I. INTRODUCTION

When the Americans with Disabilities Act (ADA) was passed in 1990, it was heralded as landmark legislation for persons with disabilities. In signing the bill, then President George H.W. Bush remarked that the Act “signals the end to the unjustified segregation and exclusion of persons with disabilities for the mainstream of American life.”1 The general provisions of the initial Act noted that the law will affect “some 43,000,000 Americans” with one or more physical or mental impairments, a number which is likely to increase as the population ages.2 According to Committee reports, the ADA was intended to address a “compelling need” for a “clear and comprehensive national mandate” to prevent discrimination against the disabled.3

Despite initial optimism surrounding passage of the law, it was not long after that public sentiment, fueled by media reports that the Act was producing inappropriate windfalls for disability plaintiffs and their lawyers, turned against the legislation.4 In addition, the courts’ narrow interpretation of who was disabled under the Act precluded many people who appeared to be covered from pressing their claims of discrimination. According to one study, in the first seven years after its passage, defendant employers won 94% of cases at the trial court level and 84% of cases appealed by losing plaintiffs.5 As a result, Congress amended the ADA, effective January 1, 2009, to broaden the definition of disability. However, whether these amendments will effectively enhance litigants’ chances of success in the courts remains questionable.6 This paper first reviews the courts’ decisions

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6 Kerri Stone, Substantial Limitations: Reflections on the ADAAA, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 509, 536-40 (2011); Hillary K. Valderrama, Is the ADAAA a "Quick Fix" or Are We out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the
regarding the scope of the ADA prior to the amendments, followed by a discussion of the changes made by the 2008 amendments (ADAAA). It will then focus on cases decided after the amendments regarding the definitions of disability, ability to perform the essential functions of the job, and reasonable accommodation. It will conclude by a discussion of implications for scholars and practitioners.

II. INTERPRETATION OF THE ADA BEFORE THE AMENDMENTS

As originally worded, Title I of the ADA prohibited employers from discriminating “against a qualified individual with a disability because of the disability of such individual . . . .”7 Title II prohibits discrimination with respect to services, programs or activities of a public entity such as a school, hospital or prison. Title III protects individuals from discrimination at places of public accommodation, such as restaurants, hotels, or entertainment centers. To establish a prima facie case under Title I of the ADA, the plaintiff must establish that (1) (s)he is disabled within the meaning of the ADA; (2) (s)he is qualified (with or without a reasonable accommodation) to perform the essential functions of the position; and (3) the employer took an adverse employment action because of his or her disability. Unlike most other civil rights statues, the ADA required plaintiffs to demonstrate that they are in the protected class in order to proceed with their claims.8 Thus, it is this first requirement that has engendered the greatest amount of controversy because it in effect acts as a gatekeeper: if the plaintiff cannot establish that he or she is disabled, the court will dismiss the case without a chance for offering evidence on the second and third issues. In order to establish disability, the ADA further provides that the plaintiff must show that he or she (1) has “a physical or mental impairment that substantially limits one or more major life activities””; or (2) has “a record of such an impairment;”” or (3) is “regarded as having such an impairment.”9 This so called three-prong test was intended to broaden the definition of disability; however, the courts’ narrow interpretation of these definitions has limited plaintiffs’ recovery under the Act, especially with respect to the first classification.

The determination of whether a plaintiff is disabled must be made on a case-by-case basis.10 As stated in previous EEOC regulations: “The determination of whether an individual has a disability is not necessarily

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8 Colker, supra note 4, at 103.
based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”\textsuperscript{11}

Under the ADA the definition of disability provides that the individual must have a physical or mental impairment that substantially limits a major life activity. The word “substantially” had been strictly construed by the Supreme Court which held that the definition means a condition that prevents or severely restricts the individual from doing major life activities and precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.\textsuperscript{12} According to the Court, claimants also need to demonstrate that the impairment limits a major life activity.\textsuperscript{13} In defining a “major life activity,” the Court held that the word major means an important life activity that would be of central importance to most people’s daily life.\textsuperscript{14} 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.”\textsuperscript{15} In addition, the Court held that the impairment must be “permanent or long term.”\textsuperscript{16} These activities included conduct such as household chores, bathing, and brushing one’s own teeth.\textsuperscript{17} Evidence of difficulty to get out of bed or to maintain daily hygiene does not provide sufficient evidence that a plaintiff’s disability substantially limits the ability to care for oneself, especially where the plaintiff lives alone.\textsuperscript{18}

This standard significantly reduced the number of individuals who could qualify for protection under the ADA because many employees may have had a disability that was serious enough to require some accommodations but not serious enough to qualify under the \textit{Toyota} standard. Further, the Supreme Court’s ruling prevented lower courts from taking an expansive reading of the ADA.\textsuperscript{19} For example in \textit{DiCarra v. Connecticut Rivers Council},\textsuperscript{20} the court found that the plaintiff’s inability to perform one specific task of lifting twenty pounds due to his degenerative arthritic condition in his spine was not substantially limiting in his major life activities. To determine whether an individual is substantially limited in a major life activity, the court considered the nature and severity of the impairment, the duration or

