CONGRESS PROPOSES, THE SUPREME COURT DISPOSES: IS THERE ROOM FOR COURTS TO SUBVERT THE WILL OF CONGRESS AFTER THE ADAA ACT BROADENS THE DEFINITION OF DISABILITY?

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I. INTRODUCTION

Congress passed the Americans with Disabilities Act of 1990 (ADA) with broad bipartisan support amid cheers from disability rights groups. As time passed, the Supreme Court handed down several decisions that left those same groups largely dissatisfied.1 To right this perceived wrong, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)2 was signed by President George W. Bush on September 25, 2008, with an effective date of January 1, 2009. Cases applying the ADAAA are now appearing in lower courts, and it will be interesting to see if all of the federal

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1 See NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS, Disability Rights, http://www.rollbackcampaign.org/issues/item.disabilityrights2143 (last visited Mar. 17, 2011). The Americans with Disabilities Act (ADA) was signed into law in 1990 to make sure that people with disabilities are protected from discrimination. After a series of Supreme Court rulings, however, people who were discriminated against because of an intellectual, psychological, or physical impairment often were not able to prove that they were entitled to any protections at all under the ADA. The courts so narrowly defined who was a person "with a disability" under the law, that many people with epilepsy, diabetes, vision in only one eye, significant hearing impairments, and other conditions didn't have protection from discrimination.

Id. See also ABILITYJOBS.COM, Judge For Yourself - Law Center Calls for Action, “Tell the President,” http://www.abilitymagazine.com/news-judge-nomination.html (last visited Mar. 17, 2011). “In several significant decisions in the years before the ADAAA, the Supreme Court chipped away at core protections for people with disabilities.” Id.

courts of appeal and the Supreme Court enthusiastically embrace Congress’ intent within the ADAAA.

This paper presents a historical framework of the continuing tension between legislative intent and the Supreme Court’s interpretation in this area of the law. It will examine Congress’ latest attempt to restore protection for persons with disabilities by passage of the ADAAA and the likelihood that its intent will be carried out by the Courts.

II. DELIVERING ON THE PROMISE

On June 18, 2001, President Bush signed Executive Order No. 13217, that directed six federal agencies to look for ways to improve the availability of community-based services for qualified individuals with disabilities.3 A report from those agencies was presented to the President on December 21, 2001.4 Before listing any concrete actions to be taken, the Employment section states an underlying theme of the disability laws: “If people with disabilities are to fully access and be a part of their communities, they must have the opportunity to work. Work is so essential that without it people with disabilities often face isolation and segregation from the very communities in which they wish to participate.”5 This position has been a primary idea directing federal policy for decades as demonstrated by Appendix A to the report, Summary of Disability-Related Legislative Initiatives, a non-exhaustive list of some sixty-six federal statutes touching on this area beginning with the National Vocational Rehabilitation Act of 1920.6

III. THE REHABILITATION ACT OF 1973

A milestone was reached in 1973 with the passage of the Rehabilitation Act of 1973 (RA), the predecessor to the ADA. The RA’s scope was limited when it came to requiring action from the private sector of the economy. Section 504 of the RA, called Nondiscrimination Under Federal Grants states: “No otherwise qualified handicapped individual in the United States,

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as defined in section 7(6), shall, solely by reason of his handicap, be
excluded from the participation in, be denied the benefits of, or be subjected
to discrimination under any program or activity receiving Federal financial
assistance.”

The RA was amended in 1974, eliminating most uses of the word
handicapped, and replacing them with individual with a disability. That term
is virtually identical in the RA and ADA. According to the RA:

Individual with a disability . . . means . . . any person who (i) has a
physical or mental impairment which substantially limits one or
more of such person's major life activities; (ii) has a record of such
an impairment; or (iii) is regarded as having such an impairment.

IV. THE SUPREME COURT SPEAKS AND CONGRESS SPEAKS BACK

As mentioned above, a major drawback of the RA was its limited scope.
Section 504 only applied to programs and activities receiving federal
financial assistance. The scope was further circumscribed by the Supreme
Court’s decision in Grove City College v. Bell, which limited the reach to
only those parts of a recipient’s operation which directly benefitted from that
federal assistance, and not the entire organization. Grove City did not
specifically involve the RA, rather it dealt with Title IX of the Education
Amendments of 1973, which contained the same jurisdictional language as
the RA (prohibiting sex discrimination in “any education program or activity
receiving Federal financial assistance”). According to the dissent of Justices
Brennan and Marshall:

