

Trends in Disability Litigation 2008

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The passage of the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) has fundamentally changed the landscape of disability discrimination litigation. In amending the original Americans with Disabilities Act of 1990 (“ADA”), the ADAAA seeks to better effectuate Congress’s intent to provide broad and comprehensive protection to the millions of American workers who, while otherwise qualified for their jobs, face discrimination as a result of their physical and/or mental disabilities.

I. The ADA and its Interpretation by the Courts

As originally enacted in 1990, the ADA was intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Similar to other civil rights statutes that had come before it, such as Title VII of the Civil Rights Act of 1964, the goal of the ADA was to protect people with disabilities from discrimination on the basis of their disabilities. The terms of the ADA were modeled after similar terms in Section 504 of the Rehabilitation Act of 1973, which had long provided broad and inclusive coverage to disabled federal employees and employees of companies receiving federal funds. *See* H.R. Rep. No. 101-485, pt. 3, at 27 (1990). Among other things, the ADA prohibited employers from discriminating against a “qualified individual with a disability” because of that individual’s disability. 42 U.S.C. § 12112(a). It defined “disability” as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

Despite the legislative history and intent behind the ADA and the guidance provided by years of Rehabilitation Act jurisprudence, federal courts, including the U.S. Supreme Court, engaged in an unexpectedly and (many argued) improperly narrow interpretation of the definition of “disability,” creating an almost insurmountable standard for coverage under the act. Unlike cases dealing with race, sex or age discrimination, in which the issue of coverage is

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usually clear, a plaintiff's ability to prove that he or she had a covered disability under the ADA became the central issue in virtually all disability employment litigation. As a result, many people with serious physical or mental limitations – including epilepsy, multiple sclerosis, diabetes, cancer and schizophrenia – did not qualify for protection under the ADA because courts determined that they were not “disabled.”

In interpreting the ADA, the Supreme Court narrowed its coverage in several important ways. First, in a trio of cases known as the “Sutton trilogy,” the Court held that mitigating measures used by an employee to treat or correct an impairment should be considered in the determination of whether an individual is disabled under the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (no disability because corrected vision was 20/200); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (no disability because hypertension controlled by medication); *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (no disability because of plaintiff's ability to compensate for monocular vision). These holdings came despite the fact that the legislative history made clear that mitigating measures should *not* be taken into account in determining coverage under the ADA; despite the fact that EEOC and DOJ guidances stated that mitigating measures should not be considered; and despite the fact that eight federal Courts of Appeal to address the issue before the *Sutton* case all agreed that mitigating measures should not be considered. *See* S. Rep. No. 101-116 at 121 (1989); *see also Sutton*, 527 U.S. at 496-97 (Stevens, J., dissenting) (listing cases).

Next, also in the *Sutton* case in 1999, the Court required individuals who alleged a substantial limitation in the major life activity of working to show that the employer viewed them as incapable of performing a “broad range of jobs,” and not just the job they had lost or been denied. *See Sutton*, 527 U.S. at 490. In so holding, the Court applied the EEOC's analysis of the major life activity of working in the context of an actual disability (the first prong of the definition of disability) to the context of a perceived disability (the third prong of the definition). *Id.* at 117. In fact, however, the EEOC had outlined two very different analyses for the major life activity of working in the first and third prongs of the definition of disability, and the Court in *Sutton* appeared to conflate the two. *See* 29 C.F.R. pt. 1630, App. § 1630.2(j, l). This ruling made it almost impossible for plaintiffs to argue successfully that their employer regarded them as substantially limited in the major life activity of working. Not only did a plaintiff have to prove that an employer regarded their impairment as preventing them from working in a particular job for that employer, they also had to somehow demonstrate that the employer regarded them as unable to perform in a broad class of jobs for any employer. Not surprisingly, plaintiffs had very little success with these claims after *Sutton*.

