A PROMISING START:

PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT

NATIONAL COUNCIL ON DISABILITY

July 23, 2013

Letter of Transmittal

July 23, 2013

The President
The White House
Washington, DC 20500

Dear Mr. President,

The National Council on Disability (NCD) is pleased to submit the enclosed report, “A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act.” As the name suggests, a review of the court decisions that have been rendered to date applying the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) reveals significant improvements in how courts are interpreting the broad coverage mandate of the Americans with Disabilities Act.

In 2004, NCD released "Righting the ADA,"- a report that analyzed all of the U.S. Supreme Court decisions interpreting the Americans with Disabilities Act (ADA) as of that time. http://www.ncd.gov/newsroom/publications/2004.

Since enactment of the ADA in 1990, courts had made substantial changes to the law, including narrowing the definition of disability so extensively, that many people with disabilities were no longer protected from disability-discrimination. In most ADA employment discrimination cases, courts focused primarily on whether an individual’s impairment constituted a disability, often never reaching the question of whether disability discrimination had occurred.

Based on our findings, NCD called for an ADA Restoration Act to restore the law to its original scope. The ADAAA was signed into law on September 25, 2008 and went into effect January 1, 2009. The ADAAA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA.

The ADAAA overturned several Supreme Court decisions that Congress believed had interpreted the definition of “disability” too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, or epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The effect of the changes was intended to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA and shift the focus away from determining whether someone had a disability to determining whether disability discrimination had occurred.

NCD has just completed a review and analysis of the case law that has developed under the ADAAA to determine whether the ADAAA has achieved its intended goals and to provide recommendations for improvements or corrective action, as necessary. The report contains 23 findings and three recommendations regarding ongoing monitoring and analysis of cases applying the ADAAA and educational and training initiatives for judges, attorneys, and other advocates.

The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits. In six of the seven Circuit Court decisions in which the provisions of the ADAAA were applied, the plaintiff prevailed on the issue of establishing a disability; and in the district court decisions analyzed in cases under the ADAAA, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a promising start and a substantial improvement over pre-ADAAA decisions in achieving the broad scope of ADA coverage that Congress intended. This does not necessarily mean that more plaintiffs are winning their disability discrimination suits. Often the poor quality of the pleadings is resulting in cases being dismissed on procedural grounds - before the alleged discriminatory conduct of the employer is ever addressed. The report includes recommendations on guidance and technical assistance to address some of these procedural issues.

NCD looks forward to working with the Administration to continue monitoring implementation of the ADAAA and to assist in the development of programs for providing high quality information and training on the ADA for judges, attorneys, and advocates.

Respectfully,

Jeff Rosen, Chair

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Acknowledgment

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EXECUTIVE SUMMARY

The ADA Amendments Act (ADAAA) was enacted in 2008 and took effect on January 1, 2009. Since that time, the judicial system has begun to hear and decide disability discrimination lawsuits raising questions under the new law. This report grew out of NCD's recognition of the emerging need for review and analysis of the court decisions that have developed under the ADAAA to ascertain whether the Amendments Act has thus far achieved its intended goals. Accordingly, NCD conducted a review and analysis of the case law that has developed under the ADAAA and prepared a report on the findings as to whether the ADAAA has achieved its intended goals. The report provides recommendations for improvements or corrective action, as necessary." From the project's inception, NCD recognized that not enough time has elapsed since the ADAAA took effect for the drawing of firm and definitive conclusions, but was convinced that present analysis of court decisions rendered to date would produce a sense of the law's current status and provide a preliminary bellwether of trends and directions in which the law is heading.

This report presents 23 findings providing both a summary of the overall results of the court decisions and a detailed legal analysis of how the courts have responded to major revisions made by the ADAAA. The decisions of the United States Courts of Appeals are discussed first, followed by the decisions of the United States District Courts. The findings in the report address the judicial landscape with regard to many important aspects of how a person who claims to have been subjected to discrimination on the basis of disability demonstrates that she or he has a disability under the standards established by Congress in the ADAAA. The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits. In six of the seven Circuit Court decisions in which the provisions of the ADAAA were applied, the plaintiff prevailed on the issue of establishing a disability; and in the district court decisions analyzed in cases under the ADAAA, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a substantial improvement over pre-ADAAA decisions in achieving the broad scope of ADA coverage that Congress intended.

Listed below are NCD's findings, followed by three recommendations regarding ongoing monitoring and analysis of cases applying the ADAAA and educational and training initiatives for judges, attorneys and other advocates.

NCD FINDINGS:

Finding 1: The decisions of the United States Courts of Appeals reflect a strong consensus that the ADAAA does not apply to ADA claims in which the alleged acts of discrimination occurred prior to January 1, 2009, when the ADAAA took effect; a few courts have recognized narrow exceptions to this general rule for situations in which: (A) a plaintiff is seeking prospective injunctive relief, such as compelling a covered entity to provide an accommodation in the future; or (B) a court considers provisions of the ADAAA for the purpose of shedding light on the original intent of Congress when it enacted the ADA.

Finding 2: In regard to cases raising ADAAA, issues that are making their way through the courts, it is still the early days: in only 10 percent of Courts of Appeals' decisions mentioning the ADAAA to date the court has found that the ADAAA was in effect when the alleged discriminatory actions took place, and in one-third of the cases in which the court found the ADAAA was in effect, the court did not apply the ADAAA.

Finding 3: Many of the Courts of Appeals' decisions in which the courts found that the ADAAA was not in effect have nevertheless included descriptions of the Act's purpose, content, and implications in a manner that conveys awareness and understanding of, and receptivity toward, the changes in the law that the ADAAA entails.

Finding 4: Research disclosed only seven decisions so far in which Courts of Appeals have both found the ADAAA to be in effect and had occasion to apply it. These included three cases involving employment discrimination claims, one addressing a requested accommodation on a medical licensing examination, two dealing with prisoners' claims of deficient medical treatment in state prisons, and one claim of discrimination in a volunteer program at a county rehabilitation center.

Finding 5: The numbers of pertinent circuit court decisions remain too small to draw any broad or authoritative conclusions. The most striking revelation about the seven cases, however, was that in six out of the seven the plaintiff prevailed on the issue of having a disability at the stage of the proceedings before the appellate court. This can be viewed as an early indication of a positive turnaround in outcomes on the definition-of-disability issue attributable to the ADAAA.

Finding 6: In *Allen v. SouthCrest Hosp*., the one case out of seven in which the plaintiff did not prevail on the showing of disability, the Tenth Circuit took a more exacting and critical look at the plaintiff's showing of a disability – an approach that, in disregarding the ADAAA's guidance supporting a broader, less restrictive approach to the elements of "disability" and the avoidance of "extensive analysis," harkened back to pre-ADAAA scrutiny of a plaintiff's claim of having a disability. Whether this decision will have a regressive effect on future decisions is a matter of concern to which close attention will should to be paid.

Finding 7: In approximately four out of five of the federal district court decisions analyzed methodically, the court found the ADAAA was in effect at the time the alleged discriminatory actions took place; this is in sharp contrast to the small percentage of cases that have made their way to the Courts of Appeals in which the courts have found that the ADAAA was in effect. Among the district court decisions in which the ADAAA was found to be in effect, about 90% involved claims of employment discrimination.

Finding 8: The decisions of the district courts under the ADAAA reflect widespread awareness of, and receptivity to, the statutory mandate for interpreting coverage of the ADA broadly. Many are replete with statements of judicial recognition and affirmation of the expansion-of-coverage first principle of the Act, and of a number of the elements established in the Act and the regulations for broad construction of "substantially limiting a major life activity."

Finding 9: With occasional exceptions, the decisions of the district courts under the ADAAA have recognized and applied changes to the "major life activities" element of the definition of disability made by the Act in (1) decreasing the restrictiveness of standards for inclusion of an

activity in the category, (2) providing a non-exhaustive list of example of major life activities, and (3) incorporating a new category of "major bodily functions." The "major bodily functions" provision is a major addition to the ADA, and so far seems to be accomplishing much of what it was intended by Congress to do in engendering more expansive coverage,

Finding 10: The EEOC's issuance in its ADAAA regulations of a non-exhaustive list of conditions that are virtually always disabilities, for which individualized assessment should be particularly simple and straightforward, has generally been embraced by the courts. To date, plaintiffs having, among a variety of other conditions, post-traumatic stress disorder (substantially limits the major bodily activity of brain function), cancer (substantially limits normal cell growth), multiple sclerosis (substantially limits neurological functions), and HIV-positive status (substantially limits immune system function) have successfully availed themselves of the "virtually always" status in court.

Finding 11: Revisions under the ADAAA relating to broadening the list of examples of major life activities, incorporating major bodily functions, and developing a non-exhaustive list of conditions for which there should be "predictable assessments" of disability are not self-evident, but somewhat challenging. Although the courts have made a good start, routine acceptance and mastery by courts and attorneys of these innovations will likely not occur easily or quickly. Additional judicial and professional education efforts devoted to these matters would greatly facilitate their broader dissemination and application.

Finding 12: The ADAAA statutory revision regarding consideration of mitigating measures is unequivocal and not particularly complicated, and the courts generally have had little trouble reincorporating into the legal framework for analyzing ADA claims the pre-*Sutton* principle that mitigating measures shall not be considered in determining disability. In a few cases, courts that have complied with the ADAAA requirement that mitigating measures are not to be taken into account in determining disability have clarified that it carries with it an obligation for plaintiffs to make some showing of the impact of major life activities on the plaintiff's condition in the absence of mitigating measures.

Finding 13: The emerging case law regarding the ADAAA provision decreeing that an impairment that is episodic or in remission constitutes a disability if it would substantially limit a major life activity when active generally appears to have begun to have its desired effect in the courts. Of the few cases examined that addressed this issue under the ADAAA, most relied on the provision in allowing plaintiffs to prevail on the issue of pleading a disability when they had conditions with only intermittent effect upon activities.

Finding 14: The new EEOC regulatory provision recognizing that an impairment lasting fewer than six months might in some circumstances constitute a disability under the ADA did not take effect until May 24, 2011, with the result that there are insufficient court decisions to date from which to draw analytical conclusions. However, the decision of a federal district court in *Green v. DGG Properties Co., Inc.* raises a concern that some courts might blunt the effect of the provision and revive pre-ADAAA views about rejecting short-term impairments as disabilities. This issue should be closely monitored in future decisions to determine whether steps are needed to avoid a resurrection of overly exacting duration standards for substantially limiting impairments.

Finding 15: The ADAAA's articulation of a general broadening of the third prong of the definition of disability, including rejecting the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, regarding it, and reinstating in its place the Court's reasoning in *School Board of Nassau County v. Arline*, has not been the subject of much judicial commentary or elaboration, but the court decisions have referred to, quoted, and seemingly accepted that direction.

Finding 16: The ADAAA revision that changes the focus of being regarded as having an impairment to whether the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment represents a profound alteration of analysis under the 'regarded as prong', with major implications for pleading, evidence, argument, and judicial resolution. Perhaps because the revision replaced a thorny and complicated determination with a more straightforward one, the courts seem to have absorbed and applied it rather smoothly. The new standard has been applied to allow plaintiffs to successfully make

a prima facie case that they have been regarded as having a disability in quite a number of court decisions.

Finding 17: The exclusion of "transitory and minor" impairments in analysis of allegations of disability under the regarded as prong of the definition of disability is an important ADAAA mandate. While the provision of the Act making this change is relatively clear and simple, the courts have not always interpreted and applied it in a manner consistent with its plain language. A worrisome line of cases has developed in which the courts have looked only to the issue of duration of the impairment in question, and have ignored the "and minor" words of the statute. The continuing development of case law in this area should be monitored closely to see how significant a problem this may portend.

Finding 18: The ADAAA's elimination of the obligation of entities covered under the ADA to provide reasonable accommodations or reasonable modifications to people who meet the definition of disability only under the "regarded as" prong is a major change. The statutory change is straightforward and clear-cut, and, so far, the court decisions interpreting and applying it generally do so in an uncomplicated manner. In addition to describing and quoting the statutory elimination of the accommodation/modification obligation, some courts have noted that, because reasonable accommodation is not available to a plaintiff alleging disability exclusively under the regarded-as prong, if such a plaintiff cannot perform essential job duties without accommodation, she or he will be deemed not qualified for the job. As time goes by, such considerations can be expected to have a growing impact on legal pleading and litigation strategies.

Finding 19: Assessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiffs in establishing disability. In cases in which district courts applied provisions of the Act, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a significant improvement over pre-ADAAA decisions. This very positive development is tempered by the recognition that many plaintiffs who prevailed on establishing a disability still lost their cases on other grounds.

Finding 20: The courts have made progress in complying with ADAAA directives that determinations whether an individual's impairment is a disability under the ADA "should not demand extensive analysis," although the progress is uneven and some decisions continue to reflect considerable analytical parsing. As to the related question of whether courts have shifted their analytical focus, particularly in employment discrimination cases, away from determining whether an individual has a disability, to determining whether disability discrimination occurred, the courts' decisions evidence a shift in that direction, but some courts still spend considerable time and energy on the medical and other details and circumstances of an individual's impairment.

Finding 21: In making determinations of disability in ADA actions, the courts have fairly consistently based decisions on individualized assessments of substantial limitation of major life activities. Some ADAAA revisions have reduced the need for individualization to a degree by making it easier for some types of impairments to be recognized as disabilities.

Finding 22: In more than a few cases in which individuals who claimed to have been subject to discrimination on the basis of disability have not succeeded in establishing that they had a legally cognizable disability, or otherwise did not prevail in their legal actions, their chances for a favorable outcome were squandered by substandard, sometimes dismal, legal pleadings and briefs on their behalf. The likelihood of such plaintiffs having a fair "day in court" could be significantly enhanced by the development and proliferation of high quality continuing education and training programs for attorneys and other advocates for people with disabilities.

Finding 23: In addition to examining how well the courts are carrying out the spirit and applying the specific provisions of the ADAAA, it will be important to monitor certain additional issue areas, incident to the Act and its implementation, that, depending upon the direction the court decisions take, have the potential to cause significant problems. Three such issues are (1) how the factor of duration affects the determination of whether an impairment does or does not constitute a disability under the ADA; (2) application of the ADAAA provision freeing covered entities from the obligation to provide reasonable accommodations or reasonable

modifications for individuals who meet the definition of disability only under the “regarded as” prong; and (3) the role of the major life activity of working and the application of the “class of jobs or broad range of jobs” standard in determining whether an impairment substantially limits it.

RECOMMENDATIONS:

Recommendation 1: Led by the primary ADA enforcement agencies charged with implementing the requirements of the ADA – the Department of Justice, the Equal Employment Opportunity Commission, and the Department of Transportation – in conjunction with NCD, agencies of the federal government should maintain and systematize ongoing monitoring and analysis of court decisions interpreting and applying the changes in the law made by the ADAAA.

Recommendation 2: The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize programs for providing high quality information and training for judges regarding the content and implications of the revisions to ADA law made by the ADAAA.

Recommendation 3: The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize high quality continuing education and professional education programs for attorneys and other advocates regarding the content and implications of the revisions to ADA law made by the ADAAA.

I. INTRODUCTION

> [T]he Supreme Court decisions have led to a supreme absurdity, a Catch-22 situation that so many people with disabilities find themselves in today. For example, the more successful a person is at coping with a disability, the more likely it is the Court will find that they are no longer disabled and therefore no longer covered under the ADA. If they are not covered under [the] ADA, then any request that they might make for a reasonable accommodation can be denied. If they do not get the reasonable accommodation, they cannot do their job; and they can get fired and they will not be covered by the ADA and they will not have any recourse.
>
> Statement of Senator Tom Harkin during Senate consideration of S. 3406, Sept 11, 2008.[1]

> [W]hen it comes to legislation, when Congress does not like something, Congress can change it, and that is what we are doing today.
>
> The authority over Federal disability policy remains right here with the Congress, and it is our responsibility to establish, change, expand, redirect, or amend it whenever and however we see fit. That is what we are doing today with this bill.
>
> Statement of Senator Orrin Hatch during Senate consideration of S. 3406, Sept 11, 2008.[2]

> For over a decade, the courts have narrowed the scope of the ADA and have thereby excluded many individuals whom Congress intended to cover under the law. The unfortunate impact of too narrow an interpretation has been to erode the promise of the ADA.
>
> With the passage of the ADA Amendments Act (ADAAA) today, we ensure that the ADA's promise for people with disabilities will be finally fulfilled. Our expectation is that this law will afford people with disabilities the freedom to participate in our community, free from discrimination and its segregating effects, that we sought to achieve with the original ADA.
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> Joint Remarks of Representative Steny Hoyer and Representative Jim Sensenbrenner on *S. 3406,* Sept. 17, 2008.[3]

Like the Americans with Disabilities Act of 1990 (ADA), the ADA Amendments Act of 2008 (ADAAA) had its origin in a recommendation of the National Council on Disability (NCD) in a report to the President and the Congress. The ADA was first proposed (and named) in NCD's 1986 report *Toward Independence* and first appeared in draft form in NCD's 1988 report *On the Threshold of Independence*. The ADAAA originated in a proposal and draft bill contained in

NCD's *Righting the ADA* report (2004).[4] *Righting the ADA* was the culmination of in-depth analysis by NCD of the Supreme Court's interpretations of the ADA, in which the Council found that some of the Court's rulings on the ADA departed from the core principles and objectives of the ADA. As NCD explained in the transmittal letter to the President accompanying the report, it had concluded that

> the provisions of the ADA that have been narrowed by Court rulings currently do not provide the same scope of opportunities and protections expressed by those involved in the creation and passage of the ADA. Legislation is urgently needed to restore the ADA to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for Americans with disabilities.

II. PROBLEMATIC RULINGS, "ADA RESTORATION," AND THE ADAAA

In its 2004 *Righting the ADA* report, NCD joined a chorus of voices of members of Congress from both parties, the White House, disability rights scholars, legal advocates, and numerous other people, including many with disabilities, who had been protesting that the Supreme Court was severely undercutting the rights under the ADA of people with disabilities. NCD had been methodically monitoring the Supreme Court's ADA decisions, and published a series of policy briefs, available on NCD's website at http://www.ncd.gov/newsroom/publications/2003/policybrief.htm , describing the particular issues and problems the Supreme Court rulings raised. NCD found that some, though not all, of the Court's rulings had dashed positive expectations at the time of the passage of the ADA. Particularly problematic were the Court's rulings pertaining to the definition of disability. The culmination of a series of decisions in which it narrowed eligibility for protection under the ADA was the Court's ruling in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* in 2002 that the definition of disability should be "interpreted strictly to create a demanding standard for qualifying as disabled."[5] In *Righting the ADA*, NCD presented a legislative proposal for getting the ADA back on course – an ADA Restoration Act bill – with an explanatory introduction and a section-by-section summary. Based on elements of NCD's proposals regarding the definition of disability, ADA Restoration Act bills were introduced in the 109th and 110th Congresses.[6] After negotiations with representatives of the business community, substantial compromises were made, and an amendment in the nature of the substitute was agreed to in committee. Because the

substitute bill had some substantial differences from the original NCD ADA Restoration Act proposal, the name of the legislation was changed to the ADA Amendments Act. The compromise bill was signed into law on September 25, 2008. The content of the ADAAA is described in some detail by the managers of the ADAAA bill in the Senate in a statement inserted into the Congressional Record as the bill was nearing passage.[7] Most of the major provisions of the ADAAA are described and discussed in sections IV and V of this report.

III. PURPOSE AND SCOPE OF THE REPORT

This report grew out of NCD's recognition of the emerging need for review and analysis of the court decisions that have developed under the ADAAA to ascertain whether the Amendments Act has thus far achieved its intended goals. Accordingly, NCD undertook: "to review and analyze case law that has developed under the ADAAA and produce a paper that will report findings, determine whether the ADAAA has achieved its intended goals, and provide recommendations for improvements or corrective action, as necessary." In light of the particular problems that had developed in job discrimination cases prior to the ADAAA that the Act sought to address, NCD identified employment discrimination rulings as a predominant focus of the study. From the project's inception, NCD recognized that not enough time has elapsed since the ADAAA took effect to draw firm and definitive conclusions, but was convinced that an examination of court decisions rendered to date would produce a sense of the current situation and provide a preliminary indication of trends and directions in which the law is heading.

Exhaustive quantitative analysis of the universe of relevant court decisions will hopefully be conducted by scholars and public agencies in the future, and such comprehensive statistical studies can be expected to yield invaluable information about the implementation and efficacy of the ADAAA and its various significant provisions. That type of elaborate and extensive data compilation is beyond the scope and time constraints of this report. The Council's current study represents instead an informed legal analysis of a substantial and representative portion of federal court decisions to date.[8]

A search of decisions of the federal courts at the beginning of June, 2013, disclosed that to date, no U.S. Supreme Court opinions have mentioned the Act, and otherwise the ADAAA had

been mentioned in 925 decisions. These consisted of 115 decisions by the United States Courts of Appeals (circuit courts) and 810 decisions by federal district courts. The analysis of each of these categories – circuit court decisions and district court decisions – and findings NCD has derived from them are described in the sections that follow. For each of the judicial decisions analyzed, an initial determination was made as to whether the court had found that the ADAAA was in effect at the time of the actions giving rise to the legal claims. For decisions in which the courts found the ADAAA to be applicable, the decisions were separated into two groups – those that involved claims of employment discrimination and those that addressed other types of alleged actions of discrimination. As described in more detail in subsequent sections, the majority of the cases dealt with discrimination in employment. Pertinent decisions were then scrutinized to ascertain the extent to which they did or did not respond to and comply with the spirit and letter of the various elements of the ADAAA. The results and the findings of this analysis are articulated in the sections that follow.

IV. ANALYSIS OF CIRCUIT COURT DECISIONS

Decisions by the 13 United States Courts of Appeals (circuit courts) manifestly occupy a highly important place in the American federal court system. They constitute legally binding precedent on district courts within each particular circuit, establishing the law applicable to millions of people within the circuit; they provide persuasive authority for other courts at both the appellate and trial level; and they articulate and chronicle the development of emerging doctrines and approaches in judicial thinking. Because of their significance, all 115 of the circuit decisions in which the court mentioned the ADAAA were examined and analyzed.

A. Timing of the ADAAA's Applicability

Cases interpreting and applying the ADAAA are at the early stages of making their way through the judicial system. The ADAAA was signed into law on September 25, 2008; its Section 8 declares that "[t]his Act and the amendments made by this Act shall become effective on January 1, 2009."[9] Many ADAAA actions filed or pending in the courts since the Act went into effect have involved claims arising prior to its effective date.

1. Retroactive Application?

An initial question with many statutes is whether they apply retroactively. The ADAAA's statutory language does not mention retroactive application. When the federal courts of appeals have addressed this issue, they have responded virtually unanimously that the Act shall not be applied to claims arising prior to its effective date. Twelve of the 13 circuits have ruled against retroactive application of the ADAAA,[10] and the Court of Appeals for the Federal Circuit has not had occasion to rule on the issue. While many of the circuit court opinions reject retroactivity somewhat cursorily, others have provided more explanation of their rationale. Nearly all of these decisions agree that the starting point for determining whether a statute should be applied retroactively is the Supreme Court's ruling in *Landgraf v. USI Film Prods.*[11] For example, the Fourth Circuit has written:

> The Supreme Court has held, "[R]etroactivity is not favored in the law [.] [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*[12] The ADAAA itself provides "[t]his Act and the amendment made by this Act shall become effective on January 1, 2009."[13] In *Cochran*[14]*,* the court concluded that the amendment "evinces a prospective intent with its delayed effective date." We agree: there is no language in the ADAAA indicating that Congress intended to make this law retroactive; in fact, the indication is to the contrary.[15]

In the case before the Fourth Circuit, *Reynolds v. American Nat. Red Cross*, the plaintiff had argued that even if the ADAAA was not in effect at the time the conduct giving rise to his claim occurred, it was in full effect when the district court rendered its decision, and so the ADAAA should be applied. He quoted the following language from the Supreme Court's opinion in the *Landgraf* case: ("[I]n many situations, a court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit."[16] The Fourth Circuit responded to this contention by quoting another passage from *Landgraf*:

> [P]rospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.[17]

Accordingly, the Fourth Circuit ruled that the ADAAA does not apply retroactively, and added, "Therefore, we will instead look to *Toyota, Sutton*, and their progeny."[18]

The Tenth Circuit likewise relied heavily on the *Langraf* decision in ruling against ADAAA retroactivity. It observed:

> [A]ll events relevant to {the plaintiff]'s claim occurred before the ADAAA's enactment in January 1, 2009. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf v. USI Film Prods*.[19] Nevertheless, "when the Congress has delayed the effective date of a substantive statute that could in principle be applied to conduct completed before its enactment," the federal courts "presume the statute applies only prospectively." *Lytes v. DC Water & Sewer Auth*.[20]
>
> In addition to the effective date, default rules of statutory interpretation under federal law weigh against retroactive application.[21]

In support of the latter point, the Tenth Circuit pointed to yet another quotation from the Supreme Court's opinion in *Landgraf*:

> When ... the statute contains no ... express command [prescribing its proper reach], the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it 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.* If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[22]

The Tenth Circuit ruled that, absent clear congressional intent favoring retroactivity, the applicable principles dictated that ADAAA does not apply to the case before it.[23]

The Court of Appeals for the District of Columbia Circuit provided yet another example of *Landgraf*-based analysis of ADAAA retroactivity when it set out the following framework:

> In *Landgraf v. USI Film Products,* the Supreme Court reaffirmed the judicial presumption against applying a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to [completed] transactions." *Landgraf* and its sequelae prescribe a process for determining whether a statute applies to past conduct. We first look for an "express command" regarding the temporal reach of the statute, or, "in the absence of language as helpful as that," determine whether a "comparably firm conclusion" can be reached upon the basis of the "normal rules of [statutory] construction."[24] If we cannot reach a firm conclusion, then we turn to judicial default rules, asking whether applying the statute "would have a retroactive consequence in the disfavored sense

> of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'"[25] If applying the statute would have such a disfavored effect, then we do not apply it absent clear evidence in the legislative history that the Congress intended retroactive application.[26]

Applying this analytical scheme to the ADAAA, the court found the effective date provision of the Act determinative:

> By delaying the effective date of the ADAA [sic], the Congress clearly indicated the statute would apply only from January 1, 2009, forward. If the Congress intended merely to "clarify" the ADA, then its decision to delay the effective date would make no sense; it would needlessly have left the ADA unclear for the more than three months between enactment of the ADAA on September 25, 2008 and its going into effect on January 1, 2009.[27]

The court felt that nothing in the statute indicated that Congress intended such a scenario, while if Congress meant for the Amendments to have a purely prospective effect, then the decision to delay the effective date would make sense. In the latter situation, according to the court, delaying the effective date would serve to "give fair warning of the Amendments to affected parties and to protect settled expectations."[28] Such reasoning led the court to conclude that "the delayed effective date in the ADAA … admits of only one explanation: The Congress intended the statute to have prospective only effect."[29]

In addition to the circuit courts' strong consensus against giving retroactive effect to the ADAAA, it is significant to note that the U.S. Equal Employment Opportunity Commission (EEOC) has taken the same position. In its *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC responded to the query "Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?" as follows:

> No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.[30]

A slight, but noteworthy, variation from circuit courts' standard rejection of retroactivity of the ADAAA occurred in a Sixth Circuit case, *Jenkins v. National Bd. of Medical Examiners*, in which a third-year medical student with "a diagnosed reading disorder" sought additional time on the

United States Medical Licensing Examination as an ADA accommodation.[31] Relying on *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[32] the district court had ruled that Jenkins did not have a disability under the ADA. The lawsuit was pending on appeal when the ADAAA took effect on January 1, 2009. The Sixth Circuit took note of the newly effective Amendments Act, which it characterized as "a law repudiating *Toyota*'s strict standard for finding a disability under the ADA and expressing its intent that the ADA be construed in favor of broad coverage."[33] The court was aware of the body of judicial precedent holding that the ADAAA is "not applicable where the actions giving rise to the litigation occurred before the effective date of the amendments," but distinguished those cases on the grounds that they involved suits for damages and that they relied upon portions of the *Landgraf* decision that related to the right to compensatory and punitive damages for violations of Title VII under the Civil Rights Act of 1991.[34] The Sixth Circuit ruled that the case before it was significantly different because it was a suit for prospective injunctive relief in which, "[r]ather than seeking damages for some past act of discrimination … [the plaintiff] seeks the right to receive an accommodation on a test that will occur in the future, well after [the ADAAA's] effective date."[35]

> The court identified portions of the Supreme Court's decision in *Landgraf* that supported its position that prospective relief should be treated differently: *Landgraf* does not stand for the principle that new laws should never apply to cases pending on appeal. The *Landgraf* Court noted, "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." The Court's holding in *Landgraf* was based on the fact that "damages are quintessentially backward looking" and, in that case, "would attach an important new legal burden to [past] conduct." However, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."[36]

The Sixth Circuit deemed it a well-settled legal principle that a court applies "the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," and, because the plaintiff was seeking prospective relief, "no injustice would result from applying the amended law. Nor does the statute direct that the amendments should not apply to a pending case for prospective relief."[37] This analysis led the Sixth Circuit to conclude that "[b]ecause this suit for injunctive relief was pending on appeal when the amendments became effective, the amendments apply to this

case. We therefore remand the case to the district court for further consideration in light of the ADA Amendments Act."[38]

The Sixth Circuit's ruling on a "prospective relief" exception from ADAAA nonretroactivity has been discussed and sometimes distinguished in other cases,[39] but its validity has not been overruled, repudiated, or directly challenged to date.

