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Enfeebling the ADA: The ADA Amendments Act of 2008

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

Introduction

Congress passed the ADA Amendments Act of 2008[2] (ADAAA) to address two issues. First, the ADA's definition of "disability" had proved to be

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1. *ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 18 (2007) [hereinafter *Hearing on H.R. 3195*] (statement of Steny H. Hoyer, House Majority Leader).

2. Pub. L. No. 110-325, 122 Stat. 3553 (amending the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006))).

underinclusive. As the epigraph notes, Congress never intended that people with very serious impairments (e.g., "diabetes, epilepsy, heart conditions, cancer, mental illnesses"[3]) would be denied ADA protection simply because they continued to function much as do people without such impairments.[4] Second, ADA litigation had become preoccupied with whether the plaintiff-employee was disabled as opposed to whether the defendant-employer had engaged in unlawful discrimination.[5]

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

But can the ADAAA restore the "intent"—or, more important, the "protections"—of the ADA simply by tinkering with the ADA's definition of "disability"? This article argues that the ADAAA succeeds in strengthening the ability of ADA plaintiffs to move past disability determinations to the issue of employer discrimination. The victory, however, comes at a steep price—the coherence of "disability" as originally understood under the ADA itself.

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

3. *Hearing on H.R. 3195*, *supra* note 1, at 18.
4. *See* ADA Amendments Act of 2008, sec. 2(b)(2)-(4), 122 Stat. at 3554.
5. *See id.* sec. 2(b)(5), 122 Stat. at 3554.
6. *Id.* at pmbl., 122 Stat. at 3553.
7. *Id.* sec. 2(b)(5), 122 Stat. at 3554.
8. *See* 42 U.S.C. § 12102(2)(A) (2006) (emphasis added).
9. *See* ADA Amendments Act of 2008, sec. 4(a), § 3, 122 Stat. at 3555-56 (amending 42 U.S.C. § 12102).
10. *See id.* sec. 4(a), § 3(2)(B), 122 Stat. at 3555.
11. *See id.* sec. 2(b)(4)-(5), 122 Stat. at 3554.

individual to reduce the practical effects of an impairment—in evaluating substantial limitation.[12]

I argue that the ADAAA's basic approach to substantial limitation is sound, but that its expansion of major life activity and elimination of mitigating measures redress the problem of underinclusiveness at the price of even greater, and largely counterintuitive, overinclusiveness. The result is that the new definition of "disability" is largely divorced from whether impairments experienced by particular individuals are sufficiently limiting to deserve the designation "disability." Furthermore, I contend that this result is out of line with the intent of the original ADA, which the ADAAA purports to "restore."[13]

Part II discusses three likely consequences of the ADAAA on employment law practice. First, under both state and federal law, the ADAAA's primary effect on employment law practice will be to redistribute the leverage between defendant-employers and plaintiff-employees. As discussed below, the win rates in federal district and appellate courts for Title I ADA plaintiffs have always been extremely low.[14] If applied straightforwardly, the ADAAA will dramatically reduce the ability of employers to obtain summary judgment on the issue of existence of disability—previously a major hurdle to plaintiffs in ADA cases.[15] In practice, this means that employers will face greater and more recurrent pressures to settle cases rather than risk large judgments and expenses at trial. Second, because many state disability antidiscrimination laws are modeled after and interpreted in accordance with the ADA, the ADAAA will likely spur expansion of state-law disability discrimination protections. Third, because the ADAAA increases the number of conditions that qualify as disabilities, the employer's duty to provide reasonable workplace accommodations will be triggered more frequently.

Ultimately, the ADAAA's finding that "the question of whether an individual's impairment is a disability under the ADA should not demand

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

13. *See id.* at pmbl., 122 Stat. at 3553; *see also supra* text accompanying note 6.

14. *See* discussion *infra* Part II.A. There is much less data on outcomes in state courts than in federal courts. But the fact that many state disability discrimination laws require interpretations consistent with the ADA supports the likelihood of results similar to federal outcomes. *See* discussion *infra* Part II.B.

15. *See* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 327-28 (2008). Professor Hoffman hypothesizes that judicial discomfort with burdening employers led to "courts' extremely narrow interpretation of the statutory term 'disability'" under the original ADA. *Id.* at 327. This narrow interpretation often led courts to find "that a plaintiff [was] not sufficiently limited to meet the 'substantially limits' requirement or that the constraint in question affect[ed] a narrow area of functionality but not a 'major life' activity." *Id.* "Consequently, plaintiffs encounter[ed] significant difficulty convincing the courts that they [were] entitled to ADA coverage by virtue of having a 'disability'" *Id.* at 328.

extensive analysis"[16] translates into a default rule for courts to follow: when disability determinations are close, courts should ignore doctrine and give plaintiffs a pass (rather than crafting judicial tests, as in the *Sutton* case[17]). This opens the door to a multitude of conditions that may receive a pass, depriving employers of any meaningful chance of obtaining summary judgment on the basis that particular employees are not legally disabled. Furthermore, it means that employees who are in no way disabled, but who have a noted physical or mental impairment and also have experienced some kind of adverse employment action, may be able to force employers to the bargaining table. This will increase the win rate of plaintiffs in ADA Title I cases, but there remains a serious question whether Congress intended the ADA to protect these kinds of individuals in the first place.

I. "Disability" After the ADA Amendments Act

The focus of this article is not the ADA or, for that matter, the ADAAA generally. The focus, rather, is on the doctrinal coherence of the ADAAA's amended definition of "disability" and its impact on ADA litigation.[18] An employee who wants to bring a disability discrimination claim under the ADA must first prove that he or she is an individual with a disability.[19] The ADA, originally and as amended by the ADAAA, establishes a three-prong definition of disability: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[20] The reforms of the ADAAA pertain primarily to the first prong—which I have

16. ADA Amendments Act of 2008, sec. 2(b)(5), 122 Stat. at 3554; *see also supra* text accompanying note 7.

17. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999) (describing the disability determination as one involving an "individualized inquiry" into whether a particular plaintiff's impairment presently causes substantial limitation of a major life activity, taking into account the effect of mitigating measures on the impairment), *superseded by statute*, ADA Amendments Act of 2008, sec. 2(b)(2)-(3), 122 Stat. at 3554.

18. For background and other information on the Americans with Disabilities Act of 1990, see generally RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (2005); EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT (Peter David Blanck ed., 2000); JOHN PARRY, DISABILITY DISCRIMINATION LAW, EVIDENCE AND TESTIMONY (2008); JOHN PARRY, HANDBOOK ON DISABILITY DISCRIMINATION LAW (2003).

19. *See, e.g.*, Sullivan v. River Valley Sch. Dist. 197 F.3d 804, 810 (6th Cir. 1999).

20. *Compare* 42 U.S.C. § 12102(2) (2006), *with* ADA Amendments Act of 2008, sec. 4(a), § 3(1), 122 Stat. at 3555.

termed "actual disability." Therefore, the remainder of this article focuses on actual disability.[21]

The ADA's definition of actual disability pyramids, with the major life activity and substantial limitation requirements acting as "statutory filters distinguishing those suffering from relatively serious impairments from those with 'minor, trivial impairment[s].'"[22] This section treats physical or mental impairment, major life activity, and substantial limitation in turn. The gist of the argument is this: While the ADAAA makes no change to physical or mental impairment, it radically expands the scope of major life activity and dramatically lowers the threshold of substantial limitation. The result is that far more individuals with physical or mental impairments—even ones that would have been considered trivial pre-ADAAA—will be able to prove that they are substantially limited in the ability to perform a major life activity, thereby qualifying as disabled.

A. Physical or Mental Impairment

The ADAAA "does not . . . [define] the terms 'physical impairment' or 'mental impairment.'"[23] Rather, the House "Committee [on Education and Labor] expect[ed] that the current regulatory definition of such terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity

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21. The ADAAA makes no changes to the second prong—"record of" disability—and makes only a straightforward, but substantial, change to the third prong—"regarded as" disability. *Compare* 42 U.S.C. § 12102(2), *with* ADA Amendments Act of 2008, sec. 4, § 3(1), (3), 122 Stat. at 3555. With respect to "regarded as" disability, the ADAAA clarifies that an employee may be regarded as disabled "whether or not the impairment limits or is perceived to limit a major life activity." ADA Amendments Act of 2008, sec. 4(a), § 3(3)(A), 122 Stat. at 3555. Yet the definition of "regarded as" disability is not without limitation, because it does "not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." *Id.* sec. 4(a), § 3(3)(B), 122 Stat. at 3555.