Finally, in 2002, the Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), further narrowed the definition of disability by holding that the term “substantially limited” be applied in a stringent manner and that the term “major life activity” be understood as covering only activities that are of “central importance” to people's daily lives. Thus, after *Toyota*, in order to qualify for coverage under the ADA, an individual must demonstrate an impairment that “prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives” – but still be able to perform the essential functions of the job. *Id.* at 185. The Court in *Toyota* went so far as to state that ADA terms “need to be interpreted strictly to create a demanding standard for qualifying as disabled.” *Id.* at

197. Such a demanding standard clearly emerged. Studies conducted after the *Sutton* trilogy and the *Toyota* holding show that plaintiffs lost approximately 97% of ADA claims, usually on the grounds that they did not meet the demanding standard for a “disability.” Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100-01 (1999).

As a result of decisions like those in *Sutton* and *Toyota*, as well as the numerous cases coming out of the lower federal courts, it became extremely difficult for individuals with impairments who suffered discrimination because of those impairments to successfully challenge an employer’s actions in court. In fact, because many plaintiffs could not establish coverage under the ADA, they never had the opportunity to present evidence, including highly probative or even direct evidence, that their physical or mental impairment motivated an adverse action by their employer. This was clearly not what Congress intended when it passed the ADA in 1990. In fact, after the *Toyota* case was handed down, Representative Steny Hoyer wrote a 2002 editorial in *The Washington Post* in which he stated: “Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word.” Congressman Steny Hoyer, Op-Ed, *Not Exactly What We Intended Justice O’Connor*, WASH. POST, Jan. 20, 2002, at B01. Soon, lawmakers from both parties, disability rights advocates, and numerous other organizations worked together towards restoring Congress’s intent to protect disabled Americans from discrimination in the workplace.

II. The ADA Amendment Act

After several years of bi-partisan collaboration to develop what was originally referred to as the ADA Restoration Act, and after a period of successful negotiation between the disability and business communities, Congress passed the ADA Amendments Act of 2008, which President George W. Bush signed into law on September 25, 2008. Pub. L. 110-325 (Sept. 25, 2008), *codified at* 42 U.S.C. § 12101 *et seq.* The ADAAA’s stated purpose is “to restore the intent and protections of the Americans with Disabilities Act of 1990.” Pub. L. No. 110-325, preamble, 122 Stat. 3553 (2008). Congress explained that it had “expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, [but] that expectation has not been fulfilled.” *Id.* § 2(a)(3) (codified at 42 U.S.C. § 12101 note). Criticizing the Supreme Court for “eliminating protection for many individuals whom Congress intended to protect,” *id.* § 2(a)(4), Congress expressly repudiated the holdings of *Sutton* and *Toyota*. *Id.* §§ 2(a)(4)-(7). Congress declared that a purpose of the ADAAA was to “reinstat[e] a broad scope of protection to be available under the ADA.” *Id.* § 2(b)(1).²

² The ADAAA went into effect on January 1, 2009. While the statute is silent as to retroactivity, courts have uniformly held that its provisions are not retroactive. *See, e.g., Nyrop v. Independent Sch. Dist. No. 11*, 2010 WL 3023665 (8th Cir. 2010) (holding that ADA amendments are not retroactive); *Becerril v. Pima County Assessor’s Office*, 587 F.3d 1162, 1164 (9th Cir. 2009) (same); *Thornton v. United Parcel Serv., Inc.*, 587 F.3d 27, 34 n.3 (1st Cir. 2009); *Fredricksen v. United Parcel Serv., Co.*, 581 F.3d 516, 521 n. 1 (7th Cir. 2009); *Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir.

