mitigation expectation" that individuals with disabilities that can be mitigated "closet" them); Lawrence D. Rosenthal, Requiring Individuals to Use Mitigating Measures in Reasonable Accommodation

measures in making disability determinations. But Sutton did address what types of consideration were legally required and/or permissible.[132] For example, consider four closely related causal issues that a court might consider in making a disability determination:

> (1) Whether reasonable mitigating measures actually taken have driven an impairment below the thresholds of substantial limitation or impact on major life activity;
>
> (2) Whether reasonable mitigating measures, if they had been taken or taken sooner, would have driven an impairment below the thresholds of substantial limitation or impact on major life activity;
>
> (3) Whether reasonable mitigating measures, because not taken, have driven or left an impairment above the thresholds of substantial limitation or impact on major life activity; and
>
> (4) Whether reasonable mitigating measures, if yet taken, would drive an impairment below the thresholds of substantial limitation or impact on major life activity.

The Sutton court did not address the larger question whether our disability law should impose a duty of reasonable care with respect to impairment. But I believe a strong presumption exists in favor of just such a duty, and it is worthwhile to discuss the basis for that presumption. The explanation begins with the observation that bodies of law whose goal it is to minimize harm routinely place minor duties of harm prevention on plaintiffs as well as defendants.○ In contracts, the doctrine of avoidable consequences provides that "damages are not recoverable" for economic losses "that the injured party could have avoided" by taking reasonable steps or "without undue risk, burden or

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Cases After the Sutton Trilogy: Putting the Brakes on a Potential Runaway Train, 54 S.C. L. Rev. 421 (2002)(arguing for a balancing approach to consideration of mitigating measures in the context of reasonable accommodation, but not in disability determinations); Sara Shaw, Comment, Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures For Their Impairments, 90 Cal. L. Rev. 1981 (2002)(arguing that neither the ADA nor congressional intent supports such a requirement). But see Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act, 103 Mich. L. Rev. 217 (2004)(advocating for the minority position in favor of duties of reasonable mitigation).

132. Sutton, 527 U.S. at 482-83.

humiliation."[133] Comparative tort regimes have similar requirements of mitigation of damages through apportionment rules and doctrines such as "last clear chance," fifty and fifty-one percent bars to recovery, and similar rules encouraging plaintiffs to minimize harm where it is reasonable to do so.[134] And criminal law takes into account both mitigating and aggravating circumstances of crimes as relevant to sentencing and punishment.[135] To be sure, the role of mitigation differs in contracts, torts, and criminal law. That is due, at least in part, to the unique types of harm those bodies of law are designed to prevent.

Antidiscrimination law, including disability law, exists to prevent a particular species of harm—discrimination. Any role for mitigation there must be refitted to the particular aims of disability law, and it must function differently than it often has. In contract, tort, and criminal law the mitigation duty modifies outcomes(damage awards and punishments). By contrast, in disability law a mitigation duty would modify inputs (those who are qualify as disabled for purposes of stating a claim). This is a very different application of the duty to mitigate. But there is nothing about that fact, standing alone, that requires rejection of the general principle that the plaintiff's duty to minimize harm are is integral tool in antiharm law. Indeed, without more, there should a strong presumption that a duty to mitigate also could find a comfortable home in disability law and antidiscrimination law generally.[136]

The role that mitigation may play in antidiscrimination law is further circumscribed by the immutability of characteristics (e.g., race, gender, sexual orientation) on which some class protections are based.[137] This means that in many cases, with regard to

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133. Restatement (Second) of Contracts § 350(1) (1981).

134. See, e.g., Restatement (Third) of Torts: Apportionment Liab. § 7 (2000); Restatement (Second) of Torts §§ 479-80 (1965).