22. Adams v. Rice, 531 F.3d 936, 944 (D.C. Cir. 2008) (alteration in original) (quoting H.R. REP. NO. 101-485, pt. 2, at 52 (1990)). The broader passage cited by the court reads,

> A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. REP. NO. 101-485, pt. 2, at 52.

23. H.R. REP. NO. 110-730, pt. 1, at 9 (2008).

Commission (EEOC) . . . [would] not change."[24] Consequently, this section briefly summarizes the law relating to physical and mental impairment under the ADA.

The EEOC defines "physical or mental impairment" as follows:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[25]

This expansive definition of "physical or mental impairment" appears to encompass nearly any human dysfunction that is not expressly excluded from ADA coverage as a nonimpairment.[26] Among the EEOC's express exclusions from the category of impairment are illegal drug use, homosexuality, and bisexuality.[27]

EEOC regulations also exclude three other types of "disorders": "(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) Compulsive gambling, kleptomania, or pyromania; [and] (3) Psychoactive substance use disorders resulting from current illegal use of drugs."[28] The EEOC points to further exclusions in its regulatory appendix:

> [T]he term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of

24. *Id.*

25. 29 C.F.R. § 1630.2(h) (2008).

26. *See* H.R. REP. NO. 101-485, pt. 2, at 51 ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.").

27. 29 C.F.R. § 1630.3(a), (e).

28. *Id.* § 1630.3(d).

> a physiological disorder[;] . . . characteristic predisposition to illness or disease[;] . . . conditions, such as pregnancy, that are not the result of a physiological disorder[;] . . . common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder[;] [e]nvironmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record . . . [;] [and] [a]dvanced age, in and of itself . . . .[29]

Because the ADA means to capture the widest possible scope of human dysfunction not statutorily excluded,[30] the existence of physical or mental impairment has not been a source of much litigation. Unless an employer has reason to suspect that an employee is faking dysfunction, it is difficult to conceive of any legal advantage gained by contending that an employee with a muscle sprain, a cold, vertigo, a backache, recurring headaches, anxiety, a limp, less than 20/20 vision, claustrophobia, a skin rash, stress, glandular complications, etc., is not, in fact, impaired.[31]

B. The New Major Life Activity of "Normal Functioning"[32]

In order for a physical or mental impairment to qualify as a disability under the ADA, the impairment must affect one or more major life activities.[33] This requirement is one statutory filter that is supposed to distinguish legal

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29. *Id.* § 1630.2(h) app.

30. *See* H.R. REP. NO. 101-485, pt. 2, at 51-52.

31. Following the regulatory framework for "physical or mental impairment" summarized above, the rare findings against the existence of impairment are made on the basis that a plaintiff-employee's alleged dysfunction is actually a *condition* or *characteristic* rather than an impairment. *See, e.g.*, Mehr v. Starwood Hotels & Resorts Worldwide, Inc., 72 F. App'x 276, 286-87 (6th Cir. 2003) (finding that short stature that is not the result of a physiological disorder is not an impairment); Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999) (concluding that an employee described as "paranoid, disgruntled, oppositional, difficult to interact with, unusual, suspicious, threatening, and distrustful" suffers from behavioral problems, not mental impairments (internal quotation marks omitted)); Duda v. Bd. of Educ., 133 F.3d 1054, 1059 (7th Cir. 1998) (noting that "mere temperament and irritability" are not impairments); Lucas v. K.O.A. Residential Cmty., No. 2:06CV992 DAK, 2008 WL 80407, at *3 (D. Utah Jan. 4, 2008) (holding that neither homelessness nor poverty qualifies as a physical or mental impairment); Greenberg v. New York, 919 F. Supp. 637, 643 (E.D.N.Y. 1996) (finding that poor judgment is a personality trait, not an impairment); Gerben v. Holsclaw, 692 F. Supp. 557, 563-64 (E.D. Pa. 1988) (concluding that infancy is not a physical or mental impairment).

32. This section and the next are indebted to Professor Ani B. Satz's article, *A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disability Analysis*, 6 YALE J. HEALTH POL'Y L. & ETHICS 221 (2006).

33. *See* 42 U.S.C. § 12102(2)(A) (2006).

disabilities from "minor, trivial impairment[s]."[34] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the U.S. Supreme Court defined "major life activities" as "activities that are of central importance to daily life."[35]

The EEOC regulations provide a nonexhaustive list of major life activities that includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, [and] reaching."[36] The EEOC's *Compliance Manual* even lists "mental and emotional processes such as thinking, concentrating, and interacting with others . . . [as] major life activities."[37] Courts have liberally added to the list of major life activities, which now includes, among other things, cognitive functions, waste elimination, eating, sleeping, reading and writing, sexual activity, and reproduction.[38]

It remains the case, however, that not every activity qualifies as "major" under the ADA, as construed by the courts.[39] Additionally, despite broad

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34. *See* Adams v. Rice, 531 F.3d 936, 944 (D.C. Cir. 2008) (alteration in original) (quoting H.R. REP. NO. 101-485, pt. 2, at 52).

35. 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(4)-(5), 122 Stat. 3553, 3554.

36. 29 C.F.R. § 1630.2(i) app. (2008).

37. EEOC, COMPLIANCE MANUAL § 902.3(b) (1995), *available at* http://www.eeoc.gov/policy/docs/902cm.pdf. According to David K. Fram, the EEOC has also advocated in amicus briefs to include the following within the definition of "major life activity": "ordinary household activities (such as changing car tires, moving furniture and other household items often associated with maintaining a home and raising children)"; "moving (including bending, twisting, stooping, or squatting)"; maintaining proper nutrition (defined as "one's ability to assimilate food and use it for growth and maintenance"); perceiving depth (as opposed to merely seeing); sleeping; "eliminating waste"; and having the "ability to control basic bodily functions, specifically one's bowels." DAVID K. FRAM, RESOLVING ADA WORKPLACE QUESTIONS: HOW COURTS AND AGENCIES ARE DEALING WITH EMPLOYMENT ISSUES I-6 (22d ed. 2007) (internal quotation marks omitted).

38. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (reproduction); *Adams*, 531 F.3d at 947 (engaging in sexual relations); Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378, 385-86 (4th Cir. 2008) (seeing and writing); Battle v. United Parcel Serv., Inc., 438 F.3d 856, 861-62 (8th Cir. 2006) (thinking and concentrating); Heiko v. Colombo Sav. Bank, 434 F.3d 249, 255 (4th Cir. 2006) (eliminating bodily waste); Head v. Glacier Nw., Inc., 413 F.3d 1053, 1062 (9th Cir. 2005) (reading); Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 384 (3d Cir. 2004) (eliminating waste from the blood); Fraser v. Goodale, 342 F.3d 1032, 1040 (9th Cir. 2003) (eating); Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 569 (3d Cir. 2002) (concentrating and remembering); Brown v. Lester E. Cox Med. Ctrs., 286 F.3d 1040, 1044-45 (8th Cir. 2002) (carrying out cognitive functions).

39. *See, e.g.*, Storey v. City of Chicago, 263 F. App'x 511, 514 (7th Cir. 2008) (cooking); Singh v. George Washington Univ. Sch. of Med. & Health Scis., 508 F.3d 1097, 1104 (D.C. Cir. 2007) (test taking); Walton v. U.S. Marshals Serv., 492 F.3d 998, 1010-11 (9th Cir. 2007) (localizing sound); Gretillat v. Care Initiatives, 481 F.3d 649, 654 (8th Cir. 2007) (crawling,

findings of major life activity by the EEOC and courts, the same activity may qualify as major in some cases but not others. For example, while courts have held that reading is generally a major life activity,[40] in *Szmaj v. American Telephone & Telegraph Co.*, the Seventh Circuit held that "the ability to read all day long is not a major life activity."[41] Judge Posner, writing for the panel, added that the situation might be different if America were "a society of bookworms."[42] Similarly, in *Marinelli v. City of Erie*, the Third Circuit held that cleaning is only "a major life activity to the extent that . . . [it] is necessary for one to live in a healthy or sanitary environment."[43]

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

The addition of major bodily functions to the ADAAA's definition of "major life activity" was in response to cases like *Furnish v. SVI Systems, Inc.*[46] Plaintiff Furnish was director of technical operations for defendant SVI

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kneeling, crouching, squatting); EEOC v. Schneider Nat'l, Inc., 481 F.3d 507, 511 (7th Cir. 2007) (truck driving); Rossbach v. City of Miami, 371 F.3d 1354, 1358 n.6 (11th Cir. 2004) (weight lifting, playing in parks, participating in sports); McGeshick v. Principi, 357 F.3d 1146, 1150-51 (10th Cir. 2004) (working on ladders, in stairwells, and on ledges to clean windows); Boerst v. Gen. Mills Operations, Inc., 25 F. App'x 403, 406 (6th Cir. 2002) (concentrating, maintaining stamina); Moore v. J.B. Hunt Transp., Inc., 221 F.3d 944, 951 (7th Cir. 2000) (bowling, camping, car restoration, lawn mowing); Weber v. Strippit, Inc., 186 F.3d 907, 914 (8th Cir. 1999) (shoveling, gardening, lawn mowing, playing tennis, fishing, hiking); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (shopping, skiing, golfing, painting, plastering); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996) (climbing stairs); Thompson v. Rice, 422 F. Supp. 2d 158, 171 (D.D.C. 2006) (working abroad); Piascyk v. City of New Haven, 64 F. Supp. 2d 19, 26 (D. Conn. 1999) (running, jumping).