Another variant from full-blown application of non retroactive application of the ADAAA-retroactivity principle was carved out by the Ninth Circuit in its decision in *Rohr v. Salt River Project Agricultural Imp. & Power Dist.*[40] The lawsuit involved an ADA claim by a welding metallurgy specialist who had insulin-dependent type 2 diabetes. Well before the ADAAA became effective on January 1, 2009, the case was pending in the Court of Appeals and oral argument had been completed.[41] The Ninth Circuit held that the plaintiff had provided sufficient evidence that he was a qualified individual with a disability under the ADA to survive summary judgment, even under pre-ADAAA analysis, so the court did not need to decide whether the ADAAA applied retroactively to the plaintiff's claims.[42] In examining whether the plaintiff's diabetes constituted a disability under the ADA, the court nonetheless considered the impact of the ADAAA, "because the ADAAA sheds light on Congress' original intent when it enacted the ADA."[43]

The court found the ADAAA informative as to original congressional intent in several ways. The 2008 Act made clear that the Supreme Court had gone astray in "defin[ing] 'disability' more narrowly than many of the ADA's original Congressional proponents had intended. *See* H.R. Rep. No. 110-730, at 5 (2008) (H. Comm. on Educ. & Labor)." The ADAAA indicates that in enacting the ADA Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a "handicapped individual" under Section 504 of the Rehabilitation Act of 1973, but that expectation had not been fulfilled. Further, "the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."[44] More specifically related to the case before it, the Ninth Circuit found that the ADAAA clarified

original congressional intent regarding the meaning of disability as it applies to the condition of diabetes in three major ways:

> First, the law makes clear that eating is a major life activity under the Act. Second, the ADAAA states that the standard articulated in *Toyota*-that "substantially limits" means "prevents or severely restricts"-"has created an inappropriately high level of limitation necessary to obtain coverage under the ADA." In this respect, Congress has decided that the current EEOC regulations, which define the term "substantially limits" as "significantly restricted," require a greater degree of limitation than the 1990 Congress had intended, and has instructed the EEOC to revise its definition. Third, and perhaps most significantly, the ADAAA rejects the requirement enunciated in *Sutton* that whether an impairment substantially limits a major life activity is to be determined with reference to mitigating measures. The ADAAA makes explicit that the "substantially limits" inquiry "shall be made without regard to the ameliorative effects of mitigating measures such as ... medication, medical supplies, equipment, or appliances ...; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications."[45]

The court thus interpreted congressional intent under the ADA to be that impairments were "to be evaluated in their *unmitigated* state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavioral adaptations such as a strict diet."[46] Drawing, in part, on the "light on Congress' original intent when it enacted the ADA" provided by the ADAAA, the Ninth Circuit ruled that Rohr had established a genuine question of material fact as to his having a disability and that he was qualified for the position in question and vacated the district court's dismissal of the lawsuit. To underscore the point of its availing itself of illumination from the ADA, the court unambiguously declared: "While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions."[47]

Finding 1: The decisions of the United States Courts of Appeals reflect a strong consensus that the ADAAA does not apply to ADA claims in which the alleged acts of discrimination occurred prior to January 1, 2009, when the ADAAA took effect; a few courts have recognized narrow exceptions to this general rule for situations in which: (A) a plaintiff is seeking prospective injunctive relief, such as compelling a covered entity to provide an accommodation in the future; or (B) a court considers provisions of the ADAAA for the purpose of shedding light on the original intent of Congress when it enacted the ADA.

2. Whether the ADAAA Was in Effect

The prevalent rejection of retroactive effect for the ADAAA discussed in the previous subsection has had a very large impact since its enactment as cases wind their way up through the courts. Reviewing the circuit court decisions under the ADAAA to date provides a clear reminder that initiating a lawsuit and proceeding through the federal court system to the appellate level commonly takes considerable time. As this report was being written, over four-and-one-half years had elapsed since President George W. Bush signed the ADAAA into law, and nearly four years had passed since the ADAAA became effective. And yet a majority of the cases that have reached the U.S. Courts of Appeals have resulted in a ruling that the ADAAA was not in effect when the alleged discriminatory acts took place. Of the 115 circuit court decisions research identified as mentioning the ADAAA, only 12 (about 10 percent) involved a finding by the court that the ADAAA was in effect at the pertinent time. In five of those twelve, the courts found the ADAAA was in effect but did not apply it, resolving the appeal on other grounds. In 86 (about 70 percent) of the cases, the courts explicitly ruled that the Amendments Act was not in effect. In the remaining 17 decisions, the courts found it unnecessary to determine whether the ADAAA was in effect in resolving the matters raised in the proceedings before them.

In relation to the full development of appellate court interpretation and application of the ADAAA, these are still very early days. Not only have most of the circuit courts found that the ADAAA was not in effect at the time of the relevant events in the appeals before them, but the cases on appeal are almost all the result of appeals of district court decisions on motions to dismiss or summary judgment. Very few of the cases have involved appeals of final decisions after trial. Cases in which the ADAAA clearly is in effect and for which retroactive effect of the law will cease to be relevant will increase dramatically as time passes. And even now, as the following subsections describe, the decisions of the circuit courts give some useful indication of where the law regarding changes made by the ADAAA is going.

Finding 2: In regard to cases raising ADAAA issues making their way through the courts, it is still early: in only 10 percent of Courts of Appeals' decisions mentioning the ADAAA to date has the court found that the ADAAA was in effect when the alleged

discriminatory actions took place, and in more than one-third of the cases in which the court found the ADAAA was in effect the court did not end up applying it.

B. Circuit Courts' Views of the Impact of the ADAAA

While a sizeable majority of circuit decisions addressing the ADAAA have held that the Act was not in effect when the alleged claims of discrimination occurred, this does not mean that the circuit courts have not had a lot to say about their interpretations and expectations of the ADAAA. The following subsection discusses the small number of circuit court decisions in which the ADAAA was applied by the court in determining whether the plaintiff had shown a disability under the ADA; that discussion conveys, to some degree, the views of those courts about how the ADAAA has modified the analysis in such cases. Those decisions were not the only ones, however, in which Courts of Appeals expressed their understanding of how the ADAAA has transformed the legal landscape. The case of *Rohr v. Salt River Project Agricultural Imp. & Power Dist.*, in which the Ninth Circuit articulated its variation on ADAAA nonretroactivity for situations where the ADAAA can shed light on Congress' original intent in enacting the ADA, In *Rohr*, the court described several ways in which the ADAAA had ramifications for cases in which the plaintiff's disability was at issue, including expanding the list of examples of major life activities under the Act; rejecting the standard articulated in *Toyota* that "substantially limits" means "prevents or severely restricts" (including directing the EEOC to revise its definition of "substantially limited"); and rejecting the requirement in *Sutton* that mitigating measures are to be taken into account in ascertaining substantial limitation of a major life activity.[48] In many other cases, however, Courts of Appeals that did not invoke *Rohr*'s original congressional intent rationale nonetheless felt compelled to express their views about the dramatic transformative impact of the ADAAA, even though they found it was not in effect for timely application in the cases before them.

In *Latham v. Board of Educ. of Albuquerque Public Schools*,[49] a case involving a disability discrimination claim by a schoolteacher with chronic asthma, the Tenth Circuit determined that the ADAAA should not be applied retroactively to the case at hand. The court offered, however, its view of the impact that the ADAAA would have, and collected some of the statements regarding the implications of the Act in decisions of various circuit courts:

> As its formal title suggests, the ADAAA was intended to "restore the intent and protections" of the ADA after the ADA's reach had been limited by certain Supreme Court decisions. Generally speaking, the ADAAA was intended to remove certain constraints on the definition of "disability" imposed by the Court's construction of the ADA. *See, e.g., Carter v. Pathfinder Energy Servs., Inc.* (10th Cir. 2011)[50] (noting that "Congress amended the ADA in 2008 'to correct what it viewed as an overly restrictive interpretation of the statute's terms that had been adopted by the Supreme Court'" (quoting *Carmona v. Sw. Airlines Co.*[51] (5th Cir. 2010)); *Kemp v. Holder*[52] (5th Cir. 2010) (agreeing with the plaintiff that the ADAAA was intended by Congress to abrogate the Supreme Court's holding that whether an impairment constitutes a "disability" must be considered with reference to the "mitigating effects" of health-care aids); *Hohider v. United Parcel Serv., Inc.*[53] (3d Cir. 2009) ("The ADAAA amends the ADA in important respects, particularly with regard to the definition and construction of 'disability' under the statute."); *see also Rhodes v. Langston Univ.*[54] (10th Cir. 2011) (discussing congressional intent in enacting the ADAAA); *Allen v. SouthCrest Hosp.*[55] (10th Cir. 2011) (same).[56]

In *Reynolds v. American Nat. Red Cross*,[57] the Fourth Circuit case discussed above in which the court held that the ADAAA does not apply retroactively and that "[t]herefore, we will instead look to *Toyota, Sutton*, and their progeny,"[58] the court catalogued some of the principles established in those rulings that would change under the ADAAA:

> Before the enactment of the ADAAA, courts relied upon *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* and *Sutton v. United Air Lines, Inc.,* in determining whether a plaintiff was disabled. These cases defined the terms "substantially" and "major," as used in the ADA definition of disability, "to be interpreted strictly to create a demanding standard for qualifying as disabled[.]"
>
> The *Toyota* Court held, in order to qualify as disabled under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." The Court continued,
>
> > It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those claiming the Act's protection ... to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial.
>
> *Id.; see also Sutton* at 482 ("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.").[59]

In *Britting v. Secretary, Dept. of Veterans Affairs*,[60] a Section 504 action (applying standards under the ADA) brought by a federal employee with irritable bowel syndrome, the Third Circuit

found the ADAAA was not in effect, but outlined some of the revisions the new law would bring about:

> At the time of [the plaintiff's] termination, the Americans with Disabilities Act (ADA) was interpreted narrowly and the standard for determining whether an individual had a disability included consideration of whether the impairment had a permanent or long-term impact. The ADA Amendments Act of 2008 (ADAAA), however, rejected this narrow interpretation and reinstated the broad scope of protections available under the ADA. In amending the ADA, Congress set forth several rules of construction governing the definition of disability, including that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[61]

Many circuit court decisions finding the ADAAA not in effect at the pertinent times in the particular cases have explicitly recognized the expansion of coverage of the ADA's definition of disability that the ADAAA will produce, including *Jones v. Nationwide Life Ins. Co.*[62] (1st Cir. 2012) ("the ADA Amendments Act … instructed that "disability" should be 'construed in favor of broad coverage.'");*Jones v. Nissan North America, Inc.*[63] (6th Cir. 2011) ("the ADAAA broadened the definition of disability"); *Watts v. United Parcel Service*[64] (6th Cir. 2010) (same); *Fleishman v. Continental Cas. Co.*[65] (7th Cir. 2012) ("the ADAAA broadened the ADA's protection … to, inter alia, include a wider range of impairments that substantially limit a major life activity"); *Tarmas v. Secretary of Navy*[66] (11th Cir. 2011) ("Congress passed amendments to the ADA, known as the ADAAA, which expanded coverage").

The fact that the ADAAA had superseded *Toyota, Sutton*, and other precedents that had restricted the definition of disability was specifically acknowledged in a number of circuit decisions, including the following: *Jones v. Nationwide Life Ins. Co.*[67] (1st Cir. 2012) (the ADAAA "rejected … the strict standard" established in *Toyota Motor Mfg., Ky., Inc. v. Williams*); Amsel v. Texas Water Development Bd.[68] (5th Cir. 2012) ("Many of the cases cited in this discussion will be superseded in whole or in part as applied to cases arising under the new law"); Hodges v. ISP Technologies, Inc.[69] (5th Cir. 2011) (the ADAAA "effectively superseded the Supreme Court's narrow construction of "disability" set forth in *Sutton* and subsequent cases"); *Fleishman v. Continental Cas. Co.*[70] (7th Cir. 2012) ("the ADAAA broadened the ADA's protection by superseding portions of *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing v. Williams*"); *Carter v. Pathfinder Energy Services, Inc.*[71] (10th Cir. 2011) ("Congress amended the ADA in 2008 to correct what it viewed as an overly restrictive interpretation of the statute's terms

that had been adopted by the Supreme Court in *Sutton* and *Williams.*") (internal quotation marks omitted).

The expansion-of-coverage and supersession-of-prior-standards-and-precedents themes were addressed together, relatively succinctly, by the Sixth Circuit as follows:

> Congress has recently enacted major changes to the ADA. Amendments Act of 2008. Although these amendments do not control this case, we note that Congress has expressly rejected the EEOC's regulations that "defin[e] the term 'substantially limits' as 'significantly restricted' " because that definition "express[es] too high a standard" and is "inconsistent with congressional intent." The amendments further reject the Supreme Court's directive that the ADA's terms should be "interpreted strictly," *Toyota,* 534 U.S. at 196, and, going forward, Congress has instructed courts that "[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under this Act."[72]

The Fourth Circuit made the same point in even simpler terms when it declared that "Congress amended the ADA in 2008 to correct what it viewed as an overly restrictive interpretation of the statute's terms that had been adopted by the Supreme Court in *Toyota* and *Sutton.* The ADAAA made it easier for a plaintiff to demonstrate his disability…."[73]

Some decisions have focused more specifically on particular elements of the Supreme Court's ADA decisions that the ADAAA would rectify. Thus, the Fifth Circuit observed generally that the plaintiff in the case of *Kemp v. Holder* [74] was correct that

> the ADAAA sought to supersede *Sutton.* The "Findings and Purposes" section of the Act explained that Congress considered "the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999) and its companion cases [to] have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."

The court next described how the Act had dealt with the issue of mitigating measures:

> The ADAAA went on to explicitly overrule "the requirement enunciated by the Supreme Court in *Sutton* ... and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures," and amended the ADA to mandate that the "determination of whether an impairment substantially limits a major life activity ... be made without regard to the ameliorative effects of mitigating measures such as-... implantable hearing devices."[75]

The Tenth Circuit has likewise addressed the mitigating measures issue, declaring that "In *Sutton,* the Supreme Court held "the determination of whether an individual is disabled should

be made with reference to measures that mitigate the individual's impairment....” The ADA Amendments Act of 2008 (“ADAAA”) rejected consideration of mitigating measures.”[76]

Other decisions have addressed ADAAA revisions relating to the “regarded as” prong of the definition of disability. Thus, in illustrating its general observation that “[t]he ADAAA amends the ADA in important respects, particularly with regard to the definition and construction of ‘disability’ under the statute,” the Third Circuit focused on the Act’s effects on the standards for showing that one has been regarded as having a disability.[77] The court noted that, while the ADAAA “retains largely the same language” as the original ADA in the general definition of “disability,” it changes the intended scope of the “regarded as” prong of that definition by adding a provision specifying that “[a]n 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.”[78] The court also pointed to the ADAAA’s new language stating that the regarded as prong “shall not apply to impairments that are transitory and minor,” and defines a “transitory impairment” as “an impairment with an actual or expected duration of 6 months or less.”[79] And the Third Circuit further declared that the ADAAA makes clear that “[a] covered entity ... need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability … solely under [the ‘regarded as' prong] of such section.” [80] The language of the ADAAA quoted by the Third Circuit in the first of the three “regarded as” changes it discussed was likewise invoked by the Eleventh Circuit in support of its conclusion that “[a]mong the Amendments, Congress changed the definition of ‘disability’ such that being “regarded as” having a disability no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity.”[81]

To a large extent, reviewing the circuit court decisions that mention the ADAAA, at a time when most of the disability discrimination cases on appeal involve legal claims that occurred before the ADAAA took effect, is a trip down a bad-memory lane – a journey back to a time when cases were all resolved based on pre-ADAAA law – and these throwback decisions manifest all the rigidity, arbitrariness, illogic, wrong-headedness, and unfairness that characterized the sorry state of the ADA court decisions that caused the ADAAA to be necessary. Thus, to name but a

few examples, after finding the ADAAA not yet in effect, circuit courts have ruled in specific cases that plaintiffs with bipolar disorder,[82] breast cancer (in remission),[83] and a below-the-knee leg amputation[84] had not qualified as having disabilities under the ADA. It is easy to understand the lament of the plaintiff in the last case (who also had a traumatic brain injury that likewise was ruled not to be a disability) who declared: "when a leg is missing, there should be no debate regarding whether a man is disabled."[85] Many of the Courts of Appeals' decisions in which the ADAAA cannot yet be applied serve as powerful reminders of why the ADAAA was needed.

And yet, as the decisions discussed in this subsection demonstrate, many circuit decisions in which the courts found they could not apply the new standards in the cases before them nonetheless recognize and express the promise of the Amendments Act as it is beginning to take effect and make its impact felt at the appellate level, and indicate an awareness of the ameliorative consequences it can have. How else can one explain that courts that decide they cannot apply the ADAAA devote paragraphs or pages of their opinions to describing what effect the ADAAA would have had had it been in effect? Indeed, some of the circuit courts seem to express some wistfulness or regret about their inability to apply the revisions enacted in the ADAAA by writing, gratuitously, that "even though [the plaintiff's] claim might fare differently if the ADAAA applied, we are bound to follow *Sutton* and evaluate whether his impairment constitutes a disability when taking into account the benefit imparted by his hearing aids"[86] or that "[t]hese amendments would be very favorable to [the plaintiff's] case if they are applicable, because they make it easier for a plaintiff with an episodic condition like [his] to establish that he is an 'individual with a disability.'"[87] It appears that many of the circuit courts constrained to apply pre-ADAAA standards are waiting with some eagerness for the amendments to take effect.

Finding 3: Many of the Courts of Appeals' decisions in which the courts found that the ADAAA was not in effect have nevertheless included descriptions of the Amendment Act's purpose, content, and implications in a manner that conveys awareness and understanding of, and receptivity toward, the changes in the law that the ADAAA entails.

C. Circuit Court Decisions in Which the ADAAA Was Applied

The courts found that the ADAAA was in effect in only a dozen, about 10 percent, of the total number of 115 circuit court decisions identified as mentioning the Act. Subtracting the cases in which the courts found that the ADAAA was in effect but made their decisions on other grounds leaves only seven cases in which the court found that the ADAAA was in effect and then applied it. Because of the small number of circuit court decisions applying the ADAAA, no statistically valid conclusions or reliable inferences can be derived from it. What is possible, however, is to describe the make-up and characteristics of the group of seven decisions, and to summarize each decision individually, for garnering insights and anecdotal information. This summary of the case law will, at a minimum, provide a snapshot of how the Courts of Appeals have put the ADAAA into action in those relatively few instances in which they have had the opportunity to do so.

Of the seven cases in which circuit courts applied the ADAAA, three involved claims of discrimination in employment, two addressed prison conditions, one related to a volunteer program at a county rehabilitation center, and one challenged the denial of additional time as an accommodation on the United States Medical Licensing Examination. The overall results in the cases, at the particular stage of the litigation that was the subject of the appellate proceedings in the cases, can be capsulized as follows:

- Six of the seven plaintiffs prevailed on the issue of properly pleading or providing evidence of a disability, and one lost on that issue;
- Apart from the pleading/showing-a-disability issue, four other plaintiffs were unsuccessful in the outcome of the appeals proceedings on other grounds, with only two plaintiffs prevailing in the circuit court's decisions on the viability of their claims;
- In the employment discrimination decisions, plaintiffs prevailed on the pleading/showing-a-disability issue in two of the three cases, but none of them prevailed on the overall viability of their claims.

What follows is a decision-by-decision summary of the seven circuit court decisions applying the ADAAA.

1. Brown v. City of Jacksonville

In *Brown v. City of Jacksonville*, the Eighth Circuit heard the appeal of a purchasing manager for the city of Jacksonville who "suffered from hip problems that caused chronic pain and required her to walk with a cane," and who allegedly was terminated from her job because of her disability.[88] The court noted that the plaintiff's legal papers "contain[ed] no citation to the relevant statute," forcing the court to "infer she bases her disability-discrimination claim on a purported violation of the ADA's prohibition of employment discrimination 'against a qualified individual on the basis of disability.'"[89] The district court analyzed the plaintiff's claim under pre-ADAAA standards, but the Court of Appeals ruled that it should have applied the ADAAA: "we evaluate her ADA claim under the more generous post-amendment version of the ADA because the City's alleged violation of the ADA—termination of Brown's employment—occurred after the 2008 amendments took effect."[90]

While "the 2008 amendments made clear the ADA applies to a person who "has been subjected to [adverse employment] action ... under [the ADA] 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,"[91] the district court had improperly analyzed the ADA claim under the more restrictive requirements that applied prior to the ADAAA. Specifically, "[t]he district court relied on the … pre-amendment regulations defining the term 'substantially limits' … that Congress expressly rejected in 2008."[92] The lower court had also focused exclusively on whether the plaintiff had an "actual impairment," and erroneously "failed to consider whether Brown made a submissible claim under the post-amendment ADA's expanded definitions of perceived and historical impairment."[93] Applying the ADAAA revisions, the Eighth Circuit indicated that it would assume that the plaintiff was an individual with a disability; the court ultimately decided it did not need to make a determination on the disability issue because the plaintiff had not presented either direct or indirect evidence of a causal link between the adverse employment action and her disability, so there was no evidence the City and supervisors had terminated her employment "on the basis of disability."[94] Since it found that the record did not contain evidence sufficient to permit a reasonable jury to find the City had terminated Brown based on disability, the court affirmed the grant of summary judgment in favor of the defendants on Brown's ADA claim.[95]

2. Wolfe v. Postmaster General

Wolfe v. Postmaster General involved an action for disability discrimination filed under Section 504 of the Rehabilitation Act of 1973[96] by a machine mechanic at a postal distribution center who had "attention deficit hyperactivity disorder (ADHD) for which he takes stimulant medication."[97] Since legal standards for liability under Section 504 are the same as those under the ADA, the timing of the alleged acts of discrimination in the case forced the Eleventh Circuit to apply both pre-ADAAA and post-ADAAA law: "The majority of Wolfe's claims concern events that occurred before the effective date of the amendments, and are therefore governed by pre-amendment standards. Wolfe's claim stemming from his removal from service notice on March 25, 2009, however, falls under the post-amendment law."[98] The plaintiff maintained on appeal that the defendants had regarded him as having a disability both before and after the ADAAA went into effect. Applying the standard of *Sutton v. United Air Lines, Inc.,* that to be regarded as having a disability with respect to one's ability to work a plaintiff must show that the employer perceived the plaintiff as being "unable to work in a broad class of jobs," the circuit court ruled that Wolfe had failed to make a prima facie case that he was regarded as having a disability with respect to the incidents that occurred before the effective date of the ADAAA.[99] With respect to incidents occurring after the ADAAA's January 1, 2009 effective date, however, the court applied the amended version of the "regarded as standard" that states:

> 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 chapter 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.*[100]

The circuit court held that, "[b]ecause of that amendment, a plaintiff need demonstrate only that the employer regarded him as being impaired, not that the employer believed the impairment prevented the plaintiff from performing a major life activity," leading the court to "take it as given for present purposes that Wolfe has carried his burden of showing that the Postal Service regarded him as disabled."[101]

Given the dramatic difference in the result on the issue of demonstrating disability, the *Wolfe* decision provides a great "before and after" example of the transformative change of law the ADAAA represents. However, even though Mr. Wolfe prevailed on the disability issue as presented on appeal and the Postal Service did not dispute that he was qualified for the position at issue, the outcome of the appeal was ultimately not at all favorable for him, as the Eleventh

Circuit found that he had "failed to establish a prima facie case because he has not shown that he was discriminated against because of his perceived disability" and affirmed summary judgment for the defendant.[102]

3. Allen v. SouthCrest Hosp.

The plaintiff in *Allen v. SouthCrest Hosp.*, a medical assistant who suffered from migraine headaches, filed an ADA action alleging that the hospital she worked for failed to accommodate her disability and terminated her employment because of it.[103] The district court granted the hospital's motion for summary judgment as to the ADA claims, "primarily because [the plaintiff] has not established the first element of a prima facie case of ADA discrimination, that she is disabled within the meaning of the ADA."[104] It does not appear that the district court took the changes made by the ADAAA into account in making its ruling. On appeal, the Tenth Circuit recognized the applicability and central objectives of the ADAAA in the following passage in its decision:

> Congress passed the ADAAA with the explicit purpose of rejecting certain standards and reasoning of Supreme Court opinions regarding interpretation of the ADA and "reinstating a broad scope of protection to be available under the ADA." Accordingly, the ADAAA added language to the ADA providing for a broad construction of the definition of disability ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."). This new language became effective on January 1, 2009, before the relevant events in this case.[105]

Having acknowledged the overall significance of the ADAAA, the circuit court proceeded, however, to analyze the plaintiff's contentions that she had a disability in a manner that was not fully in step with the Act's precepts. In addition to the provision just quoted directing that the definition of disability be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADAAA, the Act also provides that "the term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act."[106] The congressional findings include expressions of disapproval for court rulings that "have narrowed the broad scope of protection intended to be afforded by the ADA," "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities," and "interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress …"[107] The statement of purposes in the ADAAA

expressly rejects the Supreme Court's restrictive standards for interpreting the terms "major" and "substantial" in the definition of disability and the courts' creation of "an inappropriately high level of limitation necessary to obtain coverage under the ADA, and declares congressional intent that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[108]