135. See, e.g., Model Penal Code § 210.6(3)-(4) (2001).

136. The plaintiff's duty of reporting discrimination may, though need not necessarily, be construed as a mitigating measure. This obligation exists to place employers on notice of possible legal violations, but it also reduces ongoing discrimination. Likewise, requirements that discrimination complaints or lawsuits be filed within a certain time after the occurrence of an adverse employment action, while partially directed to the elimination of stale claims, also encourage plaintiffs to seek to remedy discrimination that is occurring sooner rather than later. This is also true with the duty of plaintiffs in disability discrimination cases to begin the meaningful interactive process by requesting reasonable accommodation (as opposed to placing on employers the duty of knowing when an employee may be in need of accommodation).

137. For example, Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's

establishing protected status, the doctrine of mitigation simply will have no work to do. But it will have a greater role in disability law because many physical and mental impairments are mutable-they are affected by the choices we make.[138] One way of decreasing the harm of disability discrimination is by decreasing the overall occurrence of conditions that rise to the level of legal disability. The asthmatic whose condition is controlled by over-the-counter inhalers and the vision-restricted person restored to 20-20 with contact lenses are uniquely positioned to take advantage of such opportunities. Determining when such legal opportunities exist—that is, when a duty to mitigate is truly reasonable as opposed to oppressive or contrary to law's purpose—is hard. But it is a question all antiharm laws must answer, and is not a reason for skirting the inquiry.

III. Litigation After The ADA Amendments Act

How will the ADAAA affect the litigation of employment-related disability discrimination claims? How should the ADAAA affect the advice that employment lawyers give to their clients? This section discusses three major changes to disability law practice likely to flow from the ADAAA. These are: (1) the domino effect that the ADAAA will likely have on state disability discrimination laws; (2) the shift in leverage from defendant employers to plaintiff employees at the motion to dismiss and summary judgment stages of litigation; and (3) new risks relating to reasonable accommodation.

A. Changes to Summary Judgment

The institutional limitations of the ADA are well-documented. To start, the American Bar Association examined all Title I cases decided between 1992 and 1997 and found that of the decisions in which one party or the other prevailed, employers prevailed in 92.11% of the cases and employees prevailed only 7.89% of the time.[139] Next,

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race, color, religion, sex, or national origin" or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)-(2)(1991).

138. See, for example, Sharona Hoffman, Settling the Matter: Does Title I of the ADA Work?, 59 Ala. L. Rev. 305, 327 (2008)("...the ADA acknowledges that individuals' physical and mental disabilities might pose limitations relevant to job performance" (citing to 42 U.S.C. § 12112 (2009)).

139. See American Bar Association, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 Mental & Physical Disability L. Rep. 403, 403-04 (1998).

Professor Ruth Colker conducted two studies of ADA appellate cases.[140] Professor Colker concluded that between 1992 and 1998, in the district court defendants had prevailed 94% of the time and at the appellate level plaintiffs prevailed only 18.1 percent of the time.[141]

More recently, Professors Michael Fox and Robert Mead studied appellate outcomes in ADA Title I cases. They divided disabilities into four categories: acute physical, chronic diseases, cognitive behavioral, and injuries.[142] They further divided their results into cases decided before and after the Sutton v. United Airlines, Inc. decision.[143] Because Sutton and its progeny narrowed the definition of disability under the ADA[144], most scholars predicted that the line of cases would further decrease the plaintiffs' chances of success under the ADA.[145] To the contrary, Fox and Mead concluded that post-Sutton success rates for Title I plaintiffs in the courts of appeal increased in all four categories, and by 32% overall, but that the average percentage of plaintiff wins in the years 2000-2002 for all conditions was 33%, or roughly one out of every seven cases.[146]

Finally, in a 2008 analysis conducted by Professor Sharona Hoffman, she concluded that "defendants have consistently prevailed in well over 90% of the cases since the ADA's inception."[147] Also, in its annual survey of employment law cases brought under the Americans with Disabilities Act, the American Bar Association reports that of 507 cases brought in 2008, "415 resulted in employer wins; 9 in employee wins; and 83 in no resolution of the merits. Of the 424 decisions the resolved the claim (and have not yet changed on appeal), 97.8 percent resulted in employer wins and 2.2 percent in employee wins."[148]

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140. Ruth Colker, Winning and Losing Under the Americans with Disabilities Act, 62 Ohio L. J. 239 (2001); Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. Rev. 99 (1999).

141. Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. Rev. at 107.

142. Michael H. Fox, Robert A. Mead, The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal, 13-Sum Kan. J. L. & Pub. Pol'y 485, 496-498 (2004).

143. Id. at 506.

144. Id. at 490-94.

145. See, for example, id. at 486-87 (noting Professor Colker's prediction "that the Supreme Court's 1999 decision in Sutton v. United Airlines, Inc. ...[was] likely to diminish successful employment discrimination lawsuits for certain types of disabilities ..."

146. Id. at 506-07.

147. Hoffman, supra note 138 at 306.

148. American Bar Association, Employment Decisions Under The ADA Title I–Survey

According to Professor Colker, two factors explain such favorable outcomes to employers. First is the way courts have used summary judgment in ADA cases.[149] Second, and related, is the refusal by courts in ADA cases to defer to EEOC interpretations of disability.[150] Professor Colker argues that courts routinely refuse to send to the jury the question whether an individual is disabled, treating that issue as a legal question rather than a question of fact.[151] She further contends that courts often get wrong the proper allocation of burdens at the summary judgment stage, resulting in an inordinately high threshold for a plaintiff to create genuine issues of material fact.[152]

There is other evidence that the low plaintiff win rate in ADA cases is due, in important part, to the manner in which courts have interpreted the ADA's definition of "disability." Professor Sharona Hoffman has argued that "many individuals who seek redress under [the ADA] do not have what are traditionally thought of as severe disabilities, and thus a significant portion of those who obtain relief from employers may not be the most needy or deserving plaintiffs."[153] She has also observed that:

> Courts often find that a plaintiff is not sufficiently limited to meet the "substantially limits" requirement or that the constraint in question affects a narrow area of functionality but not a "major life" activity. Thus, for example, courts have repeatedly ruled that individuals with mental retardation do not have a disability because they are not substantially limited with respect to any major life activity. Consequently, plaintiffs encounter significant difficulty convincing courts that they are entitled to ADA coverage by virtue of having a "disability." A plaintiff who does not meet the threshold requirement of being an individual with a disability under the ADA will be given no further consideration by the court, and questions of whether she should be granted a reasonable accommodation or is entitled to damages will never be reached.[154]

Update, 33 Mental & Physical Disability L. Rep. 363, 364 (2008).

149. Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 harv. C. R. C.-L. Rev. 99, 101-02(1999).

150. Id. at 102.

151. Id. at 101-02.

152. Id. at 102.

153. See Sharona Hoffman, Corrective Justice and Title I of the ADA, 52 Am. U. L. Rev. 1213, 1250 (2003).

154. Hoffman, supra note 138 at 327-28.

The primary affect of the ADAAA will to remove disability as robust summary judgment issue for employers. Courts' refusals to defer to EEOC interpretations of "disability" were based on the ADA's failure to expressly grant the agency the authority to define "disability."[155] The ADAAA expressly authorizes the EEOC to define "disability" and orders the agency to develop a less demanding standard of proof for establishing the existence of disability.[156]

After the ADAAA, the focus of summary judgment will shift from disability determinations to employer compliance—precisely what the ADAAA intended to accomplish. That is, whether an employee has presented a genuine issue of material fact regarding the employer's basis for an adverse employment decision. Thus, employers seeking summary judgment should be prepared with substantial documentation explaining adverse employment decisions, as well as evidence of compliance with ADA norms, including proof of staff training and enforcement, just as they would with any Title VII claim.