The ADAAA retains the ADA’s basic definition of a disability as 1) having a physical or mental impairment that substantially limits one or more major life activities; 2) having a record of such an impairment; or 3) being regarded as having such an impairment. 42 U.S.C. § 12102. However, the ADAAA has expanded the non-exhaustive list of “major life activities” to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. *Id.* § 2(a). Whether many of these activities constituted “major life activities” for purposes of the ADA had been hotly contested in prior litigation. The ADAAA also adds a new major life activity category – “major bodily functions” – which includes, but is not limited to: functions of the immune system; cell growth; digestive, bladder and bowel functions; neurological and brain functions; respiratory and circulatory functions; endocrine functions; and reproductive functions. *Id.* § 2(B).

In overturning *Sutton*, the ADAAA provides that the determination of whether an impairment substantially limits a major life activity is now made without regard to mitigating measures (other than ordinary eyeglasses and contact lenses). 42 U.S.C. §§ 12102(4)(E)(i), (ii). Also, in stating that *Toyota*’s standard for “substantially limits” created an “inappropriately high level of limitation necessary to obtain coverage under the ADA,” Pub. L. 110-325 § 2(b)(5), the ADAAA directs the EEOC to revise its regulations regarding the definition of “substantially limits” consistent with the amendments. *Id.* § 2(b)(6); 42 U.S.C. § 12102(4)(B) (“The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”). As an additional rule of construction for the definition of disability, the ADAAA clarifies that episodic impairments, or those in remission, are now considered disabilities if they would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D). It also provides that individuals subjected to an action prohibited by the ADA because of an actual or perceived impairment meet the “regarded as” definition of disability, unless the impairment is minor and transitory (duration of impairment is 6 months or less), 42 U.S.C. § 12102(3), and clarifies that individuals covered under the “regarded as” prong are not entitled to reasonable accommodation. 42 U.S.C. § 12201(h).

The overall intent of Congress in amending the ADA was to shift the focus from the definition of disability to the issue of causation – *i.e.*, has an individual proven that an adverse action was taken because of his or her physical or mental impairment? The ADAAA therefore states that the “primary object of attention in cases under the ADA should be whether entities covered under the ADA have complied with their obligations,” and “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Pub. L. 110–325, § 2(b)(5) (codified at 42 U.S.C. § 12101 note). In order to counteract the improperly narrow interpretation of “disability” since 1990, Congress was careful to make clear in the ADAAA that “the definition of disability in this Act shall be construed in favor of broad

2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 567 (6th Cir. 2009); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 469-70 (5th Cir. 2009).

coverage of individuals under this act, to the maximum extent permitted under the terms of this Act.” 42 U.S.C. § 12102(4). Courts (even those which are applying the old ADA standard) appear to have taken note. *See, e.g., Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 861 (9th Cir. 2009) (“Beginning in January 2009, ‘disability’ to be broadly construed and coverage will apply to the ‘maximum extent’ permitted by the ADA and the ADAAA.”); *Jenkins v. National Bd. of Med. Exam’rs*, 2009 WL 331638 at *4 (6th Cir. 2009) (noting that under the ADAAA, “the categorical threshold scope of the ADA’s coverage has been broadened”); *McGowan v. HSBC Bank U.S.A. N.A.*, 689 F. Supp. 2d 390, 398 (E.D.N.Y. 2010); *Fournier v. Payco Foods Corp.*, 611 F. Supp. 2d 120, 129 n.9 (D.P.R. 2009) (“The overarching purpose of the act is to reinstate the ‘broad scope of protection’ available under the ADA.”).³

III. Proposed EEOC Regulations

Although the ADAAA left the ADA’s three-category definition of “disability” intact, significant changes were made to how those categories are to be interpreted. The EEOC has published revised regulations to conform with the ADAAA and congressional intent, and will vote on the regulations next month. *See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 74 Fed. Reg. 48,431 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

In terms of what constitutes a “major life activity,” the courts have always assumed a narrow definition which excluded from coverage many people with significant impairments. In response, Congress included a very broad definition of “major life activity” in the ADAAA. The new definition reads: “[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A). Consistent with this, the EEOC proposed regulations state: “Major life activities are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty.” 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(i)). In addition, the proposed regulations add sitting, reaching, and interacting with others. *See* 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(i)(1)).