\textsuperscript{11} 29 C.F.R. § 1630.2(j) (1999).
\textsuperscript{12} Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 200-01.
\textsuperscript{16} Id. at 198.
\textsuperscript{17} Id. at 202.
\textsuperscript{18} Heisler v. Metro Council, 339 F.3d 622 (8th Cir. 2003).
\textsuperscript{20} 663 F. Supp. 2d 85 (D. Conn. 2009).
expected duration of the impairment, and the permanent or expected long-term impact of the impairment. Based on this reasoning, the court ruled that DiCara failed to prove that he was disabled. Similarly in *Holt v. Grand Lake Mental Health Center*, Holt claimed that her employer terminated her due to her cerebral palsy disability, which violated the ADA. The court found that Holt failed to show how her impairment substantially limited one or more of her life activities. The court defined “substantial” as impairment that affects the person’s ability to perform a wide range of daily tasks. For example, while the employee may not have been able to cut her nails, she was not severely restricted in her ability to perform other manual tasks relating to personal hygiene. Thus, the court concluded that because the employee failed to prove that her cerebral palsy limited one or more of her life activities, her cerebral palsy was not considered as a disability. The employee’s ability to overcome the obstacles caused by his or her disability will undermine the argument that the employee’s impairment substantially limits the ability to engage in one or more major life activities. Indeed, the very fact that an employee is able to hold a full time job undermines his or her success of proving a disability.

A mental condition such as depression will qualify as a disability if it interferes with a major life activity, such as sleeping. Nevertheless, sleep problems must be severe, long term, or have a permanent impact. Mere trouble getting to sleep, episodes of sleep disruption, or waking without feeling rested is not a substantial limitation on sleep.

In *Colwell v. Suffolk County Police Dep’t*, the court considered the second prong of the ADA, whether a previous hospitalization was a record of an impairment, and held that such impairment must still meet the requirement that it imposes a substantial limitation on one or more major life activities. Although the plaintiff had been hospitalized for a cerebral hemorrhage for 30 days and remained at home for an additional six months, the court held that “a seven-month impairment of his ability to work, with the non-particularized and unspecific limitations described on his police work, is too short a duration and too vague an extent to be substantially limiting.”

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21 *Id.* at 93.
22 443 F.3d 762 (10th Cir. 2006).
23 *Id.* at 766.
24 *Id.* at 767.
27 Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir. 1999).
28 158 F.3d 635 (2d Cir. 1998).
29 *Id.* at 646.
Courts have also examined whether the symptoms of an employee’s illness could be controlled or mitigated, which would preclude a finding of disability. In *Sutton v. United Airlines, Inc.*, the Supreme Court considered the ADA claims of two plaintiffs who were denied jobs as pilots for because they were nearsighted. Because the plaintiffs had 20/20 corrected vision in both eyes and could function in daily life with glasses or contact lenses, they were not disabled within the meaning of the ADA. There was no physical impairment that substantially limited them in one or more major life activities. Citing its decision in *Sutton*, the Court reached a similar conclusion in *Murphy v. United Parcel Service, Inc.*, where the plaintiff was fired because his blood pressure exceeded Department of Transportation requirements. The Court concluded that the plaintiff’s hypertension was not a disability because, when medicated, he could function normally in everyday activities. In the final case of the so-called *Sutton* trilogy, the Court held that in determining whether a plaintiff is disabled, the courts must take into account all corrective “measures undertaken, whether consciously or not, [by] the body's own systems” as mitigating measures.

Following the Supreme Court directives, lower courts also denied disabled status to plaintiffs when the effects of their disability could be controlled. For example, in *EEOC v. Agro Distribution, LLC*, the court held that an employee's anhidrotic ectodermal dysplasia, a condition which made him unable to perspire, did not substantially limit him in major life activity of working, and thus was not a disability under the ADA, where employee was able to regulate his body temperature without significant side effects and in essentially the same manner as the average person by using ordinary methods to cool himself, such as drinking cold liquids, sitting in front of a fan, spraying himself with water, resting when laboring on hot days, and using air conditioning.

The Supreme Court in *Sutton* also addressed the third prong of the disability determination, whether the plaintiff could be regarded as disabled, and interpreted the statute to require not only that the employer “entertain misperceptions about the individual,” but also that the employer perceive the plaintiff as substantially limited in a major life activity. The

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31 Id. at 482.
33 Id. at 521.
35 555 F.3d 462 (5th Cir. 2009).
36 Id. at 470-71.
37 *Sutton*, 527 U.S. 417, at 489. Courts have rarely found that an individual is disabled under prong three. Colker, *supra* note 4, at 113.
38 527 U.S. at 490-91.
requirement was reiterated in *Murphy v. United Parcel Service, Inc.* The plaintiff in *Murphy* should have had a strong case under the third prong because he acknowledged he had a disability but that it could be controlled with medication. However, his employer considered him too disabled to perform the duties of his job even though he had worked in his position for more than a month before his employer learned of his hypertension. But that was not sufficient, according to the Court, because he had to show that his employer regarded the impairment to limit him in one or more life activities. In other words, he had to show that his employer, UPS, regarded him as unable to work in a “class of jobs utilizing his skills” not just unable to work as a mechanic when the job requires driving a motor vehicle. Moreover, “when the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.” The Court questioned whether “working” was a major life activity within the meaning of the ADA. As a result, plaintiffs faced an “essentially insurmountable” barrier in seeking to establish a disability under the “regarded as” prong of the ADA’s definition of disability. In fact, the Court’s interpretation of a disability under the Act created a virtual “catch 22” making it nearly impossible to prove a disability while at the same time showing that the plaintiff could perform the essential functions of the job.