But the Tenth Circuit took a more probing and critical look at the plaintiff's showing of a disability, resulting in ADAAA-disfavored "extensive analysis." The court observed that "Ms. Allen identifies her impairments as 'hypertension, migraines, insomnia and heaviness in the chest.' Her allegations concerning substantial limitations are primarily tied to her migraines rather than the other conditions, however."[109] The court noted that Allen experienced migraine headaches several times per week, adding "but she did not suffer from them on a daily basis."[110] She described the headaches as varying in severity. At times, she reported, her head was "banging" when she got out of bed, but she was not dizzy or nauseous; at other times the symptoms were more serious and she could not get up or go to work. She saw a doctor at SouthCrest for the migraines, who prescribed her various medications to treat them.[111] On one occasion Allen became ill at work with a migraine and chest pains, for which she received treatment at the emergency room.[112] In deposition testimony, when the plaintiff was asked whether, when she had a migraine and went to work, she could then "drive home and cook a meal or whatever else you had to do at home," she responded "No. When you get home, that's when you crash and burn. Take medication that's going to make you go to sleep and you go to sleep." She later explained in an affidavit submitted with her summary judgment response what she meant by her reference to her need to "crash and burn" as follows: "On the days I had headaches I would go home after work and 'crash and burn.' That is to say, I could not function or take care of any of the routine matters of caring for myself. I could not do anything other than go home and … go straight to bed."[113]

The plaintiff contended that her impairments substantially limited her in major life activities of sleeping, caring for herself, and working.[114] Despite the fact that Allen felt compelled to take sleeping medication and apparently did so routinely on nights she had a migraine headache, the Court of Appeals was somewhat dismissive of the claim that Allen's migraines interfered with her sleep. While acknowledging that she had mentioned her difficulties with sleeping in her

briefing and argument in the district court and in her opening appellate brief ("During her migraines her ability to sleep is affected …."), the circuit court found that "she made no specific argument that sleeping was a major life activity that was substantially affected by her migraines," and "[h]er argument concerning the major life activity of sleep was insufficiently developed in district court and is mentioned only in passing here." "Accordingly," said the court, "we will give no further consideration to 'sleeping' as an alleged major life activity."[115]

The court turned next to the major life activity of taking care of oneself, even though it recognized that the plaintiff's arguments had focused more on the effect of her condition on her ability to work. It based its decision to give caring for oneself priority on a 2006 (pre-ADAAA) Tenth Circuit precedent that had relied upon statements of the Supreme Court in the *Sutton* case that characterized the EEOC's ADA regulations as treating the life activity of working as something that should be considered "only as a last resort."[116] In examining Allen's claim that her migraines substantially limited her in the major life activity of caring for her self, the circuit court quoted from her affidavit as follows: "On the days I had headaches I would go home after work and "crash and burn." That is to say, *I could not function or take care of any of the routine matters of caring for myself.* I could not do anything other than go home and [ ] go straight to bed."[117] Accordingly, the court concluded that "taken as a whole, the evidence showed that Allen's migraines, when active and treated with medication, did not permit her to perform activities to care for herself in the evenings and compelled her to go to sleep instead.[118] But the circuit court found the plaintiff's pleadings and evidence insufficient to meet her burden "to make more than a conclusory showing that she was *substantially* limited in the major life activity of caring for herself as compared to the average person in the general population," and declared that "[a] mere assertion that she took medication and slept after arriving at home for an unspecified period when undergoing a migraine attack rather than caring for herself was insufficient to meet this burden."[119]

In ruling that "Ms. Allen's allegations and evidence on this point were conclusory at best," the court took her to task for the lack of details:

> She presented no evidence concerning such factors as how much earlier she went to bed than usual, which specific activities of caring for herself she was forced to forego as the result of going to bed early, how long she slept after taking her medication, what time she woke up the next day, whether it was possible for her to complete the

> activities of caring for herself the next morning that she had neglected the previous evening, or how her difficulties in caring for herself on days she had a migraine compared to her usual routine of evening self-care.[120]

The court also felt that the plaintiff had not adequately framed the comparison group of average people with which to contrast her limitations:

> She also made no attempt to show how the alleged limitations created by her need to "crash and burn" compared to the average person's ability to care for herself in evenings after work. The average person, presumably, does not have to go to bed immediately upon returning from work and/or to medicate herself with somniferous medications to escape migraine symptoms. But this fact alone does not meet Ms. Allen's burden, since the average person also sleeps each evening and cannot care for herself while asleep, and sometimes goes to bed early.[121]

To this statement, the court attached a reference to a decision it had previously issued (in which, applying pre-ADAAA law, the Tenth Circuit had held that the plaintiff had not shown that her multiple sclerosis constituted a disability) for the proposition that, "with regard to major life activity of sleeping, … *many* non-disabled people have nightmares or disturbed sleep patterns; the ADA plaintiff is obliged to present evidence that will permit *comparison* of the effects of his sleep disturbances to those experienced by the average person."[122]

Since it was the plaintiff's "summary judgment responsibility to present evidence sufficient to meet her burden of production on the 'disability' element of her prima facie case," and the court decided that "Ms. Allen's claim of a substantial limitation in the major life activity of caring for herself was insufficiently developed and insufficiently supported by the evidence," the circuit court ruled that "[t]he district court properly rejected as unproven her claim of a substantial limitation in this major life activity."[123]

The court next turned to Allen's claim that she was substantially limited in the major life activity of working, which, as noted above, the court had described as "a last resort." This devolved into consideration of whether the requirement that proving substantial limitation of working necessitated proving that one was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," a standard that had been adopted by the EEOC in its ADA regulations and applied by the Supreme Court in the *Sutton* decision.[124] The plaintiff argued that under the broad interpretation of the definition of disability embodied in the ADAAA

and applied in the new regulations promulgated under it she should be able to demonstrate disability in the major life activity of working even if she was only disabled from performing a single job.[125] In particular, she pointed out that the provision relating to the "class of jobs or broad range of jobs" standard had been eliminated in the revised EEOC regulations issued to implement the ADAAA. But the court quoted the Interpretive Guidance accompanying the revised regulations indicating that the provision was removed from the regulation for other reasons:

> The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.[126]

The court noted that the Interpretive Guidance goes on to explain that the "broad class of jobs" restriction remains in place even after the amendment to the regulations, declaring:

> In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.[127]

The foregoing led the Tenth Circuit to conclude as follows:

> [B]ased on our existing case law, Supreme Court case law, the applicable statute, and the regulations, that to show a disability in the major life activity of working, Ms. Allen was required, even after the enactment of the ADAAA and the modified EEOC regulations, to demonstrate that she was substantially limited in performing a class of jobs or broad range of jobs in various classes as compared to most people with comparable training, skills, and abilities. She failed to do so.[128]

Rejection of all three of the plaintiff's contentions as to how her migraine headaches substantially limited a major life activity led the court to the following result: "For the foregoing reasons, Ms. Allen failed to meet her summary judgment burden to establish a prima facie case of disability discrimination. The district court therefore properly granted summary judgment to SouthCrest on her ADA claims."[129]

It may be apropos to note that the Tenth Circuit only discussed the ADAAA in the context of adopting the restrictive "class of jobs or broad range of jobs" standard for determining substantial limitation of working. In reciting that Allen experienced migraine headaches several times per week, the court made a point of adding "but she did not suffer from them on a daily

basis."[130] Yet the court did not mention the ADAAA provision declaring that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[131] And despite the fact that a key factor in the plaintiff's condition was her need to take sleep medication when she had a migraine, the court did not make any mention of the ADAAA provision that specifies that **"**(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as— (I) medication…."[132] Nor was the court apparently constrained in any way by the ADAAA directive that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[133] As to this latter point, the *Allen v. SouthCrest Hosp.* decision has characteristics of the demanding, stringent, probing approach to claims of disability that marked the pre-ADAAA era.

It remains to be seen how much impact the Tenth Circuit's decision in *Allen v. SouthCrest Hosp.* will have on other courts. To date it has been cited in another Tenth Circuit decision,[134] distinguished by one federal district court,[135] and discussed or mentioned for various points in eight other district court decisions.[136]

4. Jenkins v. National Bd. of Medical Examiners

The Sixth Circuit's decision in *Jenkins v. National Bd. of Medical Examiners* was discussed above in regard to its recognition of a "prospective relief" exception from ADAAA nonretroactivity – "[b]ecause this case involves prospective relief and was pending when the amendments became effective, the ADA must be applied as amended."[137] In regard to the plaintiff's reading disorder, the district court had found that "[t]here is ample evidence that Jenkins processes written words slowly, and that his condition prevents him from succeeding where success is measured by one's ability to read under time pressure.,"[138] and that "[t]his condition has unquestionably made it more difficult for Jenkins to keep up with a rigorous medical school curriculum and to succeed on written tests where he is under time constraints."[139] Nonetheless, applying the standard announced by the Supreme Court in *Toyota Motor Mfg. Kentucky, Inc. v. Williams* that the determination of whether an activity is a "major life activity" depends upon "whether it is central to most people's daily lives," the district court

ruled that Jenkins had not identified a major life activity that he was unable to perform due to his condition, a failure that "must be fatal to his claim of disability under the ADA."[140]

Having determined, however, that the ADAAA applied to the case, the Sixth Circuit described its impact as follows:

> Congress amended the portion of the ADA governing construction of the term "disability," such that "[t]he 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" and "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [Act]." In so stating, Congress overturned the definition of "substantially limits" put forward in *Toyota* and directed the courts to interpret the term in a more inclusive manner.[141]

The court added that "[w]ithout the benefit of these amendments, the district court relied on the Supreme Court's analysis in *Toyota,* which was controlling precedent at the time the district rendered its decision" and emphasized that "[i]n holding that Jenkins was not substantially limited in his ability to read, the district court relied on the very language from *Toyota* that Congress repudiated in the ADA Amendments Act."[142] This led the court to rule that "[b]ecause the district court relied on the Supreme Court's now-repudiated decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* the district court's legal conclusions require reconsideration,"[143] and prompted the following conclusion:

> The change in the law has therefore undermined the district court's holding, and the resolution of this case will require the district court to make a fresh application of the law to the facts in light of the amendments to the ADA. The fact-bound nature of the question whether Jenkins is disabled under the revised Act counsels a remand without an appellate attempt to give more precise definition in the abstract to the revised Congressional language.[144]

Accordingly, the Court of Appeals vacated the judgment and remanded the case to the district court for "further findings in light of the ADA Amendments Act,"[145] an outcome that illustrates the potentially transforming effect of the ADAAA.

5. Hilton v. Wright

The two circuit court decisions applying the ADAAA that were brought by prisoners both involved allegations of discriminatory denials of medical treatment. In *Hilton v. Wright,* a New York state prisoner infected with the Hepatitis C virus (HCV) filed suit after he was denied

antiviral treatment for his condition.[146] After a lengthy screening process, members of the prison medical staff recommended that Hilton be treated with antiviral drugs to combat his HCV. Under Department of Correctional Services guidelines, however, because the plaintiff had admitted to using drugs in the past – he had admitted to having used marijuana and cocaine as a teenager (though periodic drug tests had subsequently shown him to be drug free) – he could not receive HVC antiviral treatment until he enrolled in a substance abuse program.[147] When he sought to enroll in the program, but was deemed ineligible because he could not complete it before he was eligible for release, based on the earliest possible date he could be let go. When the plaintiff again requested antiviral treatment, after complaining to members of the prison medical staff that he was experiencing symptoms related to his HCV, he was again turned down.[148] Some three months after Hilton's request for treatment was denied, he filed suit against prison authorities and moved for a temporary restraining order (TRO) requiring authorization of antiviral treatment. Shortly after the motion for a TRO was made, the Chief Medical Officer for the New York State Department of Correctional Services stipulated that he would authorize treatment for Hilton.[149] A short time later, Hilton amended his complaint to assert claims on behalf of a class of similarly situated prisoners in the custody of the corrections department and to join another inmate as a named plaintiff. The amended complaint alleged that the policy conditioning HCV antiviral treatment for former alcohol and drug users on their participation in the program was without medical justification and that its true aim was to limit the number of prisoners receiving treatment in order to save money.[150] It also asserted that the department had an unnecessarily long HCV screening process for the same reason. The plaintiffs sought monetary damages and injunctive relief for asserted violations of Title II of the ADA" and Section 504 of the Rehabilitation Act, alleging that the defendants regarded the plaintiffs as disabled on the basis of their former drug or alcohol use, and discriminated against them through the substance-abuse-program-enrollment condition on eligibility for treatment.[151]

The district court certified the class with respect to the plaintiffs' claims for injunctive relief, and the parties began settlement discussions shortly thereafter.[152] They reached an interim settlement agreement that resolved all of the class's injunctive and equitable claims. It permanently eliminated the substance-abuse-program-enrollment condition, established procedures for identifying and providing treatment to those prisoners who had been denied medication because of their failure to participate in the substance abuse program, and called for

payment to class counsel of fees for attorney and paralegal time used monitoring implementation of the agreement.[153] The settlement agreement resolved all of the plaintiffs' claims except for those of Hilton and the other named plaintiff against prison authorities for monetary damages, and the defendants moved for summary judgment on those claims. The district court granted the motion for summary judgment, and as all of the plaintiffs' claims had either settled or been disposed of by summary judgment, the district court entered judgment dismissing Hilton's complaint, and he filed an appeal to the Second Circuit.[154] While the appeal was pending, attorneys for the plaintiff moved the district court for fees and costs incurred monitoring the settlement agreement, and the court granted the full amount of documented attorneys' fees – $23,152.[155]

On appeal, the defendants argued that the dismissal should be affirmed due to the plaintiff's failure to produce evidence that the prison authorities regarded him personally as being substantially limited in a major life activity. Responding to that contention, the Sixth Circuit responded that, until the ADAAA went into effect, "the defendants would have been correct, as Hilton would not have been able to demonstrate that he was 'disabled' within the meaning of the ADA."[156] The court went on to explain:

> Prior to that point, a plaintiff, such as Hilton, seeking to avail himself of the "regarded as" prong of the definition of "disability" needed to show that he was perceived as both "impaired" and "substantially limited in one or more major life activity." Because we determine disability on an "individualized, case-by-case basis," under the old regime, Hilton could survive summary judgment on his ADA claim only if he could raise a genuine issue of material fact about whether [the defendants] regarded him personally as being substantially limited in a major life activity. The record is devoid of any such evidence.[157]

The circuit court pointed out, however, that in the ADAAA Congress "substantially reworked the language" of the definition of disability, in particular by adding a provision that a person meets the requirement of "being regarded as having such an impairment" by establishing 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."[158] The court quoted explanatory language on the provision from the report of the House Committee on Education and Labor:

> The Committee therefore restores Congress's original intent by making clear that an individual meets the requirement of "being regarded as having such an impairment" if

> the individual shows that an action (*e.g.,* disqualification from a job, program, or service) was taken because of an actual or perceived impairment, *whether or not* that impairment actually limits *or is believed* to limit a major life activity.[159]

Pursuant to the new provision, the Sixth Circuit reasoned that the plaintiff was only required to raise a genuine issue of material fact about whether the defendants regarded him as having a mental or physical impairment, and was not required to present evidence of how or to what degree they believed the impairment affected him.[160] The circuit court noted that Department of Justice (DOJ) Title II regulations, not yet amended to reflect any changes made in the ADAAA, recognize "drug addiction" as a "physical or mental impairment," "to the extent that the DOJ's definition is persuasive."[161] The court's note of caution was apparently because DOJ had not yet issued revisions to incorporate ADAAA changes, although there is no reason to believe the ADAAA in any way altered the status of "drug addiction" as a physical or mental impairment. The court directed that "[o]n remand, the district court should resolve, with the benefit of further briefing, what effect, if any, this regulation should have on its interpretation of 'regarded as having such an impairment.'"[162] Assuming that drug addiction was still a physical or mental impairment, the circuit court ruled that, since "there [was] no dispute that the defendants regarded Hilton as a former drug user," there appeared to be a genuine issue of material fact as to whether the defendants regarded Hilton as having the physical or mental impairment of drug addiction.[163]

The Second Circuit found that there was still another issue pending in the case as to whether "Hilton's suit for damages was precluded by the Eleventh Amendment as the district court appears to have held," because the district court "was not express in its reasoning" on the Eleventh Amendment issue.[164] Given that "Hilton may have presented an otherwise triable issue of fact regarding his ADA claim," the circuit court indicated that it was "not inclined to affirm summary judgment upon so thin a reed." Instead, it remanded Hilton's ADA claim "for clarification and for expansion of the district court's Eleventh Amendment analysis."[165] It directed the district court that if it determined that the defendants were not protected by the Eleventh Amendment, it should proceed to "consider whether drug addition constitutes a "physical or mental impairment," … and, if so, whether there are genuine issues of material fact with respect to the other elements of a Title II ADA claim."[166] Accordingly, the Second Circuit vacated the judgment of the district court dismissing Hilton's complaint and remanded the case for further

consideration in light of the appellate court's opinion.[167] Without completely co-opting the authority of the district court on remand, the Court of Appeals gave a clear signal that the ADAAA might prove determinative on the plaintiff's disability discrimination claim.

6. Nasious v. Colorado

The other Court of Appeals decision under the ADAAA involving a prisoner challenging alleged deficiencies in medical treatment is Nasious v. Colorado,[168] a case brought by an inmate of a state prison in Colorado on his own without an attorney (*pro se*). The plaintiff sued prison officials for monetary damages and injunctive relief, asserting that he sustained injuries from defendants' "failure to treat or admit his disabilities," that defendants were deliberately indifferent to his serious medical needs, and that denials of needed medical treatment to him violated, among other things, the Eighth Amendment (cruel and unusual punishment) and Title II of the ADA.[169] The district court dismissed the plaintiff's Eighth Amendment claims and the Tenth Circuit affirmed, finding that the plaintiff's disagreement with defendants' medical opinions and their prescribed courses of treatment for his various conditions, and his allegations of incorrect treatment might, at best, establish medical malpractice, but did not rise to the level of an Eighth Amendment violation.[170]

As to the plaintiff's ADA claim, the district court granted, with one exception, summary judgment for the defendants on the grounds that some of the plaintiff's allegations were not cognizable under the ADA, that the plaintiff had failed to provide any evidence of a qualifying disability, and that the plaintiff had not produced any evidence he had been discriminated against because of a disability.[171] The district court found that Nasious's ADA-related allegations were generally conclusory and non-specific with regard to disabilities; most of his allegations involved unspecified conditions and "serious medical needs." The one exception was in regard to photophobia (severe sensitivity to, or abnormal intolerance of, visual reception of light). The district court ruled that Nasious could proceed with a claim that certain medical defendants violated Title II by failing to accommodate his photophobia while he worked at his prison job; the court limited this claim to injunctive relief only, and held that Nasious could not recover money damages.[172] While this claim was pending, however, and had not been decided on the merits,

the plaintiff was transferred to a halfway house, and, since he no longer worked at the job that gave rise to the photophobia problem, the district court dismissed the claim as moot.

On appeal, Nasious continued to argue that he had a disability under the ADA. The Tenth Circuit noted that the events underlying the lawsuit "straddle[d]" the January 1, 2009, effective date of the ADAAA, "in which Congress provided for a broader construction of 'disability' than had previously applied."[173] In light of the ADAAA, the circuit court decided it would "assume solely for purposes of this appeal that Nasious suffers from a disability." It chose to resolve the appeal, however, on "alternate grounds" asserted by the district court in its decision – that many of Nasious's ADA-related complaints concerned "defendants' failure to provide him the medical treatment he desires," but "the ADA does not provide a remedy for medical negligence or a means to challenge 'purely medical decisions' regarding the propriety of a course of treatment."[174] The court concluded that the plaintiff had "failed to produce evidence to show defendants denied him access to a prison program or discriminated against him *because of* his asserted disabilities," and affirmed the district court's decision dismissing the plaintiff's cause of action.[175] Though the applicability of the ADAAA did not change the unfavorable final result against the plaintiff, it did, however, give him a fighting chance on the proof-of-disability issue and prevented his case from being lost on that ground.

7. McElwee v. County of Orange

The plaintiff in the case of *McElwee v. County of Orange* filed a lawsuit under Title II of the ADA and Section 504 of the Rehabilitation Act in which he alleged that officials at Valley View Center for Nursing Care and Rehabilitation, a federally funded facility operated by Orange County, New York, had discriminated against him on the basis of disability by dismissing him from a volunteer program at the facility.[176] The Second Circuit described the plaintiff as follows:

> McElwee is a man in his mid-thirties with a neurodevelopmental disorder formally classified as Pervasive Developmental Disorder—Not Otherwise Specified ("PDD–NOS") and informally called an autism spectrum disorder. He has an IQ of 79, placing him in the eighth percentile of intellectual functioning. He lives with his mother, has never held a job, and likely will always require assistance in managing money and completing non-routine tasks.[177]

Actually, as the district court noted, the plaintiff's complaint was somewhat more clear and precise about his condition, alleging that he is a "disabled individual who has Asperger's

Syndrome, a developmental disorder on the autism spectrum characterized by problems in socialization and communication skills. This disorder substantially limits plaintiff's ability to communicate and associate with his peers and colleagues."[178]

McElwee had participated in the volunteer program at Valley View for some 13 years, performing janitorial and housekeeping duties and transporting nursing home residents to religious and social events. The circuit court indicated that he "competently performed these assigned tasks without hindrance from his alleged disability."[179] In 2009, he was dismissed from Valley View's volunteer program for engaging in erratic and harassing behavior toward female staff members, including following them, staring at them, and saying inappropriate things.[180] The district court granted the defendants' motion for summary judgment, holding that McElwee did not have a disability under the ADA or the Rehabilitation Act. Specifically, and somewhat surprisingly, the district court ruled that, "while Plaintiff may suffer from a diagnosed disorder, ... [he] has not demonstrated that his mental impairment substantially impairs his ability 'to connect with others, *i.e.,* to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these activities.'"[181] Basing its decision on the purported failure of the plaintiff to show that he had a disability, the court did not consider whether he was qualified to be a volunteer at Valley View nor whether the accommodations he sought were reasonable.

On appeal, McElwee contended that the district court had erred by failing to consider the ADAAA, which, as the Second Circuit characterized it, "amended the ADA to provide that the definition of 'disability' shall be construed broadly 'to the maximum extent permitted by the terms of this chapter' and '[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]."[182] The court found that McElwee's claims arose after the ADAAA took effect, and observed that "[b]oth McElwee and *amici* raise fair concerns as to whether the district court erred in not addressing whether McElwee was substantially limited in the major life activities of working, caring for himself, communicating, thinking, and brain function."[183] The court took note of the ADAAA provision declaring that "'major life activities include, but are not limited to' caring for oneself, learning, concentrating, thinking, communicating, working, and the operation of major bodily functions such as brain function,"

and of EEOC's amended regulations instructing courts to construe the term "substantially limits" broadly and specifically identifying autism as an impairment that substantially limits brain function in virtually all cases.[184] Having laid all this groundwork suggesting that the district court was wrong in holding that McElwee did not have a disability under the ADA as amended, however, the Second Circuit declined to take that step: "Nonetheless, we need not decide whether the district court erred in finding McElwee was not disabled because even assuming *arguendo* that a reasonable jury could find McElwee disabled, the County is entitled to summary judgment for the reasons set forth below."[185] The court then went on to rule that the plaintiff was not "emotionally able to conduct himself in an appropriate manner when dealing with residents, supervisors, and other staff members," and "his sexual harassment of female staff members appears to have rendered him unqualified …."[186] The court also ruled that accommodations the plaintiff was requesting to enable him to perform the essential functions of his position – talking to has therapist about helping him to change his conduct and counseling his associates to better tolerate his behavior – were unreasonable as a matter of law.[187] For these reasons, the Second Circuit affirmed the judgment of the District court granting summary judgment in favor of the defendants. Although the court ultimately rejected the plaintiff's causes of action, it sent a clear message to district courts that they would be on shaky ground under the ADAAA in ruling that a person with limitations such as McElwee's does not have a disability.

Finding 4: Research disclosed only seven decisions so far in which Courts of Appeals have both found the ADAAA to be in effect and had occasion to apply it. These included three cases involving employment discrimination claims, one addressing a requested accommodation on a medical licensing exam, two dealing with prisoners' claims of deficient medical treatment in state prisons, and one claim of discrimination in a volunteer program at a county rehabilitation center.

Finding 5: The numbers of pertinent circuit court decisions are far too small for drawing any broad or authoritative conclusions. The most striking revelation about the seven cases, however, was that in six out of the seven the plaintiff prevailed on the issue of having a disability at the stage of the proceedings before the appellate court. This can be viewed as an early indication of a positive turnaround in outcomes on the definition-of-disability issue attributable to the ADAAA.

Finding 6: In *Allen v. SouthCrest Hosp*., the one case out of the seven in which the plaintiff did not prevail on the showing of disability, the Tenth Circuit took a more exacting and critical look at the plaintiff's showing of a disability – an approach that, in disregarding the ADAAA's guidance supporting a broader, less restrictive approach to the elements of "disability" and the avoidance of "extensive analysis," harkened back to pre-ADAAA scrutiny of a plaintiff's claim of having a disability. Whether this decision will have a regressive effect on future decisions is a matter of concern to which close attention should be paid.

V. ISSUE-BY-ISSUE ANALYSIS OF FEDERAL COURT DECISIONS DISCUSSING THE ADAAA

NCD undertook this project to examine the case law to get a sense of how the ADAAA is working in regard to key issues it was intended to address. These key issues, along with some particular questions of interest to NCD, are addressed one-by-one in this section. The seven circuit court decisions in which the courts applied the ADAAA are described in some detail in the previous section. The current section focuses primarily on the decisions of the federal district courts, augmented as necessary by the occasional mention of circuit court decisions that may be especially pertinent to a particular issue. The methodology employed in trying to derive useful, informative conclusions and observations from the large body of court rulings is traditional scholarly legal analysis designed to identify emerging principles and trends in the emanations from the courts.

Some overall preliminary observations regarding the status of the case law are warranted. Perhaps not unexpectedly, the decisions are far from homogenous. Some decisions are favorable to plaintiffs based on the ADAAA; some apply the ADAAA and yet the courts rule against plaintiffs on the showing of disability. Some courts recognize that the ADAAA is in effect and then do not apply it. Some mention the ADAAA in passing and then proceed as if it did not exist. Some courts misstate or misinterpret elements of the ADAAA. Some decisions are much better reasoned or written than others; from time to time, courts do an excellent job of explaining the content and implications of the ADAAA, while every once in awhile a clinker of a juridical opinion is issued.

Within this bubbling mixture of judicial decisions of varying quality, approaches, and results, however, it is possible to tease out some clear doctrinal developments, directions, and trends in the law under the ADAAA as meted out by the U.S. district courts in the cases to date. On many issues there is considerable coherency and common ground in the decisions. The remainder of this section provides analysis of major themes and patterns that are emerging in regard to the articulation, interpretation, and application by the courts of the principal elements of the ADAAA.

Of the 810 district court decisions identified as mentioning the ADAAA, some basic information was collected on all of them, over 300 were analyzed in some detail, and more than 200 of them were subjected to methodical, in-depth analysis. Of the latter category, in nearly four out of five decisions (78 percent), the court found the ADAAA was in effect at the time the alleged discriminatory actions took place – quite a contrast to the paucity of decisions to date in which the circuit courts have found that the ADAAA was in effect. Among the decisions in which the ADAAA was found to be in effect, some 90% involved claims of employment discrimination.

