American With Disabilities Act Amendments Act: The Effect On Employers And Educators

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The American with Disability Act Amendment Act became law in 2009. In passing the Act, Congress moved to correct a trend by Courts and the EEOC to weaken the coverage of the ADA. In this article, we look at the effects of the ADAAA upon both employers and educators within post-graduate school programs. Pursuant to the Act, institutions will be required to consider accommodations for an increasing number of individuals who previously under the ADA did not qualify as possessing a disability. As a result the ADAAA, many of the previous rulings upon which businesses and universities have based their policies on are no longer valid. Concomitantly, an increase in the diagnosis of children with disabilities, including ADHD and learning disabilities, necessitates that both educators and employers will provide more accommodations to students and employees than in the past. To meet this challenge, universities must prepare policies for the identification and/or confirmation of the disability as well as to budget for the increased cost of those accommodations.

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Everything went from bad to worse, money never changed a thing. Death kept following trackin us down. At least I heard your bluebird sing, now somebodys got to show their hand. Time is an enemy. I know you’re long gone. I guess it must be up to me.

Bob Dylan, *Up to me*. Positively 4th Street, Columbia Records, 7/29/1965

In response to several Supreme Court decisions and EEOC regulations concerning the Americans with Disability Act (ADA), the President of the United States signed into law the American With Disabilities Act Amendments Act of 2008 (ADAAA). Going into effect January 2009, the Act was passed to correct a trend by the EEOC and Courts to decrease the breath of the ADA. Previously, some individuals were unable to fully participate in society as Courts refuse to define their condition as a disability. The ADAAA specifically mandates broader coverage of individuals than that previously supported by the Courts and EEOC. The basic definition of a “disability” remains the same under the ADAAA.1 A disability is a physical or mental “impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as

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having such an impairment.” What the ADAAA changes is how these terms within the definition are to be interpreted. While the particularly changes effects post-secondary universities in the area of employment, the broadening inclusion of disabilities affects postsecondary universities in their accommodations of students as well. This paper will first look at the Historical Provisions and origins of the ADA. Thereafter, it will consider areas where the Circuit Courts have disagreements. After a discussion of various issues that still remain with the ADA, it will specifically address ways for post-secondary educators to address an increasing population of students that qualify under the ADA and ADAAA.

HISTORICAL PROVISIONS OF THE ADA

In 1990, President George H. W. Bush signed The Americans with Disabilities Act into law, calling the legislation “powerful in its simplicity.” Former Attorney General Dick Thornburgh called the ADA “a great leap forward in the civil rights movement.” Congress in invoking its power to enforce the Fourteenth Amendment as well as to regulate commerce intended the Act to be “a clear and comprehensive mandate for the elimination of discrimination for individuals with disabilities.”

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2 42 U.S.C. §12102(2)(A)-(C)
6 42 USC § 12101.
The Americans with Disabilities Act of 1990 contains four titles: Title I prohibits discrimination on the basis of disability in all aspects of private sector employment. Title II addresses discrimination in the provision of public service by state and local governments. Title III prohibits discrimination in the provision of public services and accommodations operated by private entities. Title IV requires that telephone services be made available to persons with hearing or speech impairments.

Title I, focusing on employment matters, took effect for employers with 25 or more employees on July 26, 1992, and for employers with 15 or more employees July 26, 1994. Like Title VII of the Civil Rights Act of 1964, claims of discrimination based upon disability will be handled initially through administrative proceedings at the Equal Employment Opportunity Commission.

The Equal Employment Opportunity Commission (EEOC) was charged with providing guiding regulations with regards to Title I. Under Title I, employers are required to provide notice to employees of the provisions of the Act. Specifically, an employer is required to post notices in an "accessible format" to applicants or employees or members of the organization describing the applicable provisions of the ADA.

ADA Terms: Covered Entity, Person, & Industry Affecting Commerce

Title I of the ADA states "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Congress has defined "covered entity" as an "employer," including state employers, under the act. In turn, "employer" includes a "person engaged in an industry affecting commerce who has 15 or more employees." Completing the picture of who is covered, the statute defines "person" and "industry affecting commerce" to include governmental bodies.

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8 The ADA, Section 101(5).

9 The ADA, Section 101(1) and 107.

10 The ADA, Section 105.


12 42 U.S.C. § 12111(2).

“industry, business or activity.” \textsuperscript{14} “The terms ‘person’ . . . and ‘industry affecting commerce’, shall have the same meaning given such terms in section 2000(e) of this title.” \textsuperscript{15} ‘Person’ includes one or more individuals, governments, governmental agencies, political subdivisions. \textsuperscript{16} ‘Industry affecting commerce’ means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes. any governmental industry, business, or activity.” Although Congress generally included governmental employers in Title I, it exempted the federal government from that Title. \textsuperscript{17} However, ‘employer’ does not include ... the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . .” That being so, by including governmental employers in Title I, but at the same time excluding federal governmental employers, Congress was referring only to state and local governmental employers. However, it should be noted that Title I requires an employee first to file a charge with the EEOC in a timely manner, although not a requirement of Title II. \textsuperscript{18}

Title II is the “Public Services” title of the ADA. Congress required the Attorney General of the United States to promulgate regulations implementing Title II. \textsuperscript{19} Pursuant to that grant of authority, the Attorney General has determined that Title II applies to employment: No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity. \textsuperscript{20}

Title II’s operative section provides: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. \textsuperscript{21} “Public entity” has been defined as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” As is

\textsuperscript{14} See 42 U.S.C. § 12111(7).