When reaching that question today, the Court completely
disregards the broad remedial purposes of Title IX that consistently
have controlled our prior interpretations of this civil rights statute.
Moreover, a careful examination of the statute’s legislative history,
the accepted meaning of similar statutory language in Title VI, and
the post enactment history of Title IX will demonstrate that the

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(amended 1974) (emphasis added).
to the ADA: “The term ‘disability’ means, with respect to an individual (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
(amended 2008).
Court’s narrow definition of “program or activity” is directly contrary to congressional intent.\(^{10}\)

Soon after, Congress expressed its agreement with the Grove City dissent by passing The Civil Rights Restoration Act of 1987.\(^{11}\) That Act amended several statutes, including Title IX and the RA, by adding a section defining the word “program” to make clear that discrimination is prohibited throughout an entire agency if any part of that agency receives Federal financial assistance.\(^{12}\) According to the Act:

The Congress finds that --
(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and
(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.\(^{13}\)

V. ADA

The ADA easily passed by votes of 377 to 28 in the House and 91 to 6 in the Senate.\(^{14}\) President George H.W. Bush was effusive in praise of the Act when he signed it into law.\(^{15}\) It was certainly much less controversial\(^{16}\)

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\(^{10}\) Id. at 583.
\(^{15}\) EEOC 35\(^{th}\) ANNIVERSARY, Remarks of President George Bush at the Signing of the Americans with Disabilities Act, http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html (last visited Oct. 12, 2011). President Bush’s remarks at the signing included:

With today’s signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom. As I look around at all these joyous faces, I remember clearly how many years of dedicated commitment have gone into making this historic new civil rights Act a reality. It’s been the work of a true coalition. A strong and inspiring coalition of people who have
than the Civil Rights Act of 1991, perhaps because it was not viewed by the majority as a law designed to protect only minorities, but anyone who becomes disabled. In addition, an opponent of the law, Walter Olson of the Cato Institute,\(^\text{17}\) stated:

One reason for the law’s immunity from criticism is that it is defended as a matter of identity politics: if you’re against it, then you must be against the people it protects. So it is treated as rude, not merely provocative, to bring up the failure of the original ADA premise that the new law would “pay for itself” by increasing the labor force participation of the disabled (the rate declined instead).\(^\text{18}\)

As previously discussed, the ADA has the same three-part definition of disability as contained in the RA. The focus of the paper and the ADAAA is on the first definition: “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”\(^\text{19}\) The Supreme Court in \textit{Bragdon v. Abbott}\(^\text{20}\) recognized the trifurcated nature of the definitional analysis as: 1) does the plaintiff have an impairment? 2) does

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\text{shared both a dream and a passionate determination to make that dream come true. It's been a coalition in the finest spirit. A joining of Democrats and Republicans. Of the Legislative and the Executive Branches. Of federal and state agencies. Of public officials and private citizens. Of people with disabilities and without. This historic Act is the world’s first comprehensive declaration of equality for people with disabilities. The first.}
\end{flushleft}

\textit{Id.}


\text{Bush’s abandonment of the right also led directly to Pat Buchanan’s decision in December 1991 to challenge him in the Republican presidential primaries, the first (and still only) time since 1968 that a sitting president has faced serious intra-party competition for renomination. Buchanan railed against the budget accord, the Civil Rights Act, and Bush’s free-trade agenda (here, at least, Buchanan was ideologically at odds with most Reagan conservatives) and scored nearly 40 percent in the lead-off New Hampshire primary. “I think King George is starting to get the message!” he declared on primary night.}


\text{19 42 U.S.C. § 12102(2).}

\text{20 524 U.S. 624 (1998).}
the life activity upon which the plaintiff relies constitute a major life activity? and 3) does the impairment substantially limit the major life activity? The Department of Health and Human Services elaborated on this definition, giving it a broad scope, and adopting the RA’s regulations without change.  

VI. THE SUPREME COURT SPEAKS

In a trilogy of cases handed down in 1999, and a fourth case in 2002, the U.S. Supreme Court adopted a strict statutory construction of the ADA, significantly narrowing the members of its protected class. Each of these cases impacts a different aspect of the Act’s first definition of disability—what counts as impairment, what qualifies as a substantial limitation, and what constitutes a major life activity. And each case limits the Act’s coverage by narrow construction of the statutory language. Justification for

21 *Id.* at 631.

