ADHD and the New Americans with Disabilities Act: Expanded Legal Recognition for Cognitive Disorders

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I. Introduction

The conception of a disability typically envisions physical infirmities or mental defects that are readily apparent to the observer. But more subtle, cognitive disorders like Attention-Deficit Hyperactivity Disorder (ADHD) may affect individuals in equally disabling, albeit less obvious, ways that impact a person’s learning capacity, social relationships, and work performance. Characterized as a neurobehavioral condition, ADHD results in significant functional impairment of an individual’s capacity to absorb, recall, understand, process, and appropriately categorize information and ideas.\(^1\) The most common effect is an inability to concentrate on a single task for extended periods of time, though an individual with ADHD may present a complex array of symptoms that make diagnosis and treatment difficult.\(^2\)

Over the past two decades, the recognition of ADHD as a legitimate disorder within the medical and pharmaceutical fields has skyrocketed, leading to increased diagnoses among children, adolescents and adults.\(^3\) Estimates from the National Comorbidity Survey suggest that as much as 4.4% of the adult population in the United States may have ADHD.\(^4\) However, divergent opinions persist among physicians as to the validity of the diagnosis procedures and the most appropriate form of treatment to apply.\(^5\)

Adding to the difficulties facing individuals diagnosed with ADHD, the legal field has been slow to afford the condition full classification as a recognized disability.\(^6\) Under the Rehabilitation Act of 1973\(^7\) and the Americans with Disabilities Act of 1990,\(^8\) “disability” means: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of impairment; or (C) being regarded as having an impairment.\(^9\) The meaning of the “substantial limitation” qualification and examples of major life activities were left for various regulatory agencies, such as the Equal Employment
Opportunity Commission (EEOC), to interpret and define for easier implementation of the acts.\textsuperscript{10} However, the administrative guidelines were often treated by courts as merely persuasive authority, with the definitive interpretations of key elements of the statutory language left to judicial discretion.\textsuperscript{11}

In response to a number of court decisions that had narrowed the intended scope of the ADA and prevented recognition of substantially-limiting impairments as qualified disabilities,\textsuperscript{12} Congress passed the ADA Amendments Act of 2008,\textsuperscript{13} which came into force on January 1, 2009. Of particular relevance to the legal treatment of ADA claims involving ADHD are clarifications of statutorily-recognized “major life activities,”\textsuperscript{14} a broader definition of the “substantially limits” qualification,\textsuperscript{15} and a specific declaration of the irrelevance of mitigating measures to control an otherwise substantially-limiting impairment.\textsuperscript{16}

Given the significantly broader scope of protection afforded by the ADA Amendments Act of 2008, requests for better accommodations made by students and adults in the workforce diagnosed with ADHD may be more likely to receive judicial support. This article intends to explore the likely impact of the ADA Amendments Act with regard to ADHD on employers, schools and individuals. Part II will examine the symptoms, diagnosis and treatment options available for ADHD will be examined, along with the effect of the condition on the workforce.\textsuperscript{17} Next, Part III will explore the Rehabilitation Act and the ADA, along with the principal cases that led Congress to broaden the scope of protection under the statutes. Part IV will examine the newly-enacted ADA Amendments Act of 2008 through the lens of the recently-proposed interpretive guidelines of the EEOC, while questioning whether the scope may have been broadened too much. Lastly, Part V will analyze the implications of the ADA Amendments Act of 2008 for the legal recognition of ADHD as a disability.
II. Attention-Deficit Hyperactivity Disorder: Symptoms, Diagnosis, Treatment and Effects

Attention-Deficit Hyperactivity Disorder (ADHD) is a neurobehavioral condition affecting children, adolescents, and adults that results in significant functional impairment of an individual’s capacity to absorb, recall, understand, process and appropriately categorize information and ideas. Most commonly, ADHD interferes with the individual’s capacity to stay “on task,” maintain focused attention for extended periods of time, and organize and complete projects. Although the typical symptoms, such as inattentiveness or restlessness, may be experienced by many unaffected (i.e., undiagnosed) individuals periodically, they operate in concert for persons with ADHD on a daily basis and, if untreated, “can insidiously and severely interfere with one’s ability to get the most out of education, fulfill one’s potential in the workplace, establish and maintain interpersonal relationships, and maintain a generally positive sense of self.”

Studies have also indicated that a failure to effectively treat ADHD may increase the individual’s risk for abuse of tobacco, alcohol and illicit narcotics, as well as elevate the likelihood of physical harm in some instances.

A. Classifications and Symptoms

The disorder is classified into three primary sub-groups: predominantly inattentive, predominantly hyperactive-impulsive, and combined hyperactive-impulsive/ inattentive. The predominantly inattentive sub-group is characterized by conduct inconsistent with a person’s developmental level, such as a failure to give close attention to the details of a task, difficulty sustaining attention in activities, avoidance of projects and tasks requiring sustained mental effort, persistent forgetfulness, or susceptibility to distraction by extraneous stimuli. The hyperactive-impulsive individual, on the other hand, exhibits a maladaptive development level characterized by fidgeting or squirming when seated, a frequent inability to remain seated when
it is expected, difficulty engaging in work or play quietly, and a tendency to blurt out answers or to interrupt others. Meanwhile, the combination inattentive/ hyperactive-impulsive individual demonstrates tendencies from both sub-groups listed above.

Reading the common behavioral symptoms listed above, it is easy to see how controversy regarding the recognition of ADHD as a legitimate disability has arisen within the medical and legal fields. As anyone who has spent significant time with young children can attest, a lack of focused attentiveness and a general inability to remain in a single place for an extended period of time without fidgeting are universally common, if not expected. The distinction between standard conduct and behavior indicative of ADHD, however, is the inability of the latter to conform to expected levels of development for an individual’s age.

B. Diagnosis

Diagnosis of ADHD is performed using one of an array of behavior-driven rating scales that evaluate an individual’s conduct according to standards circulated by the American Psychiatric Association in the “Diagnostic and Statistical Manual of Mental Disorders,” commonly referred to as the DSM-IV. These scales are referred to as “objectives,” principally because they generate quantitative information that may be used to objectively diagnose an individual upon the display of particular qualifying behaviors. The evaluation and diagnosis, however, remain subjectively grounded for the most part when compared to more visible disabilities that may be validated by concrete examinations, such as x-ray scans and laboratory tests.

