

4-27-2012

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Recommended Citation

Schopick, Abigail J. (2012) "The Americans with Disabilities Act: Should the Amendments to the Act Help Individuals with Mental Illness?," *Legislation and Policy Brief*: Vol. 4: Iss. 1, Article 1.

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THE AMERICANS WITH DISABILITIES ACT: SHOULD THE AMENDMENTS ACT HELP INDIVIDUALS WITH MENTAL ILLNESS?

ABIGAIL J. SCHOPICK*

INTRODUCTION	7
I. BACKGROUND	8
II. INDIVIDUALS WITH MENTAL ILLNESSES SHOULD BE MORE SUCCESSFUL UNDER THE ADAAA THAN THEY WERE UNDER THE ADA.....	16
A. COVERAGE UNDER THE ADA FOR INDIVIDUALS WITH MENTAL ILLNESS.....	16
B. COVERAGE FOR INDIVIDUALS WITH MENTAL ILLNESS POST-ADAAA PASSAGE	24
CONCLUSION	32

INTRODUCTION

On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act of 1990 (ADA).¹ The ADA was intended to eliminate discrimination against individuals with disabilities² by expanding the Rehabilitation Act (Rehab Act) to cover people with disabilities in need of coverage from a non-federal employer or entity.³ Unfortunately, due to a number of Supreme Court cases narrowing the focus of the ADA,⁴ the individuals that were intended by Congress to have full protection under the law were no longer assured adequate coverage.⁵ In 2008, in response to the narrowing of the definition of disability and the serious restrictions on the term “substantially limits” that resulted from Supreme Court decisions that led to poor employee success rates, Congress passed the ADA Amendments Act of 2008

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¹ Pub. L. No. 101-336, 104 Stat. 327, *amended by* the ADA Amendments Act of 2008 Pub. L. No. 110-325, 122 Stat. 3553 (2008).

² *Id.* at § 2.

³ Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 704 (1997).

⁴ See *Toyota Motor Mfr. v. Williams*, 534 U.S. 184 (2002) (holding that for a major life activity to be considered substantially limiting under the ADA it has to severely restrict the individual's ability to do a task of central importance to an average person's daily life); see also *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (determining that whether or not an individual is disabled under the ADA needs to be determined with the consideration of mitigating measures).

⁵ See Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008).

(ADAAA).⁶ Congress passed this legislation to “restore the intent and protections of the Americans with Disabilities Act of 1990.”⁷ President George W. Bush signed the ADAAA into law on September 25, 2008.⁸ The ADAAA went into effect on January 1, 2009.⁹

This paper will argue that although there have been no decisions thus far applying the ADAAA to cases of discrimination against individuals suffering from mental illness, the amendments enacted in 2008 should result in greater coverage for such individuals. Part I of this paper will examine the history leading up to the passage of the ADAAA, including the failures of the ADA and the decisions by the Supreme Court that severely limited the scope of the ADA.¹⁰ Part II will examine the ADAAA and analyze the impact it should have on cases brought by individuals discriminated against on the basis of their mental illnesses.¹¹ This discussion will include examining the language of the statute as well as regulations and guidances that should be used to assist courts in protecting the rights of individuals who fall within the scope of the ADAAA because of their mental illnesses. Finally, the paper will conclude that under the ADAAA, individuals with mental illnesses should not continue to have the difficulties in prevailing in discrimination suits that they did under the ADA.¹²

I. BACKGROUND

The ADAAA was passed by Congress and signed into law by President George W. Bush on September 25, 2008.¹³ Congress passed the ADAAA after decisions by the Supreme Court severely eroded the legislative intent of the original disability protection legislation, the ADA.¹⁴

The primary purpose of the ADA was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁵ Between the ADA (private entities) and the Rehab Act (public entities), theoretically, all individuals with disabilities would now be protected from harmful discrimination

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *infra* pp. 8-16.

¹¹ See *infra* pp. 16-31.

¹² See *infra* pp. 31-32.

¹³ *Id.*

¹⁴ *Id.*; see *Toyota Motor Mfr. v. Williams*, 534 U.S. 184 (2002) (holding that for a major life activity to be considered substantially limiting under the ADA it has to severely restrict the individual’s ability to do a task of central importance to an average person’s daily life); *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (determining that whether or not an individual is disabled under the ADA needs to be determined with the consideration of mitigating measures).

¹⁵ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

on the basis of a disability. The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”¹⁶ In terms of mental illnesses, the Equal Employment Opportunity Commission (EEOC) Regulations further elaborate that a mental illness is considered “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁷

Despite the ultimate addition of mental illness and psychological disorders in the final version of the ADA, there were a few members of Congress who believed that such disorders should not be included in the legislation.¹⁸ Fortunately, those members were unsuccessful in their attempts. There were, however, a number of disorders that are classified as mental or psychological disorders that were specifically denied coverage under the ADA.¹⁹ These disorders include “transvestitism, transexualism, pedophilia, . . . gender identity disorders, . . . compulsive gambling, kleptomania, or pyromania.”²⁰ Additionally, the law excludes disorders stemming from the use of illegal drugs.²¹

In addition to having the qualifying disability, the individual must show that his or her disability “substantially limits” a major life activity.²² Although the ADA itself did not define “substantially limits,” the EEOC Regulations defined “substantially limits” as

(i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) [s]ignificantly 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.²³

With the combination of the statutory definition and the EEOC Regulations, individuals with mental illnesses, who were discriminated against on the basis of these illnesses, should have been covered by

¹⁶ 42 U.S.C. § 12102(2) (2009).

¹⁷ 29 C.F.R. § 1630.2(h)(2) (2011).

¹⁸ See 135 CONG. REC. S10765-803 (daily ed. Sept. 7, 1989) (debate between Sens. Helms and Harkin).

¹⁹ Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. C.R. L.J. 79, 102-03 (2006) (discussing the pre- and post-enactment debate on including personality disorders in the ADA’s scope).

²⁰ 42 U.S.C. § 12211(b) (2000).

²¹ 42 U.S.C. § 12210(a).

²² 42 U.S.C. § 12102(2).

²³ 29 C.F.R. § 1630.2(j)(1) (2009).

the ADA because mental illness will often have an impact on major life activities of individuals and is specifically mentioned in the definition of disability.²⁴

Unfortunately, that is not what happened. In 1999, the Supreme Court decided *Sutton v. United Air Lines*,²⁵ a case involving identical twins with severe myopia who applied for jobs with United Air Lines as global airline pilots.²⁶ The twins were denied the jobs, despite having the requisite experience, because their uncorrected vision was worse than 20/200, even though their corrected vision was normal,²⁷ and United Air Lines had a requirement that all pilots have uncorrected vision no worse than 20/100.²⁸ Therefore, according to United Air Lines, the twins were not qualified for the jobs for which they were applying.²⁹ The issue before the Court was whether an individual's disability should be evaluated with reference to his or her mitigated or unmitigated state.³⁰ The Court ultimately decided that an individual claiming protection because of a disability needs to be considered in his or her mitigated state, taking into consideration any factors that may make the individual seem and act normal, despite his or her disability.³¹

The Supreme Court had a number of justifications for this decision. First, the Court stated that within the statute, the phrase "substantially limits" is in the "present indicative verb form," which indicates to the Court that courts need to examine the person as he or she is, not as the person hypothetically would or could be without the mitigating measure.³² The Supreme Court's second justification for its decision was that the ADA requires an individualized inquiry as to whether a person should be considered disabled under the statute.³³ The Court reasoned that it would become impossible to truly have individualized inquiries if Congress intended individuals to be judged in their unmitigated states because of the time that would be required to actually carry out such an inquiry for every person.³⁴ The Court made this determination because viewing a plaintiff in his or her unmitigated and therefore hypothetical state would require viewing all plaintiffs with similar illnesses or disabilities as a group instead of individually.³⁵ The determination would then have to be made based upon what the ill-

²⁴ 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(j)(1) (2009).

²⁵ 527 U.S. 471 (1999).

²⁶ *Id.* at 475.

²⁷ *Id.* at 476.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 481.