22 The Department of Health and Human Services definition is as follows:

(h) Physical or mental impairment means:

(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.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits —(1) The term substantially limits means:

(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 under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

23 DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW TEXT AND CASES 582 (13th ed. 2007).

such strict interpretation of the Act hangs perilously and almost entirely on the Court’s belief that if Congress meant to include a broader class, its estimate of forty-three million disabled Americans in 1990 would have been much higher. 25 This narrow, if not miserly, construction flies in the face of years of decisions in eight of the nine U.S. Circuit Courts addressing the issue,26 guidelines from the three Executive administrative agencies charged with issuing regulations to implement the ADA,27 and legislative history from Senate and House Committee reports.28 The following is a summary of the Supreme Court’s restrictions on the definition of disability and its consequent narrowing of the protections of the ADA.

A. Corrective and Mitigating Measures Must Be Considered in Determining Existence of Disability

Both the EEOC and the Department of Justice issued similar regulations and guidelines in 1998 providing that the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.29

In *Sutton v. United Air Lines, Inc.*,30 the Supreme Court dismissed both regulations and guidelines as unpersuasive and nonbinding.31 In this case, two identical twins suffering from myopia applied to be global airline pilots. United had a minimum vision requirement that applicants failed to meet without correction and refused to hire them. Suing the airline pursuant to the

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25 See *Sutton*, 527 U.S. at 484.
27 The EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, Sections 12111-12117; the Attorney General is granted authority to issue regulations with respect to Title II, subtitle A, Sections 12131-12134, which relates to public services; and the Secretary of Transportation has authority to issue regulations pertaining to the transportation provisions of Titles II and III. See § 12149(a).
29 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) and 28 C.F.R. pt. 35, App. A, § 35.104). EEOC regulations define the three elements of disability: (1) “physical or mental impairment,” (2)”substantially limits,” and (3) “major life activities.” The agencies have also issued interpretive guidelines to aid in the implementation of their regulations. *Id.*
31 *Id.* at 479.
ADA, the applicants challenged the minimum vision requirement and claimed discrimination. The Supreme Court held that corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA and that because applicants used corrective lenses to adjust their vision, they were not considered disabled under the law.\(^\text{32}\)

According to Justice O’Connor, writing for the majority, the plain meaning of the ADA requires consideration of corrective and mitigating measures in determining whether an individual is substantially limited in major life activity, and thus disabled.\(^\text{33}\) The courts’ opinion requires a person to be presently, not potentially or hypothetically, substantially limited in order to demonstrate disability.\(^\text{34}\) Moreover, determination of disability is an individualized inquiry, with consideration of positive and negative effects of mitigating measures, requiring a case-by-case analysis.\(^\text{35}\)

In deciding that the definitions in the ADA must be interpreted strictly to create a demanding standard for qualifying as disabled, the Court points to the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.\(^\text{36}\) When it enacted the ADA in 1990, Congress found that “some 43,000,000 Americans have one or more physical or mental disabilities.”\(^\text{37}\) The Court reasoned, perhaps myopically, that if Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.\(^\text{38}\)

\(^{32}\) \textit{Id.} at 476-77.

\(^{33}\) \textit{Id.} at 482-83.

\(^{34}\) \textit{Id.} Siding with the employer, the Supreme Court held that the approach adopted by EEOC guidelines—that determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices—is an impermissible interpretation of the ADA. Because the phrase “substantially limits” appears in the present indicative verb form, the Court held that “the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.” A disability does not exist, according to the Court, “where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.” \textit{Id.} Corrected with medication or otherwise, a person’s impairment does not presently substantially limit a major life activity. \textit{Id.} See also 28 C.F.R. pt. 35, App. A, § 35.104 (1998) and pt. 36, App. B, § 36.104 (1998).

\(^{35}\) \textit{Id.} at 483.

\(^{36}\) See 42 U.S.C. § 12101 (1990)


\(^{38}\) \textit{Cf.} Sutton, 527 U.S. at 512. (Justice Stevens’ dissent, citing Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994): “We previously have observed that a statement of congressional findings is a rather thin reed upon which to base a statutory construction.”) According to Justice Stevens’ dissent, “[i]t is equally undeniable, however, that ‘43 million’ is not a fixed cap on the Act’s protected class: By including the ‘record of’ and ‘regarded as’
In so deciding, the Supreme Court failed to consider Senate and House Committee Reports in the legislative history urging broad, sweeping coverage for disabled Americans seeking employment.\textsuperscript{39} Moreover, although the Senate Report addresses that the “important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions,”\textsuperscript{40} the Court summarily and emphatically dismissed this information stating, “Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA’s legislative history.”\textsuperscript{41} The dissenting justices, Stevens and Breyer, believed this interpretation by the majority to be “perverse.”\textsuperscript{42}

Affirming the Tenth Circuit in \textit{Sutton}, the Supreme Court upheld the sole holding to this line of authority and effectively overturned prior decisions to the contrary from the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits.\textsuperscript{43}

In the second case, \textit{Albertson’s, Inc. v. Kirkingburg,}\textsuperscript{44} the Supreme Court held that a person’s own ability to compensate for a disability by categories, Congress fully expected the Act to protect individuals who lack, in the Court’s words, “actual” disabilities, and therefore are not counted in that number.” \textit{Id.} at 512.