A major complicating factor in the diagnosis of ADHD is the prevalence of a range of separate “comorbidities” that accompany the disorder, sometimes masking the subtle symptoms of inattention or hyperactivity-impulsivity with more externalized displays of another
condition. Common disorders linked to ADHD are oppositional defiant disorder, mood and anxiety disorders, and various learning disorders. Because the comorbidities mimic the symptoms of ADHD, it is often difficult to diagnose each separately and accurately, and the likelihood of misdiagnosis is significantly higher.

C. Treatment

Pharmacological options remain the primary form of treatment prescribed by physicians to control symptoms due to ease of administration and general efficacy, though numerous behavioral interventions have been suggested as viable therapies for adults diagnosed with ADHD. Medications used to treat the disorder are divided between stimulants and non-stimulants, with the former considered to be the “first-line” therapy in children and adults due to their tolerable side effects and demonstrated efficacy.

The most effective stimulant medications to treat ADHD are composed of either methylphenidate, dexamethasone, or mixed amphetamine salts. Methylphenidate, available in immediate- or extended-release forms, has been shown to reduce overactivity, impulsivity and inattentiveness symptoms in ADHD patients, along with demonstrated improvements to on-task behavior, concentration, functional memory and social interaction. Dexamethasone, claimed to be a more refined form of methylphenidate, offers similar results but at lower dosages due to its higher potency. Likewise, mixed amphetamine salts are considered to be equally effective at controlling ADHD symptoms as methylphenidate, though a comparative effectiveness analysis has never been published.

The only non-stimulant medication approved to treat ADHD is atomoxetine, but tricyclic antidepressants have also proven effective as a non-stimulant treatment option. Atomoxetine gained FDA approval to treat ADHD, and has demonstrated similar efficacy to immediate-
release methylphenidate, but the extended-release forms of stimulant medications performed significantly better, and remain the preferred first-line treatment option. Likewise, tricyclic antidepressants have proven somewhat effective to treat particular symptoms of ADHD, but the drugs’ limited therapeutic index and greater risk of side effects have cemented stimulant medications as the primary therapy of choice for ADHD.

Although pharmacological therapies have proven effective to reduce the symptoms of ADHD, a complete cure of the disorder cannot be achieved through medication alone. This is a significant point when considered in light of the Supreme Court holdings discussed infra Part III because consideration of mitigating factors, such as medications, should have been minimized in the cases where normalization of the disabling condition did not occur.

III. Americans with Disabilities Act of 1990 and Interpretive Decisions of the U.S. Courts

The Americans with Disabilities Act of 1990 (ADA) was the result of congressional findings that a significant portion of Americans suffered from one or more physical and mental disabilities, and were subject to various forms of discrimination as a result of such impairments, often without adequate legal recourse. Within the framework of the originally-enacted ADA, an individual had a disability where “a physical or mental impairment… substantially limit[ed] one or more of the major life activities.” Also relevant was a history of having, or being “regarded as” having an impairment. Under the ADA, employers, schools and other programs or activities are prohibited from discriminating against an otherwise-qualified individual on the basis of the disability. Additionally, reasonable accommodations are required to make existing facilities readily accessible to individuals with disabilities.

The original version of the ADA had significant shortcomings, however, primarily as a result of its failure to include working definitions of “major life activities” affected by the
disability, and the intended scope of the “substantially limits” qualification. The Equal Employment Opportunity Commission (EEOC) subsequently issued rules to serve as persuasive guidance for administrators, employers and the courts in the implementation of Title I of the ADA, offering definitions of the ambiguous sections of the statute.\(^52\)

In terms of defining a disability, the EEOC interpreted the “substantially limits” qualification to mean an individual was unable to perform a major life activity the average person in the general population could perform.\(^53\) The Commission was careful to provide that a determination of substantial limitation must be made on a case-by-case basis, “without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”\(^54\) Major life activities included such basic functions as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”\(^55\) The non-exhaustive list of major life activities was expanded in the second volume of the EEOC Compliance Manual to include mental functions such as “thinking, concentrating and interacting with others.”\(^56\)

A. \textit{Sutton} and the Role of Mitigating Measures

In \textit{Sutton v. United Air Lines, Inc},\(^57\) the Supreme Court engaged in an extensive analysis of the role of mitigating measures to reduce or eliminate the effects of a disability and the subsequent qualification of that individual for protection under the ADA. The case involved twin sisters diagnosed with severe myopia that resulted in untreated vision acuity of 20/200 or worse.\(^58\) With corrective lenses, however, both were functionally-identical to unimpaired individuals.\(^59\) The sisters applied for employment as commercial airline pilots with United Air Lines, but were denied for failure to meet the minimum vision requirement of uncorrected visual acuity of 20/100 or better.\(^60\) Upon filing claims of disability discrimination under the ADA with the EEOC, the twins were granted a right to sue, but the charges were dismissed by the trial and
appellate courts for failure to state a claim upon which relief could be granted. Both courts noted that the use of corrective lenses fully-corrected their visual impairments, and as a result they were not actually substantially limited in a major life activity.

Affirming the judgment of the lower courts, the Supreme Court considered the ADA classification for individuals who use mitigating measures to correct or treat their impairments. The Court determined that the use of corrective measures must be taken into account when determining whether an individual is “substantially limited” in a major life activity to qualify as having a disability under the ADA, but the mere use of such mitigating devices is not dispositive of the issue. Thus, according to the Court, an individual may still have a recognized disability under the ADA if he remains substantially limited despite the use of medications or other treatments to lessen its symptoms.