³¹ *Id.* at 482 ("[M]itigating measures must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.").

³² *Id.* at 482.

³³ *Id.* at 483.

³⁴ *Id.*

³⁵ *Id.*

ness or disability could cause for the individual instead of what it is actually causing for the individual.³⁶ The final justification for the Supreme Court's decision centers on Congress's finding, in the ADA, that 43 million Americans have some type of mental or physical disability.³⁷ The Court reasoned that if Congress intended for people to be considered in their unmitigated states, especially given the number of people who wear some type of corrective lenses, the number provided by Congress would have to be higher than 160 million.³⁸ For these reasons, the Supreme Court announced its decision to require courts to determine a plaintiff's disability status on the basis of how the individual is in his or her mitigated state.

In his dissent in *Sutton*, Justice Stevens discussed what he believed was Congress's actual intent in the ADA.³⁹ According to Justice Stevens, Congress clearly intended people who chose to mitigate their disabilities to be covered under the law.⁴⁰ Giving the example of war veterans who use prosthetics,⁴¹ he believed there was no way Congress intended this group of individuals to be denied coverage under the Act, but whom, using the *Sutton* standard, would not be covered because of mitigating measures.⁴² Justice Stevens points out that just because people are taking advantage of a mitigating measure does not mean that they are cured of their illnesses or disorders, or that they will never be discriminated against on the basis of their disabilities.⁴³ The dissent also points out that it makes no sense to allow someone who has a record of a past disability to be covered, but not someone with a current disability that is being mitigated.⁴⁴ In fact, the Senate and House reports regarding the original passage of the ADA made clear that mitigating measures were not to be considered, with the Senate stating that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."⁴⁵

The Court affirmed its decision in *Sutton* with its decisions in *Murphy v. United Postal Service Inc.*⁴⁶ and *Albertsons, Inc. v. Kirkingburg*.⁴⁷ In *Murphy*, the Supreme Court decided that an individual with high blood pressure should not be considered disabled under the ADA because

³⁶ *Id.* at 483-84.

³⁷ *Id.* at 484; 42 U.S.C. § 12101(a)(1) (1990).

³⁸ *See Sutton*, 527 U.S. at 472.

³⁹ *Id.* at 495-98.

⁴⁰ *Id.* at 495.

⁴¹ *Id.* at 497-98.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 499.

⁴⁵ *Id.* at 499-500 (analyzing S. REP. NO. 101-116, p. 23 (1989) and H. R. REP. NO. 101-485, pt. III, p. 28 (1990)).

⁴⁶ 527 U.S. 516 (1999).

⁴⁷ 527 U.S. 555 (1999).

his condition was mitigated with medications, allowing him to function normally.⁴⁸ Additionally, in *Kirkingburg*, the Court examined the case of a truck driver with amblyopia, a form of monocular vision.⁴⁹ In that case, the individual was fired for failing to meet the Department of Transportation's (DOT) vision standards despite having no difficulty performing the duties of the job.⁵⁰ Notwithstanding his clear disability, *Kirkingburg*'s "brain has developed subconscious mechanisms for coping with his visual impairment and thus his body compensates for his disability."⁵¹ The Court determined that the subconscious corrections that his mind had been making for years were indeed a mitigating measure, and he should be considered in his mitigated, and therefore compensated state, even though the mitigation was unconscious.⁵² Therefore, with what is commonly considered the "*Sutton* Trilogy," these three cases, all decided by the Supreme Court on the same day, combined to create a regime whereby an individual who mitigated his or her disability, whether consciously or unconsciously, generally became less likely to qualify as an individual with a disability under the ADA.

The Supreme Court further narrowed the scope of the ADA with its decision in 2002 of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁵³ In *Toyota*, an employee with carpal tunnel syndrome sued Toyota for failure to accommodate her disability.⁵⁴ The Court held that Williams was not sufficiently disabled because she failed to meet the "substantially limited" standard of the definition.⁵⁵ With this decision, the Court dictated that the term "substantially limits" should mean that to be considered disabled under the ADA, the "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."⁵⁶

The EEOC provided regulations as to what should be considered substantially limiting.⁵⁷ Under the EEOC Regulations, in addition to determining that the ability to perform or take part in a major life activity had to be significantly restricted,⁵⁸ the EEOC also provided other factors

⁴⁸ See *Murphy*, 527 U.S. at 525 (finding that because Murphy could not show that he could not perform a class of jobs, he could not be disabled as a matter of law).

⁴⁹ *Kirkingburg*, 527 U.S. at 559.

⁵⁰ See *id.* at 560 (explaining a DOT waiver program where individuals with deficient vision could receive DOT certification after three years of commercial driving experience without having an accident or getting their licenses suspended).

⁵¹ See *id.* at 565 (quoting *Kirkingburg v. Albertson's, Inc.*, 143 F.3d, 1228, 1232 (9th Cir. 1998)).

⁵² See *id.* at 565-66 (noting that one's body's adjustment to a disability is no different than using an artificial aid).

⁵³ See 534 U.S. 184 (2002).

⁵⁴ *Id.* at 184.

⁵⁵ *Id.* at 184-85.

⁵⁶ *Id.* at 185.

⁵⁷ 29 C.F.R. 1630.2(j)(2)(iii) (1991).

⁵⁸ *Id.* § 1630.2(j)(1)(ii).

for making the substantially limited determination.⁵⁹ The factors provided by the EEOC suggest that courts examine “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.”⁶⁰

In light of the Supreme Court narrowing the scope of the ADA, which was intended to eliminate discrimination against individuals with disabilities, Congress felt it necessary to respond because the intent of its groundbreaking legislation from 1990 was apparently being misunderstood. In response, Representative Steny Hoyer (D-MD) and Senator Tom Harkin (D-IA) introduced versions of the ADAAA in their respective Houses of Congress.⁶¹

In the findings of the ADAAA, Congress plainly states that the Supreme Court’s decisions regarding the ADA in recent years have narrowed the scope of the law such that individuals Congress clearly intended to be fully covered were no longer afforded adequate coverage under the law.⁶² With the new legislation, Congress attempted to right the wrongs of the Supreme Court and ensure that all Americans with disabilities receive adequate coverage under federal law.

The ADAAA has a number of significant changes that will help all Americans with disabilities have more consistent coverage under the law. These changes will especially help increase coverage for individuals with mental illnesses. One of the most significant changes under the ADAAA is the rejection of the mitigating measures standard set forth in *Sutton*.⁶³ The new law requires that any determination about whether a person should be considered disabled under the law generally should be made without regard to mitigating measures.⁶⁴ Mitigating measures are especially relevant for individuals with mental illnesses. According to the National Institute of Mental Health, in 2008, 58.7 percent of adults with mental illnesses received some type of treatment, either medication, therapy, or both.⁶⁵ This number increases to 71 percent among adults diagnosed with some form of depression, and is even higher among women with mental illnesses.⁶⁶ These statistics show that a huge percentage of individuals with mental illnesses are

⁵⁹ *Id.* § 1630.2(j)(2)(iii).

⁶⁰ *Id.*

⁶¹ ADA Amendments Act of 2008, S. 3406, 110th Cong. (2008) (enacted) (introduced by Senator Tom Harkin); ADA Amendments Act of 2008, H.R. 3195, 110th Cong. (2008) (introduced by Representative Steny Hoyer).

⁶² Pub. L. No. 110-325, § 2(a), 122 Stat. 3553 (2008).

⁶³ *See id.* at § 2(b)(2).

⁶⁴ *Id.* at § 343(4)(E)(i).

⁶⁵ *Use of Mental Health Services and Treatment Among Adults*, NAT’L INST. OF MENTAL HEALTH (Oct. 26, 2009, 3:02 PM), http://www.nimh.nih.gov/statistics/3USE_MT_ADULT.shtml (indicating that outpatient services and prescription medication are the most frequently used treatments).