Finding 7: In approximately four out of five of the federal district court decisions that were analyzed methodically, the court found the ADAAA was in effect at the time the alleged discriminatory actions took place; this is in sharp contrast to the small percentage of cases that have made their way to the Courts of Appeals in which the courts have found that the ADAAA was in effect. Among the district court decisions in which the ADAAA was found to be in effect, about 90% involved claims of employment discrimination.

A. General Re-Broadening of ADA Coverage

The first stated purpose of the ADAAA is "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' *by reinstating a broad scope of protection to be available under the ADA.*"[188] The substantive provisions of the ADAAA follow through directly on this stated objective, particularly in declaring as a "Rule of Construction" that "[t]he 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."[189] The

managers of the ADAAA bill in the Senate underscored the fundamental congressional intent to broaden the coverage of the ADA in a statement they inserted into the Congressional Record, in which they declared:

> It is our expectation that because the bill makes the definition of disability more generous, some people who were not covered before will now be covered.... This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.[190]

The EEOC regulations for implementing the ADAAA revisions echo the same note:

> The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of 'disability' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.[191]

The statutory mandate for interpreting coverage of the ADA broadly is thus manifestly clear and unambiguous. And that message has unquestionably been received by the courts. As discussed in section V of this report, the small number of Courts of Appeals' decisions in which the courts have applied the ADAAA, as well as many of those in decisions which the courts found the ADAAA not to be in effect, expressly recognize the centrality under the ADAAA of broadening coverage – expanding the class of people eligible for protection from discrimination on the basis of disability – under the ADA.

The decisions of district courts discussing the ADAAA are likewise replete with statements of judicial recognition and affirmation of the expansion-of-coverage first principle of the Act. In one recent decision, for example, the District Court for the Western District of Pennsylvania declared:

> Congress amended the ADA by passing the ADA Amendments Act of 2008 ("ADAAA"). Congress did this in order to reinstate broad ADA coverage of individuals because of its conclusion that the Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams* and *Sutton v. United Airlines, Inc.* had improvidently narrowed the scope of protection intended to be afforded in the ADA. Congress thus instructed the courts that they were interpreting the statute too restrictively.[192]

The same court had previously described the central purpose of the ADAAA more succinctly by writing that "[t]he ADAAA 'broadened the category of individuals entitled to statutory protection from discrimination under the ADA.'"[193] A district court in Florida stated that "The ADAAA

amended the ADA to, among other things, promulgate a more liberal standard of the term 'disabled,' making it significantly easier for a plaintiff to show disability."[194] The District Court for South Dakota observed, simply, that "[t]he ADAAA 'broadened the definition of what constitutes a disability….'"[195]

Numerous other courts have used slightly different variations on the same theme, as, for example, the following: "[The court is m]indful of Congress's mandate to construe the ADA broadly when defining a disability and the non-onerous burden on the plaintiff at the initial stage of the *McDonnell–Douglas–Burdine* analysis ….";[196] "The ADAAA provides more generous coverage than the ADA by providing that the definition of disability 'shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the terms of [the Act.]'";[197] "Under [the ADAAA], the definition of disability was broadened to increase the coverage available to individuals";[198]"The ADAAA seeks to broaden the scope of disabilities covered by the ADA after that scope had been narrowed by Supreme Court interpretation";[199] "The ADA Amendments Act … broadened the definition of a disability under the ADA";[200] "Congress amended the ADA to broaden its scope by expanding the definition of disability, which had been narrowed by Supreme Court interpretation";[201] "The ADA's definition of 'disability' was substantially broadened by the Americans with Disabilities Act Amendments Act of 2008";[202] "Congress amended the ADA to broaden its coverage by expanding the definition of what qualified as a 'disability.' This expansion was undertaken in response to court decisions that Congress felt 'had created an inappropriately high level of limitation necessary to obtain coverage under the ADA";[203] "The ADA Amendments Act of 2008 ("ADAAA") made it easier for plaintiffs to prove they are 'disabled' under the ADA, providing that a disability 'shall be construed in favor of broad coverage of individuals' and that a finding of disability 'should not demand extensive analysis'";[204] "We construe this definition [of disability under the ADAAA] liberally, with an eye towards 'broad coverage of individuals under' the ADA";[205] "The amendments broadened the scope of the ADA by expanding the definition of disability, which had been narrowed by Supreme Court interpretation";[206] "The ADA Amendments Act of 2008 ('ADAAA') was intended to make it easier for plaintiffs to prove they are disabled under the ADA";[207] "In the wake of the ADA Amendments Act of 2008 ('ADAAA'), it is now easier for a plaintiff to prove that he or she has a 'disability' within the meaning of the ADA";[208] "Following the ADA Amendments Act of 2008 ('ADAAA'), 'disability' is construed broadly and to the fullest

extent allowed by the ADA's terms";[209] "The ADA's definition of 'disability' was substantially broadened by the Americans with Disabilities Act Amendments Act";[210] "This Act provides that the definition of disability should be construed in favor of broad coverage; its purpose was in response to the continual limiting by the courts of what constitutes a disability under the ADAAA";[211] "The Amendments expand the definition of 'disability' to include impairments which had been interpreted by the Supreme Court as being outside the ADA's protection";[212] "Congress explicitly indicated its disagreement with the Supreme Court's narrowing of the reach of the ADA and reiterated its belief that the concept of 'disability' should be read broadly.";[213] "[C]ourts that have had occasion to consider the effects of the ADAAA … apply it broadly to encompass disabilities that previously might have been excluded."[214] This unwieldy list of examples is but a small representation of similar expressions of awareness and understanding of the central thrust of broadening ADA coverage that pervade judicial discussions of the ADAAA.

Apart from their own descriptions of the primary goal of the ADAAA, numerous courts routinely quote the statutory and regulatory language that mandates expansive coverage of disabilities, sometimes in abbreviated form, sometimes more extensively. The flavor of a moderate version of such a presentation can be garnered by looking at a few paragraphs of the decision in the case of *Cordova v. University of Notre Dame Du Lac*.[215] In that case, the U.S. District Court for the Northern District of Indiana began its analysis of the ADAAA as follows:

> Effective January 1, 2009, the ADA was amended to "carry out the ADA's objectives" by "reinstating a broad scope of protection." See ADA Amendments Act of 2008 ("ADAAA"). The ADAAA itself is described as "[a]n Act to restore the intent and protections of the Americans with Disabilities Act of 1990," and in its findings Congress specifically noted that the original intent of the ADA was to provide "broad coverage" and a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Specifically, Congress found that the United States Supreme Court had improperly narrowed the protection intended to be afforded under the ADA, and the ADAAA rejected the holdings of *Sutton v. United Air Lines, Inc.,* and *Toyota Motor Mfg., Ky., Inc. v. Williams,*. Importantly, the ADAAA left the ADA's three-category definition of "disability" intact but clarified how the categories are to be interpreted.
>
> For example, the ADAAA now provides a specific definition for the term "Major Life Activities" whereas prior to the amendments, courts frequently looked to the regulations interpreting the Rehabilitation Act of 1973 and the EEOC regulations for

guidance. Congress also added specific "[r]ules of construction regarding the definition of disability" which provide:

> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.
> (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.
> (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
> (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures ....

In essence, the ADAAA reestablished the original intent and expansive scope of the ADA.[216]

Frequently the courts have augmented their statutory analysis by focusing considerably on the EEOC regulations implementing the ADAAA. In *Healy v. National Bd. of Osteopathic Medical Examiners, Inc.*, for example, the court commenced its analysis of the Act as follows:

> In 2008, Congress amended the ADA "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." These amendments included significant changes to the "substantially limits" standard and expressly overruled the strict, demanding standard articulated by the United States Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*. Accordingly, the regulations now provide:
>
> > (i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.
> >
> > (ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
> >
> > (iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of

> whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
>
> (iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.[217]

Particularly extensive extracts from the revised regulatory provisions on the definition of disability and its "substantially limits" element are found in the court's decision in *E.E.O.C. v. Princeton Healthcare System*,[218] where the court devoted nearly four pages of its decision to the regulations.

As the preceding excerpts suggest, in attempting to follow the broad-ADA-coverage mandate, the courts have had to pay particular attention to the "substantially limits" standard in the statutory language of the ADAAA, as clarified and elaborated on in the regulations and regulatory guidance. The district courts have characteristically referred to or quoted the statutory and regulation provisions and commentary relating to some combination of the following standards regarding the determination whether a physical or mental impairment substantially limits a major life activity:

- "Substantially limits" is to be interpreted consistently with the findings and purposes of the ADAAA.
- "Substantially limits" is not a demanding standard, but is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
- The standard for whether an impairment is a disability is whether it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.
- "Substantially limits" requires a degree of functional limitation lower than the standard applied prior to the ADAAA.
- An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.
- Not every impairment constitutes a disability.
- The crucial determinations in an ADA case are whether covered entities have met their obligations and whether discrimination has occurred, not whether the individual's impairment substantially limits a major life activity.

- The threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
- Determining whether an impairment substantially limits a major life activity requires an individualized assessment.
- Determining whether an impairment substantially limits a major life activity will normally not require scientific, medical, or statistical analysis, although such evidence is permissible.
- An impairment that substantially limits one major life activity does not have to limit other major life activities in order to be considered a disability.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- The determination whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures.

While no district court decision was identified that mentioned all of these requirements for proper application of the "substantially limits" criterion, most of the courts analyzing the ADAAA have recited or discussed a few or several of them. Overall, the court decisions reflect widespread recognition and acceptance of these principles and precepts for ascertaining whether an impairment constitutes a disability under the ADAAA-revised ADA. The next four subsections address specific issue areas within the overarching determination of disability that have been particularly affected by ADAAA changes.

Finding 8: The decisions of the district courts under the ADAAA reflect widespread awareness of, and receptivity to, the statutory mandate for interpreting coverage of the ADA broadly. Many are replete with statements of judicial recognition and affirmation of the expansion-of-coverage first principle of the Act, and of a number of the elements established in the Act and the regulations for broad construction of "substantially limiting a major life activity."

B. Major Life Activities, Major Bodily Functions, and Predictable Assessments of Disability

The ADAAA made significant changes to the "major life activities" element of the definition of disability by lowering the bar for inclusion of an activity in the category, by including in the

statute a non-exhaustive list of example of major life activities, and by incorporating a new category of "major bodily functions."

In the purposes section of the statute, Congress declared it an objective of the Act to cast aside restrictive limitations on "major life activities" imposed by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, including the rulings that the term "major" in the definition of disability under the ADA "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled," and that a "major life activity" under the ADA means an activity that is "of central importance to most people's daily lives."[219] In its Regulatory Guidance, the EEOC observed:

> The ADAAA provided significant new guidance and clarification on the subject of "major life activities." As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities.[220]

Such broadening of the scope of possible major life activities may be exercised by the federal ADA enforcement agencies who may use it as a rationale for adding to the list of examples by regulation, as EEOC has done in its ADAAA regulations. It also affords some support for plaintiffs who contend that they are substantially limited in some major life activity not currently included on the list of examples in the statute or regulations, and it can provide a rationale for courts to hold that additional activities should be recognized as major life activities.

As originally passed, the ADA did not contain a definition of the term "major life activity." Section 504 regulations had included a definition-by-examples ("Major life activities means functions such as …," followed by a list of examples). That definition was quoted in committee reports on the ADA and incorporated into the ADA regulations of the EEOC. In the ADAAA, a similar definition was added, for the first time, to the statutory language of the ADA.[221] It declares that "major 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."[222] In its amended regulations implementing the ADAAA, the EEOC added three more activities – sitting, reaching, and interacting with others – to the list of examples.[223]

In its ADAAA regulatory guidance, the EEOC underscored that the examples of major life activities in the ADAAA and its regulations "are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the examples does not create a negative implication as to whether an omitted activity or function constitutes a major life activity under the statute."[224] The Commission added that it anticipated, in light of the ADAAA mandate that the definition of disability be construed broadly, that courts would recognize additional major life activities.[225] In an unusual case, a court encountered the question of whether "waking up" constituted a major life activity. *Thomas v. Bala Nursing & Retirement Center* involved the ADA claim of a nurse practitioner with anemia who had been terminated from her job for tardiness in arriving at work.[226] She alleged her anemia "affected her ability to stand for a long period of time, occasionally limited her ability to think or concentrate, caused shortness of breath when she would walk fast or run, and caused her to sleep up to twelve hours per day," and contended that, therefore, she was substantially limited in the major life activities of standing, walking, concentrating, sleeping; and breathing.[227] At oral argument, the defendant made the innovative argument that the major life activity at issue should be characterized as "waking up" instead of "sleeping," and that "sleeping longer than the average individual is hardly a substantial *limitation* for sleeping."[228] Considering that waking up might be considered "inescapably central to anyone's life," however, the District Court for the Eastern District of Pennsylvania responded that "at this time we cannot say as a matter of law that "waking up" is not a major life activity."[229] "Moreover," said the court, "even if we were to classify the major life activity as 'waking up,' we could not say that it was not substantially limited for the same reasons given for 'sleeping.' If sleeping meets this standard, then it is hard to see how the opposite (waking up) would fail to."[230]

Because the expansion of the list of examples of major life activities was prescribed in statutory and regulatory provisions, the courts seem to have had no hesitation or qualms about accepting and applying it. In the district court decisions analyzed, the expanded (by the ADAAA) and further-expanded (by regulation) lists of major life activities have been widely recited and applied; the additions made by the EEOC have not encountered any significant judicial resistance.[231] At least one court, however, has expressed less-than-complete approbation of the more extensive list, even while applying it. The District Court for the Middle District of Alabama declared that "[t]his expanded list, for better or worse, makes a person afflicted with a common,

minor condition 'just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.'"[232] Such grousing is, however, not at all typical, and most courts seem to have accepted the growth of the list of major life activities without expression of reservations.

The ADAAA made an even more innovative and dramatic expansion of major life activities under the ADA by adding a totally new component – "major bodily functions" – to it. The new provision states that "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."[233] As with the list of examples of other major life activities, EEOC has emphasized that the list of included major bodily functions is "illustrative and non-exhaustive," and that the absence of a bodily function from the list creates no negative implication that it does not constitute a major bodily function under the ADA.[234] Indeed, the EEOC decided to augment the statutory list of examples of major bodily functions itself; the EEOC regulations added functions of the special sense organs and skin; and genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal functions.[235] The regulations also provide that "[t]he operation of a major bodily function includes the operation of an individual organ within a body system,"[236] which the Commission has explained "would include, for example, the operation of the kidney, liver, pancreas, or other organs."[237]

EEOC observed that in the legislative history of the ADAAA, Congress expressed its expectation that the inclusion of major bodily functions would engender more expansive coverage, and that it would address problematic court decisions in which courts had struggled to determine whether such conditions as HIV infection, cirrhosis of the liver resulting from Hepatitis B, and breast cancer substantially limited a major life activity.[238] And EEOC indicated how the major bodily functions component should play out in determining whether various impairments affect a major life activity:

> The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle

> cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.[239]

The recognition that some impairments are intrinsically linked to certain major bodily functions, or other major life activities, helped to precipitate the phenomenon that EEOC refers to in its regulations as "predictable assessments." "That phrase is the heading of Section 1630.2(j)(3) of the ADAAA regulations, which begins with a statement that the principles set forth in other regulatory provisions for more generous coverage under the ADA are intended to provide "a framework that is predictable, consistent, and workable …."[240] Accordingly, upon individualized assessment, some types of impairments, "[g]iven their inherent nature, … will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward."[241] This led EEOC to the following significant regulatory pronouncement:

> it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.[242]

The Commission added that "[t]he types of impairments described in this section may substantially limit additional major life activities not explicitly listed above."[243]

The regulatory guidance noted that, even before the ADAAA, some courts had recognized that "certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness"; "with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward."[244] In the regulatory guidance EEOC then added some other such conditions:

> For example, mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking. Diabetes may substantially limit major life activities

> such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.[245]

It also took note of expressions of congressional intent that conditions such as amputation, cancer, cerebral palsy, developmental disabilities, diabetes, epilepsy, heart conditions, intellectual disabilities, mental illnesses multiple sclerosis, and muscular dystrophy would be protected from discrimination under the ADA.

In the judicial arena, courts have made some strides in incorporating major bodily functions and predictable disabilities analysis into determinations of disability under the ADA. For example, in the cases examined, district courts have held that post-traumatic stress disorder is an impairment that substantially limits the major bodily activity of brain function;[246] that cancer substantially limits the major bodily activity of normal cell growth (whether in remission or not);[247] that non-cancerous, but not benign, breast disease substantially limited major bodily activities of normal cell growth and endocrine and reproductive functions;[248] that multiple sclerosis substantially limits major life activities including neurological functions;[249] that Hepatitis C substantially limits major life activities of working, eating, sleeping, and major bodily functions of immune system, digestive, bowel, and bladder function;[250]

that Osler–Weber–Rendu syndrome, a chronic blood disorder that causes decreased oxygen in the blood, substantially limits the major life activities of breathing, respiration, and/or circulation;[251] that HIV-positive status substantially limited the major life activity of immune system function;[252] that *osteogenesis imperfecta*, a congenital condition frequently causing extremely fragile bones, reduced size, and mobility limitations, substantially limited the major bodily function of normal cell growth;[253] that a testicular problem causing inability to engage in sexual intercourse was sufficient to establish substantial limitation on the reproductive function;[254] that surgical removal of stomach and other parts of gastrointestinal system substantially limits major life activity of eating, and major bodily functions of digestive and bowel functions;[255] and that “impairments of spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy” substantially limited the major life activity of the operation of the musculoskeletal system.[256]

Not every court, however, has gotten the message yet. In one case, a district court ruled that a plaintiff with cancer had not pled that he had a disability. The court stated that the plaintiff had alleged "that he has Adenoid Cystic Carcinoma, a form of cancer, and therefore, that he has an ADAAA disability. However, merely having cancer – which, though [it] may be an 'impairment' as defined under the EEOC regulations – is not enough to support an inference that [the plaintiff] has an actual disability."[257] The court made no mention of the major bodily function of normal cell growth, nor of EEOC's guidance that cancer is a condition that "virtually always" imposes a substantial limitation on a major life activity, and the court even relied upon pre-ADAAA precedent that cancer does not necessarily constitute a disability.[258] In another case, a district court ruled that a plaintiff with trigeminal neuralgia (a chronic disorder of the trigeminal nerve in the head, which causes extreme, sporadic, sudden, incapacitating face pain) had established a prima facie case of discrimination under the ADA pursuant to the broad coverage mandated by the ADAAA.[259] However, while the court mentioned the "neurological system" as one of the body systems whose limitation constitutes an impairment under the regulations and the plaintiff claimed that her condition qualified as a physical impairment because it was a physiological condition that "affects the body's neurological system," neither the court nor the plaintiff's attorney seems to have been aware that the "neurological function" is a "major bodily function" – a category of major life activity that might have greatly simplified the analysis of the plaintiff's condition as a disability.[260]

The lists of examples of major bodily functions and virtually-always disabilities are significant, complex innovations that are still quite new. The idea of a bodily function, which may be largely or completely involuntary (*e.g.*, cell growth, respiratory and endocrine systems, and the autonomic nervous system) being an "activity" is somewhat counterintuitive, even a bit illogical. And the notion of "predictable," "individualized" assessments of conditions that are not always, but *virtually* always, disabilities is not instantly comprehensible. It takes a while for such advances to be circulated within the judiciary and the rest of the legal community, and even longer for their meaning and use to be clearly understood and accepted. A certain amount of lag time is to be expected before these concepts become fully operational and mainstream. The courts have made a good start at integrating these analytical innovations into their decision-making, but it will take a while longer for comfortable proficiency in applying them to become

widespread and commonplace, in furtherance of the ADAAA objective of expanding protection under the ADA.

Finding 9: With occasional exceptions, the decisions of the district courts under the ADAAA have recognized and applied changes to the "major life activities" element of the definition of disability made by the Act in: (1) decreasing the restrictiveness of standards for inclusion of an activity in the category, (2) providing a non-exhaustive list of examples of major life activities, and (3) incorporating a new category of "major bodily functions." The "major bodily functions" provision is a major addition to the ADA, and so far seems to be accomplishing much of what it was intended by Congress to do in engendering more expansive coverage,

Finding 10: The EEOC's issuance in its ADAAA regulations of a non-exhaustive list of conditions that are virtually always disabilities, for which individualized assessment should be particularly simple and straightforward, has generally been embraced by the courts. To date, plaintiffs having, among a variety of other conditions, post-traumatic stress disorder (substantially limits the major bodily activity of brain function), cancer (substantially limits normal cell growth), multiple sclerosis (substantially limits neurological functions), and HIV-positive status (substantially limits immune system function) have successfully availed themselves of the "virtually always" status in court.

Finding 11: Revisions under the ADAAA relating to broadening the list of examples of major life activities, incorporating major bodily functions, and developing a non-exhaustive list of conditions for which there should be "predictable assessments" of disability are not self-evident, but somewhat challenging. Although the courts have made a good start, routine acceptance and mastery by courts and attorneys of these innovations will not occur easily or quickly. Additional judicial and professional education efforts devoted to these matters would greatly facilitate their broader dissemination and application, resulting in more informed and perceptive court decisions.

C. Mitigating Measures

The ADAAA explicitly rejected the ruling in the Supreme Court's decision in *Sutton v. United Air Lines, Inc.,* that "[i]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative-must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act."[261] In its *Righting the ADA* report, NCD had described the jolt to ADA law that resulted from that harmful ruling and its progeny:

> In a sharp break from the legislative history of the ADA, the position of the executive agencies responsible for enforcing the ADA, and the prior rulings of eight of the nine federal courts of appeal that had addressed the issue, the Supreme Court decided, in its rulings in the *Sutton v. United Airlines, Inc.*, *Murphy v. United Parcel Service*, and *Albertson's, Inc. v. Kirkingburg* cases, that mitigating measures should be considered in determining whether an individual has a disability under the ADA. The Supreme Court's position on mitigating measures ignores the rationale that led courts, regulatory agencies, and Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge.[262]

In the ADAAA, Congress responded to the problematic decisions by articulating a congressional purpose to reject the requirement in *Sutton* and its companion cases regarding mitigating measures, and by enacting a provision declaring in no uncertain terms 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 ....," followed by an extensive list of examples of types of mitigating measures.[263] The EEOC ADAAA regulations essentially paraphrase the statutory language on mitigating measures,[264] while the regulatory guidance offers some additional explanatory and elaborative commentary.[265]

Probably because the statutory change regarding consideration of mitigating measures was unequivocal and not particularly complicated, and, in fact, represented a return to a widely accepted analytical premise abruptly discarded by the Supreme Court, the courts have had little trouble reincorporating it into the legal framework for analyzing ADA claims. A straightforward example was provided in the case of *Orne v. Christie,* in which a senior legal counsel with a state corporation commission developed sleep apnea, and allegedly was given a choice between termination from his job and demotion.[266] Alleging that his sleep apnea affected his sleep and concentration, the plaintiff filed an ADA claim charging that he had been subjected to an adverse employment action because of his disability. Some time prior to the adverse

employment action, a sleep disorder specialist treated the plaintiff with a Continuous Positive Airway Pressure (CPAP) machine, which allowed him to sleep, work, and concentrate without being affected by his condition.[267] The defendant commission argued that the plaintiff "cannot be considered 'disabled' under the ADA because he uses a CPAP machine to 'relieve' or 'cure' his sleep apnea," and that, at the time he lost his position as Senior Counsel, the plaintiff was no longer "impaired" or "affected by his sleep apnea."[268] Taking the mitigating measures provision in the ADAAAA into consideration, the District Court for the Eastern District of Virginia ruled the commission's argument was without merit. It acknowledged that some other courts had held that sleep apnea does not qualify as a disability, but noted that "those courts applied the law as it existed prior to the ADA Amendments Act of 2008."[269] The court continued its analysis as follows:

> Under the 2008 amendments, the determination of whether an impairment "substantially limits a major life activity" is now to be made "without regard to the ameliorative effects of mitigating measures." These mitigating measures include "oxygen therapy equipment and supplies," "the use of assistive technology," and "reasonable accommodations or auxiliary aids." The use of a CPAP machine, which provides Orne with a steady supply of oxygen, thus counts as a mitigating measure whose effect is to be disregarded.[270]

Considering the plaintiff's sleep apnea in its untreated state, the court ruled that the plaintiff's assertions that his condition affected multiple major life activities were sufficient to defeat the commission's motion to dismiss on the ground that he did not have a disability, and the court denied the motion.

Another case involved a plaintiff who used a cane to get around and claimed that she was substantially limited in the major life activity of walking.[271] The defendant countered by citing cases holding that "mere use of a cane does not establish 'disability' for purposes of the ADA."[272] The District Court for Maryland observed that the precedents cited by the defendant predated the enactment of the ADAAA, and that "the continued validity of such cases is suspect,"[273] and went on to discuss the impact of the ADAAA in rejecting the *Sutton* decision's stance on mitigating measures:

> the ADA, as amended by the ADAAA, requires that the "definition of disability … shall be construed in favor of broad coverage," and provides specifically that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as ... equipment, or ... mobility devices ...." * * * Thus, under the ADAAA, the fact that

> plaintiff was able, according to defendant, to travel to and from work and perform the functions of her job without substantial limitation, through the use of a cane, does not resolve whether she has a "disability" within the meaning of the ADA. The relevant question is whether plaintiff's mobility would be substantially limited *without* a cane.[274]

Although the parties had not yet briefed the issue of the ADAAA's impact, the court assumed, *arguendo*, for purposes of the pending motion for summary judgment, that the plaintiff had adequately alleged that she had a disability.[275]

Harty v. City of Sanford is another example of a decision in which the court recognized and applied the ADAAA's revised mitigating measures standard, albeit in that case with somewhat measured enthusiasm.[276] The plaintiff had suffered a knee injury that did not heal completely, resulting in his needing to take pain medication and to use a cane or crutches to assist in walking, and caused permanent limitations on squatting, using stairs, kneeling, running, and jumping. Citing the *Sutton* court's position on taking mitigating measures into account, the District Court for the Middle District of Florida indicated that "[h]ad the events in this case occurred prior to 2009, case law suggests that Harty might not be considered disabled under the 'actual disability' prong [of] the ADA."[277] The ADAAA had gone into effect on January 1, 2009, however, and the district court observed that "[t]he purpose of the ADAAA was, in part, '[t]o reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.,* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.'"[278] "In effect," added the court "these provisions require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated."[279] Expressing some disinclination toward the prospect of such an analysis, the court felt that it was called upon to "hypothesize whether Harty would be 'substantially limited' in the absence of any mitigating behaviors, [but, as] problematic as this is, it does not occur in a vacuum."[280]

The court found that "[t]here is some evidence to suggest that Harty would be substantially limited without his mitigating behavior," and that the plaintiff had submitted evidence which, when taken in a light most favorable to him, suggested that he had substantial limitations in several major life activities including walking, standing, lifting, bending, and performing manual tasks.[281] While he was able to ameliorate the effects of his condition by doing these things "in a different way," the court noted that the ADAAA regulations list "learned behavioral modifications"

as “mitigating measures,“ and the “ADAAA does not permit such measures to be considered.“[282] Thus, the district court found that there was evidence to suggest that the plaintiff would be substantially limited without his mitigating behavior, including particularly that two physicians had indicated that he was permanently restricted from squatting, using stairs, kneeling, running or jumping. The court added that, while these acts might not be major life activities, “they could support a reasonable inference that Harty was substantially limited in walking, standing, lifting, bending, and performing manual tasks—which are defined as ‘major life activities’ in the regulations.”[283] In light of Congressional directives in the ADAAA, and for the purposes of summary judgment, the court ruled that the plaintiff had presented sufficient evidence that he was actually disabled.