40. *See, e.g.*, *Head*, 413 F.3d at 1062.

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

42. *Id.*

43. 216 F.3d 354, 362-63 (3d Cir. 2000).

44. The nonexhaustive list of major life activities now includes the following: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(2)(A), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(2)(A)).

45. *Id.* sec. 4(a), § 3(2)(B), 122 Stat. at 3555 (to be codified at 42 U.S.C. § 12102(2)(B)).

46. 270 F.3d 445 (7th Cir. 2001), *cited in* H.R. REP. NO. 110-730, pt. 2, at 17 (2008).

Systems.[47] Furnish was "responsible for pre-installation technical work and for installing SVI's video systems in hotels," which required regular travel.[48] In August 1995, Furnish was diagnosed with Hepatitis B and septal fibrosis, which affected his liver's ability to eliminate toxins and maintain proper glucose levels.[49] In January 1996, Furnish informed his supervisor that the disease and the prescribed medications would require him to miss work in the coming months.[50] Furnish also told his employer of possible side-effects of the medication, which included sleep loss, mood swings, and flu-like symptoms.[51] In March 1996, Furnish told his supervisor that, due to his condition, he was no longer able to travel long distances for installation jobs.[52] Soon thereafter, Furnish missed an installation job "because he had vomited and had to go home to rest."[53] By June 1996, Furnish was behind on his installation schedule.[54] As a result, Furnish's supervisor relieved him of his former installation duties and limited him to preinstallation work.[55] SVI terminated Furnish less than a month later for "unsatisfactory work performance."[56]

Furnish filed suit under the ADA, but the district court granted summary judgment in favor of SVI because Furnish's "disease did not substantially limit a major life activity."[57] The Seventh Circuit Court of Appeals affirmed.[58] In explaining why liver function was not a major life activity, the court first observed that "'liver function' bears little resemblance to the major life activities enunciated in the ADA regulations,"[59] namely, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[60] The Seventh Circuit then turned to Supreme Court jurisprudence on major life activity, which instructed that the activity must be "integral to one's daily existence."[61] Applying this principle to Furnish's case, the Seventh Circuit distinguished between the *characteristics* of an impairment

47. *Id.* at 446.
48. *Id.* at 446-47.
49. *Id.* at 447.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 448.
58. *Id.* at 451.
59. *Id.* at 449.
60. *Id.* (quoting 29 C.F.R. § 1630.2(i) (2001)).
61. *Id.* (quoting Lawson v. CSX Transp., Inc., 245 F.3d 916, 923 (7th Cir. 2001)).

and *activities* that are impacted because of an impairment.[62] It held that diminished liver function was a characteristic of Hepatitis B–induced liver fibrosis and not an activity in its own right, major or otherwise.[63]

According to the House Committee on Education and Labor (the Committee), the addition of "major bodily functions" to the definition of "major life activities" "was needed to ensure that the impact of an impairment on the operation of major bodily functions is not overlooked or wrongly dismissed as falling outside the definition of 'major life activities' under the ADA,"[64] as the Committee claimed had happened in *Furnish*.[65] The Committee further explained that "[a]n impairment can materially restrict the operation of a major bodily function if it causes the operation to over-produce or under-produce in some harmful fashion."[66]

The Committee described the addition of major bodily functions as a "clarification" rather than an expansion of the scope of major life activities.[67] But it is much more. In fact, the addition radically changes the definition of "disability" under the ADA. Now, in many cases, the symptoms, side effects, or other manifestations of a physical impairment will themselves qualify as major life activities. This, I will show, effectively merges what, before the ADAAA, were separate inquiries into the existence of physical or mental impairment and impact on major life activity.[68] In short, because *part of what it means* to suffer certain physical impairments is to be substantially limited in having normal bodily functions,[69] a person suffering from an impairment such as liver fibrosis (like the plaintiff in *Furnish*) is *necessarily* "disabled" under the ADAAA since that person is substantially limited in the major life activity of having a normally functioning liver.

The ADAAA's rationale for treating individuals like Furnish as substantially limited in a major life activity is not merely an extension of preexisting ADA doctrine. Rather, it represents a whole new theory of disability—deviation from the major life activity of normal functioning. As used here, "normal functioning" is an umbrella term under which any bodily function can be stuffed. Under the umbrella, medical documentation of deviate functioning created by an impairment will, alone, prove sufficient to

62. *Id.* at 450.
63. *See id.*
64. H.R. REP. NO. 110-730, pt. 2, at 16 (2008).
65. *See id.* at 17.
66. *Id.*
67. *See id.* at 16-17.
68. *See* discussion *infra* Part I.C.2.
69. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(2)(B), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102(2)(B)).

establish disability. On its face, linking physical or mental impairment with major bodily function is much easier than linking physical or mental impairment to traditional major life activities. For example, it is likely easier to show that a physical impairment (e.g., asthma) affects the normal operation of one's circulatory or respiratory system than it is to show that the same impairment limits the major life activity of walking. Similarly, it should be easier to prove that an impairment (e.g., chronic acid reflux) affects the normal operation of one's digestive system than it is to show that the impairment limits the major life activity of eating. This is probably what Congress intended with the ADAAA's addition of major bodily functions to the list of major life activities.

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

In linking impairment with major bodily function, the ADAAA confuses two ideas. It confuses the ADA's concern for particular outcomes—"equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities[75]—with a concern that persons with

70. 42 U.S.C. § 12101(a)(8) (2006). The Findings and Purposes section of the ADAAA reiterates these goals. *See* ADA Amendments Act of 2008, sec. 2(a)(2), 122 Stat. at 3553.

71. 42 U.S.C. § 12102(2)(A); *see also supra* text accompanying note 8.

72. *See, e.g.*, Gretillat v. Care Initiatives, 481 F.3d 649, 654 (8th Cir. 2007) (excluding crawling, kneeling, crouching, and squatting from the category of major life activities); Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 767 (10th Cir. 2006) (excluding chewing and swallowing from the category of major life activities); Marinelli v. City of Erie, 216 F.3d 354, 362-63 (3d Cir. 2000) (excluding cleaning and doing housework from the category of major life activities).

73. *See* Kania v. Potter, No. 09-1326, 2009 WL 4918013, at *3 (3d Cir. Dec. 22, 2009) (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002)).

74. 29 C.F.R. § 1630.2(i) app. (2008).

75. *See* 42 U.S.C. § 12101(a)(8); *see also supra* note 70 and accompanying text.

disabilities function normally.[76] Professor Satz observes that in thinking about normal species functions, we may be concerned about one of three different "categories of actions": "standardizing biological states, promoting familiar modes of functioning, [or] striving for particular outcomes."[77]

> Standardizing biological states involves accommodations that allow individuals to function in biologically similar ways to other individuals. In other words, the mode of functioning is emphasized over the result of functioning. . . . Promoting familiar or normal modes of functioning entails accommodations that allow individuals to execute functions in ways that are most familiar, while not necessarily involving biological standardization.[78]

According to Professor Satz, both of these categories of actions "emphasize a manner or mode of functioning . . . rather than functional outcomes."[79] The ADAAA's impairment–major bodily function link exemplifies just this kind of error, because it focuses on standardizing biological states instead of alternative modes of functioning that may result in outcomes consistent with the stated goals of the ADA.