\textsuperscript{15} 42 U.S.C. § 2000(a).

\textsuperscript{16} 42 U.S.C. § 2000e(h).

\textsuperscript{17} See 42 U.S.C. § 12111(5)(B).

\textsuperscript{18} See 42 U.S.C. § 12117(a) (incorporating the charge requirement from Title VII of the Civil Rights Act of 1964, as amended).

\textsuperscript{19} See 42 U.S.C. § 12134(a).

\textsuperscript{20} 28 C.F.R. § 35.140(a) (1998).

\textsuperscript{21} 42 U.S.C. § 12132.

\textsuperscript{22} 42 U.S.C. § 12131(1)(A) & (B).
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evident, that section contains two clauses. First, § 12132 says that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.23

However, Congress did not define any of the terms in that clause except “public entity” and “qualified individual with a disability.”24 The Courts have taken the position that when a statute does not define a term, [the Courts] generally interpret the term by employing the ordinary, contemporary, and common meaning of the words that Congress used.25

A common understanding of the first clause shows that it applies only to the “outputs” of a public agency, not to “inputs” such as employment.26 First, employment by a public entity is not commonly thought of as a “service, program, or activity of a public entity.”27 Second, the “action” words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output.28

The U.S. Ninth Circuit provided the hypothetical example where they considered how a Parks Department would answer the question, “What are the services, programs, and activities of the Parks Department?” It might answer, “We operate a swimming pool; we lead nature walks; we maintain playgrounds.” It would not answer, “We buy lawnmowers and hire people to operate them.” The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.29 Similarly, they considered how a member of the public would answer the question, “What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?” The individual might answer, “I want to participate in the Wednesday night basketball league, or find out about the free children’s programs for the summer months.” The individual would not logically answer, “I want to go to work for the Parks Department.”30

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23 42 U.S.C. § 12132

24 See 42 U.S.C. § 12131 (defining Title II’s terms).

25 United States v. Iverson, 162 F.3d 1015, 1022 (9th Cir.1998).

26 See Decker, 970 F.Supp. at 578. “The phrase ‘services, programs, and activities,’ ... understood as a whole, focuses on a public entity's outputs rather than inputs.” (citation and internal quotation marks omitted).

27 Id

28 Id.

29 See Zimmerman, 170 F. 3D 1169 (9TH Cir. 1999)

30 Id
Title III discusses the many barriers impeding recovery for employees. Title III of the ADA, pertaining to public accommodations and services operated by private entities took effect on January 26, 1992 (18 months from the date of passage of the Act). Under Title III, the United States Attorney General can seek monetary damages and civil penalties, although the Court must consider any good faith effort to comply by the entity being charged with discrimination.

Title IV details the Courts' consistent inability to find protection for disabled employees under the ADA. This section specifically highlights the EEOC's proposed standard and the manner in which it hampers recovery by compelling a demographic comparison group that consistently results in the determination that learning disabled individuals fail to qualify for protection under the ADA.

ORIGINS OF THE ADA

While the ADA was the most comprehensive legislation of its kind, Congress had previously passed other legislation attempting to provide greater rights for people with physical and mental disabilities. Following World War II, Congress prohibited employment discrimination against persons with physical disabilities as part of the Act of June 10, 1948, to assist disabled veterans. Subsequently, Congress required all federally financed or constructed buildings be accessible to people with disabilities through the Architectural Barriers Act of 1968.

The true predecessor of the ADA, however, was the Rehabilitation Act of 1973, which required federal executives and government contractors to develop affirmative action plans for the advancement and promotion in employment of the disabled by the federal government (Section 501) and federal contractors (Section 503). The Rehabilitation Act provides that recipients of

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31 The ADA, Section 308(b.)
32 Id.
33 Id.
34 Id.
35 Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387 (1991). Mr. Weicker was the original sponsor of the ADA in the Senate.
federal financial assistance, executive agencies, or the U.S. Postal Service may not discriminate against otherwise qualified individuals on the basis of disability. Until the passage of the ADA in 1990, Section 504 of the Rehabilitation Act of 1973 was the only other significant federal legislation prohibiting disability discrimination in employment. The employment provisions which are found in Title I of the Act are derived in large part from the Rehab Act 1973, and it’s implementing regulations, promulgated by the Dept. of Health, Education and Welfare in 1977. Pursuant to specific provision of the ADA, Supreme Court is required to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act. While ADA and Rehabilitation Act generally are to be interpreted and applied consistently with one another, standards used to determine whether federal employer has violated section of Rehabilitation Act prohibiting discrimination in employment will not always be identical to those employed in suits brought under section of Rehabilitation Act prohibiting discrimination under federal grants and programs or under ADA. An informative discussion of the outgrowth of the ADA from the Rehab Act is contained in Helen v. DiDaino.