The new definition also includes major bodily functions in the definition of 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.” 42 U.S.C. § 12102(2)(B). The EEOC’s proposed regulations add functions of the hemic, lymphatic, and musculoskeletal systems, 74 Fed. Reg. 48440 (to be codified at 29 C.F.R.

³ The ADAAA also changed the definition of disability for claims under the Rehabilitation Act of 1973 to be consistent with the definition of disability under the amended ADA. 29 U.S.C. § 705(9)(B), (20)(B). *See also Ellis v. Georgetown Univ. Hosp.*, 2010 WL 2721848 (D.D.C. 2010) (noting that the ADAAA also changed the Rehabilitation Act to be consistent with the ADAAA).

§ 1630.2(i)(2)), as well as genitourinary and cardiovascular functions, and functions of the skin and of the special sense organs. 74 Fed. Reg. 48,446 (to be codified at 29 C.F.R. pt. 1630 App., § 1630.2(i)).

Also, in a break from past interpretations of the ADA, both the statute and proposed regulations make clear that only one major life activity need be limited. 42 U.S.C. § 12102(4)(C); 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iii)). For example, a plaintiff who is HIV-positive would not also have to show that other major life activities such as eating or normal sexuality were also substantially limited, in addition to bodily functions (immune system). The EEOC's proposed regulations illustrate this by stating that an individual whose endocrine system is substantially limited by diabetes does not also need to show any substantial limitation in eating or any other major life activity, and a person whose normal cell growth is substantially limited by cancer does not also need to show any substantial limitation in another life activity, such as working. 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(iii)).

Particularly interesting is the inclusion of “working” in the ADAAA’s list of major life activities. EEOC regulations interpreting the ADA and the case law that arose based on those regulations had required a plaintiff to allege an inability to work in a “broad class of jobs” if the major life activity alleged was working. *See, e.g., Sutton*, 527 U.S. at 491 (citing the EEOC’s requirement in 29 C.F.R. § 1630.2(j)(3)(i) that ADA plaintiffs allege an inability to work in a “broad class of jobs” if the major life activity at issue is working); *Black v. Roadway Express, Inc.*, 297 F.3d 445, 452 (6th Cir. 2002) (same). In contrast, the EEOC’s current proposed regulations entirely reject the “broad class of jobs” analysis, finding that such analysis is inconsistent with the ADAAA’s mandate that “‘substantially limits,’ including the application of that term to the major life activity of working, shall be construed in favor of broad coverage of individuals to the maximum extent permitted.” *See* 74 Fed. Reg. 48,447 (to be codified at 29 C.F.R. pt. 1630 app. § 1630.2(j)). Instead, the proposed regulations state that “[a]n impairment substantially limits the major life activity of working if it substantially limits an individual’s ability to perform, or to meet the qualifications for, *the type of work at issue.*” 74 Fed. Reg. 48,442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(ii)) (emphasis added).

The type of work at issue may often be determined by referencing “the nature of the work” an individual cannot perform because of an impairment, in comparison with others having comparable training, skills, and abilities. Examples of “types of work” include commercial truck driving (*i.e.*, driving those types of trucks specifically regulated by the U.S. Department of Transportation as commercial motor vehicles), assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. 74 Fed. Reg. 48,442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)(B)). The type of work at issue can also be determined by reference to “job related requirements that an individual is substantially limited in meeting because of an impairment, as compared to most people performing those jobs.” 74 Fed. Reg. 48,442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)(C)). Job-related requirements include repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; working under certain conditions, such as in workplaces characterized by high temperatures, high noise levels, or high stress; or working rotating,

irregular, or excessively long shifts. 74 Fed. Reg. 48,442 (to be codified at 29 C.F.R. § 1630.2(j)(7)(iii)(C)). Whereas previously a plaintiff was required to show she was substantially limited from performing a broad class of jobs, now a plaintiff may qualify as “disabled” under the ADAAA by showing she is substantially limited in assembly line jobs, for example, or in jobs involving repetitive or heavy lifting – even if she is perfectly capable of performing other classes of jobs, such as desk jobs.