Return to *Furnish*. A person who suffers liver fibrosis, as Furnish did,[80] presumably has a liver that is not functioning normally. Such a person has a condition that affects the major bodily function of toxin elimination.[81] But there is no necessary connection between that condition and those *activities* "of central importance to daily life"[82] or "those basic *activities* that the average person in the general population can perform with little or no difficulty."[83] A full examination of Furnish's life might reveal that he can still walk, talk, see, care for himself, perform manual tasks, go on vacation, play sports, etc. That is, the particular state of Furnish's liver might not at all affect basic, daily activities. Of course, we can imagine a circumstance where Furnish's liver

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76. *See* Satz, *supra* note 32, at 241-43.

77. *See id.* at 241 (internal quotation marks omitted) (citing Ani B. Satz & Anita Silvers, *Disability and Biotechnology*, *in* ENCYCLOPEDIA OF ETHICAL, LEGAL, AND POLICY ISSUES IN BIOTECHNOLOGY 173, 183 (Thomas J. Murray & Maxwell J. Mehlman eds., 2000)).

78. *Id.*

79. *Id.* at 241-42.

80. *See* Furnish v. SVI Sys., Inc., 270 F.3d 445, 447 (7th Cir. 2001); *see also supra* text accompanying note 49.

81. *See Furnish*, 270 F.3d at 447 (noting that liver fibrosis "affects the liver's ability to perform its blood filtering function").

82. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002); *see also supra* text accompanying note 73.

83. 29 C.F.R. § 1630.2(i) app. (2008) (emphasis added); *see also supra* text accompanying note 74.

functioned so poorly that it did, in fact, have such an impact, but this is not a foregone or necessary conclusion. Yet the ADAAA omits this inquiry altogether, and instead accepts abnormal bodily function of any degree, no matter how minor, as categorical proof of effect on major life activity.

If Congress believed that cases like *Furnish* were wrongly decided, there was another, more coherent legislative solution that it could have adopted. The ADAAA's reinstatement of a broad view of disability and its call for the EEOC to craft a more relaxed standard for disability determinations created room for a different outcome in the *Furnish* case.[84] Rather than extending major life activities to cover bodily functions, Congress could have expanded the list of major life activities to expressly include the kinds of daily restrictions that Furnish actually faced (loss of "sleep, nausea, mood swings, . . . irritability[,] . . . [and] flu-like symptoms").[85] This course of action would have lowered the threshold for establishing existence of disability in a manner that would have preserved the traditional link between impairment and major life activity, and so between disability and the goals of the ADA.

Nevertheless, Congress ultimately opted for a different approach in the ADAAA. The Act partially collapses major life activity into physical and mental impairment by including major bodily functions in the definition of "major life activities."[86] Although this unquestionably lowers the threshold for proving existence of disability, it does so only by making the definition of "disability" less coherent.

C. Redefining "Substantial Limitation"

Before passage of the ADAAA, "substantially limits" had the following meaning:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration

84. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b), 122 Stat. 3553, 3554. The "broad view of disability" mentioned here refers to the scope of "disability" as discussed throughout *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The ADAAA explicitly states an intention to reinstate this broad view. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(3), 122 Stat. at 3554.

85. *See Furnish*, 270 F.3d at 447; *see also supra* text accompanying note 51.

86. *See* ADA Amendments Act of 2008, sec. 4(a), § 3(2)(B), 122 Stat. at 3555 (to be codified at 42 U.S.C. § 12102(2)(B)).

> under which the average person in the general population can perform that same major life activity.[87]

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the U.S. Supreme Court interpreted "substantially" to mean "considerable" or "to a large degree" and reasoned that the term needed "to be interpreted strictly to create a demanding standard for qualifying as disabled."[88] The Court went on to hold that "to be substantially limited in [a major life activity], an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[89]

The ADAAA expressly rejects the "severely restricts" standard announced in *Toyota* because that standard requires "a greater degree of limitation than was intended by Congress."[90] In debating Senate Bill 3406, the Senate version of the ADAAA that became law, the Senate deliberated extensively about whether a new term should be used in the ADAAA in place of "substantially limits."[91] The Senate decided against a new term, reasoning that "[t]he resulting need for further judicial scrutiny and construction [would] not help move the focus from the threshold issue of disability to the primary issue of discrimination."[92] Instead, the Senate reaffirmed that the proper question is "whether a person's activities are limited in condition, duration and manner."[93] It was careful to note, however, that courts must apply a lower standard than *Toyota* in order to "make the disability determination an appropriate threshold

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87. 29 C.F.R. § 1630.2(j)(1).

88. 534 U.S. 184, 196-97 (2002).

89. *Id.* at 198.

90. ADA Amendments Act of 2008, sec. 2(a)(7), (b)(4), 122 Stat. at 3553-54.

91. *See* 154 CONG. REC. S8840, S8841 (daily ed. Sept. 16, 2008) (Statement of Managers). House Bill 3195, the House version of the ADAAA, would have clarified the meaning of "substantially limits" for the EEOC and courts by adding the phrase "*materially restricts*":

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

H.R. REP. NO. 110-730, pt. 1, at 9-10 (2008).

92. 154 CONG. REC. at S8841.

93. *Id.* at S8842.

issue but not an onerous burden for those seeking accommodations or modifications."[94]

In addition to discarding the Supreme Court's restrictive interpretation of "substantially limits," the ADAAA makes another important change regarding substantial limitation. It prohibits considering "the ameliorative effects of mitigating measures" when determining "whether an [individual's] impairment substantially limits a major life activity."[95] In theory, this provision removes the "penalty" of being less eligible for protection under the ADA by virtue of receiving accommodations or adopting adaptive strategies that lessen the harmful effects of a disability.[96]

According to the Senate, "[S]ome individuals previously found not disabled will now be able to claim the ADA's protection against discrimination" as a result of the above two changes.[97] But who are these newly protected individuals, and *should* they be protected? Recall that the ADAAA was passed to expand the ADA's coverage to more people with serious impairments and to focus attention on the issue of employer compliance.[98] The changes to the meaning of "substantial limitation" are the central tools of this strategy. In the next two subsections, however, I argue that the ADAAA's alterations to substantial limitation get the issue half right. On the one hand, the ADAAA's less restrictive understanding of "substantial limitation" is a sound strategy for correcting the problem of underinclusiveness. On the other hand, the near-wholesale rejection of mitigating measures undermines the logical consistency and common sense of the ADA, and it opens the door to protection of many people who should not qualify as disabled.

1. The Proper Measure of Substantial Limitation

Courts have taken at least two approaches to measuring substantial limitation. First, some courts have measured substantial limitation in terms of the severity of an individual's impairment. A good example of this approach

94. *Id.*

95. ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556 (to be codified at 42 U.S.C. § 12102(4)(E)(i)). In *Sutton v. United Air Lines, Inc.*, the Supreme Court ruled that the effect of mitigating measures must be taken into account when determining whether a person is disabled. *See* 527 U.S. 471, 481-82 (1999), *superseded by statute*, ADA Amendments Act of 2008, sec. 2(b)(2)-(3), 122 Stat. at 3554.

96. 154 CONG. REC. at S8842 ("[A]n individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their [sic] own adaptive strategies or received [informal or undocumented] accommodations . . . that have the effect of lessening the deleterious impacts of their [sic] disability.")