The majority opinion relied heavily upon the “plain language” of the statute, noting that the phrase “substantially limits” requires a present, as opposed to a past or future, evaluation of an individual’s impairment. Therefore, when a physical or mental impairment may be cured or corrected by mitigating measures, it ceases to “substantially limit” the individual’s major life activities and no longer rises to the level of a “disability” within the ADA. The principal determination in evaluating a disability is whether, after accounting for the use of mitigating measures, the limitations actually endured by an individual as a result of the impairment were “substantial.” With this rubric in mind, the Court held that because the use of corrective lenses was sufficient to bring the visual acuity of the sisters to a level where their severe myopia was no longer a “substantially limiting” impairment, the litigants did not qualify as a protected class under the ADA. Thus, despite having been denied employment because of their visual
impairment, in the Court’s view, the sisters had not presented a claim of discrimination upon which relief could be granted.\textsuperscript{70}

The Court went on to analyze the discrimination claim in light of the third prong of the ADA’s disability definition – that an individual is disabled when he is “regarded as” having a substantially-limiting impairment.\textsuperscript{71} To be applicable, according to the Court, an employer must have mistakenly believed: (1) that a person had a physical impairment substantially limiting “one or more major life activities;” or (2) that an actual non-limiting impairment rose to the level of a substantially-limiting one.\textsuperscript{72} The Court dismissed the contention that the airline’s visual acuity requirement mistakenly presumed that the sisters’ severe myopia substantially limited their capacity to pursue the major life activity of “working.”\textsuperscript{73} Specifically, the Court noted the provisions within the ADA permitting employers to apply qualification standards in certain circumstances where select physical attributes were preferable to others in the performance of a task.\textsuperscript{74}

The dissenting opinion, penned by Justice Stevens and endorsed by Justice Breyer, criticized the majority’s treatment of mitigating measures in the evaluation of a person’s disability.\textsuperscript{75} Drawing upon the legislative history of the ADA, it argued the majority opinion ran counter to the intended scope of the ADA.\textsuperscript{76} From the Senate and House committee reports drafted during the creation of the ADA, Justice Stevens argued, the clear intent of Congress was to assess the impact of an impairment without consideration of mitigating measures.\textsuperscript{77} Furthermore, the “disability” classification had been consistently interpreted by the executive branch agencies charged with the Act’s implementation to focus on the presence of disability in the individual’s uncorrected state.\textsuperscript{78} Despite the strong evidence pointing to congressional intent in the legislative history, the dissenting opinion noted that the “plain language” approach of the
majority determined the case, and narrowed the scope of individuals covered by the ADA
disability classification.

B. *Toyota Motor* and a Stricter Interpretation of “Substantially Limits”

The scope of the ADA was further narrowed in *Toyota Motor Manufacturing, Kentucky,
Inc. v. Williams* when the Supreme Court sought to create a more demanding standard to qualify
as “disabled.” The case involved a worker in the company’s automobile manufacturing plant
diagnosed with carpal tunnel syndrome caused by the repeated use of various tools, resulting in a
reassignment from the assembly line to various quality-control inspection jobs. When one of
the quality-control inspection positions caused her to suffer from an inflammation of the muscles
and tendons around her shoulder blades, Williams requested another reassignment from Toyota
to accommodate her condition. Her physicians strongly recommended that she stop working to
avoid aggravating her condition, and her employment was subsequently terminated as a result of
a poor attendance record.

Alleging disability discrimination under the ADA, Williams claimed that she was
substantially limited in manual tasks related to her work, as well as in her capacity to perform
housework, gardening, and playing with her children due to her physical impairments. However, the Supreme Court rejected her claims, and held that “substantial limitation” required
an impairment to prevent or severely restrict the capacity to perform activities of central
importance to the daily lives of most people with a permanent or long-term impact. In the
Court’s view, the primary question was whether the worker was unable to perform various tasks
central to most people’s daily lives, rather than an inquiry into her inability to perform activities
associated with her specific employment. Because Williams was able to perform such
“activities of central importance,” even though unable to fulfill obligations of her employment,
the Court held that she was not, in fact, substantially limited in her performance of major life activities.\textsuperscript{86} As a result, in the Court’s view, she did not qualify as “disabled” under the ADA.

In effect, after the holding in \textit{Toyota Motor}, an individual’s impairment would have to fully incapacitate the ability to function without assistance to qualify as “substantially limiting” a major life activity – a significantly-higher standard than previously required.\textsuperscript{87} Taken together with the \textit{Sutton} holding, this requirement restricted the class of individuals likely to qualify for protection under the ADA.

C. \textit{Knapp} and the Judicial Treatment of ADA Discrimination Claims for ADHD

Against the background of the judicially-narrowed scope and applicability of the ADA, the case of \textit{Knapp v. City of Columbus}\textsuperscript{88} applied the standards set out in \textit{Sutton} and \textit{Toyota Motor} to disability claims involving ADHD. \textit{Knapp} involved three firefighters – Gary L. Knapp, Brian Willison, and William Fitzpatrick – in Columbus, Ohio, who separately sought and were repeatedly denied testing accommodations for their ADHD, despite a demonstrated need for such modified examination facilities.\textsuperscript{89} The requests included accommodations for extra time to complete the examination, a verbal explanation of the instructions, and an allowance to take the exam alone in order to minimize distraction from other test-takers.\textsuperscript{90} On appeal from the district court’s grant of summary judgment for failure to present a valid disability discrimination claim, the Court of Appeals for the Sixth Circuit affirmed the judgment.\textsuperscript{91} Applying the standards established in \textit{Sutton} and \textit{Toyota Motor}, the appellate court found that the men did not qualify as “disabled” within the judicially-narrowed scope of the ADA.\textsuperscript{92}

Though the court noted that ADHD qualified as a “physical or mental impairment” under the regulations of the Department of Health, Education, and Welfare (HEW)\textsuperscript{93} and the EEOC’s interpretation of “learning” as a major life activity,\textsuperscript{94} it primarily turned to the definition of
“substantial limitation” set forth in *Toyota Motor*.95 Thus, the principal consideration was not whether the men were limited in their capacity to perform activities associated with their specific jobs, but rather whether they were unable to perform tasks central to an ordinary person’s daily life.96

The Court next took note that each of the men treated their ADHD with prescription Ritalin™, a mitigating measure that, by the admissions of the men, helped to quell the symptoms of their conditions.97 Following the holding in *Sutton*, the testimony of the use and efficacy of mitigating measures was dispositive of the disability issue for the Court.98 Quoting *Sutton*, the Court noted that “the ADA’s coverage is restricted to only those whose impairments are not mitigated by corrective measures.”99 Thus, because the men failed to present a genuine issue of material fact that each was disabled in a manner substantially limiting their capacity to learn, the district court’s grant of summary judgment was affirmed.100