### III. Amendments to the ADA

Supporters of the ADA argued that the courts’ decisions “severely constricted the broad protections Congress intended to provide to individuals with disabilities through the ADA.” Dissatisfaction with the courts’ interpretation of the law led to Congress’ passing amendments to the ADA in 2008, commonly referred to as the ADAAA, effective January 1, 2009. In enacting the ADAAA, Congress noted that the holdings of the Supreme

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39 527 U.S. at 521-22.
40 Colker, *supra* note 4, at 113.
41 527 U.S. 516, at 525.
42 *Sutton*, 527 U.S. 471, at 491.
43 *Id.* at 492.
45 Stone, *supra* note 6, at 527.
Court in *Sutton v. United Air Lines, Inc.*\(^{47}\) and its companion cases and the later case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*\(^{48}\) have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.\(^{49}\) As a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not persons with disabilities.\(^{50}\) Congress also stated that the current Equal Employment Opportunity Commission’s regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with Congressional intent, by expressing too high a standard.\(^{51}\)

Specifically, Congress rejected the Supreme Court’s holding in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that merely having impairment does not make one disabled for purposes of the ADA.\(^{52}\) This ruling was one of the key factors in the rewording of the ADA because it narrowed the scope of what is to be considered substantially limiting. In addition the *Toyota Motor* Court ruled that the terms “substantially” and “major,” as used in the ADA provision defining “disability” needed to be interpreted strictly to create a demanding standard for qualifying as disabled.\(^{53}\) Congress thus amended the ADA to reject this standard because it created an inappropriately high level of limitation necessary to obtain coverage under the ADA; the question of whether an individual’s impairment is a disability under the ADA should not demand such an extensive analysis.\(^{54}\)

With the enactment of the ADAAA the list of major life activities was expanded to ensure the broad coverage that Congress intended the ADA to provide to those with disabilities. The ADAAA defines “major life activities” in two categories: (1) general activities and (2) bodily functions. General activities under the ADAAA 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.\(^{55}\) In addition, the definition now includes “the operation of a major bodily function,” meaning that under the ADAAA, the plaintiff need only prove that the impairment substantially limits a bodily function without proving that such impairment

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\(^{48}\) 534 U.S. 184 (2002).
\(^{50}\) Id. § 2(a)(6).
\(^{51}\) Id. § 2(a)(8).
\(^{52}\) 534 U.S. 184, at 198.
\(^{53}\) Id. at 197.
also limits another major life activity. Bodily functions include reproduction, normal cell growth, and respiratory, neurological, circulatory, brain, endocrine, immune system, digestive, bowel, and bladder functions. EEOC regulations add to the list both functions of systems and organs, including speech organs and skin and cardiovascular, hemic, lymphatic, musculoskeletal, and genitourinary functions. The ADAAA also clarifies that a plaintiff needs to show only that he or she is substantially limited in a single major life activity in order to meet the definition of disability under the first prong. In addition, the ADAAA specifically defines working as a major life activity, resolving the issue raised in *Toyota*. Finally, regulations clarify that a person can be treated as disabled even if the disability is expected to last for fewer than six months and that there is no durational minimum for any disability. The regulations also provide that the focus should be on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

While definitional range of major life activities is much broader, plaintiffs must still be able to show that their disability “substantially limits” a major life activity. The ADAAA does not change the requirement that plaintiffs alleging a substantial limitation on their ability to work must prove that the limitation applies to a broad range of jobs. “The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” Thus, for example, where the only effect on the plaintiff’s performance of her job was the stress of reporting to a supervisor, the court ruled that she could not show that her work-related stress substantially limited her major life activity of working because she was willing and capable of performing all of the other requirements of her position. It was evident, stated the court, that plaintiff’s disability was situational and not applicable to a class of jobs or a broad range of jobs in various classes.

Consistent with the amendments, the regulations detail a list of physical and mental impairments that will qualify as a disability under the ADA.

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56 Id. § (2)(B).
57 29 C.F.R. § 1630.2(i)(1)(ii).
58 Id. § 1630.2(j)(1)(ix).
59 Id.§ 1630.2(j)(4)(iii).
60 Id. § 1630.2(j)(3)(i).
62 Id. at *7.
These include any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. Disability does not include the illegal use of drugs, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs. Further, homosexuality and bisexuality are not impairments and so are not disabilities as defined by the ADA. Further, the amendments clarify that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

The amendments also changed the rule regarding whether plaintiffs being assessed for a disability would be evaluated in their unmitigated, rather than in their mitigated states. Congress drafted the amendments to state that when determining whether a plaintiff is disabled within the meaning of the act, no weight or regard is to be given to the ameliorative effects of mitigating measures such as (1) 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; (2) use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications. Thus, with the exception of ordinary glasses or contact lenses, the effects of mitigating measures are not to be considered in determining whether an impairment substantially limits a major life activity. Lawsuits by plaintiffs who can prove that they are being discriminated against because of their impairments are will not be dismissed “simply because their impairments are successfully treated by mitigating measures.” Several authors believe that the extension of ADA protection to employees who suffer from no limitations in their daily

63 29 C.F.R. § 1630.2(h).
64 Id. § 1630.3(a), (d).
65 Id. § 1630.3(e).
67 Id. § 12102(4)(E)(i) (2012).
68 Stone, supra note 6, at 534.
lives simply because they may be disabled in their hypothetical, unmedicated state will prove counterproductive.\footnote{E.g. Amelia Michele Joiner, \textit{Opening the Floodgates}, 47 SAN DIEGO L. REV. 331, 363 (2010).}