The ADAAA has also fundamentally changed the interpretation of “substantially limits” in the definition of “disability.” The *Toyota* court held that the term “substantially” in the ADA should be interpreted strictly, such that an individual must have an impairment that prevents or severely restricts her from doing activities that are of central importance to daily life, but yet still be able to perform the essential functions of the job. *Toyota*, 534 U.S. at 185. This burden proved too difficult for many plaintiffs who were discriminated against for their serious medical conditions even while they were capable of performing their jobs. The ADAAA rejects *Toyota* as well as the EEOC’s regulation which defined the term “substantially limits” to mean “significantly restricted,” finding that to be too high a standard. The EEOC has proposed new regulations stating that “[a]n impairment need not prevent, or significantly or severely restrict ... a major life activity in order to be considered a disability.” 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(j)). Consistent with the ADAAA, the EEOC’s new proposed regulations state that “the term ‘substantially limits’ ... shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis.” 74 Fed. Reg. 48,440 (to be codified at 29 C.F.R. § 1630.2(j)(2)(i)).

The ADAAA also expands the definition of “substantially limited” by stating that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D). Consistent with the statute, the proposed regulations state that impairments may be episodic and “include, but are not limited to, impairments such as epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities such as depression, bipolar disorder, and post-traumatic stress disorder.” 74 Fed. Reg. 48,441 (to be codified at 29 C.F.R. § 1630.2(j)(4)); *see also* 74 Fed. Reg. 48,447 (to be codified as 29 C.F.R. pt. 1630 App., § 1630.2(j)) (listing as further examples diabetes and schizophrenia). One rationale given in the proposed regulations for including these impairments is that individuals with these impairments can experience flare-ups that substantially limit major life activities such as sleeping, breathing, caring for oneself, thinking, or concentrating. *Id.* The proposed regulations also explain that epilepsy is a disability because *during a seizure* it substantially limits many functions. 74 Fed. Reg. 48440 (to be codified as 29 C.F.R. § 1630.2(j)(2)(iv)(A)). With regard to cancer, in addition to including it in the list of episodic impairments, the proposed regulations state that someone with a past diagnosis of prostate cancer who is told after treatment that he “no longer has cancer” has a “record of” disability. 74 Fed. Reg. 48443 (to be codified as 29 C.F.R. § 1630.2(k)(1)(i)). The proposed regulations do note, however, that episodic conditions that impose only “minor limitations” are not disabilities. 74 Fed. Reg. 48,448 (to be codified as 29 C.F.R. pt. 1630 App., § 1630.2(j)).

The ADAAA also overrules *Sutton* and states that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. 42 U.S.C. § 12102(4)(E)(i). The EEOC’s proposed regulations are consistent with the ADAAA, 74 Fed. Reg. 48,440 (to be codified as 29 C.F.R. § 1630.2(j)(3)(i)), and make clear that even someone who has never personally suffered any limitation because from their impairment because of effective medical treatment or other mitigating measures nevertheless has a disability if the impairment would be substantially limiting without the mitigating measures. 74 Fed. Reg. 48,441 (to be codified as 29 C.F.R. § 1630.2(j)(3)(iii)). As examples, the proposed regulations suggest that an individual who is “taking a psychiatric medication for depression, or insulin for diabetes, or anti-seizure medication for a seizure disorder has a disability if there is evidence that ... [the impairment], if left untreated, would substantially limit a major life activity.” *Id.*