97. *Id.*

98. *See supra* text accompanying notes 2-7.

may be found in *Littleton v. Wal-Mart Stores, Inc.*[99] The plaintiff in *Littleton* was a twenty-nine-year-old man who suffered mental retardation.[100] Although Littleton graduated from high school, because of his disability he lived with his mother and received social security benefits.[101] Littleton applied for a job as a cart pusher with Wal-Mart through an Alabama state employment agency.[102] According to Littleton, he requested to bring the state employment coordinator to his interview, but Wal-Mart ultimately denied this request.[103] Littleton's interview went poorly, and Wal-Mart did not offer him a position.[104]

Littleton sued Wal-Mart under the ADA, claiming to be "substantially limited in the major life activities of learning, thinking, [and] communicating," among others.[105] The district court granted summary judgment to Wal-Mart, finding that Littleton was not substantially limited in any major life activities.[106] The Eleventh Circuit affirmed after noting that Littleton could read, drive a car, and communicate effectively with words.[107] The circuit court indicated that the analysis of substantial limitation should focus on the severity of the plaintiff's impairments—in this case, how severe Littleton's impairments were in relation to major life activities that most people perform.[108] Since Littleton could (to a significant degree) do many of the major life activities that nondisabled people can, the court found that, for purposes of summary judgment, he had failed to establish that he was substantially limited in any major life activities.[109]

Other courts have measured substantial limitation, not in terms of severity of impairment, but rather in terms of level of restriction. *Price v. National Board of Medical Examiners* exemplifies this approach.[110] Price, Singleton, and Morris were medical students with diagnosed learning disorders.[111] Although they requested special testing accommodations, their medical school denied the requests after determining that none of the plaintiffs was substantially limited in the major life activity of learning as a result of his

99. *See* 231 F. App'x 874 (11th Cir. 2007).
100. *Id.* at 875.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 876.
106. *Id.* at 876-77.
107. *Id.* at 877-78.
108. *See id.* at 877.
109. *See id.* at 877-78.
110. *See* 966 F. Supp. 419 (S.D. W. Va. 1997).
111. *Id.* at 422.

impairment.[112] Mr. Price finished high school with a 3.4 grade point average, and finished college with a 2.9 grade point average.[113] There was little evidence that Price had ever been substantially limited in "home, school, or work functioning," although he had received testing accommodations for the Medical College Admission Test.[114]

Mr. Singleton finished high school with a weighted grade point average of 4.2 and won a state debate championship.[115] He attended the U.S. Naval Academy, later graduated with a physics degree from Vanderbilt, and gained admission to medical school.[116] Singleton accomplished all of this "without any accommodation for his alleged disability."[117]

Mr. Morris was an honor student in high school and earned average grades as a student at Virginia Military Institute, where he received his undergraduate degree.[118] Morris's medical school prerequisites, which he completed at another institution, reflected a grade point average of 3.5.[119] Morris accomplished all of this—and eventually gained admission to medical school—without any accommodation for his disability.[120]

The district court held that the plaintiffs were not substantially limited in the major life activity of learning.[121] In explaining its holding, the court gave the following hypothetical:

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

112. *Id.* at 422, 424.
113. *Id.* at 423.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 424.
119. *Id.*
120. *Id.*
121. *Id.* at 427-28.

> ability to learn as compared with most people. Therefore, Student B is not a person with a disability for purposes of the ADA.[122]

According to the *Price* court, then, the determination of substantial limitation turns on whether an impairment restricts a person's ability to perform at the level of an average person, as opposed to the severity of the impairment in and of itself.[123]

One virtue of the ADAAA is that it resolves that the proper measure of substantial limitation is level of restriction (*Price*), not severity of impairment (*Littleton*).[124] The ADAAA's formal adoption of level of restriction as the proper measure of substantial limitation comports with much prior ADA policy. For instance, the Senate maintains that after the ADAAA it will remain true that "[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."[125] Similarly, the EEOC has long taken the position that

> an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity

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122. *Id.* at 427.

123. *See id.* at 426-28.

124. The Report on House Bill 3195 prepared by the House Committee on Education and Labor explains why:

> The level of the restriction created by the impairment must be the determining factor—not the severity of the impairment itself. For example, an individual with mild mental retardation (intellectual disability) would be considered materially restricted in the major life activities of learning and thinking. . . . When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. . . . The Committee believes that the comparison of individuals with specific learning disabilities to "most people" is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically–based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.

H.R. REP. NO. 110-730, pt. 1, at 10-11 (2008).

125. 154 CONG. REC. S8840, S8842 (daily ed. Sept. 16, 2008) (Statement of Managers) (quoting S. REP. NO. 101-116, at 23 (1989)); *see also supra* note 22.

> of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.[126]

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

2. The Rejection of Mitigating Measures

The same cannot be said of the ADAAA's near-wholesale rejection of considering mitigating measures.[127] The poverty of this amendment is made plain when it is contrasted with the lone exception to the rule: "The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses *shall be considered* in determining whether an impairment substantially limits a major life activity."[128] Congress's rationale for this lone exception is that "the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA."[129]

Can it be that poor eyesight is the only impairment so remediable as to justify disqualification as a disability? The same seems true of other impairments that, at least in their mild forms, can be managed through widely accessible, effective mitigating measures. Hearing impairments treatable with hearing aids represent the most sharp and intuitive analogue. But other conditions treatable with medication or assistive technology—e.g., asthma, diabetes, hypertension—could also qualify for exception under Congress's rationale.

One possible explanation for why Congress singled out vision impairments is that these impairments have a unique and well-developed factual and legal history under the ADA. This is because of longstanding vision requirements for driving and flying positions with federal and state departments of transportation and private employers.[130] The ADAAA's permission to

126. 29 C.F.R. § 1630.1(j) app. (2008).

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

128. *See id.* sec. 4(a), § 3(4)(E)(ii), 122 Stat. at 3556 (emphasis added) (to be codified at 42 U.S.C. § 12102(4)(E)(ii)).

129. 154 CONG. REC. at S8842.

130. The leading cases on the permissibility of vision requirements for certain occupations

consider mitigating measures with respect to vision impairments probably has more to do with this history than with the fact that vision is an especially remediable type of impairment.

But however limiting certain impairments may be in their uncorrected states, the impairments mentioned above simply are not disabilities in a practical sense when effective and readily available treatments exist. We do not prohibit individuals from obtaining driver's licenses simply because their uncorrected vision would leave them unfit to be on the roads. They are allowed to drive upon showing that corrective glasses or lenses give them safe road vision. They are allowed behind the wheel because, in fact, they *are able* to drive safely.

If the consideration of mitigating measures makes sense with regard to vision impairments, it must also make sense with at least some other impairments. In fact, it should make sense with any condition whose effects are neutralized or well controlled with medication or other medical support (that does not itself create additional hindrances). Diabetes, arthritis, HIV, asthma, and epilepsy, to name a few, should all cease to be actual disabilities when so managed.

Furthermore, ignoring evidence of mitigation in assessing level of restriction except in the context of vision impairments comes at great cost. First, such ignorance creates an artificially high level of restriction that bears no true relationship to what an impaired individual is actually able to do in the way of major life activities. Second, and more important, the policy serves to exclude essential evidence of functionality. In some cases, the exclusion will render the element of substantial limitation altogether meaningless. If, in evaluating an asthmatic or a hearing-impaired person, the law must ignore the fact that these conditions may be normalized by over-the-counter inhalers and standard hearing aids, respectively, then the inquiry into substantial limitation is hollow. In such cases, the "requirement" of substantial limitation is straw; it is reached by counterfactual inference.

* * *

A caveat: This article contends that the ADAAA's rejection of mitigating measures disconnects substantial limitation from an individual's true functionality and, therefore, one's actual (dis)ability. Even before the

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are—or were—*Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, sec. 2(b)(2)-(3), 122 Stat. at 3554. For more recent examples, see Buboltz v. Residential Advantages, Inc., 523 F.3d 864 (8th Cir. 2008); Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006); EEOC v. United Parcel Serv., Inc., 424 F.3d 1060 (9th Cir. 2005); Shannon v. N.Y. City Transit Auth., 332 F.3d 95 (2d Cir. 2003).

ADAAA's passage, however, some scholars disputed whether our disability law should impose a legal duty to take reasonable care to prevent treatable conditions from becoming disabilities.[131] Whether individuals should carry a duty to mitigate impairment to prevent disability is related to, but distinct from, the broader issue of voluntariness as treated in section 902.2(e) of the EEOC *Compliance Manual*:

> *Voluntariness*—Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops lung cancer as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment. The cause of a condition has no effect on whether that condition is an impairment. *See* House Judiciary Report at 29 (noting that "[t]he cause of a disability is always irrelevant to the determination of disability"); *see also Cook v. Rhode Island Dep't of Mental Health, Retardation and Hosp.*, 10 F.3d 17, 63 EPD ¶ 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). Further, the voluntary use of a prosthetic device or other mitigating measure to correct or to lessen the effects of a condition also has no bearing on whether that condition is an impairment.[132]

The foregoing rejects denying the law's protection to individuals whose poor choices are causally related to their disabilities. If the opposite were the case, voluntariness would function as an affirmative defense to evidence that would otherwise establish physical or mental impairment. Voluntariness in this sense is, and should be, irrelevant to the determination of disability.