The ADAAA also make it clear that to establish the “regarded as” prong of disability, plaintiffs need only show that they have been subjected to discrimination “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”\footnote{Pub. L. 110-325 § 3(3), codified in 42 U.S.C. § 12102(3) (2012).} According to one author, this was a “drastic change” from courts’ previous rulings that a plaintiff who was not perceived as being substantially limited in at least one major life activity could not be “regarded as” disabled.\footnote{Stone, \textit{supra} note 6, at 535.} However, in order to be “regarded as” disabled, the claim must be predicated on impairments (actual or perceived) that last or are expected to last more than six months,\footnote{42 U.S.C. § 12102(3)(B) (2006).} thus, allaying concerns regarding claims based on common ailments.\footnote{Valderrama, \textit{supra} note 6, at 202.} Congress also resolved a split among the circuits as to whether individuals who are “regarded as” disabled must be provided with reasonable accommodations, answering in the negative.\footnote{42 U.S.C. § 12201(h) (2012).}

IV. CASES DECIDED AFTER THE AMENDMENTS

While it is clear that Congress intended that the ADAAA broaden the scope and protections of the ADA, the appellate courts are generally in agreement that it is not retroactive.\footnote{Shin v. Univ. of Md. Med. Sys. Corp., No. 09-1126, 2010 WL 850176, at *5 (4th Cir. Mar.11, 2010); Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 34 n. 3 (1st Cir.2009); EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469-70 n. 8 (5th Cir.2009); Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562, 565-67 (6th Cir.2009); Fredricksen v. United Parcel Serv., Inc., 581 F.3d 516, 521 n. 1 (7th Cir.2009); Becerril v. Pima Cnty. Assessor's Office, 587 F.3d 1162, 1164 (9th Cir.2009); Lytes v. DC Water & Sewer Auth., 572 F.3d 936, 939-42 (D.C.Cir.2009).} In other words, for actions that took place before January 1, 2009, appellate courts agree that the standards enunciated in \textit{Sutton} and \textit{Toyota} continue to apply.

Cases decided under the new amendments provide insight on how courts will interpret the ADAAA. In \textit{Lewis v. Florida Default Law Group},\footnote{No. 8:10-CV-1182-T-27EAJ, 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011).} the employee claimed that she was mostly bedridden during the time she was infected with H1N1, was physically drained, dizzy, had shortness of breath, was vomiting, and had diarrhea. As a result, she was unable to take care of her children, cook, run errands, and perform tasks around her house such as
laundry and dishes. Upon returning back to work, she was terminated due to too many absences. Consequently, Lewis filed a suit against the company claiming discrimination because of her disability. The court acknowledged that an impairment lasting or expected to last fewer than six months could be substantially limiting, but the employee must clearly show that the illness was sufficiently severe. Here, the illness was short-term in duration but was not sufficiently severe. Therefore, the ailment did not qualify as a disability. The court also reviewed the change in the law that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. This provision, stated the court, applies to efforts to mitigate the symptoms of an impairment, not treatment that alleviates a condition in its entirety. To hold otherwise would require that almost any infection or injury, regardless of its actual impact, be treated as a covered disability under the ADA. Further, the ADAAA’s language regarding conditions that are episodic in nature should apply only to permanent—albeit episodic—conditions like cancer, epilepsy, asthma, bipolar disorder, schizophrenia, hypertension, diabetes and post-traumatic stress disorder.

In contrast, an Illinois district court recognized renal cell carcinoma (in remission when the employee was terminated) as a basis for a qualified disability and denied the employer’s motion for summary judgment. The court noted that individuals with episodic conditions such as epilepsy, severe asthma, or multiple sclerosis should qualify if these conditions (when active) would substantially limit one or more of the above major life activities. Similarly, normal cell growth that is substantially limited due to cancer now qualifies under the ADAAA as a disability. When the cancer is in remission, the individual affected nevertheless has an ADAAA disability without a showing that he was substantially limited in a major life activity at the time he was terminated. Periodic loss of the ability to speak can also fall within the definition of an episodic impairment that, when active, substantially limits a major life activity; the fact that the loss may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. However, even though the ADAAA provides that a disability does not have to last at least six months,
illnesses of a relatively short-term nature such as pneumonia will not render
an employee disabled.\(^85\)

### A. Substantial Limitation

While the ADAAA reversed the Toyota decision with respect to how severe the employee’s impairment must be, the law still requires that the impairment substantially limit the employee in a major life activity. Neither the law nor subsequent regulations shed light on the type of evidence that must be presented to prove this. Further, pre-ADAAA courts often granted summary judgment for employers if the employee was able to perform some tasks. For example, an employee who claimed a substantial limitation in caring for herself because of a back injury lost on a motion for summary judgment because, the court concluded, she could drive, bathe, brush her teeth, and dress herself, and thus was not substantially limited in the ability to care for herself.\(^86\) Substantial limitation may also require that the employee be continuously affected by the impairment. For example, an employee with chronic pancreatitis that caused him to miss a few days of work when his condition “flared up” was not covered by the ADA, because “such temporary effects do not amount to a substantial limitation.”\(^87\)