Ordinary eyeglasses or contact lenses are excluded from the new mitigating measures analysis, and whether or not an individual’s vision in substantially limited may be assessed in light of his or her use of normal eyeglasses or contact lenses. *See* 42 U.S.C. § 12102(4)(E)(ii) and (iii). “Ordinary eyeglasses or contact lenses” are defined as lenses that are intended to fully correct visual acuity or eliminate refractive error. 42 U.S.C. § 12101(4)(E)(iii)(I). The EEOC’s proposed regulations are consistent with the statute. 74 Fed. Reg. 48441 (to be codified as 29 C.F.R. § 1630.2(j)(3)(iv)). Neither the ADAAA nor the proposed regulations includes “low vision devices” that magnify, enhance, or otherwise augment a visual image. 42 U.S.C. § 12101(4)(E)(iii)(II); 74 Fed. Reg. 48,441 (to be codified as 29 C.F.R. § 1630.2(j)(3)(iv)). These include such devices as magnifiers, closed circuit television, large-print reading materials, and instruments that provide voice instructions. *See* H.R. Rep. No. 110-730, pt. I, at 15 (2008). *See also Edwards v. Marquis Cos. I, Inc.*, No. CV 08-390, 2009 WL 2424670, at *6 n.6 (D. Or. Aug. 6, 2009) (noting that under the ADAAA a magnifying glass would not be considered to be ordinary eyeglasses).

Despite the fact that poor vision correctable by ordinary eyeglasses is not a disability under the ADA, the ADAAA provides that an employer cannot use any selection criteria (qualification standards, employment tests, etc.) based on an individual’s uncorrected vision unless it is job-related and consistent with business necessity. 42 U.S.C. § 12113(c). The EEOC’s proposed regulations state that “[b]ecause the statute does not limit the provision on uncorrected vision standards to individuals with disabilities, a person does not need to be an individual with a disability in order to challenge such qualification standards.” 29 C.F.R. pt. 1630 App. The proposed regulations note, however, that “the Commission believes that such individuals will usually be covered under the ‘regarded as’ prong of the definition of disability.” *Id.* Thus, going forward, if an applicant or employee faces a qualification standard requiring uncorrected vision, as in *Sutton*, the employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity.

IV. Judicial Application of the ADAAA

The ADAAA is silent as to retroactivity, but courts thus far have uniformly held that it has no retroactive application. *See supra* note 3.⁴ As such, there have been very few reported cases to date that have applied the substantive provisions of the ADAAA. The courts that have recently considered a pre-amendment analysis of the ADA, however, recognize that the amendments have changed the landscape of ADA analysis and that, but for lack of retroactivity, might even have affected the outcome of the cases at hand. *See, e.g., Casseus v. Verizon N.Y., Inc.*, --- F. Supp. 2d ---, 2010 WL 2736935 (E.D.N.Y. 2010) (applying pre-amendments ADA to hold that episodic condition did not constitute disability, but noting that same condition would be considered a disability under the ADAAA).

Consistent with the ADAAA's mandate that the ADA be construed in favor of broad coverage of individuals to the maximum extent permitted, courts have begun to apply an expansive view of the terms "substantially limited" and "major life activity." In *Horgan v. Simmons*, 704 F. Supp. 2d 814 (N.D. Ill. 2010), for example, the court rejected defendant's motion to dismiss, holding that plaintiff who was HIV-positive, and who was terminated immediately after revealing that status to his supervisor, stated a claim for disability discrimination under the ADAAA. The court analyzed the amendments to the ADA and the significant changes to the definition of disability. Specifically, the court noted that the ADAAA now included the major life activity of bodily functions, which included the functions of the immune system. *Horgan*, 704 F. Supp. 2d at 818. The court also recognized that under the amendments, an impairment that is episodic or in remission can constitute a disability. *Id.* Finally, citing to the EEOC proposed regulations which list HIV as an impairment that will consistently meet the definition of disability, the court found that plaintiff was disabled under the statute and suggested, without explicitly stating, that HIV will be now considered a *per se* disability under the ADAAA. *Id.* In comparison, in 1998, the Supreme Court held that while an HIV-positive plaintiff stated a claim in light of her unchallenged testimony about being unable to reproduce, the Court chose not to answer the question of whether to recognize HIV as a *per se* disability under the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *see also EEOC v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 445 (7th Cir. 2008) (declining to adopt HIV as a *per se* disability).