This does not, however, preclude in our disability law what might be termed "a duty to reasonably mitigate impairment." Pre-ADAAA scholarship relating to a duty to mitigate severe impairment developed in response to *Sutton v.*

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131. *See, e.g.*, Melissa Cole, *The Mitigation Expectation and the* Sutton *Court's Closeting of Disabilities*, 43 HOW. L.J. 499 (2000) (characterizing *Sutton* as creating a repressive "mitigation expectation" that individuals with disabilities that can be mitigated "closet" them); Lawrence D. Rosenthal, *Requiring Individuals to Use Mitigating Measures in Reasonable Accommodation Cases After the* Sutton *Trilogy: Putting the Brakes on a Potential Runaway Train*, 54 S.C. L. REV. 421 (2002) (arguing for a balancing approach to consideration of mitigating measures in the context of reasonable accommodation, but not in disability determinations); Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981 (2002) (arguing that neither the ADA nor congressional intent supports such a requirement). *But see* Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217 (2004) (advocating the minority position in favor of duties of reasonable mitigation).

132. EEOC, *supra* note 37, § 902.2(e).

United Air Lines, Inc.[133] *Sutton* instructed courts to consider mitigating measures in making disability determinations but did not address what types of considerations were legally required and/or permissible.[134] For example, consider four closely related causal issues that a court might consider in making a disability determination:

(1) Whether reasonable mitigating measures *actually taken* have driven an impairment below the threshold of substantial limitation or impact on major life activity;

(2) Whether reasonable mitigating measures, *if they had been taken or taken sooner*, would have driven an impairment below the threshold of substantial limitation or impact on major life activity;

(3) Whether *the failure to take* reasonable mitigating measures has resulted in an impairment above the threshold of substantial limitation or impact on major life activity; and

(4) Whether reasonable mitigating measures, *if yet taken*, would drive an impairment below the threshold of substantial limitation or impact on major life activity.

Although the *Sutton* court did not address the larger question of whether our disability law should impose a duty to reasonably mitigate impairment,[135] I believe that a strong presumption exists in favor of just such a duty, and it is worthwhile to discuss the basis for that presumption. The explanation begins with the observation that bodies of law whose goal it is to minimize harm routinely place minor duties of harm prevention on plaintiffs as well as defendants. In contracts, for example, the doctrine of avoidable consequences provides that "damages are not recoverable for [economic] loss that the injured party [reasonably] could have avoided without undue risk, burden or humiliation."[136] Comparative tort regimes have similar requirements for mitigation of damages through apportionment rules and doctrines such as "last clear chance" and fifty- and fifty-one-percent bars to recovery, which encourage plaintiffs to minimize harm where it is reasonable to do so.[137] Likewise, criminal law considers both mitigating and aggravating

133. 527 U.S. 471. Of the scholars writing on this issue, most appear to have viewed the propriety of any duty of mitigation at the disability determination stage with great skepticism. *See* sources cited *supra* note 131.

134. *See Sutton*, 527 U.S. at 482-83.

135. *See* 527 U.S. 471.

136. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981).

137. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 7 cmt. a (2000) (discussing modified comparative fault regimes, which preclude recovery if the plaintiff is fifty- or fifty-one-percent responsible); RESTATEMENT (SECOND) OF TORTS §§ 479-80 (1965) (setting forth two variations of the "last clear chance" rule).

circumstances as relevant to sentencing and punishment in murder cases.[138] To be sure, the role of mitigation differs in contracts, torts, and criminal law. That is due, at least in part, to the unique types of harm those bodies of law are designed to prevent.

Antidiscrimination law, including disability law, also exists to prevent a particular species of harm—discrimination. Any role for mitigation in this arena must be refitted to the particular aims of disability law, and mitigation must function differently than it often has in other areas of law. In contract, tort, and criminal law, the mitigation duty modifies outcomes (damage awards and punishments). By contrast, a mitigation duty in disability law would modify inputs (those elements required to qualify as disabled for purposes of stating a claim). This is a very different application of the duty to mitigate. But there is nothing about that fact, standing alone, that requires rejection of the general principle that the plaintiff's duty to minimize harm is an integral feature of antiharm law. Indeed, the introduction of a duty to reasonably mitigate impairment into disability law seems a logical extension of disability law, with similar precedents in other areas of antiharm law. Thus, without particular reasons to question a duty to reasonably mitigate impairment, we should presume that such a duty could find a comfortable home in disability law.

Admittedly, the role that mitigation might play in antidiscrimination law is circumscribed by the immutability of the characteristics (e.g., race, gender, sexual orientation) on which some class protections are based.[139] This means

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138. *See, e.g.*, MODEL PENAL CODE § 210.6(3)-(4) (2001).

139. For example, Title VII of the Civil Rights Act makes it unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2006). Also, an increasing number of states include sexual orientation as a protected class. For example, Oregon recently amended its employment discrimination statute to add sexual orientation to its list of protected classes:

> For an employer, because of an individual's race, color, religion, sex, *sexual orientation*, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, *sexual orientation*, national origin, marital status or age of any other person with whom the individual associates, . . . to refuse to hire or employ the individual or to bar or discharge the individual from employment.

Act of May 9, 2007, ch. 100, § 4, 2007 Or. Laws Spec. Sess. 431, 432 (emphasis added)

that in many cases, with regard to establishing protected status, the doctrine of mitigation simply would have no work to do. But it would have a greater role in disability law because many physical and mental impairments are mutable—they are affected by the choices we make.[140]

One way of decreasing the incidence of disability discrimination is to decrease the overall occurrence of conditions that rise to the level of legal disability. The asthmatic whose condition is controlled by over-the-counter inhalers and the vision-restricted person whose vision is restored to 20/20 with contact lenses are uniquely positioned to take advantage of these opportunities for mitigation. Determining when such legal opportunities exist—that is, *when a duty to mitigate is truly reasonable as opposed to oppressive or contrary to the law's purpose*—is hard. But it is a question all antiharm laws must answer, and the difficulty of arriving at an answer is not a reason for skirting the inquiry.

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II. Litigation After the ADA Amendments Act

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

A. Changes to Summary Judgment

The institutional limitations of the ADA are well documented. To start, the American Bar Association examined all Title I cases decided between 1992 and 1997 and found that, "[o]f the 760 decisions in which one party or the other prevailed, employers prevailed in 92.11 percent of those cases, meaning employees prevailed only 7.89 percent of the time."[141] Additionally, Professor Ruth Colker conducted two studies of ADA appellate cases between 1992 and

(amending OR. REV. STAT. § 659A.030(1)(a) (2007)).

140. *See, e.g.*, Hoffman, *supra* note 15, at 327 ("[T]he ADA acknowledges that individuals' physical and mental disabilities might pose limitations relevant to job performance." (citing 42 U.S.C. § 12112 (2000))).

141. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability L. Rep. (ABA) 403, 403-04 (1998).

1998,[142] concluding that defendants prevailed 94% of the time in district courts and 84% of the time on appeal from district court level losses.[143]

More recently, Professors Michael Fox and Robert Mead studied appellate outcomes in ADA Title I cases.[144] They divided disabilities into four categories: acute physical conditions, chronic diseases, cognitive behavioral conditions, and injuries.[145] They further divided their results into cases decided before and after the *Sutton* decision.[146] Because *Sutton* and its progeny "narrowed the definition of disability under the ADA," some scholars predicted that those cases would further decrease ADA plaintiffs' chances of success.[147] To the contrary, Fox and Mead concluded that post-*Sutton* success rates for Title I plaintiffs in the courts of appeals increased in all four disability categories, and by 32% overall.[148] These gains remained too low, however, to signal that the balance had tipped in favor of plaintiffs: "The average percentage of plaintiff wins in the years 2000–2002 for all conditions [remained a mere] 33%."[149]

Furthermore, after conducting an analysis in 2008, Professor Sharona Hoffman concluded that "defendants have consistently prevailed in well over 90% of cases since the ADA's inception."[150] Finally, in its annual survey of employment law cases brought under the ADA, the American Bar Association reported that of 507 cases brought in 2008, "415 resulted in employer wins; 9 in employee wins; and 83 in no resolution of the merits. Of the 424 decisions that resolved the claim (and have not yet changed on appeal), *97.8 percent resulted in employer wins and 2.2 percent in employee wins*."[151]

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142. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) [hereinafter Colker, *Windfall for Defendants*]; Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).

143. Colker, *Windfall for Defendants*, *supra* note 142, at 107 tbl. 1.

144. Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal*, 13 KAN. J.L. & PUB. POL'Y 485 (2004).

145. *See id.* at 497-506 & tbl. 1.