Applying the new ADAAA standard, a district court held that depression may be considered a disability if the plaintiff can establish that it was the primary cause that substantially limited her major life activity of sleeping.\(^88\) Citing both ADAAA and EEOC regulations, an Illinois district court recognized HIV as a qualified disability that compromises the immune system.\(^89\) Plaintiff’s HIV positive status substantially limited a major life activity: the function of his immune system. Such a conclusion is consistent with the EEOC’s proposed regulations to implement the ADAAA which lists HIV as an impairment that will consistently meet the definition of disability.\(^90\) However, even after the enactment of the ADAAA and the modified EEOC regulations, employees must show substantial limitation in performing a class of jobs or broad range of jobs in various classes as compared to most people with comparable training, skills, and abilities.\(^91\)

Both the regulations issued before and after the amendments suggested that the determination of substantial limitation be made with reference to

\(^86\) Squibb v. Mem. Med. Ctr., 497 F.3d 775, 784 (7th Cir. 2007).
\(^89\) Horgan v. Simmons, 704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010).
\(^90\) Id. at 819.
\(^91\) Allen v. SouthCrest Hosp., 455 F. App’x 827 (10th Cir. 2011).
other individuals. Regulations issued after the ADAAA made it clear that the
definition of substantially limited should be construed broadly and provide
that an impairment is a disability if it substantially limits the ability of an
individual to perform a major life activity as compared to most people in the
general population.\textsuperscript{92} 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. Thus, while the regulations removed
the comparison to an “average person” it continues to require the
determination of substantially limited to be made with respect to “most
people in the general population.” It is not clear whether this change will
have any significant impact on the courts’ inquiry, and plaintiffs are well-
advised to continue to present evidence regarding the extent, duration, or
frequency of the limitation, as well as the abilities of either the average
person or most people in the general population.\textsuperscript{93}

Using the standard under the previous regulations, the Third Circuit held
that an employee who walked with crutches after arthroscopic surgery on his
ankle was no different than an average person with respect to walking or
standing during a fifty minute stretch, and as such, could “carry out most
regular activities that require standing and walking.”\textsuperscript{94} Similarly, the
inability to perform some household chores plus the inability to lift more
than ten pounds is not enough to find an employee sufficiently different from
the general population such that he was substantially limited in lifting
ability.\textsuperscript{95} Under the new ADAAA regulations, a federal district court
concluded that many people are unable to lift the 50–pound and 100–pound
boxes as required for a position; thus, plaintiff’s inability to do so did not
render him substantially limited in lifting ability compared to the general
population.\textsuperscript{96} This begs the question whether the plaintiff in this case would
have been considered substantially limited under the revised regulations if
he claimed that he could not lift more than, say, ten pounds.

In any event, the employee must still present evidence not only of the
impairment but that the impairment substantially limits a major life activity.
Simply claiming limited eyesight due to monocular vision is not sufficient;

\textsuperscript{92} 29 C.F.R. § 1630.2(j)(1)(ii) (2010). The regulations had previously provided that a person
was substantially limited if he or she is unable to perform a major life activity that the average
person in the general population can perform or is 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. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1999).
\textsuperscript{93} Hickox, \textit{supra} note 26, at 494.
\textsuperscript{94} Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 186 (3d Cir. 1999).
\textsuperscript{95} Marinelli v. City of Erie, Pa., 216 F.3d 354 (3d Cir. 2000).
\textsuperscript{96} Chi. Reg’l Council of Carpenters v. Thorne Assocs., Inc., 893 F. Supp. 2d 952, 962 (N.D.
Ill. 2012).
the employee must also demonstrate that it substantially limits some other activity such as driving at night.\textsuperscript{97} Similarly, failing to get a good night’s sleep, while perhaps inconvenient, does not standing alone establish that an employee was substantially limited in any major life activity.\textsuperscript{98} Inability to work long hours is not evidence of a substantial limitation.\textsuperscript{99} In \textit{Koller v. Riley Riper Hollin & Colagreco},\textsuperscript{100} the employee claimed that for two weeks following his surgery he was in pain and heavily medicated so he had trouble staying awake and concentrating; while he was still in pain and medicated, he returned to work, even though he had difficulty moving and driving because of the cast on his knee; and that he was able to arrive at work at 10 a.m. on the two days per week that he had his therapy sessions. The court held that these “allegations do not rise to the level of important, let alone, substantial limitations on a major life activity.”\textsuperscript{101}

The regulations state that an employee is not required to furnish medical evidence of a disability, but that medical evidence may be presented.\textsuperscript{102} Under pre-ADAAA law, many courts admonished plaintiffs for not providing any proof other than their own unsubstantiated testimony, and this does not appear to have been changed under the amendments. An employee who suffered from anxiety, depression, and post-traumatic stress disorder was not disabled within meaning of the ADA, absent evidence supporting employee’s contention that her mental condition substantially limited her in performing any major life activity. According to the court, the plaintiff’s bald assertion that she suffers from certain mental or psychological conditions does not mean, \textit{a fortiori}, that she is disabled within the meaning of the ADA.\textsuperscript{103} Thus, a plaintiff facing a summary judgment motion may need to continue to present medical or vocational testimony regarding the extent of the limitation rather than relying on the plaintiff's own description of his or her limitations.\textsuperscript{104}

Note that if the employee cannot meet the “substantial limitation” standard, he or she might be able to meet the third prong of the definition of disability. In contrast to the pre-amendment statute, under the ADAAA, a plaintiff proceeding under the “regarded as” prong of the disability definition need only prove the existence of an impairment that is neither transitory (\textit{i.e.}, having an actual or expected duration of 6 months or less) nor minor to be