Congress passed additional legislation in the 1970s and 1980s improving access to education for handicapped children, expanding rights and programs for people with developmental disabilities, demanding voting accessibility, addressing airline service, and safeguarding the rights of

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9 See Id. :794(a).


44 Helen v. DiDaino, 46 F. 3d 325 at 330-335 (3d Cir. 1993).


**HISTORY AND PROTECTIVE INTENT**

Congress found that the disabled persistently “encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.”\footnote{Id. at 391.} In the face of these and other distressing facts regarding the plight of disabled Americans, Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of
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Discrimination against individuals with disabilities. The ADA guarantees "broad antidiscrimination protection for disabled individuals--defined as those having physical or mental impairments that substantially limit one or more major life activities."

Besides its facially broad--and therefore inclusive (per 2008 amendment)--language regarding "disability," the ADA's legislative history reveals Congress's remedial intent. Research into the ADA's legislative history reveals that Congress heard extensive testimony on the pitiable plight of the disabled. In response to testimony on disabled persons in the workplace and their potential to contribute if given protections and accommodations, the House Report states, consistent with the ADA as enacted, that "the ADA is to . . . bring persons with disabilities into the economic and social mainstream of American life." The report repeatedly revisits this theme. These reports constitute particularly strong evidence of Congress's intent. As the Court in Garcia v. United States stated, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" Nothing in the report indicates a desire to exclude large groups of people with medically recognized disabilities from ADA protection. When selecting which physical and mental impairments to recognize under the "disability" definition, Congress expressly left that list open so that the statute could remain comprehensive as new disabilities emerge.

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56 See id. § 12101(a)(2)-(7). Id. § 12101(b)(1).

57 David W. Lannetti, Extending Coverage of the Americans with Disabilities Act to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance, 35 Tort & Ins. L.J. 155, 157 (1999) (emphasis added); see also 29 C.F.R. pt. 1630 app. (2006) ("The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.").


59 Id. at 22.

60 See generally id.


63 See id. at 51.
Congress was similarly inclusive in its list of “major life activities.”‘Major life activity’ has been defined as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities. Most significantly, Congress, as set out in the Congressional report, set an inclusive “limitation” threshold for coverage. For example, Congress went so far as to say that a person may be “substantially limited” in a major life activity “even if the effects of the impairment are controlled by medication.” Additionally, Congress declared that impairment does not constitute a disability “unless its severity is such that it results in a ‘substantial limitation’ . . . .” Rather than using the term “severity” to describe the requisite level of “limitation” to qualify for ADA coverage, Congress can be understood to have used “severity” to represent a continuum on which the Courts are to place a given impairment. In other words, Courts are to ask, “Does this person's impairment reach the level of ‘substantial’ on the severity continuum?”

Perceiving that employers were basing employment decisions on unfounded stereotypes, Congress enacted the Americans with Disabilities Act to level the playing field for disabled people. Also, Congress acted partially because it recognized problems caused by inconsistent interpretations of Rehabilitation Act, and partially to broaden coverage. However, the ADA is not designed to allow individuals to advance to professional positions through a back door; rather, it is aimed at rebuilding threshold of profession's front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering front door.

The Courts have interpreted and employed several purposes for Congress' enactment of the ADA along with other Civil Rights Acts. Courts have stated the purpose of both Rehabilitation Act and Americans with Disabilities Act (ADA) is to:

64 See id. at 52.
65 See id.
67 Id.
68 Id.
69 Id.
Prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy same privileges and duties afforded to all United States citizens.\textsuperscript{73}

Extend prohibitions against discrimination against the handicapped beyond federal government entities that receive federal funding.\textsuperscript{74}

Barring discrimination to ensure opportunity to take part in activities enjoyed by others who are not disabled.\textsuperscript{75}

Ensure that handicap individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.\textsuperscript{76}

Unfortunately, but not unbelievable, an alarming trend has precipitated the enactment of the 2008 amendment to the ADA which did take effect January 1, 2009. This trend occurred as a result of the Court's use of its discretion to narrowly define and interpret the Act's terms to exclude, rather include, individuals from receiving the intended protections.