146. *See id.* at 506 (discussing the impact of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(2)-(3), 122 Stat. 3553, 3554, on subsequent appellate court decisions).

147. *See id.* at 486-87 (noting Professor Colker's prediction "that the Supreme Court's 1999 decision[] in *Sutton* . . . [was] likely to diminish successful employment discrimination lawsuits for certain types of disabilities").

148. *Id.* at 506.

149. *Id.* at 507 & tbl. 2.

150. Hoffman, *supra* note 15, at 306.

151. Amy L. Allbright, *2008 Employment Decisions Under the ADA Title I–Survey Update*, 33 Mental & Physical Disability L. Rep. (ABA) 363, 364 (2009) (emphasis added).

According to Professor Colker, two factors explain such favorable outcomes for employers. First is the way courts have used summary judgment in ADA cases.[152] Second, and related, is the refusal by courts in ADA cases to defer to EEOC interpretations of "disability," among other things.[153] Professor Colker argues that courts routinely refuse to send the question of whether an individual is disabled to the jury, treating that issue as a question of law rather than a question of fact.[154] She further contends that courts often incorrectly allocate the burden of proof at the summary judgment stage, resulting in an inordinately high threshold for a plaintiff to meet in order to establish genuine issues of material fact.[155]

There is other evidence that the low plaintiff win rate in ADA cases is due, in important part, to the manner in which courts have interpreted the ADA's definition of "disability." Professor Hoffman has argued that many people who have filed ADA claims have not had "what are traditionally thought of as severe disabilities"; consequently, a "significant portion" of victorious individuals might not have been "the most needy or deserving plaintiffs."[156] She has also observed that

> [c]ourts often find that a plaintiff is not sufficiently limited to meet the "substantially limits" requirement or that the constraint in question affects a narrow area of functionality but not a "major life" activity. Thus, for example, courts have repeatedly ruled that individuals with mental retardation do not have a disability because they are not substantially limited with respect to any major life activity. Consequently, plaintiffs encounter significant difficulty convincing the courts that they are entitled to ADA coverage by virtue of having a "disability." A plaintiff who does not meet the threshold requirement of being an individual with a disability under the ADA will be given no further consideration by the court, and the questions of whether she should be granted a reasonable accommodation or is entitled to damages will never be reached.[157]

The primary effect of the ADAAA will be to remove existence of disability as a robust summary judgment issue for employers. Courts' prior refusals to defer to EEOC interpretations of "disability" were based on the ADA's failure

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152. *See* Colker, *Windfall for Defendants*, *supra* note 142, at 101-02.

153. *See id.* at 102-03.

154. *See id.* at 101.

155. *Id.* at 102.

156. *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1250 (2003).

157. Hoffman, *supra* note 15, at 327-28 (footnotes omitted).

to expressly grant the Agency the authority to define "disability."[158] The ADAAA, however, expressly authorizes the EEOC to define "disability" and orders the Agency to develop a less demanding standard of proof for establishing the existence of a disability.[159]

Consequently, the focus of summary judgment will shift from disability determinations to employer compliance—precisely what the ADAAA was intended to accomplish.[160] The new question will be whether an employee has presented a genuine issue of material fact regarding the employer's basis for an adverse employment decision. Therefore, employers seeking summary judgment should be prepared with substantial documentation explaining adverse employment decisions and evidence of compliance with ADA norms, including proof of staff training and enforcement, just as they would in any Title VII case.

B. State Antidiscrimination Laws

Many states' disability discrimination laws are modeled after the ADA. Several states even *require* that their disability laws be construed in a manner consistent with the ADA. Oregon, for example, adopted the ADA's general framework with regard to reasonable accommodation, undue hardship, qualification standards, the definition of "employment discrimination," illegal drug use, and medical examinations.[161] Oregon also mandates that its disability discrimination laws "be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended."[162] Moreover, Oregon's definition of "disability" is the same as the ADAAA's definition.[163]

Similarly, Utah law defines "disability" as "a physical or mental disability *as defined and covered by the Americans with Disabilities Act of 1990*."[164]

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158. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (finding that "[n]o agency . . . has been given authority to issue regulations . . . interpret[ing] the term 'disability'" in the ADA), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(b)(2)-(3), 122 Stat. 3553, 3554.

159. *See* ADA Amendments Act of 2008, sec. 6(a)(2), § 506, 122 Stat. at 3558 (to be codified at 42 U.S.C. § 12205a) ("The authority to issue regulations granted to the Equal Employment Opportunity Commission . . . includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.").

160. *Id.* sec. 2(b)(5), 122 Stat. at 3554; *see also supra* text accompanying note 7.

161. *See* OR. REV. STAT. §§ 659A.103-.145 (2009).

162. *Id.* § 659A.139.

163. *See id.* § 659A.104.

164. UTAH CODE ANN. § 34A-5-102(5) (West 2004 & Supp. 2009) (emphasis added).

Many other states, although not adopting the ADA writ large, have adopted the ADA's definition of "disability" *in toto*[165] and require state-law interpretations consistent with parallel provisions of the ADA[166] or require that state-law protections be construed more broadly than the protections afforded under the ADA.[167] States with such mandates appear poised to revamp their laws to conform with the ADAAA. This would mean an increase in disability discrimination cases under state, as well as federal, law.

C. Reasonable Accommodation

Under the ADA, employers have a duty to reasonably accommodate the known disabilities of employees.[168] That duty requires employers to make adjustments to the workplace that enable qualified individuals with disabilities to enjoy the same employment opportunities as individuals without disabilities, provided that such adjustments do not cause an undue hardship to the

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165. *See, e.g.*, ALASKA STAT. § 18.80.300(14) (2008); ARIZ. REV. STAT. ANN. § 41-1461(2) (2004); COLO. REV. STAT. § 24-34-301(2.5) (2009); DEL. CODE ANN. tit. 19, § 722(4) (2005); D.C. CODE ANN. § 2-1401.02(5A) (LexisNexis 2001 & Supp. 2010); HAW. REV. STAT. § 378-1 (2008 & Supp. 2009); IND. CODE. ANN. § 22-9-5-6(a) (LexisNexis 1997 & Supp. 2008); KAN. STAT. ANN. § 44-1002(j) (2000); KY. REV. STAT. ANN. § 344.010(4) (West 2006); LA. REV. STAT. ANN. § 23:322(3) (2010); MASS. ANN. LAWS ch. 151B, § 1(17) (LexisNexis 2008); MO. ANN. STAT. § 213.010(4) (West 2004); MONT. CODE ANN. § 49-2-101(19) (2009); NEB. REV. STAT. § 48-1102(9) (2004); NEV. REV. STAT. ANN. § 613.310(1) (West 2000 & Supp. 2009); N.H. REV. STAT. ANN. § 354-A:2(IV) (LexisNexis 2008); N.M. STAT. ANN. § 28-1-2(M) (West 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 168A-3(7a) (West 2007); N.D. CENT. CODE § 14-02.4-02(5) (2009); OHIO REV. CODE ANN. § 4112.01(A)(13) (LexisNexis 2007 & Supp. 2009); 25 OKLA. STAT. § 1301(4) (2001); 43 PA. CONS. STAT. ANN. § 954(p.1) (West 2009); S.C. CODE ANN. § 1-13-30(N) (2005); S.D. CODIFIED LAWS § 20-13-1(4) (2004); TENN. CODE ANN. § 4-21-102(3)(A) (Supp. 2009); TEX. LAB. CODE ANN. § 21.002(6) (Vernon 2006 & Supp. 2009); VT. STAT. ANN. tit. 21, § 495d(5) (2003); W. VA. CODE ANN. § 5-11-3(m) (LexisNexis 2006); 025-140-005 WYO. CODE R. § 2(a) (Weil 2002); *see also* R.I. GEN. LAWS § 28-5-6(4) (2006) (excluding consideration of mitigating measures, consistent with the ADAAA).

166. *See, e.g.*, 3 COLO. CODE REGS. § 708-1, Rule 60.1(B)-(C) (2007) ("Whereas the State law . . . concerning disability is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act of 1990 and the Fair Housing Act concerning disability. . . . Whenever possible, the interpretation of state law . . . concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act and the Fair Housing Act and in the Federal case law interpreting the Americans with Disabilities Act and the Fair Housing Act, and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.").