\textsuperscript{98} Anderson v. Discovery Commc’ns, LLC, 814 F. Supp. 2d 562 (D. Md. 2011).
\textsuperscript{101} \textit{Id.} at 513.
\textsuperscript{102} 29 C.F.R. § 1630.2(j)(1)(iv).
\textsuperscript{104} Hickox, \textit{supra} note 26, at 494.
covered under the ADAAA. The individual no longer is required to prove that the employer regarded his impairment as substantially limiting a major life activity. The regulations provide that an individual is “regarded as having [a disabling] impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.105 Thus, determining disability status under the new “regarded as” prong is an easier task than determining whether an individual is substantially limited in a major life activity.106 Based on this language, a district court concluded that the plaintiff presented enough evidence to conclude that his employer regarded him as disabled and thus denied the employer’s motion for summary judgment.107

B. Essential Functions

Before the passage of the ADAAA, the definition of disability was in effect used as a “gatekeeper” by the courts as a means of limiting vagueness or preventing frivolous cases from going forward.108 With the clarification of disability by the ADAAA, it will not be as easy for employers to win summary judgment motions on the basis that the employee is not disabled within the meaning of the Act. However, plaintiffs can still lose their ADA claims based on the plaintiffs’ lack of qualifications (including whether they can perform essential functions of the job) or the employer’s provision of a reasonable accommodation. Changes instituted by the amended Act are expected to shift the focus of the court from issues of establishing disability to issues of plaintiffs’ abilities to do perform the essential functions of the job, with or without accommodation, notwithstanding their disabilities.109

Although the ADA does not provide a definition of essential functions of a job, the regulations set forth three nonexclusive reasons why a job function may be considered essential: (1) the position exists for “the purpose of performing the function;” (2) there are a “limited number of employees available among whom responsibility for the function can be distributed;” and/or (3) the function is “highly specialized” and the incumbent was hired for his or her expertise or ability to perform it.110 Essential functions do not

108 Valderrama, supra, note 6, at 202-03.
109 Befort, supra note 106, at 1022.
110 29 C.F.R. § 1630.2(n)(1) (2010).
necessarily mean the primary functions of the job, but must bear more than a marginal relationship to the job at issue.

While plaintiffs retain the burden of establishing that they are otherwise qualified individuals with a disability, the burden is on the employer to proffer evidence that a given function is essential. Essential functions are determined by: (1) the employer’s judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents in the job; and/or (7) the current work experience of incumbents in similar jobs.

The importance of how narrowly or broadly job duties are defined is illustrated in a pre-amendment case, Tobin v. Liberty Mutual Insurance Co. There the plaintiff, an insurance salesperson, suffered from bipolar disorder which made it difficult for him to concentrate on his work and manage his accounts. As a result, although he continued to bring in revenues from existing accounts, he routinely fell short of meeting quotas for new clients. He argued that had the employer provided him clerical assistance and assigned to him different types of accounts (mass marketing accounts which were overall more desirable) he would have been able to overcome the difficulties caused by his disability, and could have met his quotas. The court of appeals upheld the jury verdict for the plaintiff, finding that an assignment to a mass marketing account would have enabled the plaintiff to achieve his sales quotas and thus to perform the essential functions of his job—making such an assignment a “reasonable accommodation.”

However, had the employee’s duties been defined more broadly than simply meeting sales goals, and included the necessary interpersonal and customer skills of a successful sales person who recruits and maintains accounts, the case might not have been sent to the jury in the first place.

Once the essential functions of the job are established, the court must determine whether the plaintiff could perform those functions. In Quick v. VistaCare, Inc., the employer maintained that the employee could not perform an essential function of her job – attending Monday morning meetings. The court agreed and held that the employee’s subjective belief that she was a victim of discrimination is insufficient, without further

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111 Stone, supra note 6, at 554.
112 29 C.F.R. § 1630.2(n)(3) (2010).
113 553 F.3d 121 (1st Cir. 2009).
114 Id. at 127.
115 Id. at 140.
116 Stone, supra note 6, at 559-60.
evidentiary support, to overcome VistaCare’s articulation of a legitimate, non-discriminatory motive. In *Azzam v. Baptist Healthcare Affiliates, Inc.*, the court found that call responsibilities and 8-hour shifts were essential functions of a surgical registered nurse (RN). Although the hospital had allowed the employee to work a reduced schedule and avoid call duties following her stroke, “the ADA does not require employers to accommodate individuals by shifting an essential job functions on to others.” Because the employee could not perform the essential functions of a surgical RN, she was not “otherwise qualified” for the position.

Courts have held that regular attendance is an essential function of any job, and this has not changed under the ADAAA. However, it is a question for the trial court whether the flexible work schedule requested by an employee as an accommodation would have enabled him or her to fulfill this essential function of attendance.