\textsuperscript{39} \textit{Id.} at 499-500. Both Senate and House Committee Reports address this issue directly stating, “whether a person has a disability should be assessed without regard to the availability of mitigating measure, such as reasonable accommodations or auxiliary aids.” \textit{Id.}

\textsuperscript{40} \textit{Id.} at 500. “For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.” \textit{Id.}

\textsuperscript{41} \textit{Id.} at 482.

\textsuperscript{42} \textit{Id.} at 512.

What is more, in mining the depths of the history of the 43 million figure—surveying even agency reports that predate the drafting of any of this case’s controlling legislation—the Court fails to acknowledge that its narrow approach may have the \textit{perverse} effect of denying coverage for a sizeable portion of the core group of 43 million. The Court appears to exclude from the Act’s protected class individuals with controllable conditions such as diabetes and severe hypertension that were expressly understood as substantially limiting impairments in the Act’s Committee reports, and even in the studies that produced the 43 million figure. Given the inability to make the 43 million figure fit any consistent method of interpreting the word “disabled,” it would be far wiser for the Court to follow—or at least to mention—the documents reflecting Congress’ contemporaneous understanding of the term: the Committee Reports on the actual legislation.

\textit{Id.} (emphasis added).

\textsuperscript{43} See cases cited \textit{supra} note 26.

\textsuperscript{44} 527 U.S. 555 (1999).
making subconscious adjustments amounted to a mitigating measure that must be taken into account in judging whether a “present” disability exists.\textsuperscript{45} Plaintiff Kirkingburg suffered from amblyopia, an uncorrectable condition that left him with 20/200 vision in his left eye and monocular vision in effect. Despite medical testimony that the condition affected his depth perception and peripheral vision, the Court held that the “significant difference” with which Kirkingburg saw as compared to others was not the same as a “significant restriction” and accordingly did not amount to a “substantial limitation” on a major life activity.\textsuperscript{46}

B. Major Life Activity of Working Includes More Than Just A Particular Job

While it may be easier to understand why the Supreme Court would not want the ADA to be interpreted as covering all persons whose vision requires correction, the third companion case, \textit{Murphy v. United Parcel Service, Inc.},\textsuperscript{47} involved a mechanic with hypertension, a condition which easily falls within the ADA’s nucleus of covered impairments. In this case the Supreme Court managed to further narrow the construction of “disability” under the ADA by deciding that in order to be disabled, a person has to be unable to perform more than just “a particular job.”\textsuperscript{48}

On the question of whether Murphy was “regarded as” disabled because of his hypertension, the Court said no. Murphy was not substantially limited in the major life activity of working because he remained generally employable in mechanic positions that did not require driving a commercial vehicle.\textsuperscript{49} Ironically, referring to EEOC guidelines, Justice O’Connor held that to be regarded as substantially limited in the major life activity of working, one must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.”\textsuperscript{50} Thus, to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job.\textsuperscript{51}

\textsuperscript{45} \textit{Id.} at 566.
\textsuperscript{46} \textit{Id.} at 565.
\textsuperscript{47} 527 U.S. 516 (1999).
\textsuperscript{48} \textit{Id.} at 523. In this case, Murphy, who was first diagnosed with hypertension when he was 10 years old, had high blood pressure of 250/160 without medication. With medication, he could function normally and engage in activities that other persons normally do, and therefore, he was not substantially limited in his major life activity and thus, not disabled under the ADA, according to the Court.
\textsuperscript{49} \textit{Id.} at 522.
\textsuperscript{50} 29 C.F.R. § 1630.2(j)(3)(ii)(B).
\textsuperscript{51} \textit{See Murphy}, 527 U.S. at 525.
In applying this narrow construction to the statute, Justice O’Connor, speaking for the majority, ignored Murphy’s uncontested evidence that his severe hypertension—in its unmedicated state—substantially limited his ability to perform several major life activities and that without his medicine, he would likely be hospitalized.\(^{52}\)