It seems, curiously, that the Court gave too much effect to the use of medication, and too little credit to the role of the requested testing accommodations.101 It is likely that each of the men had taken their medication on the day of their respective promotion examinations, and yet their failure was universal in each instance where special accommodations were not provided.102 In fact, the only example of testing success in the court record came from William Fitzpatrick’s Fire Lieutenant examination, in which he was given extra time and permitted to take the test alone so as not to be distracted by others.103 Although the single success of Fitzpatrick when given adequate accommodations may not be sufficient to demonstrate a greater trend, the repeated failures of the three men in the absence of such provisions are certainly indicative of an issue warranting better consideration. Such demonstrations serve to support the argument that
people with ADHD may be more likely to succeed when given allowances designed to compensate for their impaired concentration.

IV. ADA Amendments and Proposed Interpretive Guidelines of the EEOC

The combined effect of *Sutton* and *Toyota Motor* stifled claims of disability discrimination under the original ADA, since, under those standards, courts would consider an individual to be disabled *only if* a condition severely restricted the person’s capacity to perform activities of central importance to daily life, and no mitigating measures were implemented to offset the deleterious effects of the disability. Believing that the judicially-narrowed standards failed to grasp the original intent of the ADA, Congress set out to broaden the class of individuals with qualifying disabilities through the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Although the three prongs of the original ADA remain intact, the amendments expand their scope with interpretive guidelines built into the statutory language, thereby making the provisions binding upon courts applying the statutes to disability discrimination claims.

A. Defining a “Disability”

In response to *Sutton*’s treatment of mitigating measures used to alleviate the effects of a condition, the ADAAA specifically requires that the determination of disability be made without reference to medications, devices, learned behaviors, or assistive technology applied to control an individual’s handicap. Thus, the presence of a disabling condition that substantially limits a major life activity is now evaluated in the absence of, or without regard for, any mitigating measures utilized by the individual.

Along with its amendments to the original ADA, Congress called upon the EEOC to revise its interpretive regulations to reflect the newly-broadened scope of the statute. In
compliance, the EEOC submitted proposed rules in September 2009, further clarifying the amended provisions and offering illustrative examples to facilitate the implementation of the ADAAA.\textsuperscript{111} Pertaining to the judicial consideration of mitigating measures, the proposed rules require a finding of disability even where the individual experiences no limitations when using prescriptive treatments, so long as the impairment \textit{would} substantially limit the individual if left untreated.\textsuperscript{112} Considering the effect such requirements would have had on prior disability discrimination claims that were dismissed for the use of mitigating measures, it is likely that the new definition of “disability” will increase the number of people protected under the ADAAA’s broad provisions.\textsuperscript{113}

B. Identifying “Major Life Activities”

Although the original ADA did not define major life activities affected by a disability, instead relying upon interpretive guidelines from the EEOC and other agencies for such definitions, the ADAAA offers broad categories of major life activities and bodily functions impaired by a disabling condition.\textsuperscript{114} Leaving room for interpretive expansions, the amendments nonetheless specify selected activities and functions to be considered in evaluating the limitations of an impairment.\textsuperscript{115} Though relatively self-explanatory from the statutory language, the EEOC proposed rules offer a general prescriptive definition of major life activities as those basic functions “that most people in the general population can perform with little or no difficulty.”\textsuperscript{116} Reflecting the congressional desire to broaden the scope of protected disabilities under the ADA, these provisions allow for almost every activity to be considered a major facet of unimpaired life.

C. Characterizing a “Substantial Limitation” of a Major Life Activity
From the holding in *Toyota Motor*, it appeared that in order to be substantially limited in a major life activity, the individual’s capacity to perform *all* activities of central importance to a person’s daily life would have to be severely restricted by a disability.\(^{117}\) Abandoning such a narrow interpretation, the ADAAA instead applies the “substantial limitation” requirement in a manner to expand the class of people covered by the Act.\(^{118}\) The expansion reflects the congressional intent that the more appropriate focus of claims under the ADA should be on whether discrimination actually occurred, rather than on an exhaustive analysis of an individual’s disability.\(^{119}\) Thus, rather than wholesale impairment, an individual needs only to demonstrate that a single major life activity is substantially limited to have a valid disability under the ADA.\(^{120}\)

The EEOC proposed rules go even further by interpreting a person’s substantial limitation in performing a major life activity to be a comparison to the capacity of the general population to perform such tasks, rather than a complete inability to carry out the activities.\(^{121}\) The proposed rules issued by the EEOC further recognize that certain impairments may impact individuals in different ways. Thus, if the intent of the ADAAA to broadly cover as many conditions as possible under its protection is to be fulfilled, an individual’s ability to succeed (either academically or in the workplace) in spite of impairment should not otherwise limit the recognition of a valid disability for ADA purposes.\(^{122}\)

D. Being “Regarded As” Impaired

The third prong of the ADA’s definition originally recognized a disability where a person was regarded as being impaired by an employer or others.\(^{123}\) The ADAAA’s revisions have since qualified a valid disability where a person has been discriminated against as a result of an actual or perceived impairment, regardless of whether it actually limits the individual’s ability to
perform a major life activity. In effect, this provision recognizes a disability and presumes improper discrimination when a demotion, termination, or denial of advancement is due to an actual or perceived mental or physical impairment, regardless of the presence or absence of a substantial limitation. According to the EEOC interpretive guidelines, a prohibited action may simply be a decision based on a symptom of impairment, so long as that condition is not transitory or minor. Thus, without actual knowledge of impairment, or substantial limitation suffered by an employee, it seems an employer’s action may nonetheless run afoul of the ADA’s prohibition of disability discrimination if it is based on a subjective element of the employee’s character rather than objective standards.

As noted above, the provisions of the ADAAA certainly appear to accomplish the congressional objective of broadening the scope of protected disabilities under the ADA. When evaluating the presence of a disability, courts will no longer be permitted to hold the use of mitigating measures against the individual, the person need only be substantially limited when compared to the general population, and actual knowledge of impairment is no longer necessary for an individual to be regarded as disabled by an employer. The question remains, however, whether the broadened scope of protection will translate into more expansive treatment of discrimination claims involving ADHD.