C. Reasonable Accommodation

The ADA requires employers to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless they can demonstrate that the accommodation would impose an undue hardship. Once an employee requests an accommodation, the employer has an “affirmative obligation to engage in an interactive process in order to identify, if possible, a reasonable accommodation that would permit ... [the employee] to retain his employment.” However, the ADA does not require the employer to provide every accommodation a disabled employee may request or obligate the employer to meet the personal preferences of disabled employees. In addition, the reasonable accommodation must be one that enables the employee to perform the essential functions of the job despite the disability. Reassignment to avoid conflict or attempting to stop co-worker harassment is not the type of accommodation contemplated by the ADA. The employee must also be

118 Id. at 498.
120 Id. at 662.
121 Valle-Arce v. P.R. Port Auth., 651 F.3d 190, 200 (1st Cir. 2011).
122 Id.
123 Dark v. Curry Cnty., 451 F.3d 1078, 1088 (9th Cir. 2006).
able to show that failure to accommodate his or her disability prevented her from performing the essential functions of her position.127

Reasonable accommodation includes a number of actions such as installing wheelchair ramps, providing the employee with special equipment, modifications of examinations, training materials, or policies, and the provision of qualified readers or interpreters.128 Reassignment is often a request for accommodation made by the employee with a disability. Reassignment is a reasonable accommodation only if a position for which the plaintiff is qualified is otherwise available.129

Where the accommodation requested involves a change in duties, change in schedules, or the addition of personnel, it becomes more difficult to claim that the request is reasonable or does not cause undue hardship. In *Grubb v. Southwest Airlines*,130 the court determined that employer was not required to “fundamentally alter its schedules” or impose “inordinate burdens” on other employees to accommodate a disabled individual with sleep apnea.

The ADA does not require an employer to create a new full-time position to accommodate a disabled employee.131 In *Toronka v. Continental Airlines, Inc.*,132 the Fifth Circuit held that it was not reasonable for employers to reassign existing employees or create new positions to accommodate a disabled employee. Additionally, an employer is not required to convert a temporary position into a permanent position to accommodate a disabled employee.133 An employer is not under any obligation to create a permanent light duty post when none previously existed.134 Further, employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee’s job which the employee cannot perform by virtue of his disability.135 In *Magnussen v. Casey's Marketing Co.*,136 the employer offered the employee a stool to use while working the register, but she rejected that offer with no suggestion of an alternative. The defendant also tried to accommodate the

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128 29 C.F.R. § 1630.2(o)(2) (2010).
130 296 F. App’x 383, 388 (5th Cir. 2008).
132 411 F. App’x 719, 724 (5th Cir. 2011).
133 Hoskins, 227 F.3d at 730.
employee by offering her a third employee to “cover” the parts of her shift when she could not stand, until doing so became a hardship in a store normally staffed by just two employees at a time. The court concluded that the defendant’s determination that it could not continue to provide a third employee to perform the essential functions of the plaintiff’s job that she could not perform and an offer of part-time employment instead were appropriate. Finally, a reassignment request that violates a company seniority plan is unreasonable as a matter of law unless the plaintiff-employee can establish special circumstances why that would not be so.

The plaintiff has the burden to request a particular accommodation. Where plaintiffs claim that they should have been accommodated by reassignment to another position, identifying the necessary accommodation requires the plaintiff to identify the position to which the plaintiff should have been reassigned. Therefore, as part of a prima facie case, the plaintiff must identify a vacant position for which the plaintiff was otherwise qualified, with or without accommodation, that existed at the time of the request for reassignment. As noted by one court: “An employer is entitled to assign workers where it sees fit, and the Court is not to act as a ‘super personnel department’ that second guesses employers' business judgments.”

In Colwell v. Rite Aid Corp., a cashier for a drug store developed a vision impairment that made it both dangerous and difficult for her to drive at night, and requested that she be assigned only to the day shifts. The employer refused claiming it would be unfair to other employees, and the plaintiff ultimately quit. The district court granted summary judgment for Rite Aid finding that because Colwell did not need any reasonable accommodation in order to perform the essential functions of her job, Rite Aid had no obligation to consider her shift transfer request and “had no duty to accommodate her commute to work.” On Colwell’s appeal, the Third Circuit reversed holding, that “as a matter of law that changing her working schedule to day shifts in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates.”

137 Id. at 957.
138 Id. at 958.
142 602 F.3d 495 (3d Cir. 2010).
143 Id. at 500.
144 Id. at 504.
In *Vande Zande v. Wisconsin Department of Administration*, the court of appeals held that the employee’s pressure ulcers were part of her disability, so her employer had the duty to accommodate reasonably. However, her employer was not required by the ADA to allow her to work at home or to install a computer in her home, so that she could avoid using her sick leave. Her employer was more than accommodating towards her disability when modifying the bathrooms, ramping a step, purchasing special furniture, and adjusting her schedule to allow her to make medical appointments. In another pre-ADAAA case the Fifth Circuit Court of Appeals has held that extended indefinite medical leave is not a reasonable accommodation.

If an employee is not able to show that the employer failed to provide reasonable accommodation, or if the employee, although disabled, does not need accommodation in order to perform the functions of a job, the employee can nevertheless prevail on a claim of discrimination based on the actions of the employer including creating a hostile work environment. Plaintiff’s hostile work environment claims must rest upon allegations of more than a few isolated incidents of comments. For example, allegations of three or four comments that specifically referred to the plaintiff’s anxiety medication and one or two additional comments that could be construed as negative assessments of her demeanor potentially caused by her disability were not sufficient to establish a hostile work environment. Although the comments may be crude and offensive, they were neither pervasive nor severe. While the plaintiff might have felt that the comments together with her supervisor’s brusque managerial style created a subjectively hostile atmosphere, the court found that the behavior was not “objectively severe or pervasive—that is, [conduct that] creates an environment that a reasonable person would find hostile or abusive” such to interfere with an employee's work performance.