B. State Antidiscrimination Laws

Many states' disability discrimination laws are modeled after the ADA. Several states require that their disability laws be construed in a manner consistent with the ADA. Oregon, for example, has adopted the ADA's general framework with regard to reasonable accommodation, undue hardship, qualification standards, definition of employment discrimination, illegal drug use, and medical examinations.[157] And Oregon law mandates that its disability discrimination laws "be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended."[158] Similarly, Utah law defines "disability" as "a physical or mental disability as defined and covered by the Americans with Disabilities Act of 1990 . . . ."[159]

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155. See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) superceded by statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (finding that "no agency . . . has been given authority to issue regulations . . . interpret[ing] the term 'disability'" in the ADA).

156. "The authority to issue regulations granted to the Equal Employment Opportunities Commission . . . includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008." ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 6(a)(1), § 506, 122 Stat. 3553, 3558 (to be codified at 42 U.S.C. § 12201).

157. See Or. Rev. Stat. §§ 659A.100-659A.145 (2008).

158. Id. § 659A.139.

159. Utah Code Ann. § 34A-5-102(5)(2004)(emphasis added).

Many other states, although not adopting the ADA writ large, have adopted the ADA's definition of "disability" en toto[160] and require state law interpretations consistent with parallel provisions of the ADA,[161] or require that the ADA be followed wherever its protections are broader than the protections afforded under state law.[162] States with such mandates appear poised to revamp their laws to comply with the ADAAA. This would mean an increase in disability discrimination cases under state, as well as federal, law.[163]

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160 . See, e.g., Alaska Stat. § 18.80.300(14)(2006); Ariz. Rev. Stat. Ann. § 41-1461(2)(2004); Colo. Rev. Stat. § 24-34-301(2.5)(a)-(b) (2008); Del. Code Ann. tit. 19, § 722(4)(2005); D.C. Code § 2-1401.02(5A)(2008); Haw. Rev. Stat. § 378-1 (2008); Ind. Code. § 22-9-5-6(2009); Kan. Stat. Ann. § 44-1002(j) (2000); Ky. Rev. Stat. Ann. § 344.010(4)(2006); La. Rev. Stat. Ann. § 23:322(3)(1998); Mass. Gen. Laws ch. 151B, § 1(17)(2009); Mo. Rev. Stat. § 213.010(4)(2009); Mont. Code Ann. § 49-2-101(19)(2007); Neb. Rev. Stat. § 48-1102(9)(2004); Nev. Rev. Stat. Ann. § 613.310(1)(2000 & Supp. 2009); N.H. Rev. Stat. Ann. § 354-A:2(IV)(2008); N.M. Stat. § 28-1-2(M)(2008); N.C. Gen. Stat. § 168A-3(7a)(2008); N.D. Cent. Code § 14-02.4-02(5)(Supp. 2007); Ohio Rev. Code Ann. § 4112.01(A)(13)(LexisNexis 2007); 25 Okla. Stat. § 1301(4)(2001); 43 Pa. Cons. Stat. § 954(p.1)(Supp. 2008); R.I. Gen. Laws § 28-5-6(4)(2000) (notably, excluding consideration of mitigating measures consistent with the ADAAA); S.C. Code Ann. § 1-13-30(N)(2005); S.D. Codified Laws § 20-13-1(4) (2004); Tenn. Code Ann. § 4-21-102(3)(A)(Supp. 2008); Tex. Lab. Code Ann. § 21.002(6)(2006); Vt. Stat. Ann. tit. 21, § 495d(5)(2003); W. Va. Code Ann. §5-11-3(m)(2008); 025-140-005 Wyo. Code R. § 2(a)(Weil 2002).

161. See, e.g., 3 Colo. Code Regs. § 708-1, Rule 60.1(B)-(C) (1994) (internal citations omitted) ("Whereas the State law . . . concerning handicap and/or disability is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act of 1990 and the Fair Housing Act concerning disability. . . . Whenever possible, the interpretation of state law . . . concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act and the Fair Housing Act and in the Federal case law interpreting the Americans with Disabilities Act and the Fair Housing Act, and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.")

162. See, e.g., Cal. Gov't Code § 12926.1 (a)-(d) (West 2005)(finding that the intent of the California Legislature was to afford disability protections broader than the ADA); Maine Rev. Stat. Ann. tit. 5, § 4554(4)(Supp. 2008)(Maine's definition of physical or mental disability "is intended to be interpreted broadly to create greater coverage than under the federal Americans with Disabilities Act of 1990.")