\textbf{CONSTITUTIONALITY OF THE AMERICANS WITH DISABILITIES ACT}

Pursuant to the "Necessary and Proper Clause" of Article I, Section 18 of the U.S. Constitution, the Congress “[s]hall make all law which shall be necessary and proper for carrying into execution . . . all . . . powers vested by [the] Constitution in the government of the United States or in any department or office thereof.” Once enacted, the law becomes, along with the provisions of the Constitution, the Supreme Law of the Land.\textsuperscript{77}

In passing the ADA, Congress concluded, in light of Congressional findings, that regulation of employment discrimination was necessary to regulate national market of employment. Therefore, the ADA's regulation of employment discrimination, as applied to the states, was permissible exercise of Congress'...
power under the Commerce Clause. However, Congress was then faced with the ever impending Iron Curtain, the Eleventh Amendment, in order for the Act to be applicable to the States. To date, their success has not been collectively achieved.

**The Iron Curtain of the Constitution**

Historically, individuals are barred from bringing suit against a sovereign without the sovereign’s consent. Article III of the Constitution gives the Federal Courts jurisdiction over suits “between states and citizens of another state” and “between a State . . . and foreign . . . Citizens.” In 1794 in the case of *Chilsholm v. Georgia*, the executor of a South Carolina man’s estate who loaned the State of Georgia money during the Revolutionary War brought suit to recover the money owed. The State of Georgia, believing that absent its consent, it was barred from suit, failed to appear and defend itself. The Court, however, ruled against the State of Georgia, holding that the language of Article III allowed the relief sought by Mr. Chilsholm’s estate. Within three weeks of the *Chilsholm* decision both houses of Congress approved what became the Eleventh Amendment. Within one year, enough states ratified the amendment for it to be adopted.

The Eleventh Amendment states, “[t]he judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.”

Later, the Court construed the Eleventh Amendment, despite its plain language and readily accessible legislative history, to immunize States from suits brought by their own citizens. However, while the Eleventh Amendment bars suits against States, the Court held in *Ex parte Young* that State officials may be sued in their official capacity, but only for prospective and injunctive relief.

**The 14th Amendment and Abrogation of Sovereign Immunity**

To a limited degree the Supreme Court has enabled Congress, via legislation, to abrogate the States’ Sovereign Immunity. In *Fitzpatrick v. Bitzer*, the Court held that State Sovereignty may be validly abrogated by the

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79 Hans v. Louisiana, 134 U.S. 1 at 13 (1890).

80 U.S. constitution article III :2, clause 1.

81 Chilsholm v. Georgia, (2 U.S. (2 Dall.) 419 (1793)).

82 United States Constitutional Amendment XI (1798).

83 Hans, at 18.

84 Ex parte Young, (209 U.S. 123 (1908)) at 156.
enforcement provisions of [Section 5] of the Fourteenth Amendment. The Court reasoned that without Section Five, Section One would be nothing more than “declaratory of the moral duty of the State[s].” Section 5 grants Congress the “power to enforce, by appropriate legislation, the provisions of this article.” Section One of the Fourteenth Amendment bars States from making or enforcing laws that violate due process, equal protection, or privileges and immunities afforded all U.S. citizens by the Federal Constitution. Section Five of the Fourteenth Amendment gives Congress all power that is necessary and proper to implement the other provisions of this Amendment.

To analyze the validity of a Congressional abrogation, a multi-part test has evolved consisting of two, two part analysis. The first half of the analysis was established in *Seminole Tribe of Florida v. Florida*, where the Court asked: whether Congress has “unequivocally expressed its intent to abrogate the [States] immunity.” If yes, then has Congress acted pursuant to a valid grant of constitutional authority? The second half of the test, known as the Congruence and Proportionality Test, was announced in *City of Boerne v. Flores*, where the Court reasoned that “[w]hile preventative rules are sometimes appropriate remedial measures, congruence and proportionality must exist between the means used and the ends used to be achieved.

Title II of the Americans with Disabilities Act prohibiting a qualified individual with a disability from being excluded from participation in or being denied the benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity because of the individual’s disability, was a congruent and proportional means of preventing and remediying the unconstitutional discrimination that Congress found to exist both in education and in other areas of governmental services, many of which implicated fundamental rights, and thus, Congress acted within its Fourteenth Amendment authority in abrogating sovereign immunity under Title II of the ADA.

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86 Id. at 455.
87 United States Constitutional Amendment XVI, Section 5.
88 United States Constitutional Amendment XIV, Section 1 (1868).
89 United States Constitutiona l Amendment XIV, Section 5 (1868).
91 Id. at 59.
92 City of Boerne v. Flores, (521 U.S. 507 at 530 (1997)) at 520.
93 28 C.F.R. § 35.140(a) (1998)
94 Bowers v. National Collegiate Athletic Ass’n, 475 F. 3d 524 (3rd Cir. 2007).
This demonstrates that Title II of the ADA is a valid exercise of Congress' powers under Fourteenth Amendment, and thus not unconstitutional infringement upon powers reserved to states under *Tenth Amendment* 95 which states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Congress' abrogation of state's sovereign immunity, in ADA section which prohibited discrimination by governmental entities in their operation of public services, programs, and activities, was a valid exercise of its power under the enforcement section of the Fourteenth Amendment, where it was a congruent and proportional response to risk of discrimination in public education against the disabled. 96