⁶⁶ *See id.* (“Generally, women and adults over 50 were more likely than men and younger adults to use services for depression.”).

taking measures to mitigate their diseases. After *Sutton*, an enormous number of people with legitimate disabilities, especially those with mental health disorders, were no longer covered under the ADA solely because of the measures they were taking to control their illnesses. Therefore, the elimination of the mitigating measures rule is incredibly important for individuals with mental illnesses.

In addition, cases brought under the ADA generally required an extensive determination as to whether the individual was actually disabled instead of the determination focusing on whether the person was discriminated against on the basis of the claimed disability.⁶⁷ The ADAAA directs the lower courts to end the extensive determination process previously required to determine whether the person is disabled.⁶⁸ The courts are instead instructed to focus on what the ADAAA is actually intended to do: prevent discrimination against people with disabilities.⁶⁹

There are other significant changes in the ADAAA. While the ADAAA keeps the same definition of disability that existed under the ADA,⁷⁰ the new law does something that the ADA did not do. It provides examples of what would qualify as a major life activity.⁷¹ In addition to other things, the list includes activities such as “caring for oneself, . . . learning, . . . concentrating, thinking, [and] communicating.”⁷² These are all activities that could have a positive impact on the ability of people with mental illnesses to more successfully bring claims under the ADAAA given that they are activities that are often significantly limited by mental illnesses.⁷³ In addition to the list provided by Congress in the statute, the EEOC Regulations include an even more comprehensive, although not exhaustive, list of what might be considered major life activities.⁷⁴ Besides including the activities listed by Congress, this list also includes the major life activity of “interacting

⁶⁷ See Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 745-51 (2004) (providing a survey of ADA cases in several circuits where the focus was on the plaintiff's disability rather than the discrimination).

⁶⁸ See Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (2008) (clarifying that courts should not extensively analyze individuals' impairments to decide if they are disabilities).

⁶⁹ See *id.* (instructing lower courts to focus on whether the challenged entity has complied with the ADA, rather than the individuals' capabilities).

⁷⁰ Compare *id.* § 3(1), with 42 U.S.C. § 12102(2) (using identical language to define “disability”).

⁷¹ See Pub. L. No. 110-325, § 3(2), 122 Stat. 3553 (2008).

⁷² *Id.*

⁷³ But see Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 470 (2010) (arguing that the inclusion of these terms might create more problems because they sweep too broadly and are too difficult to define as they cannot be seen).

⁷⁴ See 29 C.F.R. § 1630.2(i)(1)(i) (2011) (listing major life activities to include, but not be limited to: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working...”).

with others,”⁷⁵ something that is of vital importance to most people in their everyday lives, but something that many individuals with mental illnesses struggle to do on a daily basis.

In addition to providing examples of what constitutes a major life activity, the ADAAA also expands the definition of major life activity to include not just activities, but also “major bodily functions.”⁷⁶ Listed among the enumerated major bodily functions are neurological and brain functions.⁷⁷ These categories could be of vital importance to the likelihood of success in court for individuals with mental illnesses.⁷⁸

Another change under the ADAAA is that Congress specified that if a person has a disability that is not currently active, he or she should still be considered disabled if the disability would substantially limit a major life activity when active.⁷⁹ Additionally, although the ADAAA does clearly overturn the “severely restricts” language from *Toyota*,⁸⁰ it does not define what is meant by the term “substantially limits.” The EEOC Final Regulations do provide some guidance, but they also do not truly define “substantially limits.” During Senate debates on the bill, there was some talk about changing the wording to further define what was meant by substantially limits.⁸¹ The most likely alternative was to change “substantially limits” to “materially restricts.”⁸² This language was defeated in the Senate because of concerns that the “materially restricts” language was ambiguous and would provide no better guidance to the courts than what had already been provided.⁸³ The EEOC, in its regulations, provides more information about what “substantially limits” does not mean than what it does mean.⁸⁴ In an attempt to ensure the courts understand that Congress did not intend them to follow the EEOC’s former guidance of “significantly restricted” or the *Toyota* language of “severely restricts,” the EEOC Final Regulation provides that

[a]n impairment is a disability within the meaning of this section if it ‘substantially limits’ the ability of an in-

⁷⁵ *Id.*

⁷⁶ Pub. L. No. 110-325, § 3(2)(B), 122 Stat. 3553 (2008).

⁷⁷ *Id.*

⁷⁸ But see Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667 (2010) (arguing that the expansion of major life activities and the addition of bodily functions actually brings the ADAAA out of the realm of what was intended by the ADA because it is too expansive, is now allowing side effects to essentially make someone eligible for coverage, and confuses the goal of positive outcomes with the disability definition itself).

⁷⁹ Pub. L. No. 110-325, § 3(4)(D), 122 Stat. 3553 (2008).

⁸⁰ *Id.* § 1630.2(b)(5).

⁸¹ Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 653 (2009).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See 29 C.F.R. § 1630.2(j)(1)(ii) (2011) (elaborating on the intent of “substantial meaning”).

dividual 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.⁸⁵

Additionally, the EEOC discusses that the threshold for reaching the disability definition is lower than it was under the ADA, and therefore the definition of “substantially limits” is less crucial to the determination.⁸⁶ The EEOC clearly states that “[t]he question of whether an individual meets the definition of disability . . . should not demand extensive analysis.”⁸⁷

II. INDIVIDUALS WITH MENTAL ILLNESSES SHOULD BE MORE SUCCESSFUL UNDER THE ADAAA THAN THEY WERE UNDER THE ADA

A. COVERAGE UNDER THE ADA FOR INDIVIDUALS WITH MENTAL ILLNESS

Under the ADA, individuals with mental illnesses were generally unsuccessful in making claims of discrimination against their employers.⁸⁸ In 2009, not a single employee who brought suit under the ADA for discrimination in the workplace on the basis of his or her mental illness was successful in the claim.⁸⁹ While employees with mental illnesses fared better in previous years, there were still an extremely small number of successful employees with mental illness claims under the ADA.⁹⁰ From the inception of the ADA, there were a number of concerns that people with mental illnesses would not be afforded full protection under the law. The major concerns were that:

(1) the legislative history, early commentaries, and practice manuals relating to the ADA scarcely acknowledged the application of the Act to persons with mental disabilities; (2) when commentators have considered the Act’s application to persons with mental disabilities, the analysis has generally been limited to persons with

⁸⁵ *Id.*

⁸⁶ *Id.* § 1630.2(j)(1)(iii)-(iv); see also Bonnie M. Wheaton, *The Americans with Disabilities Act: Who is Disabled?*, 23 DUPAGE CNTY. BAR ASS’N BRIEF 22 (2010) (explaining that while the threshold to be considered disabled is lower under the ADAAA, it is still a determination that needs to be made, based on facts, by the courts).

⁸⁷ 29 C.F.R. § 1630.1(c)(4) (2011).

⁸⁸ See Amy L. Allbright, *2009 Employment Decisions Under the ADA Title I – Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 341 (2010) (explaining that employers generally win on summary judgment or dismissals).

⁸⁹ See *id.* (describing the drop in employee wins from 2008, when more employees prevailed).

⁹⁰ *Id.*

mental retardation, rather than those with mental illness; and (3) no matter how strongly such an Act is worded, the law's aims cannot be met unless there is a corresponding change in public attitudes (especially among the legal system interpreting and enforcing the Act).⁹¹

When the House of Representatives wrote its report on the proposed legislation, it stated that discrimination against individuals with disabilities "often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies."⁹² This belief is often referred to as discrimination resulting from myths, fears and stereotypes. Since 1997, claims to the EEOC based on a violation of the ADA as a result of the employee's mental illness have increased significantly, especially in the areas of manic-depressive disorder, depression, and schizophrenia,⁹³ and many of these claims were likely based on some type of myth, fear or stereotype.