163. NOTE TO EDITORS: Respectfully, this suggestion is off the mark and I reject it. [NTA: Please consider beefing up your analysis in this section. Some background information about state disability cases would be helpful. Do courts generally conduct one analysis for both state and federal claims, or are there actually distinct analyses? How often, if ever, do plaintiffs bring state claims without federal claims? Do plaintiffs actually win on state law grounds without winning on federal grounds? Knowing this information would help evaluate the possible effects of the ADAAA on state disability discrimination practice. Thank you.]

C. Reasonable Accommodation

Under the ADA, employers have a duty to reasonably accommodate the known disabilities of employees.[164] That duty requires employers to make adjustments to the workplace that enable qualified individuals with disabilities to enjoy the same employment opportunities as individuals without disabilities, provided that it does not cause an undue hardship to the employer.[165] The ADAAA does not change the duty of reasonable accommodation. Similarly, the ADAAA does not change the fact that many accommodations are so obvious, simple, and otherwise unproblematic that employers may wish to grant them to employees apart from whether the latter are legally entitled to them under the ADA.[166] Because the ADAAA increases the number and range of physical and mental impairments that qualify as disabilities, however, there will be a corresponding increase in the number of conditions entitled to workplace accommodation.

The ADAAA will make a difference in those cases where an employer resists a requested accommodation, especially when the result is a subsequent adverse employment action such as demotion or termination. First, the ADAAA's expanded definition of "disability" includes conditions that are counterintuitive. Thus, human resources personnel must train themselves on the fact that a much broader range of employee impairments now trigger the duty of reasonable accommodation and potential ADA liability. Early on, it will be crucial to consult employment law counsel on whether particular conditions are considered disabilities under the new law. In the absence of clear ADAAA guidance, human resources personnel may feel compelled to grant seemingly unreasonable accommodations for dubious disabilities rather than risk protracted and unpredictable litigation.

Second, medical verification of disability is likely to play an enhanced role in reasonable accommodation, especially with respect to major bodily functions. For example, without detailed medical verification, the employer in Furnish could not have known the extent of limitation to the major life activity of liver function, nor how that affected Furnish's ability to appear and perform at work. Employer rights to second

164. 42 U.S.C. § 12112(b)(5)(A)(2009).

165. See 29 C.F.R app. § 1630.9 (2008).

166. According to Professor Sharona Hoffman, the studies that have been conducted concerning costs of accommodations reveal that most accommodations involve very modest direct expenditures or none at all. The various studies cited in her article, Settling the Matter: Does Title I of the ADA Work?, 59 Ala. L. Rev. 305, 335-336 (2008), place the average net cost incurred per accommodation at $500 or less.

opinions and independent medical evaluations could also be important in cases relating to the extent of work limitation caused by an impaired bodily function because these conditions may qualify as disabilities even when they do not substantially limit major life activities as traditionally understood.[167]

Third, where the defenses of direct threat or undue burden are unavailable, arguments based on inability to perform essential functions will likely be an employer's best ground for resisting a requested accommodation. Recall that Furnish was terminated for unsatisfactory work performance after he had fallen behind on his work schedule.[168] Had the case been filed after the ADAAA and furnish classified as "disabled," SVI might still have prevailed if it could have shown that Furnish's disability prevented him from performing the essential functions of the job. In Furnish, essential functions could have included regular attendance,[169] particular performance standards such as number of installations,[170] or perhaps the ability to travel.[171] The primary impact of the ADAAA on Furnish would only have been that SVI could not have prevailed on the basis that Furnish

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167. See Section IB, supra pp. __.