In a few cases, courts have recognized the ADAAA requirement that mitigating measures are not to be taken into account in determining disability, but have clarified that it does not relieve plaintiffs from the obligation to make some showing of how major life activities would be impacted in the absence of mitigating measures. For example, in *Lloyd v. Housing Authority,* a case brought by a maintenance mechanic with hypertension and asthma, the court stated that “under *Sutton,* common maladies like asthma and hypertension would not likely, if ever, render a plaintiff disabled because readily available, inexpensive medication ameliorates the symptoms of these impairments so they would not substantially limit a major life activity.”[284] The court noted, however, that ADAAA had markedly change the situation:

> [The ADAAA] rejected this approach. Now courts must inquire into whether an impairment substantially limits a major life activity “without regard to the ameliorative effects of mitigating measures.” This includes medication, assistive technology, and reasonable accommodations. The only exceptions are eyeglasses or contact lenses, the ameliorative effects of which courts must consider still. In effect, these provisions require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated.[285]

The court ruled, however, that the plaintiff in such a case still bears “the burden of producing evidence about how his condition would affect him if left untreated. A contrary rule would require courts to gaze into a crystal ball, put on a white coat, and divine how a given impairment would have affected the plaintiff had he decided to leave it untreated.”[286] In the situation before the court, it felt that the plaintiff had not produced evidence about whether his asthma and high blood pressure had substantially affected a major life activity in the relevant time period, and,

critically, had "failed to produce evidence tending to prove how either impairment would have affected him in a hypothetical, untreated state. … Hence he has failed to produce evidence that would allow a reasonable jury to conclude that he suffered from a disability …"[287] The court did conclude that the plaintiff's impairments had substantially limited his ability to work after he was transferred to another job location, but that decision appeared to be based on his conditions even with ameliorative treatments, as the court did not mention any evidence regarding his status without mitigating treatments in that part of its decision.

In another case, a plaintiff with several mental health conditions for which he was receiving various forms of treatment including medication regimens, had his ADA case dismissed for failure to plead a plausible *prima facie* case.[288] The court acknowledged that the ADAAA requires courts to examine whether an impairment substantially limits a major life activity "without regard to the ameliorative effects of mitigating measures," and that mitigating measures include medication, assistive technology, and reasonable accommodations, with the result that "treatable yet chronic conditions may qualify as a disability."[289] But the court ruled that the plaintiff had made "no plausible allegations identifying substantial limits on the major life activities affected by his mental health disorders, whether treated or untreated, that would satisfy the ADA's definition of a disability," and accordingly found that the Amended Complaint was devoid of sufficient factual matter, taken as true, to draw the reasonable inference that he suffered from substantial limitations to a major life activity.[290] The court granted the defendants' motion to dismiss plaintiff's ADA disability discrimination claim, but granted it without prejudice and gave the plaintiff leave to amend his complaint.[291]

Finding 12: The ADAAA statutory revision regarding consideration of mitigating measures is unequivocal and not particularly complicated, and the courts generally have had little trouble reincorporating into the legal framework for analyzing ADA claims the pre-*Sutton* principle that mitigating measures shall not be considered in determining disability. In a few cases, courts that have complied with the ADAAA requirement that mitigating measures are not to be taken into account in determining disability have clarified that it carries with it an obligation for plaintiffs to make some showing of the impact on major life activities that would result from the plaintiff's condition in the absence of mitigating measures.

D. Transitory, Episodic, or In-Remission Impairments

The ADAAA added the following new provision to the ADA: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[292] The EEOC regulations simply reiterate the statutory provision verbatim.[293]

EEOC explained its purpose by quoting the following statements from the legislative history of the ADAAA:

> This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent."[294]
>
> This … rule of construction thus rejects the reasoning of the courts in cases like *Todd* v. *Academy Corp.*[57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental* v. *Dartmouth-Hitchock Clinic,* 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.[295]

As additional examples of impairments that may be episodic, EEOC listed hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. It also clarified that "[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity," and added, as an example, "a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking."[296]

The provision regarding conditions that are episodic or in remission generally appears to be in the early stages of having its desired effect in the courts. Only a few of the cases examined addressed this issue under the ADAAA, but those that did pretty consistently relied on the new provision in allowing plaintiffs to prevail on the issue of pleading a disability when they have

conditions that only intermittently effect activities. To cite some examples, courts have ruled that conditions that are in remission or episodic can constitute disabilities under the ADA in the following situations: cancer that is in remission;[297] fibromyalgia whose effects would "wax and wane";[298] vocal cord edema (brought about by mercury toxicity) which had inactive periods and active periods causing pain in speaking and "losing voice";[299] Hepatitis C "that has gone in and out of remission";[300] intermittent back pain, diagnosed as lumbar internal disc derangement, lumbar radiculopathy, and lumbago, from which the pain varied by the day from less to more severe;[301] and kidney stones.[302]

The ADAAA provision declaring that the "regarded as" avenue for establishing disability shall not apply to impairments that are "transitory and minor" is discussed in the subsection below dealing with that prong of the definition of disability. EEOC noticed, however, that an implication of that provision is that the exception is *not* made applicable to the other prongs of the definition. Accordingly, EEOC's ADAAA regulations incorporate the following clarification: "The six-month 'transitory' part of the 'transitory and minor' exception to "regarded as" coverage … does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section."[303] In light of the fact that the "regarded as" statutory exception defines "a transitory impairment" to refer to an impairment "with an actual or expected duration of 6 months or less," the non-exception regulatory provision for actual-disability and record-of-disability showings includes a corresponding additional sentence which clarifies that "[t]he effects of an impairment lasting or expected to last fewer than six months *can* be substantially limiting within the meaning of this section."[304]

In its regulatory guidance, EEOC elaborated as follows:

> Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, … if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability.[305]

To temper its recognition of short-term disabilities, the EEOC drew upon a statement in the ADAAA legislative history that "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that

last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."[306]

Because the EEOC's ADAAA regulations were not in effect until May 24, 2011, to date, there are far too few court decisions interpreting the provision recognizing that an impairment lasting fewer than six months might in some circumstances constitute a disability under the ADA to draw any analytical conclusions. In one case, *Newman v. Gagan LLC,* the plaintiff had suffered a workplace injury, for which he was treated by a physician and received medications.[307] When he was cleared to return to work about three months later, his physician limited him to sedentary activities so that he would not lift over ten pounds or operate machinery. Some five months later, the doctor withdrew the work limitations relating to sedentary work and not engaging in lifting. Even then, the court noted, "Newman was to use a cane and continue medication for pain."[308] The court declared that "[t]hese allegations are not exactly a model of detail and clarity. But they are specific and factual, and they show that for a time, Plaintiff was 'substantially limited' in lifting, which the ADA defines as a major life activity."[309] And the court made the following response to the question of whether the plaintiff's temporary limitations could constitute a disability:

> The apparently transitory nature of Plaintiff's lifting impairment does not automatically negate the conclusion that he qualified as disabled under the ADAAA standard, *see* 29 C.F.R. § 1630.2 ("The effects of an impairment lasting ... fewer than six months can be substantially limiting within the meaning of this section."), and Defendants have not persuaded the Court that it should in this particular case.[310]

The factual situation in the *Newman* case is quite similar to the example in the EEOC regulatory guidance – an impairment resulting in a lifting restriction that lasts for several months. According to the Commission, a person with such a condition "is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability."[311] In *Newman*, the court was similarly inclined, and it denied the defendants' motion to dismiss the plaintiff's disability discrimination claims.

The court in *Green v. DGG Properties Co., Inc.,* however, had quite a different perspective on short-term impairments.[312] The plaintiff in that case was recovering from multiple surgeries, including hip surgery, relating to mobility problems.[313] When he and his wife wanted to go to a resort, they chose one that advertised that it was wheelchair accessible, and featured a hotel,

spa, salon, and restaurants. As they were making reservations, the plaintiff notified the resort that he "was disabled, not ambulatory and substantially limited in mobility," that he used a walker and/or a wheelchair, and was "not otherwise able to move without assistance."[314] Upon their arrival at the resort, however, the couple found that their hotel room, the restaurant, the salon, and the spa were not accessible, which led to a series of inconvenient and unpleasant experiences, including being escorted "to a dilapidated and odiferous freight elevator (laden with food stuffs) that deposited them to the basement and back of the kitchen," from which they were escorted to and ate in "an area where no other guests were seated."[315] The spa and salon areas lacked ramp access and could only be reached via stairs. When the plaintiff confronted the manager on duty about the limited accessibility and the allegedly false advertisements, the manager "shrugged and speciously exclaimed, 'this is an old hotel.'"[316]

Green filed a disability discrimination action under Title III of the ADA, alleging that "[a]t the time of [his] visit to [the resort], he used a walker and a wheelchair for mobility and qualified as an individual with a disability as defined by the ADA."[317] The defendants argued that the plaintiff had failed to state a claim under the ADA "because he has alleged only that he was temporarily impaired."[318] The court acknowledged the applicability of the ADAAA to the case, discussed the Act's general objective of broadening coverage, and quoted several of its major provisions. Since the *Green* lawsuit was not an employment case but involved claims under the public accommodations provisions – Title III – of the ADA, the EEOC ADAAA regulations had no binding effect, but the court looked to the regulations as "useful to understanding the intended meaning of the Amendments."[319] It quoted EEOC regulatory provisions lowering the standard for substantial limitation of a major life activity and addressing impairments that are episodic or in remission.

Surprisingly, the court did not quote or even mention the provision in the regulations dealing with the non-application of the "transitory and minor" exception to proof of disability under the actual and record prongs. It did refer, however, to the same language presented as text in the regulatory guidance – "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."[320] The court took this provision in quite a different direction than the EEOC did, however. It stressed the statement in the ADAAA legislative history quoted in the regulatory guidance – "Impairments that last only for

a short period of time are typically not covered, although they may be covered if sufficiently severe," and treated this language as completely overshadowing the "can be" wording in the regulation. The court announced flatly that "even under the ADAAA's broadened definition of disability, short term impairments would still not render a person disabled within the meaning of the statute," and the court launched a cascade of quotations from pre-ADAAA decisions holding that transitional conditions cannot be disabilities:

> "[T]emporary, non-chronic impairments of short-duration, with little or no long term or permanent impact, are usually not disabilities"; "[f]or purposes of the ADA, short term, temporary restrictions are not 'substantially limiting' and do not render a person 'disabled'"; "[t]o establish a disability under the ADA, there must be some proof of permanency"; "temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities."[321]

The court took the plaintiff to task for failing to claim in his complaint that "his use of a walker or wheelchair was permanent or chronic, or indicate the duration or long-term impact of his impairment such that the Court may reasonably infer that his condition was anything but temporary."[322] The court even inferred from the plaintiff's "use of the qualifier 'at the time' in describing his impairment while staying at [the resort] … that his need for a wheelchair or walker *was* temporary."[323] It concluded that "[w]hile Plaintiff has pled facts showing that he was limited in a major life activity—walking—he has failed to demonstrate that he suffers from a nontemporary physical disability that is the cause of the limitation on this major life activity."[324] Accordingly, the court ruled that the plaintiff had "failed to state a plausible claim for relief under the ADA," and dismissed his ADA claim.[325]

The analysis and outcome in the *Green* decision are harsh departures from the thrust of the new regulatory provision as interpreted by the EEOC in its guidance, and amount to a striking revival of pre-ADAAA analysis of short term impairments. Given the context of the case as a challenge to alleged major violations of ADA accessibility requirements, the court's spirited rejection of the plaintiff's eligibility to bring such a challenge is highly questionable from a disability policy point of view. The *Green* ruling is certainly out of step with the understanding of what is "minor" and, conversely, what is "severe" that underlies the EEOC's interpretation of the provision as expressed in its regulatory guidance, and as put into effect in the *Newman* decision. If under the EEOC guidance, "a 20-pound lifting restriction" can represent a severe or not minor impairment of the activity of lifting, how can complete inability to walk, requiring the

use of a wheelchair or a walker not be a severe or not minor impairment of the activity of walking? Or is the term “severe” perhaps itself too severe? Given the paucity of relevant decisions on these legal interpretation questions, this is an issue that needs to be closely monitored in future decisions in the interest of determining the necessity for taking steps to avoid a resurrection of immoderately exacting duration standards for substantially limiting impairments.

Finding 13: The emerging case law regarding the ADAAA provision decreeing that an impairment that is episodic or in remission constitutes a disability if it would substantially limit a major life activity when active generally appears to have begun to have its desired effect in the courts. Of the few cases examined that addressed this issue under the ADAAA, most relied on the provision in allowing plaintiffs to prevail on the issue of pleading a disability when they had conditions with only intermittent effect upon activities.

Finding 14: The new EEOC regulatory provision recognizing that an impairment lasting fewer than six months might in some circumstances constitute a disability under the ADA did not take effect until May 24, 2011, with the result that there are insufficient court decisions to date about which to draw analytical conclusions. However, the decision of a federal district court in *Green v. DGG Properties Co., Inc.* raises a concern that some courts might blunt the effect of the provision and revive pre-ADAAA views about rejecting short-term impairments as disabilities. This issue should be closely monitored in future decisions to determine whether steps might be needed to avoid a resurrection of overly exacting duration standards for substantially limiting impairments.

E. Regarded As

The ADAAA made several changes to the application of the prong of the definition of disability that incorporates individuals who have been regarded as having a substantially limiting impairment:

- It changed the breadth of coverage of the "regarded as" prong by rejecting the restrictive interpretation of it established by the Supreme Court in *Sutton v. United Air Lines* and reinstating the broad view of the third prong applied in School Board of Nassau County v. Arline.

- It substantially altered what an individual must show to establish that she or he has been regarded as having a disability, by changing the focus away from whether or not an impairment limits or is perceived to limit a major life activity to whether the individual has been subjected to an action prohibited under the Act because of an actual or perceived impairment.

- It established that an impairment cannot qualify as disability under the third prong if it is transitory and minor, and it provides that a "transitory impairment" is one with an actual or expected duration of 6 months or less.
- It eliminated the obligation of a covered entity under the ADA to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

This subsection discusses each of these revisions in turn.

1. Overall Breadth of the "Regarded As" Prong

The ADAAA declares that one of the congressional purposes of the Act is:

> to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.[326]

The EEOC's regulatory guidance provides the following commentary on this objective:

> This third prong of the definition of disability was originally intended to express Congress's understanding that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions." In passing the original ADA, Congress relied extensively on the reasoning of *School Board of Nassau County* v. *Arline* "that the negative reactions of others are just as disabling as the actual impact of an impairment." The ADAAA reiterates Congress's

> reliance on the broad views enunciated in that decision, and Congress "believe[s] that courts should continue to rely on this standard."[327]

While frequently referred to and quoted, the new stated purpose relating to regarded as has not been the subject of much judicial commentary or interpretation. One case that did provide some discussion of it is *Walker v. Venetian Casino Resort, LLC,* which involved the ADA claim of a cocktail server at a casino who suffered an injury at work for which she took disability leave, after which she was terminated from her job.[328] The plaintiff alleged that the defendants regarded her as having a disability. The court began its analysis of her claim by providing a pretty good, succinct summary of the standards applicable to the third prong of the definition of disability as revised by the ADAAA:

> The ADA defines "disability" in part as "being regarded as having [a physical or mental impairment]." An individual is "regarded as" having a disabling impairment if she has been subjected to unlawful discrimination because of it, "whether or not the impairment limits or is perceived to limit a major life activity." A regarded-as impairment cannot be transitory and minor. Nor is an employer obliged to provide reasonable accommodations to an employee only regarded as disabled.[329]

The court quoted from the regulatory guidance a statement that in the ADAAA Congress had repudiated "the Supreme Court's reasoning in [*Sutton v. United Airlines, Inc.*] with regard to coverage under [the regarded as prong] and reinstat[ed] the reasoning of the Supreme Court in *School Board of Nassau County v. Arline,* which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973."[330] The court explained that "*School Board of Nassau County* reasoned that 'the negative reactions of others are just as disabling as the actual impact of an impairment.'"[331] In the case before it, the court ruled that "[u]nder the ADAAA, [the plaintiff] has successfully raised a genuine issue of material fact as to whether [the defendant casino] regarded her as disabled.[332] The court ultimately granted summary judgment for the defendant on the plaintiff's ADA claim based on another ADAAA revision – the plaintiff was seeking a reasonable accommodation but "[u]nder the ADAAA … an employer has no duty to accommodate a regarded-as disability."[333]

2. Revised Focus of "Regarded As" Showing

Prior to the ADAAA, an individual seeking to establish disability under the regarded as prong of the definition had to show that he or she had been regarded by the employer or other covered

entity as having a condition that either substantially limited a major life activity or was perceived to substantially limit a major life activity. This led to a convoluted and demanding analysis involving proof of what was in the mind of the defendant about the plaintiff's condition, and whether the impairment, if the plaintiff really had it, did or would substantially limit a major life activity – an analysis that often had little or nothing to do with the situation and actions that were allegedly discriminatory. EEOC has observed that congressional intent was not to impose such a demanding and perplexing process for establishing that one was regarded as having a disability: "Coverage under the 'regarded as' prong of the definition of disability should not be difficult to establish. *See* 2008 House Judiciary Committee Report at 17 (explaining that Congress never expected or intended it would be a difficult standard to meet)."[334]

The ADAAA inserted the following provision:

> 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.[335]

The EEOC regulations provide, in fewer words, that "[b]eing regarded as having such an impairment … means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."[336] The entire focus of regarded-as analysis is thus shifted to how the individual was treated by the covered entity – was the individual subject to an adverse action because of her or his impairment or perceived impairment?

The new provision entails a profound alteration of analysis under the regarded as prong, with major implications for pleading, evidence, argument, and judicial resolution. It might be expected that it would take the courts some time to adjust to this major transformation. However, perhaps because the revision replaced a thorny and complicated determination with a more straightforward one, the courts seem to have absorbed and applied it rather smoothly. The new standard has been applied to allow plaintiffs to successfully make a prima facie case that they have been regarded as having a disability in quite a number of court decisions.[337] Of course, not all plaintiffs who have tried to claim that they have been regarded as having a disability have prevailed on that contention. The ADAAA requires that an individual seeking to

establish having been regarded as having an impairment must establish that he or she was subjected to an adverse action "because of" the actual or perceived impairment, a requirement the EEOC regulatory guidance refers to as "causation."[338] In a few cases, plaintiffs have failed to establish a link between the perception they had a condition and the adverse action they suffered. Thus, in *Jenkins v. Medical Laboratories of Eastern Iowa, Inc.,* the plaintiff alleged that her employer perceived her as having a mental impairment due to perceived psychological problems (some time after she had been diagnosed with anxiety).[339] She contended that she had been subjected to adverse employment actions by being ordered to go to dispute management counseling and, after she refused, being fired from her job.[340] The court concluded that the order for the plaintiff to go to the counseling was not due to her perceived condition, as her fellow employees were also required to attend, and that her termination was because of her continued refusal to do so. The court declared that "[e]ven construing the definition of disability in favor of broad coverage, the court finds that Jenkins failed to set forth any facts establishing that MedLabs subjected Jenkins to an action prohibited by the ADA because of a perceived disability."[341] Accordingly, the court announced its final resolution of the case as follows:

> Because Jenkins failed to show that she was subjected to an action prohibited under the ADA due to a perceived disability, she cannot establish that MedLabs regarded her as having such an impairment. Accordingly, she cannot demonstrate a prima facie case of disability discrimination. For these reasons, the court shall grant summary judgment to MedLabs on Jenkins's disability discrimination claim.[342]

In another case, *Butler v. BTC Foods Inc.,* after returning to work from a medical leave of absence, the plaintiff had confided in management personnel at the company for which he worked that he was suffering from depression in large part due to the death of his son, and that he was receiving treatment including therapy and medication.[343] He alleged that subsequently "management treated him in a distant manner and were unnecessarily hostile towards him when they interacted with him," and he contended that he had ultimately been terminated from his job because of his perceived mental impairment.[344] The court concluded, much like the court in the *Jenkins* case, that the plaintiff had failed to connect the dots between his impairment and the adverse employment actions he alleged, but along the way seemed to go a bit off track in trying to explain the difference between the concepts of a regarded as showing of disability and ultimate liability on the ADA claim. Thus, the court stated:

> Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an

> individual proves that a covered entity discriminated on the basis of disability within the meaning of … the ADA. The focus is on how a person has been treated because of a physical or mental impairment rather than on what an employer believed about the nature of the impairment.[345]

This quotation distinguishes regarding a person as having a disability, which purportedly depends on what an employer believes about an impairment, with liability, which depends on how the individual has been treated. Actually, under the ADAAA revisions, establishing that an individual is regarded as having a disability does not depend upon "what an employer believed about the nature of the impairment," and both perceived disability and ultimate liability depend upon how the covered entity treated the employee. The EEOC regulatory guidance gives a better description of the interplay between these elements:

> The fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a "regarded as" claim is complex. While a person must show, for both coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.[346]

3. Exclusion of "Transitory and Minor" Impairments

Another significant revision made by the ADAAA to analysis of issues under the regarded as prong of the definition of disability is the mandate that an impairment cannot qualify as a disability under the third prong if it is transitory and minor. In so many words, the Act states that the third prong of the definition of disability "shall not apply to impairments that are transitory and minor." It adds that "[a] transitory impairment is an impairment with an actual or expected duration of 6 months or less."[347] While this provision appears clear and simple, it has not always been interpreted and applied by the courts in a manner consistent with its plain language.

Some courts have conscientiously applied the "transitory and minor" criterion. In *Davis v. NYC Dept. of Educ.,* for example, the plaintiff suffered spinal, shoulder, and lower back damage in an automobile accident that she alleged left her disabled and in pain for three months.[348] The court discussed the broader approach taken in the ADAAA, both as to how to establish substantial limitation of a major life activity and how to establish a perceived disability. As to the latter, the court observed that "[t]he ADAA specifies, however, that the 'regarded as' definition of disability

does not apply to impairments that are both transitory and minor," and acknowledged the six months ceiling on "transitory."[349] The court also took heed of the directive in the EEOC ADAAA regulations that "[w]hether the impairment at issue is or would be 'transitory and minor' is to be determined objectively."[350] The court found that the plaintiff claimed she was regarded as disabled from the end of October 2008 until the end of January 2009, and that "during the period when she was on unpaid disability leave, defendants regarded her as disabled."[351] Applying the standards applicable in considering defendants' motion to dismiss, the court reached the following conclusion:

> Although plaintiff's three-month period of disability appears to be "transitory," it is not apparent from the face of the Complaint that plaintiff's impairment was "minor." Accordingly, because the Complaint must only give defendants fair notice of plaintiff's claims, the court finds that plaintiff has sufficiently alleged that she was disabled within the meaning of the ADA.[352]

In *Saley v. Caney Fork, LLC,* the plaintiff had produced a medical record demonstrating that he had been diagnosed with "iron overload" in the blood (hemochromatosis), and he alleged that he had both an actual and a perceived disability under the ADA.[353] When the defendant argued that the plaintiff's condition could not be a disability because (according to the defendant) "it causes no symptoms," the court responded that that argument "is inconsistent with the logic of the 'regarded as' prong of the ADAAA," because, "[u]nder current law, whether an individual's impairment 'substantially limits' a major life activity is 'not relevant' to coverage under the 'regarded as' prong," so that "[the plaintiff] may recover under the "regarded as" prong in the absence of visible symptoms, or any symptoms at all."[354] The defendant also contended that the plaintiff's condition did not qualify as a disability because "his perceived impairment is 'transitory and minor.'"[355] The court noted that a transitory impairment is "defined as lasting or expected to last six months or less," while a minor impairment includes "common ailments like the cold or flu."[356] Based on the EEOC ADAAA regulations, the court replied to the defendant's characterizing the plaintiff's condition as transitory and minor as follows:

> The relevant inquiry is whether the actual or perceived impairment is objectively "transitory and minor," not whether the employer subjectively believed the impairment to be transitory and minor. "For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor."[357]

And the court quoted the following provision from the regulations:

> [a] covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor.[358]

The court had noted that the plaintiff's medical record established that plaintiff's condition was life-threatening,[359] and found it was

> distinguishable from a minor ailment like the cold or flu. Hemochromatosis is an acute disease requiring regular phlebotomy treatments, for which Plaintiff has had to seek the care of hematologists. Additionally, Plaintiff has produced evidence showing that his impairment is not transitory. To combat hemochromatosis—an incurable, lifelong, and permanent ailment—Plaintiff has received phlebotomy treatments for more than two years[,] far longer than the six-month period required to be deemed not transitory. Moreover, even if Plaintiff's *actual* impairment were transitory and minor, he has produced sufficient evidence showing a genuine dispute of material fact as to whether his *perceived* impairment was transitory and minor.[360]

Accordingly, the court concluded that, "drawing all reasonable inferences in favor of the nonmoving party, the Court finds that Plaintiff has shown a genuine dispute of material fact from which a reasonable juror could conclude that his impairment is not transitory and minor."[361]

In these two examples, the courts looked at both issues – whether the impairment was transitory ***and*** whether it was minor – in conformity with the clear statutory wording. Unfortunately, some other courts have not been so faithful to the plain meaning of the ADAAA. A line of cases has developed in which the courts have looked only to the issue of duration of the impairment in question.

In one case, the plaintiff had suffered a work-related leg injury and was placed on medical leave; he alleged that he was terminated from his job when he exhausted his Family and Medical Leave Act leave time.[362] In considering his claim that his employer had regarded him as having a disability, the court declared that "[t]he ADA states that the regarded-as-impaired provision 'shall not apply to impairments that are transitory and minor,' defining those impairments as having an actual or expected duration of 6 months or less."[363] To be accurate, the definition the court mentioned is of the term "transitory," not "transitory and minor." The court then continued to focus only on the duration, not the severity, of the condition, declaring that the plaintiff "does not directly allege the necessary durational threshold, and his related allegations

do not permit a reasonable inference thereof."[364] The court stated that the plaintiff's statements that he "was experiencing significant recovery within one to two months of the … injury, with even greater capability 'well before' the end of his three-month, FMLA leave period" led it to conclude that it could not reasonably infer "that the impairment had an actual or expected duration of more than six months," and as a result, the court ruled that the plaintiff had "not alleged a disability which satisfies the regarded-as-impaired prong."[365] At no time did the court consider whether the level of limitation and severity associated with the plaintiff's condition rise to a level above "minor."