C. Major Life Activity Determination Goes Beyond Workplace Activity

Three years later, in the case of Toyota Motor Manufacturing Kentucky, Inc. v. Williams,\(^{53}\) the Supreme Court again considered the definition of disability under the ADA. Once again, the Court further restricted an employee’s eligibility to become a member of its protected class.\(^{54}\) Writing the opinion for the Court, in which all nine justices joined, was Justice O’Connor. In this case, with perhaps the harshest result to date, the Supreme Court failed to find an employee with bilateral carpal tunnel syndrome and bilateral tendinitis disabled, holding that her inability to perform manual tasks associated only with her job was insufficient to amount to being “substantially limited in the major life activity of performing manual tasks.”\(^{55}\) The proper standard to be applied, according to the court, is restriction from performing tasks that are of central importance to most people’s daily lives.\(^{56}\)

What makes the result in this case especially harsh is the fact that for a two-year period, Toyota assigned Williams to a quality control inspection operation that she was physically capable of performing satisfactorily.\(^{57}\) During the fall of 1996, Toyota required Williams to rotate through two additional processes, one of which required Williams to “hold her hands and arms up around shoulder height for several hours at a time.”\(^{58}\) Her symptoms returned and she requested Toyota to accommodate her medical conditions by allowing her to return to doing only her original two jobs. Toyota refused. Williams began to miss work, and ultimately was fired on the

\(^{52}\) 527 U.S. at 525 (dissenting opinion by Justice Stevens, joined by Justice Breyer).

\(^{53}\) 534 U.S. 184 (2002).

\(^{54}\) Id. at 187.

\(^{55}\) Id. at 200-01.

\(^{56}\) Id. at 201. Williams’ limitations precluded her from lifting more than 20 pounds or from frequently lifting or carrying objects weigh up to 10 pounds, and engaging in constant repetitive flexion or extension of her wrists or elbows, performing overhead work or using vibratory or pneumatic tools. This was not considered “substantially limiting” despite the fact that as an assembly line worker at Toyota she was required to perform these activities and was not able. Id. at 184.

\(^{57}\) Id. at 189.

\(^{58}\) Id.
grounds of poor attendance. The Supreme Court held it was error for the lower court to determine disability by focusing on Williams’ inability to perform manual tasks associated only with her job. Instead, the Court held “when addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”

In a somewhat twisted argument, the Supreme Court went on to hold that determination of disability does not turn solely on the effect of the impairment in the workplace. The Court said that because the Act’s definition of “disability” applies not only to employment, but also to public transportation and privately provided public accommodations, the definition is intended to cover individuals with disabling impairments regardless of whether the individual’s limitations have any connection to a workplace. With tangled reasoning, the Court used the breadth of the Act—its coverage of employment, public transportation and accommodations—to narrow its application in the workplace. The Court said manual tasks unique to any particular job are not necessarily important parts of most people’s lives, and therefore, Williams’ inability to do such manual work in her specialized assembly line job should not be considered sufficient proof that she was substantially limited in performing manual tasks. She could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house. And even if she could no longer sweep, dance, dress herself without assistance, garden, drive long distances or play with her children for as long as before, “these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people’s daily lives that they establish a manual task disability as a matter of law.”

The Supreme Court further held that the impairment’s impact must be permanent or long term to qualify. To justify such strict statutory

59 Id. at 190. In the Kentucky District Court, the trial judge found that even if Williams was disabled at the time of her termination, she was not a “qualified individual with a disability because, at that time, her physicians had restricted her from performing work of any kind.” In order to be qualified, one must be able to perform the job with or without a reasonable accommodation.
60 Id. at 200-01.
61 “There is also no support in the Act, our previous opinions, or the regulations for the Court of Appeals’ idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace.” Id. at 201.
63 42 U.S.C §§ 12141-150, 12161-165, 12181-189.
64 Toyota, 534 U.S. at 201.
65 Id. at 202.
66 Id. at 198.
construction, the Supreme Court once again cited the first section of the Act wherein it states that Congress intended the ADA to cover only 43,000,000 Americans.67

In considering the trend in this area, it is interesting to note, that while in 1999 Justices Stevens and Breyer vigorously dissented to such strict construction of the term disability under the ADA, in 2002 the Supreme Court’s decision was unanimous. What happened to their vigorous dissent that had solid and substantial support from both legislative history and agency interpretation? Of further interest is the fact that arguing for the employer in the most recent case was the soon to be appointed Chief Justice, John G. Roberts, Jr.68