Under the ADA, individuals with mental illnesses had a particularly hard time showing that they were both qualified to do the job and significantly disabled enough to qualify for protection against discrimination under the ADA. It was particularly hard for such individuals to prove this because the effects of their disabilities often resulted in courts determining that they were not actually qualified to do the job in question.⁹⁴ This is because some of the most common outward manifestations of mental illnesses in the work place are attendance problems, often resulting from side effects of the individual's medications, and problems with concentration and misconduct, which often result from an inability to fully deal with the stresses of the workplace.⁹⁵ When individuals are having problems such as these at work, especially in terms of missing a lot of days or being habitually tardy, courts often determine that they are no longer qualified to do the job, and therefore further inquiry into the case is unnecessary.⁹⁶

⁹¹ Jennifer M. Jackson, Comment, *The Americans with Disabilities Act, Mental Illness, and Medication: A Historical Perspective and Hope for the Future*, 12 MARQ. ELDER'S ADVISOR 219, 224 (2010).

⁹² H. R. REP. NO. 101-485, pt. 24, at 30 (1990).

⁹³ See U.S. Equal Employment Opportunity Commission, ADA Charge Data by Impairments/Bases - Receipts.

FY 1997-FY 2010, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> (showing that the rates for impairment for persons with manic depressive disorder rose from 1.9% in 1997 to 4.3% in 2008).

⁹⁴ See Randal I. Goldstein, Note, *Mental Illness in the Workplace after Sutton v. United Air Lines*, 86 CORNELL L. REV. 927, 945 (2001) (describing the requirement to prove disabled status and qualification for the position as a catch-22).

⁹⁵ *Id.*

⁹⁶ See Spangler v. Fed. Home Loan Bank of Des Moines, 278 F. 3d. 847, 850 (8th Cir. 2002) (holding that an employee with depression who missed a significant amount of work was not qualified for the job because she would have to be present in the workplace to perform the essential

Another significant problem facing individuals with mental illnesses is that their employers often do not know they are disabled, as mental illnesses are generally not known to others unless the individual reveals his or her condition.⁹⁷ Under the ADA, an employer is only held accountable for discrimination on the basis of disability if the employer is aware that the disability exists.⁹⁸ There are a multitude of cases, spanning from the inception of the ADA through the present, where the plaintiff was denied relief for the alleged discrimination because the employer was unaware of the condition.⁹⁹

One part of the reason why individuals with mental illnesses might have had trouble claiming disability status under the ADA stems from the EEOC Guidance and Regulations in regards to the mental illnesses.¹⁰⁰ The EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities states that “traits or behaviors are not, in themselves, mental impairments.”¹⁰¹ While the EEOC seems to be making the point that it requires more than just the traits or behaviors of an illness to be actually considered disabled, the traits or behaviors that characterize the illness are often what the person is being discriminated against for. The EEOC makes a valid point, that odd behaviors alone are not enough for coverage. However, it may have given some employers the idea that discriminating against an employee on the basis of his or her traits or behaviors, especially if the employer is not certain that the employee has a mental illness, is an acceptable practice. In turn, it is possible that courts may get the impression, based on the EEOC Guidance, that it is allowable for an employer to discriminate against an employee with a mental illness because the fact that the employee is exhibiting unusual behaviors or has unusual traits is not a disability.

However, the EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities was not entirely negative for individuals with mental illnesses. The EEOC created the guidance

functions of her job); *see also* Grubb v. Southwest Air Lines, 296 F. App'x 383, 389 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1986 (2009).

⁹⁷ *See generally* Rogers v. CH2M Hill, Inc., 18 F.Supp.2d 1328 (M.D. Ala. 1998) (determining that without the employee telling the employer about a mental illness, there was no way for the employer to know).

⁹⁸ 42 U.S.C. § 12112(b)(4).

⁹⁹ *See* Kobus v. College of St. Scholastica, Inc., 2009 WL 294370, at *7 (D. Minn. 2009); *see also* Fussell v. Georgia Ports Authority, 906 F. Supp. 1561, 1569 (S.D. Ga. 1995).

¹⁰⁰ *See* Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. C.R. L.J. 79, 103 (2006) (describing how the EEOC guidance specifically notes that traits or behaviors are not, in themselves, mental impairments although they may be linked).

¹⁰¹ *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997), *available at* <http://www.eeoc.gov/policy/docs/psych.html>.

because it was receiving a high number of mental health claims.¹⁰² It wanted to clarify how the law works and improve protection for those individuals.¹⁰³ The guidance helped to highlight, for both employers and employees, the parts of the ADA and related regulations relevant to individuals with mental illnesses. The guidance explains that mitigating measures should not be considered,¹⁰⁴ chronic and episodic disorders are covered,¹⁰⁵ and major life activities includes interacting with others and concentrating.¹⁰⁶ The guidance also provides direction about disclosing mental illnesses¹⁰⁷ and how to request accommodations.¹⁰⁸ Despite some flaws, this guidance overall is an invaluable tool for individuals with mental illnesses and their employers.

Individuals with mental illnesses had a major problem with the EEOC Guidance and Regulations because of the lack of official inclusion of mental illness related major life activities, such as concentrating and interacting with others. In fact, there were instances where individuals with mental illnesses attempted to bring suit under the ADA claiming that they were disabled because they were substantially limited in these major life activities. These claims, however, were rejected by the courts because they were not viewed as rising to the level of a major life activity that was substantially limited.¹⁰⁹ In the case of *Soileau v. Guilford of Maine, Inc.*, the First Circuit felt that if the EEOC intended interacting with others to be considered a major life activity, then it would have included it in its Regulations or Guidance.¹¹⁰ In addition, the Court felt that no workable definition of interacting with others could exist because it was too different from things like walking and breathing, which were specifically mentioned by the EEOC.¹¹¹ In *Pack v. Kmart Corp.*, the Tenth Circuit determined that “[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an ‘activity’ itself,” and therefore it cannot qualify as a major life activity that is substantially

¹⁰² See *id.* (explaining that the EEOC “receives a large number of charges under the ADA alleging employment discrimination based on psychiatric disability”).

¹⁰³ See *id.* (“This guidance is designed to: facilitate the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability; respond to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and answer questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities.”).

¹⁰⁴ *Id.* at no. 6. This guidance was written pre-*Sutton*.

¹⁰⁵ *Id.* at no. 8.

¹⁰⁶ *Id.* at no. 9-10.

¹⁰⁷ *Id.* at no. 14 (explaining the circumstances when an employer can ask for disability-related information).

¹⁰⁸ *Id.* at no. 17-29.

¹⁰⁹ See *Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999); see also *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997).

¹¹⁰ 105 F.3d at 15 (stating that interacting with others is not listed as an ability in the EEOC regulations).

¹¹¹ *Id.*

limited in terms of qualifying an individual for protection under the ADA.¹¹² However, some plaintiffs have successfully made claims that interacting with others is a major life activity. In *McAlindin v. County of San Diego*, the Ninth Circuit held that an individual with anxiety, panic and somatoform disorders was disabled under the ADA, in part because he was substantially limited in the major life activity of interacting with others.¹¹³ The court determined that interacting with others qualified as a major life activity because it “is an essential, regular function, like walking and breathing, [so it] easily falls within the definition of ‘major life activity.’”¹¹⁴

A significant problem after the Supreme Court’s decision in *Sutton* was the effect that using medication would have on the likelihood of a person succeeding in an ADA claim based on a medicated psychiatric disorder.¹¹⁵ In *Sutton*, the Supreme Court declared that should an individual use any means to mitigate his or her illness, his or her claim of being disabled needs to be determined in that mitigated state.¹¹⁶ In the case of *Spades v. City of Walnut Ridge*, the Eighth Circuit determined that a police officer with depression was not disabled because his medication allowed him to function normally, even though without mitigating measures he attempted suicide.¹¹⁷ It did not appear that the *Sutton* Court was encouraging plaintiffs who generally mitigated their conditions to stop correcting those conditions just to have the ability to sue under the ADA.¹¹⁸ There was, however, a fear after the *Sutton* decision that people who were dutiful in strictly mitigating their illnesses would be less likely to succeed than someone with the same disorder of similar severity who was less strict about his or her mitigation.¹¹⁹ There was also a fear that individuals who had the money or insurance for adequate mitigation measures would be disadvantaged under the statute as compared with individuals who did not have the means to mitigate, and therefore could only be viewed in their unmitigated states.¹²⁰

Especially after the decision in *Sutton*, individuals with disabilities that could be mitigated, especially those with mental illnesses, began offering an alternative theory to their disability claims, that their medi-

¹¹² 166 F.3d at 1305.