Although Congress has enjoyed success with respect to the ADA’s application to the States, since the ADA’s enactment, the judiciary has systematically eroded the protections enacted, finding fewer and fewer grounds to force these rules upon the states. For example, the Supreme Court and Chief Justice Rehnquist held that: (1) states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational; (2) the legislative record of the ADA fails to show that Congress identified a pattern of irrational state discrimination in employment against the disabled, and thus did not support abrogation of the states' Eleventh Amendment immunity from suits for money damages under Title I of the ADA. 97 Furthermore, the Court has held the Class of individuals protected by ADA was not entitled to heightened constitutional protection under equal protection clause of Fourteenth Amendment, even though Congress stated in findings for Act that individuals with disabilities were “discrete and insular minority.” 98 However, concerning Title II of the ADA, in January 2006 the Supreme Court held that insofar as Title II creates a private cause of action for damages against the state for conduct violating the 14th Amendment, Title II validly abrogates state sovereign immunity. 99

**ADMINISTRATIVE**


ADA and Rehabilitation Act are interrelated Congressional mandates designed to remedy discrimination against disabled individuals. Although the text of the ADA is not specific about the particular physical or mental impairments that qualify individuals for protection under the Act, the ADA leaves many of these disability determinations in individual circumstances up to the EEOC and other “implementing agencies, such as the Departments of Education (42 USC 12201) Labor and Transportation, Title II, subsection B.” Congress has granted the Department of Justice (“the DOJ”) rulemaking authority to enforce Title II, subsection A and III of the ADA. In regards to Title I for which the EEOC has rulemaking authority, Courts have also looked for guidance from the EEOC’s regulations in interpreting the definition of disability in the context of claims under Title 1 of the ADA since the ADA authorizes the EEOC to issue regulations interpreting the Act.

Although Congress in the ADA authorizes the EEOC to issue regulations interpreting the Act, many Courts have disregarded this express authority and used the Court’s discretion to interpret the ADA disregarding the EEOC’s guidance. Congress has provide in the regulations of the ADA a preceding section-by-section analysis and accompanying lengthy commentary called the Interpretive Guide on Title I of the ADA. Both the Analysis and the Interpretive Guide provide further interpretation of the Act and useful examples of how it will work. It is important to remember the ADA expressly requires its provisions to be interpreted in way that prevents imposition of inconsistent or conflicting standards for the same requirements under the ADA and the Rehabilitation Act, case law interpreting the Rehabilitation Act's “otherwise qualified” requirement may be relied upon in determining whether employee was “qualified” under the ADA.

Again, the alarming trend is the clear disregard of Congress’ express intent as the Supreme Court’s decisions have consistently disregarded Congress’ grant of rule-defining authority to several various Administrative agencies including the EEOC, the Department of Labor (DOL), Department of Justice (DOJ), and Department of Transportation (DOT). The Courts have essentially usurped the power expressly granted to them by Congress causing these agencies to be devoid of authority in matters that they were charged with by the


102 42 U.S.C. §§ 12134, 12186.


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Congress. The Courts have routinely stated: “Equal Employment Opportunity Commission’s interpretative guidelines are not controlling upon Courts by reason of their authority; nevertheless, where consistent with ADA, they do constitute body of experience and informed judgment to which Courts and litigants may properly resort for guidance.” Another Court stated that administrative regulations regarding ADA provide interpretive guidance, which constitutes body of experience and informed judgment, although not controlling upon Courts.

THE PRIMA FACIE CASE AND EMPLOYER DEFENCES

The following facts and circumstances tend to establish that an unsuccessful job applicant has a valid cause of action for employment discrimination based on disability. These elements of proof are generally required to establish a prima facie case of discriminatory failure to hire or to rebut the defendant employer's articulation of a legitimate nondiscriminatory reason for the employment action complained. Some of the elements can also give rise to potential liability under state law or under related federal laws.

1. Plaintiff's disability within meaning of ADA
2. Record of such impairment or regarded as (perceived to be) having such impairment
3. Not specifically excluded by statute
4. Plaintiff's application for employment that followed appropriate application procedures
5. Open position at time of application
6. Plaintiff's "qualification" for position sought (within meaning of ADA)
7. Reasonableness of any accommodations requested by plaintiff
8. Subsequent hiring of nondisabled applicant
9. Pretextual reasons by employer for not hiring plaintiff

Plaintiff's Disability Within Meaning Of ADA

There are physical or mental impairment that substantially limits major life activity. These physical or mental impairments include (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body (such as the nervous and musculoskeletal systems, the respiratory organs, the cardiovascular system, and the glands); and (2) any mental or psychological disorder (such as mental retardation, organic brain syndrome, emotional illnesses, and learning disabilities). 109

Under the Regulations, an individual is considered "disabled" even if he or she uses medication or some prosthetic device that tends to mitigate the effects of the impairment. For example, hearing loss corrected through a hearing aid would still be considered impairment. An individual with epilepsy controlled through medication would similarly be considered to be impaired under the ADA. 110

With respect to the requirement that an impairment substantially limit a major life activity, the EEOC Regulations follow the Rehabilitation Act's definition in referring to basic activities a nondisabled person could perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, breathing, learning, working, sitting, standing, and lifting. 111 While most of these disabilities are open and obvious, it is important to note that for post-secondary universities, that while most of the above list is directly related to easily documented physical disabilities, the critical trait is one of learning. For a postgraduate university, its product is a learned student. The fact that a student can’t learn the material is not a disability. The issue is the amount of support the University must give to achieve its mission.