VII. ADAAA

In September 25, 2008, President George W. Bush signed the ADAAA,69 which had an effective date of January 1, 2009. This Act, which was introduced into the Senate as Senate Bill 3406, progressed through the Senate with the title “A bill to restore the intent and protections of the Americans with Disabilities Act of 1990.” There was a similar bill introduced in the House of Representatives, which passed by a vote of 403-17. When first introduced into the Senate, Senator Tom Harkin stated that, “these bills have been conceived and crafted in a spirit of genuine bipartisanship, with members of both parties coming together to do the right thing for all Americans with disabilities.”70 Mr. Harkin described the ADA as “one of the landmark civil rights laws of the 20th century – a long-overdue emancipation proclamation for Americans with disabilities.” He boasted that “we have advanced the four goals of the ADA – equality of opportunity, full participation, independent living, and economic self-sufficiency.”71 But he noted that although much progress had been made to transform the lives of and liberate individuals with disabilities, “the courts have narrowed the definition of who qualifies as an ‘individual with a disability.’ As a consequence, people with conditions that common sense tells us are disabilities are being told by courts that they were not in fact disabled, and

68 Toyota, 534 U.S. at 186.
71 Id. at 211.
are not eligible for protections of the law.”

He listed the following impairments that the Court did not consider as a disability: “amputation, intellectual disabilities, epilepsy, diabetes, muscular dystrophy, and multiple sclerosis.” He specifically pointed to the 1999 Supreme Court rulings in Sutton, Murphy, Albertson’s, and Toyota, describing them as creating “a supreme absurdity.”

Senator Harkin pointed out the differences between the House and Senate bills and in so doing, he further explained the problems with the Supreme Court’s cases involving the ADA:

This Senate bill builds on the success of the House bill. However, it seeks to broaden the definition of disability in a way that maximizes bipartisan consensus and minimizes unintended consequences.

Our bill leaves the ADA’s familiar disability definition language intact: A person with a disability is one who has a physical or mental impairment that “substantially limits” one or more of the major life activities of the individual. It does not substitute the term “materially restricts” as in the House bill. Instead, the bill takes several specific and general steps that, individually and in combination, direct courts toward a more generous meaning and application of the definition.

This bill will overturn the basis for the reasoning in the Supreme Court decisions--the Sutton trilogy and the Toyota case—that have been so problematic for so many people with very real disabilities.

This bill fixes the “mitigating measures” problem by clearly stating that mitigating measures--like the medication or assistive devices I talked about earlier are not to be considered in determining whether someone is entitled to the protections of the ADA.

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72 Id.
73 Id.
74 Id. at 212. Mr. Harkin continued:

The more successful a person is at coping with a disability, the more likely it is for a court to find that they are no longer sufficiently disabled to be protected by the ADA. And if these individuals are no longer protected under the ADA, then their requests for a reasonable accommodation at work can be denied. Or they can be fired—without recourse.

Id.
This bill will make it easier for people with disabilities to be covered by the ADA because it effectively expands the definition of disability to include many more major life activities, as well as a new category of major bodily functions. This latter point is important for those with immune disorders, or cancer, or kidney disease, or liver disease, because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.

This bill rejects the current EEOC regulation which says that “substantially limits” means “significantly restricted” as too high a standard. We indicate Congress’s expectation that the regulation be rewritten in a less stringent way, and we provide the authority to do so.

This bill revives the “regarded as” prong of the definition of disability, and makes it easier for those with physical or mental impairments to be able to seek relief if they have been subjected to an adverse action because of their disability.

This bill has a broad construction provision which instructs the courts and the agencies that the definition of disability is to be interpreted broadly, to the maximum extent permitted by the ADA.75

The Act amended Section 12101(a)(1) of the ADA to eliminate the finding of Congress that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”76 This statement, which was relied upon by various courts, was substituted with the following:

[P]hysical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination.77

76 42 U.S.C.A. § 12101 Amendments.
77 Id. § 12101(a)(1); 122 Stat. 3553, 3554-55. Further the Act eliminated paragraph (7) of the Findings which provided:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and
The Act amended Section 12102(1) of the ADA by defining a “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 (as described in
paragraph (3)).” The Act defines “Major Life Activities” in Section 12102
(2) as follows:

(A) In General
For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions
For purposes of paragraph (1), a major life activity 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.

The Act defines “regarded as having such an impairment” in Section 12102 (3) for purposes of Section 12102 (1)(C) as follows:

(A) An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit major life activity.