**D. Other Reasons for Employment Action**

Even if an employee is found to be disabled under the ADA, if the employer can present legitimate, non-discriminatory reasons for the adverse employment action, the employee will not be successful in pursuing a discrimination claim. For example, where the employee had longstanding problems with communication and respect, which was documented in every formal review, the employee had communication problems with her

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145 44 F.3d 538 (7th Cir. 1995).
146 *Id.* at 544.
147 Reed v. Petroleum Helicopters, Inc., 218 F.3d 477, 481 (5th Cir. 2000).
149 *Id.* at 255-56.
supervisors, including going to a day-long conference but not returning for a week without notice, and the employee was unable or refused to correct time discrepancies or to provide explanations as requested by her supervisor, the court found such evidence sufficient to support a summary judgment motion in favor of the employer.150

In *Naber v. Dover Healthcare Associates, Inc.*,151 a genuine issue of material fact existed as to whether the employee’s previously diagnosed depression was the cause of her inability to sleep one or two nights a week and whether that sleeplessness was substantially limiting as compared to the average person in the general population. Nevertheless, the employer proffered a legitimate reason for terminating employee, that employee falsified documents, which was found by the court not to be a pretext for discrimination in violation of the ADA.152 Thus, summary judgment for the employer was granted.

V. DISCUSSION

Congress’s attempt to provide disabled persons with employment opportunities where they can make meaningful contributions to society is an objective on which few employers would disagree. At the same time, employers do not want to be forced to hire or retain unqualified workers, workers who take excessive sick leave, or workers whose medical expenses cause a drain on employers’ health plans. The amendments to the ADA take a more level approach to allow disabled employees their rights to press their claims of unfair treatment in the workplace by recognizing a plethora of impairments which should be considered as disabilities. Some scholars argue that the amendments may have gone too far by allowing employees to pursue claims for trivial illnesses or impairments which can be totally controlled with medications or prosthetics. Others argue that the “substantial limitation” requirement will still prevent many employees from a hearing on the issues. Although the amendments specifically rejected the rule enunciated in the *Toyota* decision that the terms “substantially” and “major” need to be “interpreted strictly to create a demanding standard for qualifying as disabled,” several recent decisions seem to indicate that the hurdle for proving substantial limitation is still difficult.

With the definition of disability fairly broad, employment lawyers familiar with the ADAAA will need to focus on other requirements of the law to argue their cases. The three provisions most likely to receive the most judicial attention are: the substantial limitation requirement, the employee’s

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152 *Id.* at 646-67.
ability to perform the essential requirements of the job, and the duty to accommodate. Regarding the first issue, the amendments to the third prong of proving that a plaintiff is disabled, the “regarded as” prong, alleviate the need to prove substantial limitation. However, reliance on this definition also relieves employers with the duty to accommodate. When expanding this part of the definition, Congress also adopted the position of several prior courts of appeals that to require accommodation for an employee who is merely regarded as disabled would lead to “bizarre results” by entitling such an employee to accommodations for a non-disabling impairment that no similarly situated employees would enjoy, and require employer to unnecessarily use resources for those not needing special attention. This is true for employees who are not actually disabled but are mistakenly perceived to have a disability, but is not necessarily the case for employees whose impairment does not substantially limit major life activities, but who otherwise might need accommodation. Since a claim of discrimination does not include failure to provide a reasonable accommodation under the “regarded as” prong, the employee must allege some other act of discrimination such as an adverse employment action or a hostile work environment, the latter of which is often difficult to prove. In such cases, the employer will be successful if it can show that the employee was fired because he or she could not perform the essential functions of the job and it is under no obligation to provide reasonable accommodation to permit the employee to do so.

Whether the employee is able to perform the essential requirements of the job will also become a more contested issue after the ADAAA. Prior cases involving the plaintiffs’ physical abilities to lift weights or perform other strenuous activities typically found for the employer based on a finding that the plaintiffs in those cases were not substantially limited as compared to the “average person.” Whether the change in the regulatory language to “general population” will change the analysis remains to be seen. However, even if the employee is able to meet the definition of disabled, the question becomes how critical is the ability to lift weights to the essential functions of the job. Employers would be well-advised to review their job descriptions to insure that such duties are included in the job tasks. Cases involving insomnia or other sleeping disorders may also turn on issues other than whether the plaintiff is disabled. Previous decisions holding that the duty to report to work on time is an essential function of a job will continue to be relied upon by employers seeking to dismiss such cases on summary judgment motions.

153 Weber v. Strippit, Inc. 186 F.3d 907, 916 (8th Cir. 1999).
154 Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).
155 Befort, supra note 106, at 1023.
Whether the employer provided reasonable accommodation is the third issue that will attract more attention under post-ADAAA scrutiny. The line of cases regarding reassignment, job sharing, flexible hours, and similar accommodation requests will be relevant in the courts’ consideration of this issue. The question of undue hardship will also be more closely examined. While the size of the employer will be relevant, it is not conclusive that large employers must grant every request by employees with disabilities. As noted by the Seventh Circuit, an employer, even a large employer such as the state, should not be “required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.”156

VI. CONCLUSION

The amendments to the ADA as well as the EEOC’s subsequent regulations have changed the landscape regarding discrimination claims based on disability. While the intent of Congress was to extend the protections of the ADA to a broad class of persons with a disability, courts will continue to protect employers from frivolous claims as well as to recognized employers’ rights to make reasonable business decision. Scholars and practitioners alike will watch carefully as decisions are handed down interpreting these new provisions.

156 Vande Zande v. Wis. Dep’t of Admin, 44 F.3d 538, 542-43 (7th Cir. 1995).