Record Of Such Impairment Or Regarded As (Perceived To Be) Having Such Impairment

With respect to the third alternate definition of a disabled individual as one who is regarded as having a physical or mental impairment that substantially

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109 See 29 CFR § 1630.2(h)(1), (2). For further discussion of the definition of physical or mental impairment, see 2 Americans with Disabilities: Practice and Compliance Manual, §§ 7:24–7:28.

110 29 CFR Part 1630 Appendix § 1630.2(h).

limits one or more major life activities, the focus is on the "attitudes of others toward such impairment."  An individual is impaired under the ADA even though the individual's impairment does not in fact substantially limit a major life activity if the impairment is perceived by an employer as constituting a substantially limiting impairment. In determining whether an impairment is "substantially" limiting, the factors to be considered include:

- the nature and severity of the impairment,
- the length of time the impairment continues or is expected to continue, and
- the permanent or long-term impact that might result from the impairment.

Categories Not Specifically Excluded By Statute

The ADA specifically excludes from coverage a number of categories, such as transvestites, homosexuals, and compulsive gamblers. Also excluded are current drug users, persons with other sexual behavior disorders (such as voyeurism, exhibitionism, and transsexualism), kleptomaniacs, and pyromaniacs. Importantly, the EEOC has similarly recognized in its regulations certain other conditions that will not be considered covered impairments, including such things as physical characteristics (eye color, hair color, left-handedness), predisposition to certain illnesses or diseases, pregnancy, personality traits such as a quick temper (unless tied in with a mental or psychological disorder), or environmental or economic disadvantages such as poverty or lack of education.

1. • Plaintiff's application for employment that followed appropriate application procedures
2. • Open position at time of application
3. • Plaintiff's "qualification" for position sought (within meaning of ADA)

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112 29 CFR § 1630.2(l).
113 29 CFR § 1630.2(j)(2).
114 See 42 USCA §§ 12208, 12211.
115 See 29 CFR Part 1630 Appendix § 1630.2(h).
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4. Satisfies requisite skill, experience, education, and other job-related requirements

5. Able to perform "essential functions" of position, with or without reasonable accommodation

As part of a prima facie case, a plaintiff must prove that he or she was "qualified" for the position sought within the meaning of the ADA. Under the ADA, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The governing regulations similarly provide that a qualified individual is one "who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." Future inability to perform may not be considered. The regulations specifically provide that the employer's determination of qualification must be made based on the individual's status at the time of the employment action; it cannot be based on some speculation about the applicant's future ability or inability to perform the job or such factors as the possibility that the individual will cause insurance premiums or workers' compensation premiums to go up.

A "qualified" applicant is thus one who meets the general knowledge, skill, and education requirements for the job, and who, despite having a disability, can perform the essential job functions of the position, with or without reasonable accommodation. The "essential functions" of a particular job are those that the employer in fact requires to be performed, and those that, if removed, would fundamentally alter the position. The regulations indicate that whether a function is essential will be determined on a case-by-case basis, looking at all the relevant evidence.

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116 For further discussion of the definition of a qualified individual with a disability, see 2 Americans with Disabilities: Practice and Compliance Manual, §§ 7:38–7:40.

117 42 USCA § 12111(8).

118 29 CFR § 1630.2(m).

119 29 CFR Part 1630 Appendix § 1630.2(m).


121 29 CFR Part 1630 Appendix § 1630.2(n).
Reasonableness Of Any Accommodations Requested By Plaintiff Versus “Undue Burden On Employer

Employers are required to make such "reasonable accommodations" for applicants or employees unless doing so would cause the company undue hardship. This means "significant difficulty or expense." The following factors will be considered:122

- Nature of the accommodation
- Cost of the accommodation
- Financial resources of the company (parent and subsidiary)
- Number of employees
- Impact on earnings and resources
- Overall size of the business
- Type of operations

If a disabled individual poses a direct threat to the health or safety of that individual or to others, the employer may lawfully decline to hire that person. However, the employer must identify the specific risk, and the risk must be significant rather than speculative or remote, that is, the risk cannot be removed through reasonable accommodation. Employers cannot rely on generalized fears about the risks to a disabled person in the event of an evacuation or other emergency.123

Subsequent Hiring Of Nondisabled Applicant, Pretextual Reasons By Employer For Not Hiring Plaintiff

The law has been well-established in cases involving claims under the various federal employment discrimination statutes as to what a plaintiff must show to establish a prima facie case of unlawful discrimination.124 Based on these cases, a claim under the ADA must initially show:

(1) That a plaintiff is a member of a protected class (that is, disabled);
(2) That a plaintiff applied for and was qualified for the position(s) sought;

122 42 USCA § 12111(10); 29 CFR § 1630.1(p).