(B) Paragraph (1)(C) shall 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.
The ADAAA added Rules of Construction to Section 12102 § 4 of the ADA, which clearly explain how to construe the term *disability* in paragraph (1) of the ADA as amended. It provides as follows:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

   (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
   (II) use of assistive technology;
   (III) reasonable accommodations or auxiliary aids or services; or
   (IV) learned behavioral or adaptive neurological modifications.

(ii) 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.

(iii) As used in this subparagraph—

   (I) the term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
   (II) the term ‘low-vision devices’ means devices that magnify, enhance, or otherwise augment a visual image.

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81 *Id.* Section 4 of the ADAAA explains what is included in the term “auxiliary aids and services”:

(A) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
The Act revised Section 12112(a) to provide: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." The former provision began: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." When the bill was introduced in the House of Representatives for vote, Representative George Miller expressed his thoughts on Senate Bill 3406, stating that the section:

reestablishes the scope of protection of the Americans with Disabilities Act to be generous and inclusive. The bill restores the proper focus on whether discrimination occurred rather than on whether or not an individual’s impairment qualifies as a disability. S. 3406 ensures that individuals who reduce the impact of their impairments through means such as hearing aids, medications, or learned behavioral modifications will be considered in their unmitigated state. We expect the courts and agencies to apply this less demanding standard when interpreting “substantially limits.” S 3406 directs the courts and the agencies to interpret the term consistent with the findings and purposes of the ADA Amendments Act. We intend that the ADA Amendments Act will reduce the depth of analysis related to the severity of the limitation of the impairment and return the focus to where it should be: the question of whether or not discrimination, based upon the disability, actually occurred.

(B) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
(C) Acquisition or modification of equipment or devices; and
(D) Other similar services and actions.

*Id.* at 3556. Section 5 of the ADAAA adds the following subsection to Section 12103 of the ADA:

(c) QUALIFICATION STANDARDS AND TESTS RELATED TO UNCORRECTED VISION. – Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

*Id.* at 3557.

82 122 Stat. 3556.
83 122 Stat. 3556. A similar substitution was made in Section 12113 (b)(2). *Id.*
Whether the agencies and courts follow this directive is yet to be seen. There is only one district court case, whose cause of action arose after the ADAAA was adopted.

VIII. WILL STRICT AND NARROW CONSTRUCTION CONTINUE?

The first district court to look at the effect of the ADAAA was the Northern District of Indiana in *Hoffman v. Carefirst of Fort Wayne, Inc.* 85 This case involved a plaintiff who had a cancerous kidney surgically removed. When his work schedule was greatly increased due to a new service contract that his employer entered into with a customer, the plaintiff’s doctor advised the employer that his work schedule should not exceed eight hours per day, with no more than five days of work per week. He eventually was transferred to another office, necessitating an additional two hour daily commute. He sued under the ADA. His employer filed for a summary judgment since his cancer was in remission and therefore he was not substantially limited in a major life activity at the time of his termination. The Court denied the employer’s motion for summary judgment due to express language contained in the ADAAA. 86

More insight may be found in several cases arising before the effective date of the ADAAA. In these cases, plaintiffs argued that the Act’s provisions should be applied retroactively, but the respective courts failed to agree. 87 The passage of the ADAAA will make it easier for plaintiffs to

85 737 F. Supp. 2d 976 (N.D. Ind. 2010).
86 Id. at 978.
87 Carmona v. Sw. Airlines, 604 F.3d 848, 857 (5th Cir. 2010). See also Barnes v. GE Sec., Inc., 342 Fed. Appx. 259 (9th Cir. 2009). “Because Barnes filed suit prior to the effective date of the Americans with Disabilities Act Amendments of 2008, the standards from Toyota Motor Manufacturing., Kentucky, Inc. v. Williams (citations omitted) govern the determination of whether she is disabled. See Rivers v. Roadway Express, 511 U.S. 298, 311, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) (holding that “clear evidence of intent to impose the restorative statute ‘retroactively’ is required to overcome the presumption against retroactive
establish that they are disabled, but that alone will not be enough to prevail in a case based on the ADA. The Fifth Circuit may have given a hint of things to come in the recent case of Cook v. Equilon Enterprises, L.L.C. The Court made it clear that in order to survive summary judgment, the plaintiff needed:

[t]o establish [a prima facie case of] discrimination based on disability, a plaintiff must demonstrate that: (1) he was disabled during the relevant time period; (2) he was nonetheless qualified to do the job; (3) an adverse employment action was taken against him; and (4) that he was replaced by or treated less favorably than non-disabled employees.