167. *See, e.g.*, CAL. GOV'T CODE § 12926.1(a)-(d) (West 2005) (declaring that the intent of the California Legislature in enacting its disability laws was to afford disability protections broader than those in the ADA); ME. REV. STAT. ANN. tit. 5, § 4554(4) (Supp. 2009) (stating that Maine's definition of "physical or mental disability" "is intended to be interpreted broadly to create greater coverage than under the federal Americans with Disabilities Act of 1990").

168. 42 U.S.C. § 12112(b)(5)(A) (2006).

employer.[169] The ADAAA does not change the duty of reasonable accommodation.[170] Similarly, the ADAAA does not change the fact that many accommodations are so obvious, simple, and otherwise unproblematic that employers may wish to grant them to employees regardless of whether the employees are legally entitled to them under the ADA.[171]

Because the ADAAA increases the number and range of physical and mental impairments that qualify as disabilities, however,[172] there will be a corresponding increase in the number of conditions entitled to workplace accommodation. This will change the way employers behave—or should behave—in at least three important ways when employees without obvious disabilities request a reasonable accommodation. The ADAAA will make the greatest difference in those cases where an employer chooses to resist a requested accommodation and a subsequent adverse employment action, such as demotion or termination, results.

First, the ADAAA's expanded definition of "disability" includes conditions such as asthma and diabetes[173] that are counterintuitive from a human resources perspective because they are so easily managed for purposes of full functionality in the workplace. Thus, human resources personnel must train themselves on the fact that a much broader range of employee impairments now triggers the duty of reasonable accommodation and potential ADA liability. In the absence of clear ADAAA guidance, human resources personnel may feel compelled to grant seemingly unreasonable accommodations for dubious disabilities rather than risk protracted and unpredictable litigation. Therefore, early on it will be crucial for employers to consult employment law counsel regarding whether particular conditions are considered disabilities under the new law.

Second, medical verification of disability is likely to play an enhanced role in reasonable accommodation, especially with respect to major bodily functions. For example, without detailed medical verification, the employer in *Furnish* could have known neither the extent of limitation to the major life activity of liver function nor how that affected Furnish's ability to appear and

169. *See* 29 C.F.R § 1630.9(a) & app. (2008).

170. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 5(a), § 102, 122 Stat. 3553, 3557.

171. According to Professor Sharona Hoffman, "The studies that have been conducted concerning costs of accommodations reveal that most accommodations involve very modest direct expenditures or none at all." Hoffman, *supra* note 15, at 335. In fact, various studies place the average cost of making an accommodation for an employee at $500 or less. *Id*. at 335-36.

172. *See* discussion *supra* Part I.B.

173. *See* discussion *supra* Part I.B.

perform at work.[174] Employer rights to second opinions and independent medical evaluations could also be important in cases relating to the extent of work limitation caused by impaired bodily functions, because these conditions may qualify as disabilities even when they do not substantially limit major life activities, as traditionally understood.[175]

Third, where the defenses of direct threat or undue burden are unavailable, arguments based on inability to perform essential job functions will likely be an employer's best ground for resisting a requested accommodation.[176] Recall that Furnish was terminated for unsatisfactory work performance after he had fallen behind on his work schedule.[177] Had the case been filed after the ADAAA and Furnish classified as "disabled," SVI might still have prevailed by showing that Furnish's disability prevented him from performing the essential functions of the job. In *Furnish*, essential functions could have included regular attendance,[178] particular performance standards such as number of installations,[179] or perhaps the ability to travel.[180] The primary

174. Furnish v. SVI Sys., Inc., 270 F.3d 445, 447 (7th Cir. 2001); *see also supra* text accompanying notes 46-63.

175. *See* discussion *supra* Part I.B-C.

176. The EEOC defines "essential functions" as "basic job duties that an employee must be able to perform, with or without reasonable accommodation." EEOC, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER, http://www.eeoc.gov/eeoc/publications/ada17.cfm (last visited May 27, 2010). When an employee's ability to perform the essential functions of a job depends on employer accommodation, an employer is only required to accommodate the employee to the extent that doing so would not result in undue hardship on the employer. *See id.* "Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of [the employer's] business." *Id.* Furthermore, an employer is not obligated to hire or continue the employment of an employee who, despite reasonable accommodation, poses "a significant risk of substantial harm" to the health or safety of the employee or others. *See id.*

177. *Furnish*, 270 F.3d at 447.

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

179. *See Furnish*, 270 F.3d at 447 (stating that Furnish had fallen behind on his share of the "hundreds of outstanding installations" SVI had contracted to complete); *see also* 29 C.F.R. § 1630.2(n) app. (2008) ("It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show

impact of the ADAAA on *Furnish* would only have been to prevent SVI from prevailing on the basis that Furnish was not disabled.

Employer clarity on essential versus nonessential functions has always been of fundamental importance under the ADA.[181] But after passage of the ADAAA, employers defending against disability discrimination claims will be tested on this issue with greater frequency. This means that in assessing potential ADA claims by employees, employers must evaluate the merits of an essential-functions argument early on. This will require looking at job descriptions to determine whether the functions have historically been held essential, whether and to what extent the functions have been waived or modified for past employees, etc.

Conclusion: The Devil Left in the Details

In ADA litigation, the determination of disability must be made *before* reaching the issue of employer compliance.[182] The threshold determination of disability is necessary because not every physical or mental impairment rises to the level of legal disability.[183]

Imagine a circumstance where an employer makes an adverse employment decision on the basis of an individual's physical or mental impairment. Suppose further that the impairment does not prevent the employee from performing the essential functions of the position, with or without reasonable accommodation. This is an *improper* employment decision of the sort that the ADA was passed to prevent.[184] Nevertheless, the employment decision is only *illegal* under the ADA if the employee is legally disabled.[185]

The ADA thus permits, and has always permitted, discrimination on the basis of physical or mental impairment when employees' impairments do not

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that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection." (internal citation omitted)).

180. *See Furnish*, 270 F.3d at 447 (stating that Furnish notified his supervisor of his inability to travel to distant installation sites any longer). It is permissible for employers to make extensive travel an essential job function, but it has proven difficult for plaintiffs to prove that travel is a major life activity for purposes of establishing disability. *See, e.g.*, Canales v. Nicholson, 177 F. App'x 834, 840 (10th Cir. 2006); *cf.* Taylor v. Rice, 451 F.3d 898, 906-07 (D.C. Cir. 2006); Brumbalough v. Camelot Care Ctrs., Inc. 427 F.3d 996, 1004-06 (6th Cir. 2005).

181. *See* 29 C.F.R. § 1630.2(m) app.

182. *See, e.g.*, Sullivan v. River Valley Sch. Dist. 197 F.3d 804, 810 (6th Cir. 1999).

183. *See* discussion *supra* Part I.B-C.

184. *See* 42 U.S.C. § 12101(b) (2006).

185. *See id.* § 12112(a).

qualify as legal disabilities. It is immaterial that employers' intent in such cases is just as insidious as in cases that do give rise to actionable claims by disabled employees. Some of the legislative history of the ADAAA reveals Congress's confusion on this point:

> The Committee understands that many employers do not discriminate against individuals with disabilities, however, the civil rights protections of the ADA have been diminished by the narrowing of the definition of disability, especially in the workplace. Too often cases have turned solely on the question of whether the plaintiff is an individual with a disability; *too rarely have courts considered the merits of the discrimination claim*, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.[186]

The confusion in this passage is this: under the structure of the ADA (and the ADAAA), *there is no merit to a disability discrimination claim if the employee is not legally disabled*. This is true even where the employer has engaged in intentional discrimination against a person who would have had a viable ADA claim had the person been "disabled" under the ADA. Therefore, as long as the ADA retains the threshold requirement of disability, it makes no sense to say that courts have too rarely considered the merits of discrimination claims. Determinations of disability *are part of the merits* of such claims.[187]

In the end, the ADAAA's enfeeblement of the definition of "disability" gives all disability discrimination claims more merit. The increased merit, however, has nothing to do with employer compliance or noncompliance. Instead, it comes from the fact that many more claimants can now qualify as disabled.

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186. H.R. REP. NO. 110-730, pt. 1, at 8 (2008) (emphasis added).

187. *See* 42 U.S.C. §§ 12101-12213, *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *see also* Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 567 (6th Cir. 2009) ("To make a prima facie case of discrimination under the ADA, [a plaintiff] must first show that she is 'a disabled person within the meaning of the Act.'" (quoting Sullivan v. River Valley Sch. Dist. 197 F.3d 804, 810 (6th Cir. 1999))).