123 29 CFR Part 1630 Appendix § 1630.2(r).

(3) That a plaintiff was denied the position(s);
(4) That a nondisabled person was hired for the position.\textsuperscript{125}

Note that direct proof of discriminatory intent is not required to establish a prima facie case. In fact, the burden of establishing a prima facie case "is not onerous."\textsuperscript{126}

If an employee has direct evidence of discrimination in violation of the ADA, the employee then bears the burden of proving that he or she is disabled, and that he or she is otherwise qualified for the position despite his or her disability without accommodation from the employer, with an alleged essential job requirement eliminated, or with a proposed reasonable accommodation; employer bears the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship on the employer.\textsuperscript{125} (ADA) plaintiff bears the burden of proving that she is a "qualified individual with a disability," that is, a person who, with or without reasonable accommodation, can perform the essential functions of her job.\textsuperscript{128}

Under the \textit{McDonnell Douglas} framework, an ADA plaintiff first must establish a prima facie case by proving by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.\textsuperscript{129} Once the plaintiff has established a prima facie case, the burden then shifts to the defendant employer to "articulate" a legitimate nondiscriminatory reason for the employment action in question (for example, non-hiring). This is simply a burden of producing evidence, as opposed to a burden of proof. In other words, the employer must simply present some evidence of a nondiscriminatory reason for the action taken.\textsuperscript{130} The burden then shifts back to the plaintiff to prove to the satisfaction of the jury that the defendant employer's stated reason for the employment action is "pretextual;" that is, a pretext (not the true reason) for what was in fact a discriminatory act.\textsuperscript{131}

This Title VII/McDonnell Douglas approach has been used by the Courts in a number of cases brought under state handicap discrimination

\textsuperscript{125} Taylor v. Phoenixville School District, 113 F.Supp 2\textsuperscript{nd} 770 (E.D Pa. 2000)

\textsuperscript{126} Texas Dept. of Community Affairs v Burdine, 450 US 248 (1981); 9 Fed Rules Evid Serv 1.


\textsuperscript{130} See McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817, 5 BNA FEP Cas 965, 5 CCH EPD ¶8607.

\textsuperscript{131} Id.
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It is important to keep in mind that "[t]he ultimate burden of proving that the employer engaged in intentional discrimination remains at all times with the Complainant."  

CASE HISTORY REVIEW

While plaintiffs have urged the federal Courts to adopt an expansive interpretation of who is a ‘qualified individual with a disability’ under the Title I of the ADA, the U.S. Supreme Court continues to construe this definition narrowly. In *Toyota Motor Mfg., Ky., Inc. v. Williams*, the U.S. Supreme Court restricted the definition of “disability.” The Court held that an employee cannot establish that he or she is disabled based solely on evidence of a medical diagnosis. Rather, the employee must present evidence that the limitation resulting from the impairment “in terms of their own experience” is substantial. The Court stressed the necessity of performing an individualized assessment of an employee's impairment, as the effects of particular medical conditions (such as the employee's carpal tunnel syndrome) can vary widely from person to person. The Court also noted that the impairment's impact must be permanent or long-term.

In other instances, the Courts have challenged the administrative agencies in defining the terms of the ADA and struggled among themselves as to who is and who is not covered by the act. In its regulations implementing Title I, the U.S. EEOC lists “working” as a major life activity. However, in *Sutton v. United Airlines, Inc.*, the U.S. Supreme Court questioned whether working is in fact a major life activity. After noting some “conceptual difficulty” in defining “major life activity” to include work, the Court did not reach this issue because the parties did not dispute it. The Court again raised this

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133 Acorn Corrugated Box Co. v Illinois Human Rights Com. (1989, 1st Dist) 181 Ill App 3d 122, 129 Ill Dec 882, 536 NE2d 932, app den (Ill) 136 Ill Dec 580, 545 NE2d 104 (handicap discrimination).


135 Id.

136 Id.

137 See 29 C.F.R. § 1630.2(i).

issue and again declined to reach it in *Toyota Motor Mfg.*\(^{139}\). The U.S. Supreme Court's curious commentary in *Sutton* has provoked some discussion in the circuits whether working is a major life activity. The Fifth Circuit subsequently held, based on the plain text of the ADA, that working is "without a doubt" a major life activity.\(^{140}\) The Eleventh Circuit continues to follow prior circuit precedent holding that working is a major life activity because the Court has not expressly held to the contrary.\(^{141}\)

With respect to working, the EEOC defines “substantially limits” as significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.\(^{142}\) In *Burns v. Coca-Cola Enters., Inc.*, the plaintiff was substantially limited in the major life activity of working where his injury precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience.\(^{143}\) Simple inability to perform a particular job is not sufficient to be classified as ‘disabled’ under the ADA.