¹¹³ *McAlindin v. County of San Diego*, 192 F.3d 1226, 1230, 1233 (9th Cir. 1999).

¹¹⁴ *Id.* at 1234.

¹¹⁵ See Jackson, *supra* note 91, at 220 (2010) (commenting on the division between the lower courts after the *Sutton* decision on how to address the issue of mitigating measures, such as medications used to ameliorate the illness).

¹¹⁶ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999).

¹¹⁷ See *Spades v. City of Walnut Ridge*, 186 F.3d 897, 899-900 (8th Cir. 1999).

¹¹⁸ See Jackson, *supra* note 92, at 231-32 (explaining that the Court in *Sutton* did not want to encourage future plaintiffs from not mitigating their disabilities in order to meet the statutory definition of disability).

¹¹⁹ Goldstein, *supra* note 94, at 953 (2001).

¹²⁰ *Id.*

cations were the cause of their disabilities.¹²¹ For example, in *Collins v. Prudential Investment & Retirement Services*, the plaintiff claimed her medication for Attention Deficit Hyperactivity Disorder (ADHD) was causing a sleep disorder, causing her to need additional medication.¹²² The court determined that the mitigating measure of taking medications corrected the impairment, so she was not disabled under the law.¹²³ In the *Sutton* decision, the Supreme Court pointed out a few mitigating measures that have negative side effects for the individuals using them.¹²⁴ The mitigating measures listed by the Supreme Court were antipsychotic drugs, drugs used to treat Parkinson's disease, and antiepileptic drugs.¹²⁵ Additionally, the Court noted that given its interpretation of the ADA leading to the decision on mitigating measures, for courts to determine whether a person qualified as "substantially limited" as part of the disability definition, side effects of the mitigating measures, whether good or bad, would have to be considered.¹²⁶

Plaintiffs did bring claims prior to *Sutton* that they were disabled due to the side effects of their medications, but the number of those claims increased after the Supreme Court's decision.¹²⁷ Some Circuit Courts established a test beyond the normal ADA disability claim to determine whether side effects of a medication could be considered disabling under the law.¹²⁸ This test requires the plaintiff to show that "(1) the treatment is required in the prudent judgment of the medical profession, (2) the treatment is not just an attractive option, and (3) that the treatment is not required solely in anticipation of an impairment resulting from the plaintiff's voluntary choices."¹²⁹ Once a plaintiff prevails on the above test, courts generally treat the side effects of the medication the same as they would any other disability.¹³⁰ If the side effects of medication taken to ameliorate the effects of a disability are themselves disabling, courts have determined that a plaintiff can pre-

¹²¹ See *id.* at 953-54.

¹²² See *Collins v. Prudential Inv. & Ret. Serv.*, 119 F. App'x 371, 378-79 (3d Cir. 2005) (describing the Plaintiff's need to take Ambien to counteract the effects of Adderol).

¹²³ See *id.* (stating that the test of mitigating measures is not whether the mitigating measure cures the disability).

¹²⁴ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999) (noting medications that cause severe side effects).

¹²⁵ See *id.* (citing reports of side effects of various drugs).

¹²⁶ See *id.* at 482 (rejecting the interpretation that people must be evaluated in their uncorrected state).

¹²⁷ Cf. Jackson, *supra* note 91, at 232-33 (2010) (explaining that courts considered the disabling effects of medications before *Sutton* in determining coverage under the ADA).

¹²⁸ See *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186-87 (3d Cir. 2010); see also *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997).

¹²⁹ See *Sulima*, 602 F.3d at 186.

¹³⁰ *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052; see Lauren J. McGarity, Note, *Disabling Corrections and Correctable Disabilities: Why Side Effects Might be the Saving Grace of Sutton*, 109 YALE L.J. 1161, 1182 (2000).

vail on his or her disability claim.¹³¹

However, not mitigating an illness or condition that could be mitigated could, on its own, disqualify a plaintiff from coverage under the ADA. *Siefken v. Village of Arlington Heights*¹³² is the first case where a non-mitigating plaintiff was found to have no claim because of a failure to mitigate.¹³³ In this case, the plaintiff was fired from his job as a police officer after having a hypoglycemic reaction as a result of uncontrolled diabetes.¹³⁴ He was ultimately fired due to the effect on his body caused by not medicating his diabetes.¹³⁵ The court determined that his failure to medicate his condition made him unqualified to continue to work as a police officer.¹³⁶ Other courts have interpreted the *Siefken* decision to stand for the proposition “that a plaintiff cannot recover under the ADA if through plaintiff’s own fault plaintiff fails to control an otherwise controllable illness.”¹³⁷

After *Sutton*, the calculus changed for individuals with disabilities in terms of mitigation of their illnesses or disabilities. Theoretically, after the Supreme Court’s decisions in 1999, a person was to be viewed in his or her current state, irrespective of whether that state was mitigated or unmitigated.¹³⁸ The Supreme Court, in its justification for requiring plaintiffs to be viewed in their mitigated states, proclaimed that to do otherwise would require speculation about what an individual would hypothetically be like in another state.¹³⁹ The Court believed that if the rule were to look at a plaintiff in a hypothetical state, Congress’s desire for an individualized inquiry for each plaintiff would not be met since the individual claiming a disability would theoretically have to be looked at the same as any other individual with that disability.¹⁴⁰ The same justification, however, also works to ensure that individuals who choose not to mitigate their disabilities would need to be examined in their current, and therefore unmitigated, states. If the courts were to view individuals with unmitigated disabilities in any light other than the way they currently are, they would be going against the Court’s holding in *Sutton*.

In his dissent in *Sutton*, Justice Stevens makes the point that it is not

¹³¹ See *Jamison v. Dow Chem. Co.*, 354 F. Supp. 2d 715, 728 (E.D. Mich. 2004) (citing *Sutton*, 527 U.S. at 484).

¹³² 65 F.3d 664 (7th Cir. 1995).

¹³³ See *id.* at 667 (finding that the employer did not have to create reasonable accommodations if the employee could not control his disability). See also *Jackson*, *supra* note 92 at 234-35 (discussing the circumstances of *Siefken*).

¹³⁴ *Siefken*, 65 F.3d at 665-66.

¹³⁵ *Id.* at 666.

¹³⁶ *Id.* at 667.

¹³⁷ See *Paine ex rel. Eilman v. Johnson*, 2010 WL 785397, at *4 (N.D. Ill. Feb. 26, 2010) (citing *Nunn v. Illinois State Bd. of Educ.*, 448 F. Supp. 2d 997, 1001 (C.D. Ill. 2006)).

¹³⁸ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

the consideration of mitigating measures that results in people with similar disabilities being grouped together unnecessarily, it is instead the majority's decision in *Sutton* that does that.¹⁴¹ Justice Stevens reasons that by not allowing mitigating measures to be considered, the Court is actually condoning employers having blanket policies stating that individuals with certain disabilities are incapable of doing the job, when in fact, with reasonable accommodations, there are most likely some disabled individuals who would be able to perform the essential functions and adequately do the job.¹⁴²

Unfortunately, even after *Sutton*, courts continued to deny coverage to individuals that chose to not mitigate their disabilities, even though this was contrary to the holding from *Sutton*.¹⁴³ In the case of *Nunn v. Illinois State Board of Education*, the plaintiff, an employee suffering from bipolar disorder, was denied coverage under the ADA.¹⁴⁴ This denial, theoretically, was because she did not mitigate her disease given that she did not or could not acknowledge that she actually had bipolar disorder.¹⁴⁵ Coverage under the ADA was denied in large part because, in her unmitigated state, the plaintiff was not otherwise qualified for her job.¹⁴⁶ However, the plaintiff was also denied coverage because she did not mitigate her condition.¹⁴⁷ The court cited the decision from *Siefken*, that a plaintiff who chooses not to mitigate a condition that can be mitigated cannot be covered under the ADA.¹⁴⁸ Because the court believed that bipolar disorder could be mitigated, the plaintiff was barred from further consideration under the ADA.¹⁴⁹ Although the *Nunn* decision was seven years after *Sutton*, there is no mention of either the *Sutton* decision or the rule implied in that case, that individuals cannot be denied coverage under the ADA simply because they choose not to mitigate their conditions; they need to be viewed in their current states.¹⁵⁰ Although the plaintiff in *Nunn* still likely would have been denied coverage since she, in her unmitigated state, was not qualified for her job, the case ignores *Sutton* but adheres to *Siefken*.