In a second case, a plaintiff notified his employer that he had suffered a significant injury to his leg and requested medical leave; the employer subsequently terminated him from his job.[366] The court observed that "where a plaintiff is merely regarded as disabled rather than suffering from an actual disability, the perceived impairment must *not* be transitory and minor."[367] Making the same mistake as in the case described above, the court treated "transitory and minor" as if it was synonymous with "transitory": "Transitory and minor impairments are defined as those with an expected duration of six months or less."[368] The plaintiff argued that his injury was not minor because it substantially limited a major life activity – he mentioned walking and working – but the court persisted in focusing on duration.[369] The court agreed with the defendant "that a plaintiff's potential inability to work for a short period of time while recovering from an injury or surgery does not constitute a 'disability' under the ADA's 'regarded as' analysis," and that six months was the applicable minimum.[370] Somewhat surprisingly, however, the court gave the plaintiff a pass because his complaint was not specific; the court declared that "[a]lthough Plaintiff does not allege that his injury would last six or more months in duration, it is not apparent from the pleadings that it did not last six or more months."[371] Accordingly, the court "[d]rawing all inferences favorably to the Plaintiff," refused to dismiss the plaintiff's ADA claim based on the issue of whether the injury was transitory and minor.[372]

A third case involved a plaintiff who had taken six weeks of medical leave after knee surgery, had returned to work on a part-time basis, and was scheduled for another surgery on the knee when she was laid off from her job.[373] When the court considered her claim that she had been regarded as having a disability, it took note of the "transitory and minor" exception under the regarded as prong. Although the court acknowledged that the plaintiff's orthopedic surgeon had

made repeated notations in her medical chart that she was "totally disabled,"[374] it never focused on the possibility that the plaintiff's condition was more than minor. Instead it considered only the issue of her condition being "transitory," leading to the following conclusion:

> Based on Plaintiff's history of physical aliments and surgeries requiring leaves from work of between six (6) and twelve (12) weeks, which includes her first knee surgery, the evidence indicates, when objectively viewed at the time of the employment decision in question, that Plaintiff has presented evidence indicating only that she was regarded as having an impairment that was transitory and minor in nature. Accordingly, Plaintiff has not satisfied the second element of her *prima facie* case.[375]

In still another case, also involving a plaintiff with a painful knee problem and upcoming knee surgery, who alleged that she was terminated the day before the surgery was to occur, the court reached the same result as the two cases previously discussed – that the plaintiff had not adequately shown that she had been regarded as having a disability – but did not undertake much analysis even of the transitory issue.[376] It did mention the ADAAA and the "transitory and minor" exception under the third prong of the disability definition, and acknowledged the plaintiff's allegations that her knee pain limited her ability to perform daily tasks, that she was scheduled for surgery to remedy the pain, and that she would be even more limited during the recovery period after the surgery.[377] Instead of accepting such indications of the seriousness of he plaintiff's condition, the court relied upon its generalized view, bolstered by two prior decisions it cited, one of which was from 1998, that "[s]everal courts have concluded that knee surgeries such as the Plaintiff's are insufficient to establish a disability under the ADA."[378] It ruled that the plaintiff "has not presented sufficient evidence that she is disabled under the ADA."[379]

If such an approach proliferates, it would raise the troubling possibility of more courts undercutting the precisely worded exception the ADAAA created along with its logical corollary that conditions that are either transitory or minor, but not both, can qualify a person for "regarded as" coverage. This issue should be monitored closely to see if it will be an increasingly serious problem or simply an early "growing pain" of a new provision, which with the passage of time will become more widely understood, accepted, and applied.

4. No Reasonable Accommodation Requirement under the Regarded As Prong

The ADAAA eliminated the obligation of entities covered under the ADA to provide reasonable accommodations or reasonable modifications to people who meet the definition of disability only under the “regarded as” prong. The Act provides that

> a covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability … solely under subparagraph (C) [the regarded as prong].[380]

The elimination of the reasonable accommodation/reasonable modifications obligation for individuals who seek protection on a perceived disability basis is straightforward – the obligation simply no longer applies. Presumably because the change is so clear-cut the court decisions applying it generally do so in an uncomplicated manner. Two themes characterize judicial discussions of the provision. The first is that the courts describe and quote the statutory elimination of the accommodation/modification obligation.[381] The second theme, articulated in some of the cases, is that, as a logical consequence of the first, because reasonable accommodation is not available to a plaintiff alleging disability exclusively under the regarded-as prong, if such a plaintiff cannot perform essential job duties without accommodation, she or he will be deemed not qualified for the job.[382]

The EEOC regulations suggest that the inapplicability of reasonable accommodation and reasonable modification requirements to plaintiffs who make use of the regarded as prong to establish a disability may have significant strategic and pleading implications. They provide:

> Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.[383]

The EEOC regulatory guidance elaborated as follows:

> [I]n many cases it may be unnecessary for an individual to resort to coverage under the "actual disability" or "record of" prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is "qualified" without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the "regarded as" prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability "to be used only by people who are affirmatively seeking reasonable accommodations …" and that "[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation … —should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment."[384]

It is not clear whether plaintiffs and their attorneys have yet appreciated such considerations and incorporated them into their litigation strategies. Certainly they have not done so in cases in which plaintiffs have proceeded under the regarded as prong, only to have the court decide that they were not entitled to workplace accommodations that they needed in order to be qualified.[385]

Finding 15: The ADAAA's articulation of a general broadening of the third prong of the definition of disability, including by rejecting the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, regarding it, and reinstating in its place the Court's reasoning in *School Board of Nassau County v. Arline*, has not been the subject of much judicial commentary or elaboration, but the court decisions have referred to, quoted, and seemingly accepted that thrust.

Finding 16: The ADAAA revision that changes the focus of being regarded as having an impairment to whether the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment represents a profound alteration of analysis under the regarded as prong, with major implications for pleading, evidence, argument, and judicial resolution. Perhaps because the revision replaced a thorny and complicated determination with a more straightforward one, the courts seem to have absorbed and applied it rather smoothly. The new standard has been applied to allow plaintiffs to successfully make a prima facie case that they have been regarded as having a disability in quite a number of court decisions.

Finding 17: The exclusion of "transitory and minor" impairments in analysis of allegations of disability under the regarded as prong of the definition of disability is an important ADAAA mandate. While the provision of the Act making this change is relatively clear and simple, the courts have not always interpreted and applied it in a manner consistent with its plain language. A worrisome line of cases has developed in which courts have focused only on the issue of duration of the impairment in question, and have ignored the "and minor" words of the statute. The continuing development of case law in this area should be monitored closely to see how big of a problem this may portend.

Finding 18: The ADAAA's elimination of the obligation of entities covered under the ADA to provide reasonable accommodations or reasonable modifications to people who meet the definition of disability only under the "regarded as" prong is a major change. The statutory change is straightforward and clear-cut, and, so far, the court decisions interpreting and applying it generally do so in an uncomplicated manner. In addition to describing and quoting the statutory elimination of the accommodation/modification obligation, some courts have noted that, because reasonable accommodation is not available to a plaintiff alleging disability exclusively under the regarded-as prong, if such a plaintiff cannot perform essential job duties without accommodation, she or he will be deemed not qualified for the job. As time goes by, such considerations can be expected to have a growing impact on legal pleading and litigation strategies.

VI. ASSESSMENT OF OVERALL OUTCOMES AND SPECIFIC CONCERNS

A. Overall Case Results

Prior sections of this report examine particular issues, and present legal analysis primarily based on the content of numerous individual court decisions. Some very significant and informative insights into post-ADAAA case law to date can be gleaned, however, by stepping back from the "trees" of the individual court rulings to perceive the overall "forest" or the big picture of how individuals who have filed ADA lawsuits are doing in the courts. Such a perspective reflects an aggregation of the results of all the revisions that the ADAAA has made to ADA law, in pursuit of an answer to the big question whether they are working or not. Given

the relatively early state of judicial application of the amendments, and the very small number of such cases that have made it to decision in the appellate courts interpreting and applying the ADAAA changes, no major, long-term conclusions can be drawn at this time. But a sufficient number of decisions have been issued to date to make it possible to gauge which way the wind is blowing and to give a preliminary, but enlightening, progress report on the efficacy of the Amendments Act.

As noted above, in about four out of five of the federal district court cases analyzed methodically, the court found that the ADAAA was in effect at the time the alleged discrimination occurred, quite a contrast to the mere 10 percent of the circuit court decisions finding the Act in effect. Of the district court cases in which the ADAAA was in effect, many of them did not give the court the occasion to apply substantive legal principles of the ADAAA for a variety of reasons, usually relating to the procedural posture of the case, as where the proceeding before the court focused on auxiliary issues, such as class certification or scope of discovery; or the court saw fit to decide the matter on non-substantive grounds, such as lack of standing, failure to exhaust remedies, or filing the lawsuit after the statute of limitations had run. Thus, in about one-fifth of the decisions in which the court acknowledged that the ADAAA was in effect, the court did not reach the substantive ADA nondiscrimination issues.

In the remaining cases – in which the courts did apply substantive law under the ADAAA – the results were quite positive from the point of view of those filing the lawsuits claiming they had been discriminated against on the basis of disability. In such cases, the plaintiff prevailed on the showing of disability in more than three out of four decisions. What is meant by “prevailing” in this context depends upon the procedural posture of the case at the time of the decision. In many cases, it involved the court rejecting a motion to dismiss or a motion for summary judgment on the issue of the plaintiff having properly pled or made a *prima facie* case that he or she had a disability under the ADA. This three-out-of-four figure, combined with the six-of-seven plaintiffs who prevailed at the circuit court level, is impressive. Moreover, in some of the cases in which plaintiffs lost on the issue of establishing disability, the courts dismissed their claims “without prejudice” or with express permission to amend their complaints (or to “replead”) to address deficiencies in the allegations they had proffered. There is no real comparison figure for saying what a good success rate on the disability determination should be, but there can be no

doubt that the present rate of prevailing is dramatically better than before the ADAAA was enacted, when studies were showing that more than 90 percent (some as high as 97 percent) of plaintiffs in ADA employment cases were having their cases thrown out of court on motions to dismiss or summary judgment – abysmal rates of dismissals that helped to prompt calls for amending the ADA that produced the ADAAA.

The foregoing does not mean, however, that such prevailing plaintiffs were necessarily going to win their lawsuits, or even succeed in the proceeding in which they prevailed on the pleading or proof of disability issue. Quite a few plaintiffs who prevailed on the showing of disability fell short on proof that they are qualified or on proving that they were subjected to unlawful discriminating actions. In the decisions in which courts applied the ADAAA, almost six out of ten did not prevail in the proceeding before the court. Of those who prevailed on disability, more than half (a rate of about 55 to 45) prevailed in the proceeding, in that they were either victorious on the merits or were permitted to continue to pursue their lawsuits.

Finding 19: Assessment of overall outcomes in court decisions interpreting and applying the ADAAA shows that the Act has had a dramatic impact in improving the success rates of plaintiffs in establishing disability. In cases in which district courts applied provisions of the Act, plaintiffs prevailed on the showing of disability in more than three out of four decisions – a huge improvement over pre-ADAAA decisions. This very positive development is tempered somewhat by the recognition that many plaintiffs who prevailed on establishing a disability still lost their cases on other grounds.

B. Focus and Extent of Analysis of Disability

An important question is whether the courts have fulfilled congressional intent that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[386] A related question is whether under the ADAAA the focus of court inquiries in ADA cases, particularly those addressing employment discrimination, has shifted to determining whether disability discrimination occurred ("the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations"[387]), as opposed to focusing primarily on determining whether an individual has a disability. In a section of its ADAAA regulatory guidance discussing provisions relating to

"Discrimination Prohibited," EEOC touched on both of these issues: "We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case—including whether discrimination occurred because of the disability ...."[388]

In regard to avoiding extensive analysis, it is difficult to generalize about how well the courts have complied with the congressional intent and EEOC's directions. Some courts have devoted minimal analysis to the issue of determining whether a plaintiff has a disability under the ADA. In one case in which the plaintiff had provided evidence that she had multiple sclerosis, the court's analysis of whether her condition constituted a disability consisted, in its entirety, of the following: "The court assumes, without deciding, that [the plaintiff] can establish that she was disabled under the new, more lenient guidelines of the ADAAA and moves directly to the heart of the issue—whether [the plaintiff] established that she was discriminated against because of her disability.."[389] The court proceeded to examine the plaintiff's claims that she had suffered discrimination and determined that "there is simply no evidence before the court that [the defendant] discriminated against [the plaintiff] because of her disability. As such, summary judgment is due to be granted in favor of [the defendant] on [the plaintiff's] claims under the ADA."[390] A second court analyzed the plaintiff's allegations of disability as follows:

> [The plaintiff] is disabled under the ADA. The parties agree that [she] cannot sit or stand for extended periods of time, and that she also cannot lift heavy objects or bend at the waist. Construing the ADA's definition broadly, the court finds that [the plaintiff] has produced sufficient evidence to prove that she is disabled within the meaning of the ADA.[391]

Another court went so far as to consider no analysis even better than limited analysis and simply jumped over the issue of demonstrating disability:

> The ADAAA states that "it is 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...." Therefore, the "question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* In keeping with the clear directive of the ADAAA and recognizing that Plaintiff's claims fail for various other reasons, *the Court will not engage in an analysis of Plaintiff's alleged disability*.[392]

Other courts have expended paragraphs or pages in analyzing whether a plaintiff has adequately pled and proven the existence of a disability that meets the standards established in

the ADAAA. Quite naturally, when courts are considering whether a plaintiff's condition constitutes a disability under the ADA, they tend to cite and discuss previous decisions addressing the same or similar conditions. And, given the novelty of many of the ADAAA revisions, courts may be prone to over-discuss and over-analyze them.

As to whether courts have shifted their focus, particularly in employment cases, away from determining whether an individual has a disability, and more toward determining whether disability discrimination occurred, this has certainly occurred to a considerable extent, particularly with conditions that affect major bodily functions or are included in EEOC's "predictable assessments of disability" examples list. The consideration of conditions without taking into account mitigating measures has also simplified and abbreviated the process for establishing disability for conditions to which it applies. The very fact that more plaintiffs are prevailing on the proof of disability issue means that courts are required to go on to grapple with the substance of their discrimination claims.

And yet, the careful and somewhat tentative application by courts of the ADAAA changes as they begin to become familiar with them has led some courts to put considerable effort into interpreting and parsing the standards; and some issues, such as the "transitory and minor" exception to inclusion of regarded-as disabilities, have occasioned extensive discussion in the decisions. At times, this has continued to lead to ADAAA-frowned-upon instances of courts spending considerable "time and energy on the minutia of an individual's impairment."

Finding 20: The courts have made progress in complying with ADAAA exhortations that determinations whether an individual's impairment is a disability under the ADA "should not demand extensive analysis," although the progress is uneven and some decisions continue to reflect considerable analytical parsing. As to the related question of whether courts have shifted their analytical focus, particularly in employment discrimination cases, away from determining whether an individual has a disability, to determining whether disability discrimination occurred, the courts' decisions evidence quite a bit of movement in that direction, but some courts still spend considerable time and energy on the minutia of parsing the medical and other details and circumstances of an individual's impairment.

C. Individualized Assessment

Since the enactment of the ADA, the elements of the term "disability" have been defined "with respect to an individual."[393] The EEOC regulations under the ADAAA have emphasized the individualization aspect of determining disability by mandating that "[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment."[394] The question arises whether the courts are in fact making the requisite individualized assessment to determine whether an impairment substantially limits a major life activity. From the cases analyzed for this report, the answer appears to be a resounding "yes." The courts routinely seek to assess whether each particular plaintiff has alleged sufficient facts and produced sufficient evidence to establish that she or he meets the criteria under the statute. From time to time, a court may make a determination about a plaintiff's condition based upon the label or what other courts have said about it, but such instances are far from common. Of course, when a court is struggling with how to apply the legal criteria to the condition and circumstances before it, it is only to be expected that the court may seek guidance, support, and reassurance from the rulings of other courts.

It is also true that some revisions made by and pursuant to the ADAAA have actually provided some impetus toward less-individualized determinations, while making it easier for plaintiffs to establish that certain conditions qualify as disabilities under the ADA. The statutory addition of the category of major bodily functions to the list of examples of major life activities and EEOC's designation of examples of conditions that "virtually always" constitute disabilities definitely push in the direction of more categorically determined disabilities.

Finding 21: In making determinations of disability in ADA actions, the courts have pretty consistently based them on individualized assessments of substantial limitation of major life activities. Some ADAAA revisions have reduced the need for individualization to a degree by making it easier for some types of impairments to be recognized as disabilities.

D. Deficient Pleadings and Flawed Litigation

“Bad facts make bad law” is an old law school adage, but it might equally well be said that “bad pleadings make bad law,” or at least they lead to bad outcomes for litigants. A conspicuous aspect of the court decisions under the ADAAA is that some plaintiffs lost on their claims of having a disability and on other elements of their lawsuits because they simply did not make a minimally adequate case. Not uncommonly, courts’ opinions attribute the dismissal of claims to the failure of the pleadings and other submitted documents to adequately assert or support the necessary elements of a cause of action. Thus, in one case before the Seventh Circuit, the court complained that “[the plaintiff] has not produced evidence that his aneurism limits a major life activity. In his motion before the district court, [the plaintiff] merely cited the Wikipedia article on aneurisms and concluded that the ‘ability to function and live is certainly a major life function.’”[395] Another court made the following finding:

> Plaintiff's allegations fail to even suggest that her work-related stress condition limited or impaired—substantially or otherwise—her ability to engage in any major life activity. Plaintiff's bare and conclusory allegation that her “work related stress condition renders her disabled” is insufficient to meet the pleading requirements discussed above. Accordingly, even under the ADAAA's substantially-broadened definition of disability, the Court finds that Plaintiff has failed to allege facts tending to show that she was or is disabled ….[396]

In a case litigated under the “regarded as” prong of the definition of disability, a district court found as follows:

> Plaintiff merely relies upon her subjective belief and conclusory statements to argue that she was “regarded as” disabled. Plaintiff states that her supervisor regarded her as disabled because her supervisor knew that she had facet arthrosis. She then states that “they didn't want to accommodate me after I went through my physical therapy.” She acknowledges, however, that she did not ask for any accommodations. … Even in light of the ADA amendments, Plaintiff fails to create a genuine issue of fact on whether she was “regarded as” disabled. Subjective belief and conclusory allegations of discrimination are insufficient to defeat summary judgment.[397]

A similar deficiency in pleading disability caused another court to conclude as follows:

> Plaintiff has only alleged that she suffered from the condition of transverse myelitis and has pled no other facts indicating how this condition substantially limited one or more major life activities. Consequently, Plaintiff has not even alleged a “formulaic recitation of the elements of a cause of action” [much]less the required factual enhancement to render her claim plausible under Rule 12(b)(6). Courts have held that “dismissal is appropriate where a plaintiff fails to allege how an impairment limits a major life activity.”[398]

Compassionately, the court opted to dismiss the plaintiff's claim "without prejudice," and granted her leave to amend her complaint, if she can, to allege how her transverse myelitis substantially limited a major life activity and to clarify whether she is asserting a claim for disability discrimination arising from a failure to make a reasonable accommodation, a claim for discrimination arising from an adverse employment action taken because of her disability or both.[399]

In one case, the plaintiff took vagueness about his condition to an even higher level. The court stated that "[the plaintiff's] complaint alleged only that 'he suffers from a recognized disability of which [the defendant] was well aware[;] however [the plaintiff] fails to state what this disability is and how [the defendant] knew about it."[400]

Sometimes poorly reasoned and poorly written legal briefs undercut plaintiffs' ADA claims. In a recent, extreme case, the Eighth Circuit noted that "[a]fter spending 'many hours' reviewing [the plaintiff's] bewildering brief in opposition to summary judgment, the district court granted [the defendants'] motion for summary judgment on all of [the plaintiff's] claims."[401] Unfortunately the briefing did not improve on appeal, and the appellate court observed:

> Because [the plaintiff's] brief, filled as it is with unsupported legal and factual assertions, sometimes borders on incomprehensible, the precise issues she is raising in this appeal are unclear. Like the district court, we struggle to decipher seemingly inconsistent claims, and we have interpreted [the plaintiff's] counsel's pages of arguments as favorably as the record allows.[402]

In a footnote, the court stated that "[w]e echo the district court's notice to [the plaintiff's] counsel that we are 'not inclined to undertake this effort again in his cases.'"[403] The footnote went on to say that "[n]ot only is the opening appellate brief submitted by [the plaintiff's] counsel littered with irrelevant sentences, careless prose, and rambling multi-page paragraphs, but [the plaintiff's] counsel did not submit a reply brief—a decision which, even *if* tactical, underestimated the persuasiveness of the appellees' arguments."[404] If that was not enough, the court reported that the plaintiff's "brief contains no citation to the relevant statute," so the court was compelled to "infer she bases her disability-discrimination claim on a purported violation of the ADA's prohibition of employment discrimination 'against a qualified individual on the basis of disability.'"[405] Not surprisingly, the Eighth Circuit affirmed summary judgment in favor of the defendants on the plaintiff's ADA claim.

The decisions discussed here are only a sampling of cases in which plaintiffs' failure to prevail appears to have stemmed as much or more from the poor quality of the legal papers submitted on their behalf as from intrinsic invalidity of their ADA claims. In assimilating the findings in this report regarding improvement in how plaintiffs are doing under the ADAAA, it should be borne in mind that the results could be even more favorable if the quality of the pleadings, briefs, arguments, and analysis could be upgraded.

Finding 22: In more than a few cases in which individuals who claimed to have been subject to discrimination on the basis of disability have not succeeded in establishing that they had a legally cognizable disability, or otherwise did not prevail in their legal actions, their chances for a favorable outcome were squandered by substandard, sometimes dismal, legal pleadings and briefs on their behalf. The likelihood of such plaintiffs having a fair "day in court" could be significantly enhanced by the development and proliferation of high quality continuing education and training programs for attorneys and other advocates for people with disabilities.

E. Potentially Emergent Ancillary Issues

This report primarily focuses on providing a preliminary assessment of the extent to which the ADAAA is fulfilling its promise – whether it is addressing the problems and having the positive impact it was intended to. In addition, however, analysis of the court decisions suggests some possible issues or potential problems that go beyond the purview, or even a bit against the grain, of the ADAAA. This subsection points up a few such matters that merit ongoing observation and monitoring to see if they do, in fact, become serious enough to warrant remedial action.

One such issue that deserves watching is the factor of duration of an impairment in the determination that it does or does not constitute a disability under the ADA. In the Supreme Court's decision in *Toyota Motor Manufacturing , Kentucky, Inc. v. Williams,* the Court had endorsed a requirement that an "impairment's impact must also be permanent or long term" to constitute a disability. NCD's *Righting the ADA* report condemned the "permanent or long term" duration requirement, and included in the ADA Restoration Act proposal presented in the report a provision stating that "[a]n impairment that otherwise substantially limits a major life activity

meets the definition of a disability … even if the impairment is temporary or of limited duration."[406] When the ADAAA included two congressional findings and two statements of congressional purpose in which Congress rejected the standards and the narrowing of the scope of protection that the *Williams* decision had adopted, there was thought that the duration limitation was severely weakened, if not abolished. Congress furthered this line of thought in a fashion when it established an exception under the "regarded as" prong for impairments that are "transitory and minor," with the implication that no such exception had been recognized under the other two prongs. EEOC, to its credit, has endorsed this interpretation of the exception and its limitation to the third prong, and has refused to extend the six-month criterion for "transitory" to the other two prongs. It has also refused to specify any time limit of minimum duration that an impairment must last for it to constitute a disability. These are positive developments.

However, there is the line of cases that have applied the "transitory and minor" exception without actually taking the "and minor" part into account, as discussed in subsection V.D above. Courts are sometimes overly eager to screen out what, based upon pre-ADAAA law, they had learned to consider impairments of too short a duration to be substantially limiting. Accordingly, there is a danger that, in addition to the misinterpretation of "transitory and minor" for regarded as complainants, such sloppy analysis may bleed over into the first and second prongs and fuel the impulse to exclude temporary or transitory conditions, with an associated danger that courts will begin to apply the six month standard as the minimum duration period for disability generally. Hopefully these problems will not become serious or widespread, but the possibility that they will should be monitored to ensure early detection and the application of appropriate corrective measures if necessary.

One of the major compromises that occurred during negotiations over the legislation that became the ADAAA was the incorporation of the provision that specifically states that covered entities do not have to provide a reasonable accommodation or reasonable modification for an individual who meets the definition of disability only under the "regarded as" prong. In *Righting the ADA,* NCD argued for reasonable accommodation for "regarded as" individuals and suggested statutory language requiring it.[407] As enacted, the ADAAA did not follow that approach and specifically provided that accommodation/modification is not required in such situations. The congressional expectation was apparently that the broadened, less onerous

"regarded as" standard would be used for most ADA cases except those that involved claims for reasonable accommodations/modifications, and that where accommodation/modification was at issue, the first and second prongs would fit the bill.

It remains to be seen, however, whether any significant negative repercussions will flow from denying accommodation/modification rights to people who show that they were just perceived as having a disability. Certainly as the ADAAA began to take effect, some litigants were surprised to learn that the regarded as basis upon which they had successfully established disability to a court's satisfaction would not entitle them to a reasonable accommodation. There may be many reasons why people cannot or do not want to use the first two prongs even though they have an impairment and really need reasonable accommodations or reasonable modifications. These include privacy concerns about disclosing confidential medical and mental health records, evidentiary concerns that it may be difficult to prove substantial limitation of a major life activity under the actual and record of disability prongs, and indignation about having to spend money and time to amass documentation and testimony to prove how seriously impaired you are just to get a reasonable adjustment to enable you to participate or do a job. Ongoing attention should be paid to court decisions relating to the disallowance of accommodations and modifications under the third prong in order to assess just how much of a problem it is going to pose.

In one of its least insightful moments, the Supreme Court, in *Sutton v. United Air Lines, Inc.* and associated cases, questioned whether working should be considered a major life activity, and expressed doubts about the validity and authoritativeness of EEOC's regulations interpreting the definition of disability.[408] The ADAAA explicitly rejected the Court's ruling on these matters by including "working" among a statutory list of major life activities and directly authorizing EEOC, the Department of Justice, and the Secretary of Transportation to issue regulations implementing the definition of disability as amended by the ADAAA.[409] After having been vindicated in both its regulatory authority and its inclusion of working as a major life activity, EEOC has opted to deemphasize the major life activity of working by removing a discussion of it from its regulations, explaining that no other life activity had received comparable special attention in the regulations, and that, in light of the broadening of the definition of disability under the ADAAA, the major life activity "will be used in only very targeted situations."[410] EEOC

expressed the expectation that in most instances an individual with a disability would establish coverage by demonstrating substantial limitation of some other major life activity, since "impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities."[411]

Related to the invoking of the life activity of working to establish disability is the requirement of demonstrating that the individual's impairment substantially limits the ability to perform "a class of jobs or broad range of jobs." This requirement, and its endorsement by the Supreme Court in its decision in *Sutton,* were decried by NCD in *Righting the ADA.*[412] With the congressional repudiation of the *Sutton* decision in the ADAAA, the class-of-jobs/broad-range-of-jobs standard might have been discarded. Instead, EEOC chose to relax the concept and confine its usage as described in the regulatory guidance:

> In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. In keeping with the findings and purposes of the Amendments Act, the determination of coverage under the law should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act. … Accordingly, as used in this section the terms "class of jobs" and "broad range of jobs in various classes" will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act.[413]

Because the "class of jobs or broad range of jobs," as applied before the ADAAA, had become very engrained in judicial analysis of the major life activity of working, it remains to be seen whether EEOC will succeed in its admirable effort to relax the criterion and limit its use. It will be important to keep a close eye on future court decisions to see if the standard has been appropriately lowered and confined.

Finding 23: In addition to examining how well the courts are doing in carrying out the spirit and applying the specific provisions of the ADAAA, it will be important to monitor certain additional issue areas, incident to the Act and its implementation, that, depending upon the direction the court decisions take, have the potential to cause significant problems. Three such issues are (1) how the factor of duration affects the determination

whether an impairment does or does not constitute a disability under the ADA; (2) application of the ADAAA provision freeing covered entities from the obligation to provide reasonable accommodations or reasonable modifications for individuals who meet the definition of disability only under the "regarded as" prong; and (3) the role of the major life activity of working and the application of the "class of jobs or broad range of jobs" standard in the determination whether an impairment substantially limits it.