Similarly, in *Hoffman v. CareFirst of Fort Wayne, Inc.*, 2010 WL 3522573 (N.D. Ind. 2010), in one of the first ADAAA cases to reach the summary judgment stage, the court held that a plaintiff with renal cancer in remission was disabled for purposes of the amended act. The court stated: "[B]ecause Hoffman had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), Hoffman does not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action." *Hoffman*, 2010 WL 3522573 at *8. As in *Horgan*, the *Hoffman* court

⁴ Curiously, however, at least one case addressed events occurring prior to January 1, 2009, but applied an ADAAA analysis without comment as to retroactivity. *See Broderick v. The Research Foundation of State Univ. of New York*, 2010 WL 3173832 (E.D.N.Y. 2010). In that case, the court sua sponte dismissed the disability discrimination claims for failing to state a claim due to insufficient pleading.

looked to the EEOC proposed regulations which state that cancer is an example of an impairment that while episodic or in remission will consistently meet the definition of a disability. *Id.* Thus, like HIV status, cancer will likely be considered a *per se* disability under the ADAAA. This is a major change from pre-ADAAA case law. *See, e.g., Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008) (holding that plaintiff with breast cancer not actually disabled because cancer had been treated and was not an active condition); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999) (holding that cancer that was in remission, with the only further treatment being several chemotherapy treatments that would not affect the plaintiff's ability to do his job, did not rise to the level of a disability).

Also, in *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234 (D. Mass. 2010), the court addressed the termination of a punch press operator with monocular vision. Here again, the court outlined Congress's intent for broad coverage under the ADAAA and its displeasure with the Supreme Court's "parsimonious treatment of the term 'substantially limits.'" *Gil*, 697 F. Supp. 2d at 238. Noting that the Supreme Court had previously determined that persons with monocular vision will "ordinarily" meet the definition of disability if they can provide sufficient evidence of the extent of their limitation, *see Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999), the court in *Gil* determined that the "relaxed disability standard" of the ADAAA mandates a finding of disability for monocular vision without detailing the precise nature of the substantial limitations. *Id.* at 239-40. Again, there is a suggestion that given the directive by Congress that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis," many more impairments (in this case monocular vision) will be deemed *per se* disabilities under the statute and the focus will shift to the qualifications of the employee and the actions of the employer.

V. Where Do We Go From Here?

While the ADAAA has dramatically changed the analysis of the term "disability" and eases the burden for plaintiffs seeking to bring cases for disparate treatment and failure to accommodate, it does not change the law or the analysis with respect to many other issues that can and will arise. The ADA as amended protects qualified individuals who can perform the essential functions of a job and requires employers to provide reasonable accommodations when it is not an undue burden to do so. 42 U.S.C. §§ 12111(8), 12112(b). The ADAAA does make any changes to the analysis of what it means to be a "qualified" individual, what is an essential function of the job, what is a reasonable accommodation, and what qualifies as undue hardship. In the past, these points were less often litigated than the issue of whether a particular plaintiff was "disabled" and therefore qualified for protection under the ADA.

Now, with a broad and inclusive interpretation of what it means to be "disabled," and with Congress having stated that the "primary object of attention in cases under the ADA should be whether entities covered under the ADA have complied with their obligations," it is expected that future litigation will center around these issues, as well as more common issues that typically arise in discrimination and retaliation cases once the issue of coverage is past: motivation, causation, and pretext. While disability plaintiffs must still establish all the elements

of a claim in order to prevail, for the first time since the original ADA was passed in 1990, they will have a fair opportunity to get past the basic issue of coverage in order to do so.