¹⁴¹ *Id.* at 509-510.

¹⁴² *Id.*

¹⁴³ Jackson, *supra* note 91, at 237-38 (2010) (detailing cases that applied *Sutton* and *Siefken* to deny ADA coverage to nonmitigating plaintiffs).

¹⁴⁴ 448 F. Supp. 2d 997, 1001 (N.D. Ill. 2006).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1001-02.

¹⁴⁸ *Id.* (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir.1995)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999).

B. COVERAGE FOR INDIVIDUALS WITH MENTAL ILLNESS POST-ADAAA PASSAGE

When the ADAAA was passed in 2008, members of the disability communities had high hopes that it would help individuals with disabilities, especially those with mental illnesses, diabetes, and epilepsy, disorders which, under the old regime, were often excluded from coverage.¹⁵¹ Additionally, plaintiffs and potential plaintiffs were excited at the possibility of having their litigation move forward, instead of being decided at the summary judgment stage for the employer, as so many cases were under the ADA.¹⁵² In 2009, there were no employees with mental illnesses who were successful in their ADA claims against an employer.¹⁵³ When looking at ADA claims cumulatively, for all disabilities, plaintiffs were only successful 2.6 percent of the time in 2009, accounting for just nine out of 454 cases.¹⁵⁴ Many of these cases were decided for the employer at the summary judgment stage because although the employee claimed to have some type of disability, due to the narrowing of the definition of disability by the Supreme Court in the “*Sutton* Trilogy” and *Toyota*, the individual had trouble establishing either that he or she was otherwise qualified for the job or that his or her disability substantially limited a major life activity.¹⁵⁵

However, the high hopes for the future in disability discrimination claims have not yet come to light. This is not to say that the ADAAA will not sufficiently do what it intended—broaden the coverage of the legislation to fully cover all qualified individuals.¹⁵⁶ Many people are predicting that all plaintiffs may not be successful, but there will be more disability discrimination claims under the new law, and overall more plaintiffs will be successful in their cases.¹⁵⁷ There are many plaintiffs who had pending cases at the time of the ADAAA’s passage, or who have brought claims subsequent to the passage. The ADAAA

¹⁵¹ See Claudia Center & Andrew J. Imparato, *Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for all Workers*, 14 STAN. L. & POL’Y REV. 321, 321-22 (2003) (noting that people suffering from epilepsy, diabetes, and psychiatric conditions who are able to control their conditions with medication routinely had their ADA cases dismissed as outside of the protection of the statute).

¹⁵² See generally Allbright, *supra* note 88.

¹⁵³ See *id.* at 341 (recounting survey results that indicating that no employee won in cases of mental illness or substance abuse).

¹⁵⁴ *Id.* at 339 (the least employee wins in the survey’s history).

¹⁵⁵ Danielle J. Ravencraft, Note, *Why the “New ADA” Requires an Individualized Inquiry as to What Qualifies as a “Major Life Activity”*, 37 N. KY. L. REV. 441, 442-45 (2010).

¹⁵⁶ See Pub. L. No. 110-325, §§ 2, 3, 122 Stat. 3553 (2008) (listing the findings and purpose of the ADA Amendments of 2008).

¹⁵⁷ See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1495-1500 (2011). See also Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 667-68 (2009) (discussing the likelihood of increased litigation due to the ADAAA and the potential for better outcomes for plaintiffs).

became effective on January 1, 2009.¹⁵⁸ However, there is no published case law to date dealing with mental illness in which the plaintiff's cause of action and damages sought originate after the effective date of the bill.¹⁵⁹ In all of the cases where a plaintiff with a mental illness is seeking damages for a past action of his or her employer, the courts have determined that the amendments do not apply retroactively, and therefore the courts are bound by the ADA and case law surrounding that statute, not the ADAAA.¹⁶⁰ The courts that have already faced this issue determined that "Congress did not state in the ADAAA or indicate in the legislative history whether the amendments should govern cases arising before January 1, 2009."¹⁶¹ One such court determined that a plaintiff cannot be judged under the standards of the ADAAA because the new legislation created new legal standards and broadened the scope of the law.¹⁶²

Courts have stated that, dating back to cases surrounding the Civil Rights Act of 1991, when amendments to legislation create a substantial change to the structure of the statute, the new legislation cannot apply to cases currently pending.¹⁶³ The Court says, "a statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."¹⁶⁴

There has been one case that has applied the ADAAA to pending legislation.¹⁶⁵ In *Jenkins v. National Board of Medical Examiners*, the plaintiff was a medical student seeking extra time on the United States Medical Licensing Examination (USMLE) based on his diagnosed reading disorder.¹⁶⁶ Jenkins was awarded extra time for other standardized tests, such as the ACT and MCAT, but was denied the extra time for the USMLE.¹⁶⁷ The District Court for the Western District of Kentucky denied Jenkins any relief based on its belief that, under the *Toyota* standard, he failed to identify major life activities in which he was sub-

¹⁵⁸ See Pub. L. No. 110-325, 122 Stat. 3553 (2008) (listing the effective date of the ADAAA as January 1, 2009).

¹⁵⁹ See, e.g., *Durham v. McDonald's Rests. of Okla.*, 325 F. App'x 694 (10th Cir. 2009) (footnote 2); *Pinegar v. Shinseki*, 2010 WL 891700, at *1 (M.D. Penn. Mar. 10, 2010); *Geiger v. Pfizer, Inc.*, 2009 WL 983545, at *2 (S.D. Ohio Apr. 10, 2009); *Schmitz v. Louisiana*, 2009 WL 210497, at *2 (M.D. La. Jan. 27, 2009) (the ADA Amendments do not apply retroactively).

¹⁶⁰ See, e.g., *Durham*, 325 F. App'x at 695; *Pinegar*, 2010 WL 891700, at *1; *Geiger*, 2009 WL 983545, at *2; *Schmitz*, 2009 WL 210497, at *1-2 (ADA Amendments are not retroactive).

¹⁶¹ *Schmitz*, 2009 WL 210497, at *2.

¹⁶² *Id.* at *2-3.

¹⁶³ See *Jenkins v. Nat'l Bd. of Med. Exam'rs*, 2009 WL 331638, at *2 (6th Cir. Feb. 11, 2009).

¹⁶⁴ *Id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994)).

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at *1 (giving the factual background of the case).

¹⁶⁷ See *id.* (noting that Jenkin's request for additional time was denied by the National Board of Medical Examiners after several levels of review).

stantially limited.¹⁶⁸ Jenkins claimed that he was substantially limited in the major life activity of reading.¹⁶⁹ The District Court had decided that, under *Toyota*, which was good law at the time of its decision, Jenkins was not limited enough compared to the general population in his ability to read even though it was evident he read slower and with more difficulty than most.¹⁷⁰

The Sixth Circuit of the United States Court of Appeals reversed and remanded.¹⁷¹ The Sixth Circuit reasoned that “because this case involves prospective relief and was pending when the amendments became effective, the ADA must be applied as amended.”¹⁷² The plaintiff wanted extra time to take a test, something that would happen after the effective date of the ADAAA.¹⁷³ Additionally, because he was not asking for past damages, he was not asking the court to hold the National Board of Medical Examiners liable for anything that happened before the amendments were passed.¹⁷⁴ With this decision, the court made it clear that although the ADAAA cannot apply retroactively for cases seeking damages for incidents of discrimination that occurred before the effective date of the legislation, if someone had legislation pending when the ADAAA went into effect, and the individual is only seeking injunctive relief, the plaintiff’s case should be entitled to consideration under the new legislation. If the lower court had based its decision on the new law (which did not exist at the time of its decision), it may not have come to the same conclusion that it did, given that the ADAAA provides a much broader scope as to what qualifies as a disability because of a substantial limitation in a major life activity.¹⁷⁵ The Sixth Circuit did however make clear that it is a remand, and that the plaintiff is not guaranteed a victory.¹⁷⁶ The court also makes clear that even if the lower court, on remand, does find that the plaintiff is disabled under the ADAAA, he is not automatically guaranteed the remedy that he is seeking. Instead, the decision will be a determination for the court to make, as to what the National Board of Medical Examiners should be required to

¹⁶⁸ See *id.* (citing *Jenkins*, 2008 WL 410237, at *2-3 (finding that Jenkins could not demonstrate that his reading difficulties prevented him from performing daily tasks)).