V. Impact of the ADAAA on Legal Recognition of ADHD as a Disability

At this time, the new ADAAA provisions have not been applied in cases involving ADHD discrimination claims, so it is unclear how the courts will interpret the broader scope of protection afforded under the ADA. However, because a much larger population of individuals will qualify for disability discrimination protection under the new law, including the estimated 4.4% of adults with ADHD in the U.S., the changes are expected to have a significant
impact on employer-employee relations. One thing appears quite certain: the key provisions of the ADAAA and proposed EEOC guidelines pave the way for improved legal recognition of ADHD as a valid disability.

Rather than relying upon administrative regulations to define vague statutory terms, interpretive guidelines are built directly into the provisions of the ADAAA, listing broad examples of major life activities affected by disabilities. This is particularly relevant for ADHD, since cognitive functions, such as concentrating, thinking, and learning, had previously only been recognized as “major life activities” within the EEOC’s regulations for the original ADA, but are now expressly included within the statutory language. This legislative recognition provides a statutory foundation for disability claims involving ADHD, since the most common activities impaired by the disorder now have express reference in the ADA itself.

As for the “substantial limitation” component, the provision that an individual must only be substantially limited in a single major life activity will also benefit ADHD disability claims. Individuals with ADHD typically suffer from impaired or diminished cognitive abilities when compared to those of their peers or expected of their age group, but are generally not completely unable to learn or perform reasonably well when given adequate accommodations. By determining a substantial limitation through a comparison of an individual’s performance to that of the general population, rather than requiring a complete incapacitation of a major life function, the new statutory and administrative standards allow for better recognition of ADHD as a disability. Thus, the amended ADA provisions appropriately recognize that an impairment needs not fully incapacitate the individual to be a disabling condition warranting protection.
Lastly, given that pharmacological interventions and behavioral therapy may be used to control the effects of ADHD, the inclusion of both medications and learned behaviors in the classes of mitigating measures to be disregarded by courts provides for greater legal recognition of the condition as a valid disability.\textsuperscript{135} Because ADHD medications do not fully normalize the individual, the prior judicially-narrowed definition of a disability would have excluded from the protection of the ADA persons who were still technically impaired. The ADAAA and the proposed EEOC guidelines, on the other hand, require a finding of disability even where the individual experiences no limitations when using prescriptive treatments, so long as the impairment \textit{would} substantially-limit the individual if left untreated.\textsuperscript{136} Thus, as long as the individual is medically diagnosed with ADHD (i.e., is cognitively impaired in the capacity to concentrate, think, learn, etc., without pharmaceutical or behavioral therapies), the use of prescription drugs may no longer impede a court’s evaluation of a substantial limitation of such major life activities.

VI. Conclusion

The primary effect of the ADAAA is to shift judicial focus away from an extensive evaluation of an individual’s disability, and instead place the burden upon employers to abide by the broadened provisions demanding accommodations for individuals with disabilities.\textsuperscript{137} Thus, so long as a person needs an accommodation due to an identifiable condition that limits him or her in a substantial way, the ADAAA appears to demand such action by the requested entity. Concordantly, people with ADHD are better-assured of the legal recognition of their impairment and entitlement to accommodations through the ADAAA. However, as noted above, until the first case applying the broadened standards is tried, the judicial impact of the revisions will remain unclear.


See generally Purdie et al., *supra* note 3 at 66-69 (examining arguments of ADHD as a socially-constructed versus medically-recognized disorder, and the efficacy of various interventions used to treat its symptoms).

When Nicholas Axelrod Panagopoulous, a student at the Phillips Academy in Massachusetts who was diagnosed with ADHD, challenged his dismissal from the school in court, the federal judge questioned whether the condition was a valid disability or simply a “handy excuse” to explain academic shortcomings. *Axelrod v. Phills Academy*, 46 F. Supp. 2d 72, 86 (D. Mass. 1999) (“The fact that Nicholas has ADHD is not a general excuse for Nicholas’ failure to meet academic standards.”). This is an example, among many, of judicial bias facing ADHD cases, where the condition has been denied recognition as a valid disability.

For a more in-depth review of judicial bias in ADHD disability discrimination cases, including the Axelrod case, see Kristen L. Aggeler, *Is ADHD a “Handy Excuse?” Remedying Judicial Bias Against ADHD*, 68 UMKC L. REV. 459 (2000).


42 U.S.C. §12102(1)(A)-(C). The conditions listed under subsection (A) are typically the most relevant to the determination of an individual’s disability.
10 See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §1630.2(j)(1)(1998) (interpreting “substantially limits” to mean an individual is “unable to perform a major life activity that the average person in the general population can perform…”); see Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. §1630 (1998) (defining “major life activities” as such basic functions as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working”).

11 The principal cases that defined these key terms within the ADA prior to the 2008 amendment were Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (denying recognition of a disability where mitigating measures are employed to correct the impairment) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (narrowing the scope of substantial limitations to essentially require complete incapacitation due to a condition). The case of Knapp v. City of Columbus, 2006 FED App. 0472N (6th Cir.), applied the Sutton and Toyota Motor definitions to the treatment of ADHD under the ADA.

12 See e.g., Sutton, 527 U.S. 471; Toyota Motor, 534 U.S. 184.


14 Id. at §12102(2)(A), as amended (“…[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.”) [emphasis added].

15 Id. at §12102(4)(C)-(D).

16 Id. at §12102(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…”).

17 This article does not purport to pursue an overly technical analysis of the disorder itself, but rather will attempt to describe the symptoms, diagnosis and treatment of ADHD in a non-technical manner.

18 See Dopheide & Pliszka, supra note 1 at 656-79; National Institute of Mental Health, Attention Deficit Hyperactivity Disorder (ADHD), supra note 1; DSM-IV, supra note 1.


21 See generally J. Biederman, Pharmacotherapy for Attention Deficit Hyperactivity Disorder (ADHD) Decreases the Risk for Substance Abuse: Findings from a Longitudinal Follow-Up of Youths with and without ADHD, 64 J. CLINICAL PSYCHIATRY S11, 3-8 (2003).