VII. RECOMMENDATIONS

Consistent with its statutory mission that includes gathering information about the implementation, effectiveness, and impact of the ADA, and providing advice and recommendations to the President, Congress, and Federal agencies, NCD reports frequently include specific legislative, regulatory, and policy recommendations for the improvement of federal laws and programs affecting individuals with disabilities. Given the relative novelty of judicial consideration and application of the ADAAA, the current report provides a tentative preliminary assessment of the emerging trends and legal principles; as such, it does not provide a sufficient, solid basis for substantive policy and legislative recommendations. Accordingly, the recommendations presented here principally suggest the need for ongoing monitoring and study in certain designated issue areas, and some needed training and education initiatives.

Recommendation 1: Led by the primary ADA enforcement agencies charged with implementing the requirements of the ADA – the Department of Justice, the Equal Employment Opportunity Commission, and the Department of Transportation – in conjunction with NCD, agencies of the federal government should maintain and systematize ongoing monitoring and analysis of court decisions interpreting and applying the changes in the law made by the ADAAA.

In addition to analyzing the decisions, assessing how well the courts are doing in fulfilling the objectives of the ADA, and identifying problems and troubling decisions and lines of cases

(including those identified in prior sections of this report), monitoring and research efforts should focus on specific issues and populations, including the following:

- The impact of the ADAAA on disability discrimination in the workplace, including the overall employment rates of people with disabilities.
- How the ADAAA is affecting:
    - the provision of accommodations by institutions of higher education.
    - implementation of requirements regarding the removal of architectural, transportation, and communication barriers.
    - examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.
    - accessibility of electronic services and websites.
- The effect of the ADAAA on:
    - people with invisible disabilities.
    - people with intellectual and developmental disabilities.
    - people with cognitive or information-processing disabilities.
    - people with disabilities from diverse cultures and diverse racial backgrounds.

Recommendation 2: The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize programs for providing high quality information and training for judges regarding the content and implications of the revisions to ADA law made by the ADAAA.

Such educational and training opportunities would assist judges by helping them become more aware of the changes made by the ADAAA to prior law, and assisting them to grasp and master the implications and nuances of the revisions, as well as to dispel misunderstandings. Finding 11 of this report included the observation that "[a]lthough the courts have made a good start, routine acceptance and mastery by courts … of these innovations will not occur easily or quickly," and suggested that additional judicial education efforts devoted to these matters would greatly facilitate their dissemination and informed application. Members of the judiciary should be provided information about the ADAAA revisions, the implementing regulations, and the

decisions of their fellow judges, including information of the kind provided in earlier sections of this report.

Recommendation 3: The Department of Justice and the Equal Employment Opportunity Commission, in conjunction with NCD, should organize, facilitate, and systematize high quality continuing education and professional education programs for attorneys and other advocates regarding the content and implications of the revisions to ADA law made by the ADAAA.

Subsection VI.D above described a number of cases in which plaintiffs had their lawsuits under the ADAAA thrown out of court due to deficient pleadings and other avoidable mistakes. Better training of attorneys who provide representation in ADA cases might help to reduce such failures to give individuals who believe they have been subject to discrimination based on disability their fair day in court. Such programs should target both public agency and private attorneys who practice or plan to practice disability nondiscrimination law, including, particularly, government lawyers, public interest lawyers, and lawyers for Protection and Advocacy agencies. The involvement and participation of the Regional ADA National Network Centers should be sought.

ENDNOTES

[1] 154 Cong. Rec. S8349 (daily ed. Sept 11, 2008).
[2] 154 Cong. Rec. S8353 (daily ed. Sept. 11, 2008).
[3] 154 Cong. Rec. H8294 (daily ed. Sept. 17, 2008).
[4] The *Righting the ADA* report can be found on the NCD website at http://www.ncd.gov/publications/2004/Dec12004#IIIB.
[5] 534 U.S. 184, 197 (2002).
[6] H.R. 6258, 109th Cong. (2006); S. 1881, 110th Cong. (2007); H.R. 3195,110th Cong. (2007)..
[7] Statement of Managers to Accompany ADA Amendments Act, 154 Cong. Rec. S8840-S8844 (daily ed. Sept. 16, 2008).
[8] NCD recognizes that the ADAAA decisions of state courts are an important source of legal interpretation and application of the Act, but they raise complexities, comparability issues, and research quirks that make them somewhat more difficult to compile and analyze within the time and resource restraints of this project.
[9] Pub.L. No. 110–325, § 8; 122 Stat. 3553, 3553 (Sept. 25, 2008).
[10] T*hornton v. United Parcel Serv., Inc.,* 587 F.3d 27, 35 n. 3 (1st Cir.2009): *Thomsen v. Stantec, Inc.*, 483 Fed.Appx. 620, 622 n. 2 (2d Cir. 2012); *Weidow v. Scranton School Dist.*, 460 Fed.Appx. 81, 185 n.7 (3d Cir. 2012); *Lander v. ABF Freight System, Inc.*, 459 Fed.Appx. 89, 91-92 (3d Cir. 2012); *Young v. United Parcel Service, Inc.*, 707 F.3d 437, 443 n.7 (4th Cir. 2013); *Reynolds v. American Nat. Red Cross*, 701 F.3d 143, 150 -152 (4th Cir. 2012); *Milton v. Texas Dept. of Criminal Justice*, 707 F.3d 570, 573 n.2 (5th Cir. 2013); *Wells v. Thaler*, 460 Fed.Appx. 303, 312 n.20 (5th Cir. 2012); *Bleak v. Providence Health Center,* 454 Fed.Appx. 366, 368 n. 1 (5th Cir. 2011); *Spence v. Donahoe*, No. 11-3203, at *6, 2013 WL 628524 (6th Cir. February 21, 2013); *Cardenas-Meade v. Pfizer, Inc.,* No. 12-5043, at *2 n.1, 2013 WL 49570 (6th Cir. January 03, 2013); *Powers v. USF Holland, Inc.*, 667 F.3d 815, 823 n. 7 (7th Cir. 2011); *Nyrop v. Indep. Sch. Dist. No. 11,* 616 F.3d 728, 734 n. 4 (8th Cir.2010); *Elias v. Napolitano*, No. 11-57056, at *1, 2013 WL 2177368 (9th Cir. May 21, 2013); *Murphy v. Samson Resources Co.,* No. 12-5084, at *2 n.1, 2013 WL 1896822 (10th Cir. May 08, 2013); *Wehrley v. American Family Mut. Ins. Co.*, No. 12-1079, at *3, 2013 WL 1092856 (10th Cir. March 18, 2013); *Latham v. Board of Educ. of Albuquerque Public Schools*, 489 Fed.Appx. 239, 244-245 (10th Cir. 2012); *Hetherington v. Wal-Mart, Inc.*, No. 12-13684, at *2 n.1, 2013 WL 811744 (11th Cir. March 05, 2013) (plaintiff conceded the ADAAA did not apply retroactively, and court rejected contention that legislative history of Act should be applied nonetheless); *Kapche v. Holder*, 677 F.3d 454, 461 n.7 (D.C. Cir. 2012); Lytes v. DC Water and Sewer Authority, 572 F.3d 936, 940-942 (D.C. Cir. 2009).
[11] 511 U.S. 244 (1994).
[12] *Id.* at 264.
[13] 122 Stat. at 3559.

[14] *Cochran v. Holder,* 436 Fed.Appx. 227, 232 (4th Cir. June 21, 2011).
[15] *Reynolds v. American Nat. Red Cross*, 701 F.3d 143, 151 (4th Cir. 2012).
[16] *Id.*, quoting *Landgraf*, 511 U.S. at 273.

[17] *Id.*, quoting *Landgraf*, 511 U.S. at 272–73.
[18] *Id.* at 152.
[19] 511 U.S. 244, 280 (1994).
[20] 572 F.3d 936, 940 (D.C.Cir.2009).
[21] *Latham v. Board of Educ. of Albuquerque Public Schools*, 489 Fed.Appx. 239, 245 (10th Cir. 2012).
[22] *Id.*, quoting *Landgraf*, 511 U.S. at 280 (emphasis added in 10th Circ. Opinion).
[23] *Id.* at 245.
[24] *Fernandez–Vargas v. Gonzales,* 548 U.S. 30, 37 (2006) (quoting *Lindh v. Murphy,* 521 U.S. 320, 326 (1997)).
[25] *Id.* (quoting *Landgraf,* 511 U.S. at 278).
[26] *Lytes v. DC Water and Sewer Authority*, 572 F.3d 936, 939-940 (D.C. Cir. 2009) (citations to *Landgraf* omitted).
[27] *Id.* at 940.
[28] *Id.*
[29] *Id.* at 941.
[30] EEOC, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008* (question 1), http://www1.eeoc.gov//laws/regulations/ada_qa_final_rule.cfm?renderforprint=1.
[31] *Jenkins v. National Bd. of Medical Examiners*, No. 08-5371, at *1, 2009 WL 331638 (6th Cir. Feb. 11, 2009).
[32] 534 U.S. 184 (2002).
[33] *Jenkins v. National Bd. of Medical Examiners*, *supra*, at *1.
[34] *Id.* at *2.
[35] *Id.* at *1.
[36] *Id.* at *2 (quoting *Landgraf v. USI Film Products,* 511 U.S. 244, 247, 269-70, 282-83, 273 (1994)).
[37] *Id.* at *1 (citations omitted).
[38] *Id.*
[39] *See, e,g,*, *Steffen v. Donahoe*, 680 F.3d 738, 744-745 (7th Cir. 2012); *Allen v. STHS Heart, LLC,* No. 3:09-0455, at *12-*13, 2010 WL 2133901 (M.D.Tenn. May 21, 2010); *Lawson v. Plantation General Hosp., L.P.,* 704 F.Supp.2d 1254, 1273 (S.D.Fla.2010); *Geiger v. Pfizer, Inc.*, NO. 2:06-CV-636, at *2-*3, 2009 WL 973545 (S.D.Ohio Apr 10, 2009).
[40] 555 F.3d 850, 853 (9th Cir.2009).
[41] *Id.* at 860-861.
[42] *Id.* at 853.
[43] *Id.* at 861.
[44] *Id.*, quoting P.L. 110–325, § 2(a)(4), 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 note).

[45] *Id.* at 861, quoting provisions of the ADAAA, §§ 2(b)(5), 2(b)(6) & 4, at 122 Stat. 3554-3556 (2008) (codified at 42 U.S.C. § 12101 note & 42 U.S.C. 12102 § (4)(E)(i)) (internal footnotes omitted).
[46] *Id.* at 861-862, citing H.R.Rep. No. 110-730, at 8.
[47] *Id.* at 862.

[48] *Id.* at 861.
[49] 489 Fed.Appx. 239 (10th Cir. 2012).
[50] 662 F.3d 1134, 1144.
[51] 604 F.3d 848, 855.
[52] 610 F.3d 231, 236.
[53] 574 F.3d 169, 188 n. 17.
[54] 462 Fed.Appx. 773, 776–77.
[55] 455 Fed.Appx. 827, 834.
[56] *Latham v. Board of Educ. of Albuquerque Public Schools*, 489 Fed.Appx. at 244-245 (citations to specific ADAAA provisions omitted).
[57] *Reynolds v. American Nat. Red Cross*, 701 F.3d 143 (4th Cir. 2012).
[58] *Id.* at 152.
[59] *Id.* at 150-151 (internal citations omitted)..
[60] 409 Fed.Appx. 566 (3d Cir. 2011)
[61] *Id.* at 568.
[62] 696 F.3d 78, 87.
[63] 438 Fed.Appx. 388, 397 n.9.
[64] 378 Fed.Appx. 520, 525 n.7.
[65] 698 F.3d 598, 606 n.3.
[66] 433 Fed.Appx. 754, 762 n.9
[67] 696 F.3d 78, 87 n.6.
[68] 464 Fed.Appx. 395, 399 n. 2.
[69] 427 Fed.Appx. 337, 340.
[70] 698 F.3d 598, 606 n.3 (citations omitted).
[71] 662 F.3d 1134, 1144.
[72] *Verhoff v. Time Warner Cable, Inc.*, 299 Fed.Appx. 488, 492 n. 2 (6th Cir. 2008) (citations to ADAAA provisions omitted).
[73] *Cochran v. Holder,* 436 Fed.Appx. 227, 231 (4th Cir. 2011).
[74] 610 F.3d 231, 236 (5th Cir. 2010).
[75] *Id.*
[76] *Fryer v. Coil Tubing Services, LLC*, 415 Fed.Appx. 37, 43 n.13 (10th Cir. 2011).
[77] *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 188 n.17 (3d Cir. 2009).
[78] *Id.*, quoting 42 USC § 12102(3)(A).
[79] *Id.,* quoting 42 USC § 12102(3)(B).
[80] *Id.*, quoting 42 USC § 12201(h).
[81] *Dulaney v. Miami-Dade County*, 481 Fed.Appx. 486, 489 n.3 (11th Circ. 2012).
[82] *Weidow v. Scranton School Dist.*, 460 Fed.Appx. 181,185-186 (3d Cir. 2012) (applying pre-ADAAA standards, the court ruled that the plaintiff had not shone that her bipolar disorder "severely restricted" her ability to interact with others, care for herself, concentrate, and sleep).
[83] *Grayer v. Welch,* No. 09 C 3924, at *13, 2011 WL 4578373 (N.D.Ill. September 30, 2011) ("Plaintiff's status as a two-time breast cancer survivor fails to qualify as a "disability""). The court recognized that "under the ADA Amendments Act of 2008 ("ADAAA"), Plaintiff would in fact be considered disabled on account of her status as a two-time breast cancer survivor, as the ADAAA clearly provides that 'an impairment that is episodic or *in remission*

is a disability if it would substantially limit a major life activity when active.'" *Id.* at *13 n.15 (emphasis added by the court).
[84] *Rhodes v. Langston University*, 462 Fed.Appx. 773, 779 (10th Cir. 2011) ("we conclude Rhodes' amputation and use of a prostheses constitute a physical impairment that is not substantially limiting," applying the directive of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184, 197 (2002) that the ADA "must 'be interpreted strictly to create a demanding standard for qualifying as disabled'").
[85] *Id.*
[86] *Kemp v. Holder*, 610 F.3d 231, 236 (5th Cir. 2010).
[87] *Carmona v. Southwest Airlines Co.,* 604 F.3d 848, 855 (5th Cir. 2010).
[88] 711 F.3d 883, 888-889 (8th Cir. 2013).
[89] *Id.* at 888.
[90] *Id.* at 888-889 n.6.
[91] *Id.* at 889 (emphasis and bracketed insertion added by the court).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 890.
[96] 29 U.S.C. § 794(a).
[97] 488 Fed.Appx. 465, 466 (11th Cir. 2012).
[98] *Id.* at 466-467.
[99] *Id.* at 467.
[100] 42 U.S.C. § 12102(3)(A) (emphasis added in the court's quotation of the language reproduced here).
[101] 488 Fed.Appx. at 468.
[102] 488 Fed.Appx. at 468-469.
[103] *Allen v. SouthCrest Hosp.*, 455 Fed.Appx. 827, 828 (10th Cir. 2011).
[104] *Id.* at 830.
[105] *Id.* at 834 (footnote and citations to ADAAA provisions omitted).
[106] ADAAA, P.L. 110–325 § 4, 122 Stat. 3555 (2008).
[107] *Id.* at § 2(a)(4), (6), & (7), 122 Stat. 3553.
[108] *Id.* at § 2(b)(4) & (5), 122 Stat. 3554.
[109] *Id. at* 831 n.4 (quoting Allen's Opening Appellate Brief, citation omitted).
[110] *Id.* at 829.
[111] *Id.*

[112] *Id.*
[113] *Id.* at 832.
[114] *Id.* at 831.
[115] *Id.* at 831.
[116] *Id.* at 831-832, citing *EEOC v. Heartway Corp.,* 466 F.3d 1156, 1162 n. 5 (10th Cir.2006) ("If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working"). In *EEOC v. Heartway Corp.,* the Tenth Circuit quoted the following from the *Sutton* decision: "even the EEOC has expressed reluctance to define 'major life activities' to

include working and has suggested that working be viewed as a residual life activity, considered, as a last resort." 466 F.3d 1156, 1162 n. 5, quoting *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 492 (1999).
[117] 455 Fed.Appx. at 832, quoting Aplt.App., Vol. II at 192 (emphasis added by the court).
[118] *Id.* at 832.
[119] *Id.* at 833.
[120] *Id.*
[121] *Id.*
[122] *Id., citing Johnson v. Weld Cty.,* 594 F.3d 1202, 1218 n. 10 (10th Cir. 2010).
[123] *Id.*
[124] *Id.* at 834, citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999), which quoted 29 C.F.R. § 1630.2(j)(3)(i) (2010).
[125] 455 Fed.Appx. at 834.
[126] *Id.* at 835, quoting "Substantially Limited in Working," Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630, App.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 829.
[131] 42 U.S.C. § 12102(4)(D).
[132] 42 U.S.C. § 12102(4)(E)(i).
[133] *Id.* at § 2(b)(4) & (5), 122 Stat. 3554.
[134] *Latham v. Board of Educ. of Albuquerque Public Schools*, 489 Fed.Appx. 239, 245 (10th Cir. 2012) (citing *Allen v. SouthCrest Hosp* as "discussing congressional intent in enacting the ADAAA").
[135] *Gregor v. Polar Semiconductor, Inc.,* No. CIV. 11-3306 DSD/TNL, at *3 n.5, 2013 WL 588743 (D.Minn. Feb 13, 2013). The court quoted *Allen v. SouthCrest Hosp.* for its holding that "[t]he ADAAA did not ... explicitly discuss or modify the definition of the major life activity of working," and its application of the 2010 regulations rather than retroactively applying the amended EEOC regulations. The *Gregor* court distinguished *Allen* because the case before it focused on the major life activity of performing manual tasks regarding which the 2010 EEOC regulations did not provide interpretive guidance, and the court found that "the amended EEOC regulations are persuasive indicia of Congress's intent when promulgating the ADAAA." *Id.*
[136] *Johnson v. City of Murray*, No. 2:10-CV-1130 TS, at *20, 2012 WL 5473127 (D.Utah Nov 09, 2012) (citing *Allen v. SouthCrest Hosp.* primarily for "broad class of jobs" standard); *Gluhic v. Safeway, Inc.*, No. 11-CV-02408-CMA-KMT, at *5, 2013 WL 1283820 (D.Colo. Mar 28, 2013) (citing *Allen v. SouthCrest Hosp.* for elements of *prima facie* ADA case); *Chicago Regional Council of Carpenters v. Thorne Associates*, Inc., 893 F.Supp.2d 952, 962 (N.D.Ill. 2012) (citing *Allen v. SouthCrest Hosp.* for "broad class of jobs" standard); *Kinchion v. Cessna Aircraft Co.*, No. 12-1203-MLB, *8 n.6, 2013 WL 66077 (D.Kan. Jan 04, 2013) (citing *Allen v. SouthCrest Hosp.* for ADAAA broadening of ADA coverage); *Holmes v. Cutchall Management Kansas LLC,* No. 10-2672-EFM, at *3 n.12, 2012 WL 3071056 (D.Kan. Jul 26, 2012) (citing *Allen v. SouthCrest Hosp.* for holding that

the third element in a disability termination claim requires the plaintiff to demonstrate that she was fired because of her disability); *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653, 660 (W.D.Ky. Jan 05, 2012) (citing *Allen v. SouthCrest Hosp.* for the ADAAA not being applied retroactively); *Culotta v. Sodexo Remote Sites Partnership,* 864 F.Supp.2d 466, 476 (E.D.La. 2012) (citing *Allen v. SouthCrest Hosp.* for "broad class of jobs" standard); *Hill v. Southeastern Freight Lines, Inc.,* 877 F.Supp.2d 375, 389 (M.D.N.C. 2012) (citing *Allen v. SouthCrest Hosp.* for "broad class of jobs" standard).

[137] *Jenkins v. National Bd. of Medical Examiners*, No. 08-5371, at *1, 2009 WL 331638 (6th Cir. Feb. 11, 2009).

[138] *Jenkins v. National Bd. of Medical Examiners*, No. 3:07-CV-698-H, at *3, 2008 WL 410237 (W.D.Ky. Feb. 12, 2008).

[139] *Id.* at *1.

[140] *Id.* at *3.

[141] *Jenkins v. National Bd. of Medical Examiners*, No. 08-5371, at *3, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (statutory citation omitted).

[142] *Id.* at *3.

[143] *Id.* at *2.

[144] *Id.* at *3.

[145] *Id.* at *4.

[146] 673 F.3d 120, 123-124 (2d Cir. 2012).

[147] *Id.* at 123-124.

[148] *Id.* at 124.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 124-125.

[153] *Id.* at 125.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 128.

[157] *Id.*

[158] *Id.* at 128-129 (quoting 42 U.S.C. § 12102(3)(A), emphasis added by the court).

[159] H.R.Rep. No. 110–730, pt. 1, at 14 (2008) (emphasis added).

[160] 673 F.3d at 129.

[161] *Id.* at 129 & n.8.

[162] *Id.* at 129 n.8.

[163] *Id.* at 129.

[164] *Id.* at 129.

[165] *Id.* at 129-130.

[166] *Id.* at 130.

[167] *Id.* at 131.

[168] 495 Fed.Appx. 899 (10th Cir. 2012).

[169] *Id.* at 901.

[170] *Id.*

[171] *Id.* at 901-902.
[172] *Id.* at 902.
[173] *Id.*
[174] *Id.* (quoting Fitzgerald v. Corr. Corp. of Am.*,* 403 F.3d 1134, 1144 (10th Cir.2005), and citing *Bryant v. Madigan,* 84 F.3d 246, 249 (7th Cir.1996)).
[175] *Id.*
[176] 700 F.3d 635, 637 (2d Cir. 2012).
[177] *Id.*
[178] *McElwee v. County of Orange,* No. 10 Civ. 00138(KTD), at *1, 2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011).
[179] 700 F.3d at 637.
[180] *Id.* at 637-639.
[181] *Id.* at 639 (quoting *McElwee v. County of Orange,* No. 10 Civ. 00138(KTD), at *6, 2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011)).
[182] 700 F.3d at 642.
[183] *Id.* at 642 & n.5.
[184] *Id.* at 643 (discussing 42 U.S.C. § 12102(2); 29 C.F.R. §§ 1630.2(j)(1)(i) & (j)(3)(iii)).
[185] *Id.* at 643.
[186] *Id.*
[187] *Id.* at 644-646.
[188] P.L. 110–325, § 2(b)(1), 122 Stat. 3553 (Sept. 25, 2008) (codified at 42 U.S.C. § 12101 note) (emphasis added).
[189] 42 U.S.C. § 12102(4)(A).
[190] Statement of Managers to Accompany ADA Amendments Act, 154 Cong. Rec. S8840, S8841 (daily ed. Sept. 16, 2008).
[191] 29 C.F.R. § 1630.1(c)(4).
[192] *Anderson v. Kohl's Corp.*, No. 2:12-CV-00822, at *6-*7, 2013 WL 1874812 (W.D.Pa. May 03, 2013) (citations omitted)

[193] *Semenko v. Wendy's Intern., Inc.*, No. 2:12-CV-0836, at *6, 2013 WL 1568407 (W.D.Pa., April 12, 2013) (quoting *Chedwick v. UPMC,* No. 07–806, at *19, 2011 WL 1559792 (W.D.Pa. April 21, 2011)).
[194] *Barlow v. Walgreen Co.,* No. 8:11-CV-71-T-30EAJ, at *4, 2012 WL 868807 (M.D.Fla. March 14, 2012). The identical statement has been made by other courts. *See, e.g., Beatty v. Hudco Industrial Products, Inc.,* 881 F.Supp.2d 1344. 1351 (N.D.Ala. 2012); *Mecca v. Florida Health Sciences Center Inc.,* No. 8:12-CV-2561-T-30TBM, at *2, 2013 WL 136212 (M.D.Fla. Jan. 10, 2013).
[195] *Jones v. Bracco Ltd. Partnership*, No. CIV. 11-4117-KES, at *7 n.4, 2013 WL 696381 (D.S.D. February 26, 2013) (quoting *Nyrop v. Indep. Sch. Dist. No. 11,* 616 F.3d 728, 734 n.4 (8th Cir.2010)).
[196] *Haley v. Community Mercy Health Partners,* No. 3:11-CV-232, at *11, 2013 WL 322493 (S.D.Ohio Jan. 28, 2013).
[197] *Graham v. St. John's United Methodist Church,* No. 12–CV–297–MJR, at *3, 2012 WL 5298156 (S.D.Ill. Oct.25, 2012) (quoting 42 U.S.C. § 12102(4)(A)). This language was quoted in *Newman v. Gagan LLC,* No. 2:12-CV-248-JVB-PRC, at *11, 2013 WL 1332247

(N.D.Ind. March 28, 2013). The latter court referred also to "the substantial liberalizations of the 200[8] ADA Amendments Act." 2013 WL 1332247, at *10.
[198] *Johnson v. Farmers Ins. Exchange*, No. CIV-11-963-C, at *1, 2012 WL 95387 (W.D.Okla. Jan.12, 2012).
[199] *Kravits v. Shinseki*, No. CIV.A. 10-861, at *5, 2012 WL 604169 (W.D.Pa. Feb. 24, 2012). The identical statement was made by another court in *Karr v. Napolitano,* No. C 11-02207 LB, at *8, 2012 WL 4462919 (N.D.Cal. Sept. 25, 2012).
[200] *Carter v. City of Syracuse School Dist., No. 5*:10-CV-690 FJS/TWD, at *4 n.6, 2012 WL 930798 (N.D.N.Y. March 19, 2012).
[201] *Mills v. Temple University*, 869 F.Supp.2d 609, 620 (E.D.Pa. 2012).
[202] *Cleveland v. Mueller Copper Tube Co., Inc.,* No. 1:10CV307-SA-SAA, at *4, 2012 WL 1192125 (N.D.Miss. April 10, 2012).
[203] *Molina v. DSI Renal, Inc.,* 840 F.Supp.2d 984, 993 (W.D.Tex. 2012) (footnotes omitted).
[204] *Curley v. City of North Las Vegas,* No. 2:09-CV-01071-KJD, at *3, 2012 WL 1439060 (D.Nev. April 25, 2012).
[205] *Diaz v. City of Philadelphia,* No. CIV.A. 11-671, at *9, 2012 WL 1657866, (E.D.Pa. May 10, 2012).
[206] *Pearce-Mato v. Shinseki,* No. 2:10-CV-1029, at *6, 2012 WL 2116533 (W.D.Pa. June 11, 2012).
[207] *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, at *4, 2012 WL 3043021 (S.D.Fla. July 25, 2012).
[208] *Poper v. SCA Americas, Inc.*, No. CIV.A. 10-3201, at *8, 2012 WL 3288111 (E.D.Pa. August 13, 2012).
[209] *George v. Roush & Yates Racing Engines, LLC*, No. 5:11CV00025-RLV, at *5, 2012 WL 3542633 (W.D.N.C. Aug. 16, 2012).
[210] *Love v. Baptist Memorial Hosp. - North Mississippi, Inc.*, No. 2:10CV176-SA-JMV, at *3, 2012 WL 4465569 (N.D.Miss. Sept. 25, 2012).
[211] *Flynt v. Biogen Idec, Inc.,* No. 3:11-CV-22-HTW-LRA, at *4, 2012 WL 4588570 (S.D.Miss. Sept. 30, 2012).
[212] *Butler v. BTC Foods Inc.,* No. CIV.A. 12-492, at *2, 2012 WL 5315034 (E.D.Pa. Oct. 19, 2012).
[213] *Peters v. University of Cincinnati College of Medicine*, No. 1:10-CV-906, at *6, 2012 WL 3878601 (S.D.Ohio Sept. 06, 2012).
[214] *Harty v. City of Sanford,* No. 11–cv–1041, at *5, 2012 WL 3243282 (M.D.Fla. Aug. 8, 2012), quoted in Rico v. Xcel Energy, Inc., 893 F.Supp.2d 1165, 1169 (D.N.M. 2012).
[215] *Cordova v. University of Notre Dame Du Lac*, No. 3:12-CV-153, 2013 WL 1332268 (N.D.Ind. March 29, 2013).
[216] *Id.* at *3-*4 (citations omitted).
[217] *Healy v. National Bd. of Osteopathic Medical Examiners, Inc.*, 870 F.Supp.2d 607, 617 (S.D.Ind. 2012) (citations omitted).
[218] No. CIV.A. 10-4126 PGS, at *12-*16, 2012 WL 1623870 (D.N.J. May 9, 2012).
[219] P.L. 110–325, § 2(b)(4), 122 Stat. 3554 (2008) (codified at 42 U.S.C. § 12101 note).
[220] Statement of Managers to Accompany ADA Amendments Act, 154 Cong. Rec. S8840, S8844 n. 17 (daily ed. Sept. 16, 2008), citing "Substantially Limited in Working," Appendix

to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(i) Major Life Activities).