¹⁶⁹ See *Jenkins*, 2008 WL 410237, at *2 (stating that Jenkins would have trouble reading street signs quickly, read aloud in church, or watch movies with subtitles).

¹⁷⁰ See *Jenkins*, 2009 WL 331638, at *1 (quoting the district court’s decision in *Jenkins*, 2008 WL 410237, at *2).

¹⁷¹ See *id.* at *4 (remanding the case for redetermination in accordance with the ADAAA).

¹⁷² *Id.* at *1.

¹⁷³ See *id.* (noting that Jenkins was not looking for relief for past discrimination, but extra time on a test administered after the ADAAA became effective).

¹⁷⁴ See *id.* (distinguishing the case from those that seek damages for past discrimination under the ADAAA).

¹⁷⁵ See *id.* at *2-3 (“The change in the law has therefore undermined the district court’s holding . . .”).

¹⁷⁶ See *id.* at *4 (remanding the case for further findings, rather than a directed verdict).

do to accommodate an individual with a reading impairment.¹⁷⁷

There has been no actual case law applying the ADAAA to cases seeking damages, the type of cases that makes up a significant majority of ADA cases. Therefore, it is only possible to anticipate, based on the language of the statute, the legislative history of the amendments, and the new EEOC Final Regulations, how individuals with disabilities, and particularly individuals with mental illnesses will fare under the ADAAA.

The most significant change for all individuals with disabilities, but specifically for individuals with mental illnesses, under the ADAAA, is that courts are now instructed to put more focus on the discrimination that the person has possibly been subjected to rather than the determination of whether or not the person is disabled under the law.¹⁷⁸ This is a momentous change from the ADA, where a considerable number of cases were decided on summary judgment for the employer because the plaintiff could not adequately prove he or she was qualified as a disabled individual under the law.¹⁷⁹

The EEOC, in its Final Regulations, acknowledges that the new version of the law should help people with a number of ailments, and among those listed are people with mental illnesses.¹⁸⁰ This is in part because, in terms of reasonable accommodations for mental illnesses, the costs are generally low to non-existent, with many employees simply asking for schedule changes, slight modifications to their job functions, or minimal time off for treatment.¹⁸¹ Additionally, with the inclusion of “interacting with others” to the EEOC’s list of activities that, if affected by a disability, constitute a major life activity, many people with mental illnesses of all types will be more likely to qualify as disabled under the ADAAA. This is because with many mental illnesses, the individuals, for various reasons, have trouble interacting with others, something that most people take for granted in their daily lives. However, it is something that, under the old law, a court could easily have determined was not “significant” or “severe” enough to constitute coverage for the individual under the law. The EEOC also points out that while there should not be *per se* disabilities, there are some that should predictably win out on the question of whether or not the

¹⁷⁷ See *id.* at *4 (quoting 42 U.S.C. § 12189).

¹⁷⁸ Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (2008).

¹⁷⁹ See generally *Evans v. Consumer Info. Dispute Resolution*, 223 F. App’x 46 (2d Cir. 2007); *Johnson v. Maynard*, 2003 WL 548754, at *3-4 (S.D.N.Y. Feb. 25, 2003) (holding that just having a disorder such as bipolar disorder or schizophrenia is not enough to qualify as an individual with a disability); *Schwartz v. Comex*, 1997 WL 187353, at *2 (S.D.N.Y. Apr. 15, 1997) (finding that a paranoid thought disorder, on its own, is not enough to qualify as an individual with a disability).

¹⁸⁰ 76 FR 16987 (March 25, 2011).

¹⁸¹ *Id.*

person with such illness or condition is actually disabled.¹⁸² The Commission points out that no disability can truly be *per se* since the law still shows a desire for an individualized assessment, albeit a modified, briefer assessment than existed in the past.¹⁸³ The EEOC also enumerates a number of disorders, specifically listing why, on an almost *per se* basis, they should be considered to limit major bodily functions, a category that was added to supplement the major life activities column.¹⁸⁴ The list provided by the EEOC mentions that “major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.”¹⁸⁵ By providing this list, the EEOC is attempting to ensure that individuals with a broad range of mental illnesses will have a greater chance of full coverage under the ADAAA given that Congress decided not to include interacting with others in its list of major life activities in the new law.

Although Congress did not list interacting with others as a major life activity in the final bill, the House of Representatives did acknowledge it as a possibility.¹⁸⁶ The Education and Labor Committee, in its Report, mentions in its explanation of major life activities that, among other activities, “interacting with others” should be considered a major life activity under the ADAAA.¹⁸⁷ To illustrate its beliefs, the Committee discussed *Littleton v. Wal-Mart Stores, Inc.*, a case in which an individual with an intellectual disability tried to bring suit under the ADA on the premise that his disability substantially limited him in the major life activities of learning, thinking, communicating, social interaction, and working.¹⁸⁸ The Court expressed doubt about whether thinking, communication, and social interactions could be considered major life activities.¹⁸⁹ The Court ultimately determined it was irrelevant whether those were major life activities because Littleton had not proven that he was substantially limited in any of those activities.¹⁹⁰ In the Education and Labor Committee’s Report, the Committee mentions that under the new law, Littleton should be able to “provide evidence of material restriction in the major life activities of thinking, learning, communicating and interacting with others.”¹⁹¹ This acknowledges the possibil-

¹⁸² *Id.* § 1630.2(j)(3).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 1630.2(j)(3)(iii).

¹⁸⁶ H.R. REP. NO. 110-730, pt. 1, at 11 (2008) (Report of the Comm. on Educ. & Labor) [hereafter Educ. & Labor Rep.] (explaining that the statutory list is not finite and an example of a major life activity include interacting with others).

¹⁸⁷ *Id.*

¹⁸⁸ *Littleton v. Wal-Mart Stores, Inc.* 231 F.App’x 874, 875 (11th Cir. 2007).

¹⁸⁹ *Id.* at 877.

¹⁹⁰ *Id.* at 877-78.

¹⁹¹ Educ. & Labor Rep., *supra* note 186, at 10.

ity of adding interacting with others to the list of major life activities, but it was not ultimately added into the final version.

A huge victory for individuals with mental illnesses was the overturning of the decision in *Sutton*.¹⁹² As was explained above, under the rule requiring courts to view an individual with a disability in his or her mitigated state when determining whether he or she qualifies as disabled under the legislation,¹⁹³ many individuals with mental illnesses were no longer qualified under the ADA. This was due in part to the therapies (medication, cognitive, behavioral, etc.) that the individual used to mitigate his or her illness, leading the condition to be considered controlled, and therefore not substantially limiting any major life activities. As a result, many people who legitimately should have been covered by the ADA, and who Congress appears to have wanted covered under the ADA, were wrongfully denied coverage. Along with *Sutton* being overturned, Congress specified that if a disability is “episodic or in remission[, it] is a disability if it would substantially limit a major life activity when active.”¹⁹⁴

With the removal of the *Sutton* precedent, and the addition of the episodic provision, individuals with mental illnesses should have a much easier time proving their disabilities. Some argue that removing the *Sutton* precedent will allow individuals with minor impairments that are fully mitigated by simple measures to have access to coverage under the law when such individuals are not the actual intended recipients of the law’s reach.¹⁹⁵ However, it appears as though Congress is not intending for people to be excluded from coverage just because some would consider their conditions minor.¹⁹⁶ If the individual has a condition that does in fact limit, in some way, a major life activity or a major bodily function, Congress is intending the individual to be eligible for coverage under the law.¹⁹⁷

The vast majority of individuals with mental illnesses use some type of mitigating measure for such illnesses, as they often would not be able to adequately function, and therefore would likely not be qualified for the jobs they are seeking or were discriminated against in, if they did not. Under the old regime, they faced the very realistic possibility that their attempts to normalize their lives and control their illnesses would lead to them not being covered under a piece of legislation that was intended to protect them.¹⁹⁸ However, under the

¹⁹² Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553 (2008).