22 American Psychiatric Association, Diagnostic Criteria for Attention-Deficit/ Hyperactivity Disorder, Diagnostic and Statistical Manual of Mental Disorders, Fourth Ed., Text Revision (2000). Diagnosis of the condition is based upon the identification of six or more symptoms persisting within the individual for greater than six months.

23 Id.

24 Id.

25 For an overview of arguments against recognizing ADHD as a medical condition, see Purdie et al., supra note 3 at 65-66.

26 Diagnostic Criteria for Attention-Deficit/ Hyperactivity Disorder, supra note 22 (noting that symptoms must present in a form “maladaptive and inconsistent with [the individual’s] development level”).

27 For a comprehensive review of the various rating scales used to diagnose ADHD and the overall effectiveness of such systems, see generally S.M. Snyder et al., Review of Clinical Validation of ADHD Behavior Rating Scales, 99 PSYCHOL. REP. 363 (2006).

28 Lydia Mary Furman, MD, Attention-Deficit Hyperactivity Disorder (ADHD): Does New Research Support Old Concepts?, 23 J. CHILD NEUROLOGY 7, 775, 779-80 (2008) (noting that a shortcoming of so-called “objectives” is the failure to account for “projectives,” which evaluate personality structure and behavioral dynamics to identify existing coping mechanisms of the individual and assess foundational reasons for attentional problems).

29 Id.

30 Id.

31 Id. at 778.

32 Id.

33 Nola Purdie et al., supra note 3 at 66; see also Sherwood & Rey, supra note 4 at 336. Because pharmacological interventions remain the most common form of treatment, this section will focus only on those therapies.
The most common form of immediate-release methylphenidate is Ritalin™; Common forms of extended-release methylphenidate include Concerta™ and RitalinSR™.

Sherwood & Rey, supra note 4 at 337-38.

The most common forms of mixed amphetamine salts are Adderall™ and AdderallXR™.


Sherwood & Rey, supra note 4 at 338-39.

Id.

Id. at 339.

Nola Purdie et al., supra note 3 at 66.

See W.E. Pelham, T Wheeler, & A. Chronis, Empirically Supported Psycho-Social Treatments for Attention Deficit Hyperactivity Disorder, 27 J. CLINICAL CHILD PSYCHOL. 190, 191(1998) (showing that improvements in behavior through use of medication do not bring individuals “even close to being normalized – often remaining one standard deviation above the norm”).

ADA 1990, supra note 8.


Id. at §12102(1).

Id.

Id. at §12112(a) (covering practices such as job application procedures, hiring, advancement or termination of employees, compensation and job training, and other privileges enjoyed by similarly-qualified individuals).

Id. at §12111(9).

53 Id. at §1630.2(j)(1).

54 Id. at §1630.2(j).

55 Id. at app. §1630.

56 EEOC Compliance Manual, vol. 2 EEOC Order 915.002, 902 (1995). The Compliance Manual is a monthly publication produced by the EEOC to provide employers and attorneys with the most current employment guidelines, regulations and policies.


58 Id. at 475.

59 Id.

60 Id. at 476. The ADA permits an entity to demonstrate that qualification standards or selection criteria are business necessities to prevent an unqualified candidate from posing a threat to the health or safety of other individuals in the workplace as a valid defense to a discrimination claim, 42 U.S.C. §12113(a) and (b).

61 See 130 F.3d 893 (1997).

62 Sutton, supra note 57 at 476-77.

63 Id. at 476.

64 Id. at 482, 488.

65 Id. at 488. This is an important point to keep in mind when reviewing the various court opinions in ADA discrimination cases involving ADHD, discussed infra, because although medications are effective to a certain degree, most individuals fail to reach a “normalized” level of symptom containment. See Nola Purdie et al., supra note 3 at 66.

66 Sutton, supra note 57 at 482.

67 Id. at 482-83.

68 Id. at 488.

69 Id. at 488-89.
Id.

71 ADA 1990, supra note 8 at §12102(1)(C).

72 Sutton, supra note 57 at 489.

73 Id. at 490-91.

74 Id., referring to 42 U.S.C. §12113(a) and (b).

75 Sutton, supra note 57 at 495, J. Stevens dissenting.

76 See id. at 495-513.


78 Sutton, supra note 57 at 501-02, J. Stevens dissenting (noting the EEOC’s interpretive guidelines calling for the determination of disability without regard to mitigating measures, 29 C.F.R. pt. 1630, App. §1630.2(j) (1998)).


80 Id. at 187-89.

81 Id. at 189. The court record is vague as to whether Williams’ request for accommodation was denied, or whether she simply began to regularly miss work due to complications from her injuries.

82 Id. at 189-90.

83 Id. at 190. Williams also presented alternative arguments under the other prongs of the ADA disability definition, but only her claims of a substantial limitation of major life activities are primarily relevant to this review.

84 Id. at 198.

85 Toyota Motor, supra note 79 at 200-202.

86 Id. at 202.

87 See Hospital Law Newsletter, “Supreme Court Gives Strict Interpretation to Disabilities Act Language,” Vol. 19, No. 7 (May 2002) (“The effect of [Toyota Motor] may be to discourage a considerable amount of litigation by employees who are unable to perform their assigned jobs,
but are not substantially limited in a specific major life activity, from initiating litigation…”); Frank Alvarez, “Tighter Reins on Who is ‘Disabled,’” Occupational Health & Safety, Vol. 71, No. 4, pg. 93 (Apr. 2002); The Nation’s Health, “Supreme Court Ruling Narrows Americans With Disabilities Act,” Vol. 32, No. 2 (Mar. 2002) (“The decision ‘would prevent many individuals whom Congress intended ADA to cover from receiving its protection that they may need to secure and maintain employment…”)[Quote from Marcia Bristo, Spokeswoman from the National Council on Disability].

88 Knapp v. City of Columbus, 2006 FED App. 0472N (6th Cir.).

89 See generally id. at 2-10. The requests related to testing accommodations for a promotion examination within the fire department. Knapp applied for and was denied testing accommodations three times; Willison requested and was denied accommodations twice; and Fitzpatrick had a request lost on one occasion, and was outright denied on another.