168. Furnish, 270 F.3d at 447.

169. Id. (stating that Furnish had missed a work-related meeting). It is well established under federal case law that regular attendance is an essential job function. See, e.g., Willi v. American Airlines Inc., 288 Fed. App'x 126, 127 (5th Cir. 2008); Brannon v. Luco Mop Co., 521 F.3d 843, 849 (8th Cir. 2008); Hamm v. Exxon Mobil Corp., 223 Fed. App'x 506, 508 (7th Cir. 2007).

170. Furnish, 270 F.3d at 447 (stating that Furnish had fallen behind on "hundreds of outstanding installations"); see 29 C.F.R. app. § 1630.2(n) (internal citation omitted) ("It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. . . . If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.")

171. Furnish, 270 F.3d at 447 (stating that Furnish could no longer travel to far-away installation sites). It is permissible for employers to make extensive travel an essential job function, though it can be difficult to prove. See, e.g., Canales v. Nicholson, 177 Fed. App'x 834, 840 (10th Cir. 2006); c.f. Taylor v. Rice, 451 F.3d 898, 906-907 (D.C. Cir. 2006); Brumbaugh v. Camelot Care Centers, Inc., 427 F.3d 996, 1004-1006 (6th Cir. 2005).

was not disabled.

Employer clarity on essential vs. nonessential functions has always been of fundamental importance under the ADA.[172] But after passage of the ADAAA, employers defending against disability discrimination claims will be tested on this issue with greater frequency. This means that in assessing potential ADA claims by employees, employers must assess the merits of an essential functions argument early on. This will require looking to job descriptions, whether the functions have historically been held essential, whether and to what extent the functions have been waived or modified for past employees, etc.

Conclusion: The Devil Left in the Details

In ADA litigation the determination of disability must be made prior to reaching the issue of employer compliance. The threshold determination of disability is necessary, before and after the ADAAA, because not every physical or mental impairment rises to the level of legal disability.[173]

Imagine a circumstance where an employer makes an adverse employment decision based on an individual's physical or mental impairment. Suppose further that the impairment did not prevent the employee from performing the essential functions of the position with or without reasonable accommodation. This is an improper employment decision of the sort that the ADA was passed to prevent.[174] However, the employment decision is only illegal under the ADA if the employee is legally disabled.[175] The ADA thus permits, and has always permitted, discrimination based on physical or mental impairment, even though the employer intent in such cases is equally insidious as in cases that would give rise to actionable claims by a disabled employee. Some of the legislative history of the ADAAA reveals Congress to be confused on this point:

> The Committee understands that many employers do not discriminate against individuals with disabilities, however, the civil rights protections of the ADA have been diminished by the narrowing of the definition of disability, especially in the workplace. Too often cases have turned solely

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172. 29 C.F.R. pt. 1630, App., 1630.2(m)(2009).

173. See discussion of physical and impairment, infra, at pp. __ (refer to sub-section under The ADA Amendments Act in Theory).

174. See 42 U.S.C. § 12101 (1991).

175. See id. § 12102 (1991).

> on the question of whether the plaintiff is an individual with a disability; too rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.[176]

The confusion in this passage is this: under the structure of the ADA (and the ADAAA) there is no merit to a disability discrimination claim if the employee is not legally disabled. This is true even where the employer has engaged in intentional discrimination against a person that would have given a disabled person in the same position a viable ADA claim. Therefore, as long as the ADA retains the threshold requirement of disability, it makes no sense to say that courts have too rarely considered the merits of discrimination claims. Determinations of disability are part of the merits of such claims.[177] In the end, the ADAAA's enfeeblement of the definition of "disability" gives all disability discrimination claims more merit. The increased merit has nothing at all to do with employer compliance or noncompliance, however. Instead, it comes from the fact that many more claimants can now qualify as disabled.

176. H.R. Rep. No. 110-730, pt. 1, at 8 (2008) (emphasis added).

177. See 42 U.S.C.A. § 12101 et seq.; see also Milholland v. Sumner cty. Bd. of Educ., 569 F.3d 562, 824 (2009) ("To make a prima facie case of discrimination under the ADA, [plaintiff] must first show that she is 'a disabled person within the meaning of the Act'").