¹⁹³ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999).

¹⁹⁴ Pub. L. No. 110-325 § 4(a)(4)(D), 122 Stat. 3553 (2008).

¹⁹⁵ See Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 361-62 (2010) (arguing that the ADAAA requires a court to consider an individual’s impairment in a hypothetical condition).

¹⁹⁶ Pub. L. No. 110-325 § 4(a)(1), 122 Stat. 3553 (2008).

¹⁹⁷ *Id.*

¹⁹⁸ See *Ravencraft*, *supra* note 155, at 442-45.

new regime, these individuals should be covered.¹⁹⁹ Theoretically, the courts should view the individual as he or she is without mitigation of his or her mental illness.²⁰⁰ For many with a mental illness, as the EEOC points out in its Final Regulations, without the consideration of medications and other mitigating measures, his or her illness is a disability and he or she should be afforded coverage under the law.²⁰¹

In addition, with the episodic and remission provision added, individuals with mental illnesses will have an even greater chance of getting the coverage under the ADAAA that Congress intended them to have. Many, although certainly not all, mental illnesses, even if untreated, are somewhat episodic. Additionally, many of those same mental illnesses can be considered to be essentially in remission with the use of medications and the appropriate forms of therapy. However, even if a person is not currently experiencing symptoms of his or her mental illness, the individual is still suffering from the disease because there are no cures for mental illnesses. With the changes in the ADAAA, Congress is making it clear that it intends for these types of individuals to be given full coverage under the law.

Individuals with mental illnesses are often the target of discrimination based not on their actual disabilities, but as a result of myths, fears and stereotypes. Because of this false belief, individuals with real disabilities that are not actually very disabling could easily be “regarded as” disabled, the third prong of the disability definition.²⁰² It is unfortunate that there are a number of people, including many employers, who have certain beliefs about what it means to have a mental illness. There are an unfortunate number of people who, for whatever reason, will reveal to an employer that they have a mental illness, and will then be treated differently because of it. When the individual is discriminated against because of an actual mental illness, the discussion above applies.

The change relating to the “regarded as” clause of the disability definition has to do with reasonable accommodations.²⁰³ Under the ADAAA, if a person is regarded as having a disability and is discriminated against, the person, under the new law, is not entitled to request a reasonable accommodation from his or her employer.²⁰⁴ In a sense, this is the protection the law provides for employers given that if they believe someone has a disability, and they regard the individual

¹⁹⁹ But see Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs after the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 862 (2009) (arguing that it is likely that nonmitigating plaintiffs will have trouble making a case under the ADAAA because they will likely be considered not otherwise qualified).

²⁰⁰ See *Ravencraft*, *supra* note 155, at 445-46.

²⁰¹ *Id.* at 447.

²⁰² Pub. L. No. 110-325 § 3(1)(C), 122 Stat. 3553 (2008).

²⁰³ *Id.* § 6(h).

²⁰⁴ *Id.*

as such, and subsequently discriminate against him or her based on their mistaken beliefs, under this law they are not responsible for accommodating the individual for a disease or disorder that the person does not actually have. Additionally, if a person has a disability, but the employer regards them as being in a worse state due to the disability than he or she actually is, the person still has the “actual disability” or “record of disability” prongs to fall back on.²⁰⁵

This is especially important given the new version of the legislation. Previously, if a person was regarded as having a disability that was worse than it actually was, especially if it was less severe due to mitigation, he or she often encountered difficulties trying to prevail in court. Now, however, if a person has a mental illness that is being mitigated so it is not as severe as his or her employer seems to believe it is, the mitigating measures that lessen the severity of the disability cannot be taken into account.²⁰⁶ Given the new law, individuals that most likely could not prevail in the past will have a much greater chance of prevailing today.

One aspect of the ADA that did not significantly change with the creation of the ADAAA is the overall requirement of reasonable accommodations. Under the law set forth in the ADA, an employer is generally required to accommodate an employee with a disability as long as that person can be considered otherwise qualified to do the job.²⁰⁷ Under the ADA, and now under the ADAAA, the employer did not have to accommodate the individual with a disability if the accommodation would cause an undue hardship for the employer.²⁰⁸ Under the statute, an undue hardship is “an action requiring significant difficulty or expense.”²⁰⁹ Whether an accommodation would be an undue hardship for the employer is determined by examining the nature and cost of the overall accommodation, the overall financial resources of the facility or covered entity, and the type of operation of the covered entity.²¹⁰ Reasonable accommodations are generally among the least expensive accommodations for individuals with mental illnesses, with employees most commonly asking for things like schedule modifications, the ability to work from home, or slight modifications to non-essential functions of the job.²¹¹

²⁰⁵ *Id.* § 3(1).

²⁰⁶ *Id.* § 2(b)(3).

²⁰⁷ See 42 U.S.C. § 12112(b)(5)(A) (making it discriminatory action to not make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability....”).

²⁰⁸ *Id.*

²⁰⁹ 42 U.S.C. § 12111(10)(A).

²¹⁰ 42 U.S.C. § 12111(10).

²¹¹ 29 C.F.R. § 1630.

CONCLUSION

No one knows exactly what will transpire under the ADAAA. In 2008, when Congress passed sweeping amendments to the groundbreaking law from 1990, its intention was to undo decisions by the Supreme Court that severely narrowed the scope of the ADA. In its attempt to right the Supreme Court's wrongs, Congress spelled out its goal of effectively overturning the decisions in the "*Sutton* Trilogy" and *Toyota*. In addition, and with the assistance of the EEOC Final Regulations, new rules are laid out for the courts to follow in the future litigation that unfortunately is bound to come.

Under the old law, individuals with mental illnesses were incredibly unsuccessful in challenging the unlawful actions of their employers when employers discriminated against them on the basis of disability. In most cases, the failure of the employees was not because the discriminatory actions did not actually happen or could not be proven. In most cases the litigation never reached the stage of determining fault on the discrimination claim because, due to the Supreme Court's interpretation of the ADA's definition of disability, including substantially limiting and major life activities, most cases were decided on summary judgment for the employer. This was because the plaintiff, the employee with a mental illness, was not able to adequately prove to the court that he or she was actually disabled under the law.

Under the new legislation, plaintiffs with disabilities, and especially those with mental illnesses should be much more successful, although no one can guarantee what the courts will ultimately do with the new law. The ADAAA specifically overturns previous Supreme Court precedent that was particularly detrimental to plaintiffs with mental illnesses. This includes the rule requiring plaintiffs to be viewed in their mitigated state, and the making stricter of the definition of "substantially limits."

In addition to overturning bad decisions by the Supreme Court, Congress, with the assistance of the EEOC Regulations, specifically instructs the courts that the main determination needs to be whether the employee was discriminated against, not whether the employee is or is not disabled. Additionally, the new law and regulations make clear that mental illnesses should be considered disabilities, either in that they do substantially limit a range of major life activities, including thinking and interacting with others, or in that they affect major bodily functions of the brain or other neurological functions.

Under the ADAAA, we should see plaintiffs with mental illnesses become more successful in their attempts to bring discrimination claims against their employers on the basis of disability. Of course, given that in 2009, not a single plaintiff with mental illness was successful in their employment discrimination claim, it is not a high standard to

overcome. Ultimately, the new law should work to help these plaintiffs, who greatly need the protection, to be successful, and hopefully will lead to a decrease in this discrimination happening.