After assuming, arguendo, that the Plaintiff, Cook, was disabled after the effective date of the ADAAA, he still failed on the fourth element of the prima facie case, that he was treated less favorably than non-disabled co-workers. In Moen v. Genesee County Friend of the Court, after first amendments.)” Id. at 262. See also Milholland v. Sumner Cnty. Bd. of Educ’n, 569 F.3d 562, No. 08-5568, at 4-7 (6th Cir. 2009).

Assuming that Cook was disabled in February 2009 and that Shell took an adverse action against him by reclassifying his leave status, Cook has failed to satisfy the final element of the prima facie case. Indeed, as with his ADEA claim, Cook has pointed to no evidence that he was treated less favorably than other non-disabled employees with regard to his leave status and the requirement that he pay for his health care while on non-occupational leave. Shell has provided competent summary judgment evidence that the decision to change Cook’s leave status was made in response to the TWCB’s decision to terminate his workers’ compensation and that such a reclassification was Shell’s standard procedure. The uncontroverted evidence also suggests that the accompanying requirement that Cook make health insurance payments while on non-occupational leave was a standard policy. Cook has pointed to no evidence that Shell has not consistently applied these policies to all Shell employees regardless of disability. Thus, because Cook has not satisfied
refusing to apply the Act retroactively, the Court went out of its way to say that under the facts of the case, it would not make a difference if the Amendments were in effect.\(^\text{93}\) Additionally, even if an employee establishes a prima facie case, the employer may argue that the employee requires an accommodation that will cause the employer an undue hardship.\(^\text{94}\)

The EEOC has summarized the ADAAA\(^\text{95}\) and, in March 2011, it issued its final revised regulations that discuss, among other things, whether an

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the final element of the prima facie case, even if he suffered from a disability in February 2009, summary judgment is appropriate.


\(^{93}\) Id. at *6.

Most of the conduct that Moen here complains of took place in 2007, and is therefore unaffected by the Act. In any event, no matter how far the Act broadened the universe of conditions that can qualify as a substantially impairing a major life activity, it did not eliminate the substantial-impairment requirement altogether. Thus, a plaintiff like Moen who states that a medical condition caused her some pain and discomfort, but who offers no evidence at all of any concomitant impairment in her activities, must be held to have failed to state an ADA claim under either the pre- or post-amendment standard.


A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee.

impairment substantially limits an individual in a major life activity.\textsuperscript{96} In order to provide further clarity and guidance, the EEOC, has also provided nine rules of construction.\textsuperscript{97} Because of these regulations are so new, it will be a while before anyone will know how they will be received by the courts.

\begin{itemize}
  \item[a.] directs EEOC to revise that portion of its regulations defining the term "substantially limits";
  \item[b.] expands the definition of "major life activities";
  \item[c.] states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
  \item[d.] clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
  \item[e.] changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
  \item[f.] provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.
\end{itemize}

\textit{Id.}  

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section. (iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.
IX. CONCLUSION

The plight of the disabled worker has not dramatically improved since the passage of the ADA. According to the U.S. Bureau of Labor Statistics, the employment-population ratio was 19.2 percent among those with a disability compared to 64.5 percent for people without a disability. According to some critics of the original ADA, the unintended consequences of that Act was to actually harm the employment possibilities of the disabled. The ADAAA sends a message to the courts to change one

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

Id.


99 Id.

particular part of the equation that defines the disability lawsuit. It leaves the rest of the equation unchanged. Specifically, as stated by the Fifth Circuit, to demonstrate a prima facie case the plaintiff must demonstrate that, “(1) he was disabled during the relevant time period; (2) he was nonetheless qualified to do the job; (3) an adverse employment action was taken against him; and (4) that he was replaced by or treated less favorably than non-disabled employees.”^{101} Although the intent behind the ADAAA and expectations of the ADA AAA as expressed by Representative Miller were to restore “the proper focus on whether discrimination occurred rather than on whether or not an individual’s impairment qualifies as a disability,”^{102} the limited number of cases involving the ADAAA demonstrate that there is still wiggle room for an unconvinced legal system. Only time will tell whether the cases filed under the ADAAA will have the result desired and expected by all the Senators and Representatives who supported and voted for the ADAAA.

intended beneficiaries? The added cost of employing disabled workers to comply with the accommodation mandate of ADA has made those workers relatively unattractive to firms. Moreover, the threats of prosecution by the Equal Employment Opportunity Commission (EEOC) and litigation by disabled workers, both of which were to have deterred firms from shedding their disabled workforce, have in fact led firms to avoid hiring some disabled workers in the first place.

^{101} *Cook*, 2010 WL 4367004 at *7.