[221] In its *Righting the ADA* report (2004), NCD proposed a more proper definition with a considerably expanded list of examples:

> The term "major life activities of such individual" means activities that either are important in the individual's life or are important for most people in the general population. It includes all significant endeavors of ordinary daily and occupational life, such as living; breathing; caring for one's self, including personal-care tasks; eating; standing, walking, and running; seeing; hearing; speaking; thinking, learning, and concentrating; lifting, reaching, grabbing, climbing, holding, and performing manual tasks, including housework and household chores, and manual job tasks; working; dating and engaging in sexual activities; procreating; sleeping; interacting and communicating with others; reading and writing; driving; and engaging in physical exercise.
>
> *Id.* at 113.

[222] 42 U.S.C. § 12102(2)(A).

[223] 29 C.F.R. § 1630.2(i)(1)(i).

[224] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(i) Major Life Activities).

[225] *Id.*

[226] *Thomas v. Bala Nursing & Retirement Center,* No. CIV.A. 11-5771, at *1, 2012 WL 2581057 (E.D.Pa., July 03, 2012).

[227] *Id.* at *2, *6.

[228] *Id.* at *6 n.14.

[229] *Id.*, quoting *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 307 (3d Cir.1999) (finding “thinking” to be a major life activity because it is “inescapably central to anyone's life”).

[230] *Id.*

[231] *See, e.g., Williams v. U.S. Services, Inc.,* No. CIV.A. 2:10-1546-RMG, at *5, *7, 2012 WL 590049 (D.S.C., January 31, 2012) (sitting); *Molina v. DSI Renal, Inc.,* 840 F.Supp.2d 984, 994-996 (W.D.Tex. 2012) (sitting) (EEOC regulations considered “helpful guidance” in claim under state Human Relations Act); *Bar-Meir v. University of Minnesota,* No. CIV. 10-936 SRN/JJK, at *2-*3, 2012 WL 2402849 (D.Minn., June 26, 2012) (interacting with others).

[232] *Howard v. Steris Corp.,* 886 F.Supp.2d 1279, 1291 (M.D..Ala..2012), quoting *Lloyd v. Montgomery Hous. Auth.,* 857 F.Supp.2d 1252, 1263, No. 2:10–cv–1103, 2012 WL 1466561, at *7 (M.D.Ala. Apr. 27, 2012). In both decisions, however, the court ruled that the plaintiff had met his initial burden of showing that he had a disability under the broadened list. *Howard,* at 886 F.Supp.2d 1291-1292; *Lloyd,* 857 F.Supp.2d at 1264.

[233] 42 U.S.C. § 12102(2)(B).

[234] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(i) Major Life Activities).

[235] 29 C.F.R. § 1630.2(i)(1)(ii).

[236] *Id.*

[237] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(i) Major Life Activities).

[238] *Id.*
[239] *Id.*
[240] 29 C.F.R. § 1630.2(j)(3)(i).
[241] *Id.,* § 1630.2(j)(3)(ii).
[242] *Id.,* § 1630.2(j)(3)(iii).
[243] *Id.*
[244] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(j)(3) Predictable Assessments) (quoting *Heiko* v. *Columbo Savings Bank, F.S.B.,* 434 F.3d 249, 256 (4th Cir. 2006)).
[245] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(j)(3) Predictable Assessments).

[246] *Franklin v. City of Slidell*, No. CIV.A. 12-1940, at *11, 2013 WL 1288405, (E.D.La. March 27, 2013); *Kravits v. Shinseki*, No. CIV.A. 10-861, at *5, 2012 WL 604169 (W.D.Pa. Feb. 24, 2012) (observing that "[t]he regulations expressly state that "post-traumatic stress disorder substantially limits brain function," but that the plaintiff had identified no actual evidence that he suffered from the condition).
[247] *Haley v. Community Mercy Health Partners,* No. 3:11-CV-232, at *11, 2013 WL 322493 (S.D.Ohio Jan. 28, 2013); Angell v. Fairmount Fire Protection Dist., No. 11-CV-03025-CMA-CBS, at *4, 2012 WL 5389777 (D.Colo. Nov. 5, 2012); *Katz v. Adecco USA, Inc.,* 845 F.Supp.2d 539, 548 (S.D.N.Y.2012); *Norton v. Assisted Living Concepts, Inc.,* 786 F.Supp.2d 1173, 1185 (E.D.Tex. 2011); *Hoffman v. Carefirst of Fort Wayne, Inc.,* 737 F.Supp.2d 976, 985–86 (N.D.Ind. 2010); *Chalfont v. U.S. Electrodes,* No. 10–2929, at *9, 2010 WL 5341846 (E.D.Pa. Dec. 28, 2010).
[248] *Coker v. Enhanced Senior Living, Inc.,* 897 F.Supp.2d 1366, 68-1369,1375-1376 (N.D.Ga. 2012).
[249] *Feldman v. Law Enforcement Associates Corp.*, 779 F.Supp.2d 472, 483-484 (E.D.N.C. 2011); *Carbaugh v. Unisoft Intern., Inc.*, No. H–10–0670, at *8, 2011 WL 5553724 (S.D.Tex. Nov. 15, 2011) (citing with approval *Feldman v. Law Enforcement Associates Corp.*, 779 F.Supp.2d at 483-484).
[250] *Hardin v. Christus Health Southeast Texas St. Elizabeth,* No. 1:10-CV-596, at *6. 2012 WL 760642 (E.D.Tex. Jan. 6, 2012).
[251] *Lapier v. Prince George's County, Md.*, No. 10-CV-2851 AW), at *1, *8, 2012 WL 1552780, (D.Md. April 27, 2012).
[252] *Alexiadis v. New York College of Health Professions,* 891 F.Supp.2d 418, 428, 429-430 (E.D.N.Y. 2012).
[253] *Lema v. Comfort Inn,* No. 1:10-CV-00362-SMS, at *2, *9, 2013 WL 1345510, (E.D.Cal. April 03, 2013).
[254] *Davis v. Vermont, Dept. of Corrections,* 868 F.Supp.2d 313, 325 (D.Vt. 2012).
[255] Kravtsov v. Town of Greenburgh, No. 10-CV-3142 CS, at *1, *10 n.25, 2012 WL 2719663 (S.D.N.Y. July 09, 2012).
[256] *Barlow v. Walgreen Co.,* No. 8:11-CV-71-T-30EAJ, at *4, 2012 WL 868807 (M.D.Fla., March 14, 2012).
[257] *Fierro v. Knight Transp.,* No. EP-12-CV-00218-DCG, at *3, 2012 WL 4321304 (W.D.Tex., Sept. 18, 2012).

[258] *Id.*, citing *Ellison v. Software Spectrum, Inc.,* 85 F.3d 187, 190–91 (5th Cir.1996).
[259] *Jones v. Bracco Ltd. Partnership*, No. CIV. 11-4117-KES, at *8, 2013 WL 696381 (D.S.D. February 26, 2013).
[260] *Id.* at *9.
[261] 527 U.S. 471, 482 (1999).
[262] NCD, *Righting the ADA,* at 44.
[263] 42 U.S.C. § 12102(4)(E)(i).
[264] 29 C.F.R. §1630.2(j)(1)(vi).

[265] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. §1630.2(j)(1)(vi) Mitigating Measures).
[266] *Orne v. Christie*, No. 3:12-CV-00290-JAG, at *2, 2013 WL 85171 (E.D.Va. Jan. 7, 2013).
[267] *Id.*
[268] *Id.* at *3.
[269] *Id.*
[270] *Id.*
[271] *Barrett v. Bio-Medical Applications of Maryland, Inc.,* No. CIV.A. ELH-11-2835, at *8, 2013 WL 1183363 (D.Md. March 19, 2013).
[272] *Id.*
[273] *Id.* at *8.
[274] *Id.* at *9 (emphasis added by the court).
[275] *Id.* at *10.
[276] *Harty v. City of Sanford,* No. 11–cv–1041, 2012 WL 3243282 (M.D.Fla. Aug. 8, 2012).
[277] *Id.* at *4.
[278] *Id.*
[279] *Id.*
[280] *Id.* at *5.
[281] *Id.*
[282] *Id.,* quoting 29 C.F.R. § 1630.2(j)(5)(iv).
[283] *Id.* at n.8.
[284] *Lloyd v. Housing Authority*, 857 F.Supp.2d 1252, 1258-1259, 1260, 1263 (M.D.Ala.2012).
[285] *Id.* at 1263 (statutory citations omitted).
[286] *Id.*
[287] *Id.* at 1263-1264.
[288] *O'Donnell v. Colonial Intermediate Unit 20*, No. CIV.A. 12-6529, at *1, *4, *6, 2013 WL 1234813 (E.D.Pa. March 27, 2013).
[289] *Id.* at *6.
[290] *Id.*
[291] *Id.* at *10.
[292] 42 U.S.C. § 12102(4)(D).
[293] 29 C.F.R. § 1630.2(j)(1)(vii).
[294] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(j)(1)(vii) Impairments That Are Episodic or in Remission), quoting House Majority Leader Steny Hoyer and

Representative Jim Sensenbrenner, *Joint Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195*, 154 Cong. Rec. H6067 (daily ed. June 25, 2008).
[295] *Id.,* quoting H.R. Rep. No. 110-730, pt. 2, at 19-20 (2008) (Judiciary Committee).

[296] *Id.*
[297] *E.g., Haley v. Community Mercy Health Partners,* No. 3:11-CV-232, at *11, 2013 WL 322493 (S.D.Ohio Jan. 28, 2013); Angell v. Fairmount Fire Protection Dist., No. 11-CV-03025-CMA-CBS, at *4, 2012 WL 5389777 (D.Colo. Nov. 5, 2012); *Katz v. Adecco USA, Inc.,* 845 F.Supp.2d 539, 548 (S.D.N.Y.2012); *Norton v. Assisted Living Concepts, Inc.,* 786 F.Supp.2d 1173, 1185 (E.D.Tex. 2011); *Hoffman v. Carefirst of Fort Wayne, Inc.,* 737 F.Supp.2d 976, 985–86 (N.D.Ind. 2010); *Chalfont v. U.S. Electrodes,* No. 10–2929, at *9, 2010 WL 5341846 (E.D.Pa. Dec. 28, 2010).
[298] *Howard v. Pennsylvania Dept. of Public Welfare*, No. CIV.A. 11-1938, at *12, 2013 WL 102662 (E.D.Pa. Jan. 9, 2013).
[299] *Pearce-Mato v. Shinseki*, No. 2:10-CV-1029, at *7, *9, *10-*11, 2012 WL 2116533 (W.D.Pa. June 11, 2012).
[300] *Hardin v. Christus Health Southeast Texas St. Elizabeth,* No. 1:10-CV-596, at *6. 2012 WL 760642 (E.D.Tex. Jan. 6, 2012).
[301] *Molina v. DSI Renal, Inc.,* 840 F.Supp.2d 984, 994-995 (W.D.Tex. 2012).
[302] *Esparza v. Pierre Foods,* Nos. 1:11-CVB874, 1:11-CV875-HJW, at *6, 2013 WL 550671 (S.D.Ohio Feb. 12, 2013).
[303] 29 C.F.R. § 1630.2(j)(1)(ix).
[304] *Id.* (emphasis added).
[305] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting).
[306] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting), quoting House Majority Leader Steny Hoyer and Representative Jim Sensenbrenner, *Joint Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195*, 154 Cong. Rec. H6068 (daily ed. June 25, 2008).
[307] *Newman v. Gagan LLC,* No. 2:12-CV-248-JVB-PRC, at *2, 2013 WL 1332247 (N.D.Ind. March 28, 2013).
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting).
[312] *Green v. DGG Properties Co., Inc.,* No. 3:11-CV-01989 VLB, 2013 WL 395484 (D.Conn. Jan. 31, 2013).
[313] *Id.* at *11.
[314] *Id.* at *1.
[315] *Id.*

[316] *Id.*
[317] *Id.* at *11.

[318] *Id.* at *9.
[319] *Id.* at *10, quoting *Hutchinson v. Ecolab, Inc.,* No.3:09cv1848 (JBA), 2011 WL 4542957, at *8 n.6 (D.Conn. Sept. 28, 2011).
[320] *Id.*
[321] *Id.,* quoting, respectively, *Kennebrew v. N.Y. City Housing Auth.,* No. 01 CIV 1654, , at *18 n. 32, 2002 WL 265120 (S.D.N.Y. Feb. 26, 2002); *Leahy v. Gap. Inc.,* No. 07–CV–2008, at *4, 2008 WL 2946007 (E.D.N.Y. July 29, 2008); *Green v. N.Y. City Health & Hosp. Corp.,* No. 04–CV–5144, at *4, 2008 WL 144828 (S.D.N.Y. Jan. 15, 2008); *Adams v. Citizens Advice Bureau,* 187 F.3d 315, 316–17 (2d Cir.1999); *Williams v. Salvation Army,* 108 F.Supp.2d 303, 312–13 (S.D.N.Y.2000) (same).
[322] *Id.* at *11.
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] ADAAA, § 2(b)(3) at 122 Stat. 3554 (2008) (codified at 42 U.S.C. § 12101 note).
[327] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity), quoting Statement of Managers – S. 3406, 154 Cong. Rec. S8840, S8842 (daily ed. Sept. 16, 2008); H.R. Rep. No. 110-730, pt. 2, at 17 (2008) (Judiciary Committee).
[328] *Walker v. Venetian Casino Resort, LLC,* No. 02:10-CV-00195-LRH, at *1, *14, 2012 WL 4794149, (D.Nev. Oct. 9, 2012).
[329] *Id.* at *14 (citations omitted).
[330] *Id.* at *14-*15, quoting EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. ("Introduction") (citations omitted).
[331] *Id.* at *15, quoting *School Board of Nassau County v. Arline,* 480 U.S. 273, 282 (1980), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.
[332] *Id.* at *15 n.11.
[333] *Id.* at *15.
[334] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity), citing H.R. Rep. No. 110-730, pt. 2, at 17 (2008) (Judiciary Committee).
[335] 42 U.S.C. § 12102(3)(A).
[336] 29 C.F.R. § 1630.2(g) (iii).
[337] *See, e.g., Gil v. Vortex, LLC*, 697 F.Supp.2d 234, 240-241 (D.Mass. 2010) (plaintiff "establish[ed] a plausible allegation that Vortex believed him to be disabled, and terminated him as a result," so plaintiff "met his burden of pleading a claim of 'regarded as' disability"); *Barnes v. Metropolitan Management Group, L.L.C.,* No. 11-CV-3355 AW, at *4, 2012 WL 1552799 (D.Md. Apr. 27, 2012) (plaintiff was fired because she was "a liability to the company" due to her back injury and "[a]ccordingly, Plaintiff has stated a cognizable

perceived disability discrimination claim"); *Shelton v. City of Cincinnati,* No. 1:11-CV-381, 2012 WL 5385601 (S.D.Ohio Nov. 1, 2012) (plaintiff with diabetes and chronic kidney disease who was subjected to adverse employment action of being refused reinstatement to full-duty status had established "genuine issues of material fact as to whether the City regarded plaintiff as disabled under the more lenient ADAAA standard"); *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653, 661 (W.D.Ky. 2012) (plaintiff was terminated after having a stroke/cardiovascular incident; court found that, "pursuant to the broadened standards of the ADAAA, such evidence [was] sufficient to show that Plaintiff was regarded as disabled"); *Wells v. Cincinnati Children's Hosp. Medical Center,* 860 F.Supp.2d 469, 478 (S.D.Ohio 2012) ("sufficient evidence in the record to demonstrate to a reasonable juror that [the defendant] regarded Plaintiff as disabled and took adverse employment action against the Plaintiff on the basis of a perceived disability"); *Davis v. NYC Dept. of Educ.,* No. 10-CV-3812 KAM LB, at *6, *8, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012) (plaintiff whose employer withheld part of her expected bonus after she went on medical leave as a result of injuries suffered in an automobile accident had suffered an "adverse action" and and sufficiently alleged that she was regarded as having a disability) *Cleveland v. Mueller Copper Tube Co., Inc.,* No. 1:10CV307-SA-SAA, at *4, 2012 WL 1192125 (N.D.Miss. April 10, 2012) (plaintiff who had suffered a back injury (from a lift truck accident) who had some lifting limitations was denied a block crane position she desired; court ruled that "assuming Cleveland can otherwise show that Mueller's failure to place her in the block crane position was a 'prohibited action,' there is sufficient evidence in the record from which a reasonable juror could conclude that Cleveland was 'regarded as' having a disability");

[338] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity).

[339] *Jenkins v. Medical Laboratories of Eastern Iowa, Inc.,* 880 F.Supp.2d 946, 958 (N.D. Iowa 2012).

[340] *Id.* at 954.

[341] *Id.* at 959.

[342] *Id.* at 960.

[343] *Butler v. BTC Foods Inc.,* No. CIV.A. 12-492, at *1, 2012 WL 5315034 (E.D.Pa. Oct. 19, 2012).

[344] *Id.* at *4.

[345] *Id.* at *3.

[346] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity).

[347] 42 U.S.C. § 12102(3)(B).

[348] *Davis v. NYC Dept. of Educ.,* No. 10-CV-3812 KAM LB, at *1, 2012 WL 139255 (E.D.N.Y. Jan. 18, 2012).

[349] *Id.* at *5.

[350] *Id.*, quoting 29 C.F.R. § 1630.15(f) (2011).

[351] *Id.* at *5.

[352] *Id.*

[353] *Saley v. Caney Fork, LLC,* 886 F.Supp.2d 837, 850 (M.D.Tenn. 2012).
[354] *Id.* at 850-851, citing 29 C.F.R. § 1630.2(j)(2).
[355] *Id.* at 850.
[356] *Id.* at 851, quoting 29 C.F.R. § 1630.15(f); EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity).
[357] *Id.* at 851, quoting EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (29 C.F.R. § 1630.2(l) Substantially Limited in a Major Life Activity).
[358] *Id.* at 851, quoting 29 C.F.R.. § 1630.15(f).
[359] *Id.* at 850.
[360] *Id.* at 851-852 (citations omitted).
[361] *Id.* at 852.
[362] *Martinez v. City of Weslaco Tex.*, No. 7:12–CV–417, at *1, 2013 WL 2951060 (S.D.Tex. June 14, 2013).
[363] *Id.* at *9.
[364] *Id.*
[365] *Id.*
[366] *Kiniropoulos v. Northampton County Child Welfare Service,* No. CIV.A. 11-6593, at *1, 2013 WL 140109, (E.D.Pa. Jan. 11, 2013).
[367] *Id.* (emphasis added by the court).
[368] *Id.*
[369] *Id.* at *4, *1 n.2.
[370] *Id.* at *5.
[371] *Id.*
[372] *Id.*
[373] *Zurenda v. Cardiology Associates, P.C.,* 3:10–CV–0882, at *4, *5, 2012 WL 1801740 (N.D.N.Y. May 16, 2012).
[374] *Id.* at *5.
[375] *Id.* at *9.
[376] *Tramp v. Associated Underwriters, Inc.*, No. 8:11CV371, at *7, 2013 WL 3071258 (D.Neb. June 17, 2013).
[377] *Id.*
[378] *Id.*
[379] *Id.*
[380] 42 U.S.C. § 12201(h).
[381] *See, e.g., Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653, 662 (W.D.Ky. 2012) (the plaintiff "was not entitled to reasonable accommodation because she only qualified as disabled under the 'regarded as' prong"); *Walker v. Venetian Casino Resort, LLC,* No. 02:10-CV-00195-LRH, at *15, 2012 WL 4794149, (D.Nev. Oct. 9, 2012) ("Under the ADAAA … an employer has no duty to accommodate a regarded-as disability"); Hoback v. City of Chattanooga, No. 1:10–CV–74, at *4, 2012 WL 3834828 (E.D.Tenn. Sept. 4, 2012) (quoted the statutory language); *Ryan v. Columbus Regional Healthcare System, Inc.,* No. 7:10-CV-234-BR, at *5, 2012 WL 1230234 (E.D.N.C. Apr. 12, 2012) ("the ADAAA has now clarified that an individual who is 'regarded as' disabled is not entitled to a

reasonable accommodation"); *Dennis v. Cnty. of Atl. Cnty.,* Civ. A. No. 09–6171(NLH)(AMD) , at *5, 2012 WL 1059420 (D.N.J. Mar. 28, 2012) ("[T]he 2008 amendments to the ADA exempt public employers from the requirement of providing accommodations for 'regarded as' disabilities."); *Mercer v. Drohan Mgmt. Grp., Inc.,* No. 1:10CV1212, at *7, 2011 WL 5975234 (E.D.Va. Nov. 28, 2011) ("[T]he 2008 Amendments to the ADA formally adopt th[e] position" that an employer is not obligated to accommodate an employee who is merely regarded as disabled.); *Fleck v. WILMAC Corp.,* Civ. A. No. 10–05562, at *6 n. 3, 2011 WL 1899198 (E.D.Pa. May 19, 2011) ("Notably, the ADAAA ... dictates that a plaintiff who is only perceived as disabled may not seek reasonable accommodation."); *Blackburn v. Trs. of Guilford Tech. Cmty. Coll.,* 733 F.Supp.2d 659, 665 n. 4 (M.D.N.C. 2010) (noting that the ADAAA, although not retroactively applicable to the case, formally adopted the position that an employer is under no obligation to accommodate an employee who is simply regarded as disabled); *Bateman v. Am. Airlines, Inc.,* 614 F.Supp.2d 660, 672–73 (E.D.Va. 2009) (same).

[382] *See, e.g., Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653, 662 (W.D.Ky. 2012) (plaintiff who was not entitled to reasonable accommodation because she only qualified as disabled under the regarded-as prong, "could not perform the essential functions of a surgical RN, [and therefore] was not 'otherwise qualified" for the position"); *Hoback v. City of Chattanooga*, No. 1:10–CV–74, at *4, 2012 WL 3834828 (E.D.Tenn. Sept. 4, 2012) ("an individual who is only "regarded as" disabled must be able to perform the essential functions of the job without reasonable accommodation"); *Walker v. Venetian Casino Resort, LLC,* No. 02:10-CV-00195-LRH, at *15, 2012 WL 4794149, (D.Nev. Oct. 9, 2012) (because her employer had no duty to accommodate a regarded-as disability, and the plaintiff "has not demonstrated that she was qualified for her job absent accommodation, she has failed to properly allege the elements of an ADA discrimination claim").

[383] 29 C.F.R. § 1630.2(g)(3).

[384] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.2(g) Disability) (quoting Representative Steny Hoyer and Representative Jim Sensenbrenner, *Joint Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195*, 154 Cong. Rec. H6067, H6068 (daily ed. June 25, 2008)).

[385] *See, e.g., Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F.Supp.2d 653, 662 (W.D.Ky. 2012); *Walker v. Venetian Casino Resort, LLC,* No. 02:10-CV-00195-LRH, at *15, 2012 WL 4794149, (D.Nev. Oct. 9, 2012)).

[386] P.L. 110–325, at § 2(b)(4), 122 Stat. 3554 (2008), (codified at 42 U.S.C. § 12101 note).

[387] *Id.*

[388] EEOC, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630, App. (Section 1630.4 Discrimination Prohibited). This statement was quoted by the court in *Angell v. Fairmount Fire Protection Dist.,* No. 11-CV-03025-CMA-CBS, at *4 n.7, 2012 WL 5389777 (D.Colo. Nov. 5, 2012).

[389] *Beatty v. Hudco Industrial Products, Inc.*, 881 F.Supp.2d 1344, 1355 (N.D.Ala. 2012).

[390] *Id.* at 1356.

[391] *Barlucea Matos v. Corporacion del Fondo del Seguro del Estado,*

No. CIV. 10-1868 GAG, at *6, 2013 WL 1010558 (D.Puerto Rico Mar. 14, 2013).
[392] *Torres v. Bremen Castings, Inc.,* No. 3:11-CV-035, at p. *10 n.7, 2012 WL 4498876 (N.D.Ind. Sept. 28, 2012) (statutory citation omitted) (emphasis added).
[393] 42 U.S.C. § 12102(2).
[394] 29 C.F.R. § 1630.2(j)(1)(iv).
[395] *Fleishman v. Continental Cas. Co.,* 698 F.3d 598, 606-607 (7th Cir. 2012) (ADAAA not in effect).
[396] *Carter v. City of Syracuse School Dist., No. 5*,10-CV-690 FJS/TWD, at *5, 2012 WL 930798 (N.D.N.Y. Mar. 19, 2012) (statutory citation omitted) (Section 504 case).
[397] *Dube v. Texas Health and Human Services Com'n,* No. SA-11-CV-354-XR, at *4, 2012 WL 2397566 (W.D.Tex. June 25, 2012).
[398] *Wanamaker v. Westport Bd. of Educ.,* 899 F.Supp.2d 193, 210 (D.Conn. 2012).
[399] *Id.* at 212.
[400] *Mecca v. Florida Health Sciences Center Inc.,* No. 8:12-CV-2561-T-30TBM, at *2, 2013 WL 136212 (M.D.Fla. Jan. 10, 2013).
[401] *Brown v. City of Jacksonville,* 711 F.3d 883, 887 (8th Cir. 2013).
[402] *Id.* at 887-888.
[403] *Id.* at 888 n.5.
[404] *Id.*
[405] *Id.* at 888.
[406] NCD, *Righting the ADA,* at 60-66, 124 (2004), available at http://www.ncd.gov/publications/2004/Dec12004#IIIB.
[407] *Id.* at 118-119.
[408] Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).
[409] 42 U.S.C. § 12102(2)(A); 42 U.S.C. § 12205a.
[410] "Substantially Limited in Working," Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630, App. (Substantially Limited in Working).
[411] *Id.*
[412] NCD, *Righting the ADA,* at 49-51 (2004), available at http://www.ncd.gov/publications/2004/Dec12004#IIIB.
[413] "Substantially Limited in Working," Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. Pt. 1630, App. (Substantially Limited in Working).