90 See id. at 8. The record indicates that Fitzpatrick was granted a request for testing accommodations for his Fire Lieutenant’s examination in 1995, which he passed, leading to his promotion to Fire Lieutenant.

91 See Knapp, supra note 88.

92 Id. at 15-17.

93 45 C.F.R. §84.3(j)(2)(i)(A).

94 29 C.F.R. §1630.2(i).

95 Toyota Motor, supra note 79 at 200-201.

96 Knapp, supra note 88 at 13, citing to Toyota Motor, supra note 79 at 200-201.

97 Knapp, supra note 88 at 16-17. Knapp admitted that the difference between using the medication and going untreated was like “night and day,” while Willison stated that taking the medication permitted him to fulfill his familial and employment obligations. Fitzpatrick, on the other hand, admitted that he only used the medication when he felt he needed to control his ADHD symptoms as more of a discretionary treatment.

98 Id. at 15.

99 Id. (Quoting Sutton, supra note 57 at 487).

100 Knapp, supra note 88 at 17.

101 Although it is entirely likely that the men experienced an ability to conduct daily activities with greater ease while taking their medication, such subjective evaluations of efficacy cannot be
dispositive of the issue of a treatment’s capacity to normalize an individual. Knapp’s testimony that taking his medication was like “night and day” when compared to his untreated state may be an accurate reflection of his improved ability to complete tasks and organize himself. Id. at 3. However, an unqualified statement is far from a scientific comparative analysis of his performance against that of a person unaffected by ADHD.

102 See id. at 2-9.

103 Id. at 8.

104 See Sutton, supra note 57; see also Toyota Motor, supra note 79. In fact, in 2004, plaintiffs in ADA employment discrimination claims reportedly lost 97 percent of the cases at trial as a result of the significantly-restricted definition of “disability” from the Supreme Court interpretations. Sandra B. Reiss & J. Trent Scofield, The New and Expanded Americans With Disabilities Act, 70 ALA. LAW. 38, 39 (2009).


“to carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA…”.

42 U.S.C. §12101(b)(1) (as amended). It also specifically identified Sutton v. United Air Lines, Inc. and Toyota Motor Mfg., KY, Inc. v. Williams as motivating causes behind the amendments, noting that the purpose of the ADAAA was

“to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc…. that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; […]

“to reject the standards enunciated by the Supreme Court in Toyota Motor Mfg., KY, Inc. v. Williams… that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives;

“to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Mfg, KY, Inc. v. Williams… for ‘substantially limits’… has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis;…”

27
An individual is disabled if he has a physical or mental impairment that substantially limits one or more major life activities; he has a record of such an impairment; or he is regarded as having such an impairment. 42 U.S.C. §12102(1)(A)-(C).

The inclusion of interpretive guidelines within the ADAAA likely reflects Congress’ intent to avoid a subsequent narrowing of the statutes through judicial review, and makes the standards binding, as opposed to the persuasive nature of interpretive guidelines issued by the EEOC and other administrative agencies.

42 U.S.C. §12102(4)(E)(i). It is interesting to note that although the additions were intended to reverse the broader effect of the holding in Sutton, a specific exception within the statute for the use of ordinary corrective lenses designed to normalize visual acuity likely would not have affected the outcome of the case itself. 42 U.S.C. §12102(4)(E)(ii). Because the sisters were able to completely correct their severe myopia with the use of corrective lenses, and the Court could appropriately consider such ameliorative effects, it appears that even under the amended ADA their condition would still not qualify as a disability because they were not substantially limited in seeing. See 74 FED. REG. 48,431, 48,441 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630(j)(3)(iv)(A)).

This amended standard more accurately reflects a valid determination of disability, since the presence of a medically-prescribed mitigating measure supports a claim that a condition is disabling to a degree warranting recognition under the ADA. The previous evaluation of a disability seemed to penalize the attempts by the individual at self-help by removing him from the class of protected persons under the ADA, in essence making an untreated condition more favorable for disability claims. To promote the refusal to seek treatment for a condition surely does not reflect a public policy standard of any utility. More appropriately, under the ADAAA, the use of a mitigating measure does not come into consideration at all, leaving the determining factor to be whether the individual is significantly restricted in performing a major life activity.

42 U.S.C. §12101(b)(6), as amended (2008) (“[The purposes of this Act are –]… to express Congress’ expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term “substantially limits” as “significantly restricted” to be consistent with this Act, including the amendments made by this Act.”) Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 FED. REG. 48,431 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630) [hereinafter EEOC Proposed Rules].

EEOC Proposed Rules, 74 FED. REG. 48,431, 48,441 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)(3)(iii)) (“An individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability if the impairment would be substantially limiting without the mitigating measure.”). Illustrating this point, one example offered by the proposed
rules states that a person taking medication for a mental condition, insulin for diabetes, or anti-seizure drugs for a seizure disorder, will be considered to have a disability if evidence were presented that the untreated impairment “would substantially-limit a major life activity.” Id. at 1630.2(j)(3)(iii)(A).

113 Reiss & Scofield, supra note 104 at 41 (predicting a greatly-increased class of persons with a disability under the new ADAAA definition).


115 See 42 U.S.C. §12102(2), Major life activities include, but are not limited to:

“(A) … [C]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

“(B) … [T]he operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

This specificity in the statute once again reflects a likely congressional desire to limit the discretion of the courts to interpret the protected classes of disabilities narrowly.

The inclusion of learning, reading, concentrating, and thinking as major life activities further supports the presumption that disability discrimination claims based ADHD will receive greater judicial consideration going forward. Though the court in Knapp cited to the EEOC regulations when identifying “learning” as a major life activity and recognizing ADHD as a physical or mental impairment, Knapp, 2006 FED App. 0472N, at 13 (6th Cir.), those interpretive guidelines were merely a persuasive authority. The express inclusion of those activities within the statutory language of the ADAAA now makes the provisions binding upon courts applying the ADA for disability discrimination claims.

116 EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48,440 (to be codified at 29 C.F.R. pt. 1630.2(i)).

117 See Toyota Motor, supra note 79 at 198; see also Reiss & Scofield, supra note 104 at 40.


119 42 U.S.C. §12101(b)(5), as amended (“[The purposes of this Act are –]… to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis;…”).
30 U.S.C. §12102(4)(C). The ADAAA also provides for recognition of disabilities in remission or those occurring episodically, so long as they would substantially limit the individual when active. 42 U.S.C. §12102(4)(D).

EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48,440 (to be codified at 29 C.F.R. pt. 1630.2(j)(1)) (“An impairment is a disability within the meaning of this section if it “substantially limits” the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.”). According to the proposed rules, the comparison is to be made from common-sense judgments of the ordinary person’s ability to perform a major life activity, rather than requiring more exacting scientific or medical evidence. Id. at 74 FED. REG. 48,431, 48,440 (to be codified at 29 C.F.R. pt. 1630.2(j)(2)(iv)). In effect, this provision appears to call for the judicial application of the “reasonable man” standard often used in U.S. jurisprudence when comparing the conduct of one party to the expected conduct of a rational individual. A key difference, however, is that the EEOC proposed rules specify that the comparison is to be made according to the capacity of a person in the general population, not a similarly-situated individual. Id. at 74 FED. REG. 48,431, 48,446 (“The comparison to the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated.”).

Id. at 74 FED. REG. 48,431, 48,442 (to be codified at 29 C.F.R. pt. 1630.2(j)(6)(C)) (“Example 3: An individual with a learning disability who is substantially limited in reading, thinking, or concentrating compared to most people, as indicated by the speed or ease with which he can read, the time and effort required for him to learn, or the difficulty he experienced in concentrating or thinking, is an individual with a disability, even if he has achieved a high level of academic success, such as graduating from college. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of an impairment.”) [Emphasis added].

42 U.S.C. §12102(2)(C) (2006); Reiss & Scofield, supra note 104 at 42-43.


Id.; EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48,443 (to be codified at 29 C.F.R. pt. 1630.2(1)(1)).

42 U.S.C. §12102(3)(B); EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48,443 (to be codified at 29 C.F.R. pt. 1630.2(l)(2)-(3). A condition is transitory if sustained for less than six months.

Id. at 74 FED. REG. 48,431, 48,448 (to be codified at 29 C.F.R. pt. 1630.2(l) (“As newly defined under the statute, “regarded as” coverage can be established whether or not the employer was motivated by myths, fears, or stereotypes.”).
Though the ADAAA intends to broaden the scope of protected classes of people facing disability discrimination, this provision may expand the coverage too much if an employer can be liable for an ADA claim resulting from a subjective employment decision not based on actual knowledge of an individual’s mental or physical impairment.

For example, if an employer chooses to promote Employee A over Employee B because the former more expeditiously completes his assignments and tends to give greater attention to detail to those tasks than the latter, has he discriminated against B, or simply rewarded A? What if the employer were not aware that B had a learning disability, and despite producing a lower-quality work product, B had never displayed other symptoms of that condition — would the employer still be liable for discrimination because he valued A’s productivity more? Or, what if the decision were only whether to promote B, but the employer chose not to because B’s assignments had not been completed on time due to his learning disability — can an employer discriminate against a disability of which he is unaware?

While it is easy to resolve hypothetical problems in a vacuum, the complexities and shades of gray in actual practice make this provision dangerously broad. Disability discrimination must be discouraged, but employers should not be handcuffed by the threat of litigation when making a legitimate employment decision based on the needs of their business, especially without proof of knowledge of the condition or an actual impairment suffered by the individual.

128 In October 2009, the U.S. District Court for the District of Maryland ruled against a Master’s program candidate diagnosed with ADHD on a discrimination claim against Loyola College following his dismissal from its graduate school. Herzog v. Loyola College in Maryland, Inc., 2009 U.S. Dist. LEXIS 94454 (U.S. D. MD.). Although the ADAAA was enacted January 1, 2009, the court opted not to retroactively apply the amended provisions of the ADA to the case because the challenged conduct had taken place prior its passage. Id. at 14-15, n. 3 (“The ADAAA makes important changes to the definition of the term ‘disability’ by rejecting the holdings in several Supreme Court decisions and portions of the Equal Employment Opportunity Commission’s ADA regulations. However, Congress did not specify whether or not the ADAAA is to apply retroactively…. This Court adopts the approach taken by the aforementioned circuit courts, declining to apply the ADAAA to events occurring before its effective date.”).

129 See Reiss & Scofield, supra note 104 at 39 (predicting greater emphasis on the requirements for “reasonable accommodations” and correlative measures to address employees with disabilities).

130 42 U.S.C. §12102(2) (2009). The legislative inclusion of definitions that had previously been left to the EEOC guidelines appears to be an attempt by Congress to ensure the intended expansion of the ADA’s scope is respected by courts applying the new law. Thus, the judicial application of the ADA should remain uniformly inclusive of a broad range of disabilities whether the court interprets the act according to a plain language approach, or references the congressional purpose of the statute.


See DSM-IV, supra note 1 (noting that symptoms of ADHD, such as difficulty sustaining attention in activities, must fail to conform to the expected levels of development for an individual’s age).

EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48,440 (to be codified at 29 C.F.R. pt. 1630.2(j)(1)).

See 42 U.S.C. §12102(4)(E)(i); see also EEOC Proposed Rules, supra note 111 at 74 FED. REG. 48,431, 48, 440 (to be codified at 29 C.F.R. pg. 1630.2(j)(3)).

Id. at 74 FED. REG. 48,431, 48,441 (to be codified at 29 C.F.R. pt. 1630.2(j)(3)(iii)) (“An individual who, because of use of medication or another mitigating measure, has experienced no limitations, or only minor limitations, related to an impairment nevertheless has a disability if the impairment would be substantially limiting without the mitigating measure.”). Illustrating this point, one example offered by the proposed rules states that a person taking medication for a mental condition, insulin for diabetes, or anti-seizure drugs for a seizure disorder, will be considered to have a disability if evidence were presented that the untreated impairment “would substantially-limit a major life activity.” Id. at 1630.2(j)(3)(iii)(A).

42 U.S.C. §12101(b)(5), as amended.