**INCONSISTENCIES BETWEEN THE CIRCUITS**

The circuits have provided anything but clarity and consistency when interpreting and applying the ADA. For example, the Fifth, Sixth, Eighth and Ninth Circuits have held that individuals who are merely regarded as disabled are not entitled to reasonable accommodation.\(^{144}\) In contrast, the Sixth, Tenth, and Third Circuits have held that an employer must provide reasonable accommodations to employees that it regards as disabled.\(^{145}\) The First Circuit arguably implicitly held in


\(^{140}\) See E.E.O.C. v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999).

\(^{141}\) See Mullins v. Crowell, 228 F.3d 1305 (11th Cir. 2000), reh'g and reh'g en banc denied, 251 F.3d 165 (11th Cir. 2001); see also Peters v. Mauston, 311 F.3d 835 (7th Cir. 2002) (working is a major life activity).

\(^{142}\) Id. § 1630.2(j)(3)(i).

\(^{143}\) See *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247 (6th Cir. 2000).

\(^{144}\) See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226 (9th Cir. 2003); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000).

Katz v. City Metal Co., that “regarded as” individuals are entitled to reasonable accommodation by finding that the directed verdict should not have been entered for the employer because the employee may have been regarded as disabled and may have been able to prove that he could perform his job with reasonable accommodations.\(^\text{146}\)

**Inconsistency I: Essential Job Functions**

Can an employee who becomes totally disabled who can no longer perform “essential job functions” bring an ADA claim alleging discrimination as a qualified individual with a disability as presented in *Hatch v. Pitney Bowes*? The Circuit Courts have failed to agree.\(^\text{147}\) In the context of Title I of the ADA, and not, as *Robinson* dealt with, Title VII) a majority of Courts have determined that a former employee who is currently totally disabled is not a qualified individual with a disability within Title I of the ADA.\(^\text{148}\)

**The Majority Position** – These Courts have all determined that the meaning of the term “qualified individual” is unambiguous and have rejected the contention that the plain language of section 12112 is anything other than a clear expression of Congress’s intent “to limit the scope of the Act to only job applicants and current employees capable of performing essential functions of available jobs.”\(^\text{149}\)

**The Minority Position** – The Second and Third Circuits, in contrast, have held that a totally disabled person who is no longer employed is nevertheless a “qualified individual” who may bring a discrimination claim under the ADA. These Courts have concluded that the statutory language of Title I is ambiguous. The “ambiguity” is inferred from the “disjunction between

\(^\text{146}\) Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996).


\(^\text{148}\) See Weyer, 198 F.3d at 1110; see also Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir.1999); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir.1997), rev’d on other grounds, 121 F.3d 1006 (6th Cir.1997) (en banc); EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir.1996); Gonzales v. Garner Food Services, Inc., 89 F.3d 1523, 1531 (11th Cir.1996); Beauford v. Father Flanagan’s Boys’ Home, 831 F.2d 768 (8th Cir.1987).

\(^\text{149}\) Gonzales v. Garner Food Services, Inc., 89 F.3d 1523 at 1528 (11th Cir.1996); see Weyer v. Twentieth Century Fox, 198 F.3d 1104, 1112 (9th Cir.2000) (concluding that to hold otherwise would “essentially render[ ] the qualified individual requirement under the Act, that an individual with a disability hold or desire a position the essential functions of which he or she can perform, meaningless.”) (quoting Gonzales, at 1529); See Weyer v. Twentieth Century Fox, 198 F. 3d 1104 at1112 (9th Cir.2000) (announcing agreement with the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits). However, two circuits have held, to the contrary, that totally disabled individuals are covered under the qualified individual definition and may bring ADA discrimination claims. See Ford v. Schering-Plough Corp., 145 F.3d 601 at 607 (3d Cir.1998); Castellano v. City of NY, 142 F. 3d 58 at 66-70 (2d Cir.1998).
the explicit rights created by Title I of the ADA and the ostensible eligibility standards for filing suit under Title I.\footnote{150} Recognizing that the scope of Title I’s prohibition of discrimination extends to the provision of fringe benefits, including post-employment and disability benefits, these Courts have refused to assign a plain meaning definition to the qualified individual eligibility requirement because it would effectively “undermine the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination of fringe benefits.”\footnote{151}

Reasoning that “the definition of ‘employee’ under the ADA parallels that under Title VII and was intended to be given the ‘same meaning,’” \footnote{152} Castellano, at 69, the Second and Third Circuits found Robinson’s approach to determining ambiguity persuasive, with “the locus of ambiguity” centering on “whether the ADA contains a temporal qualifier of the term ‘qualified individual with a disability.’ ”\footnote{153} Discerning no temporal qualifier, these Courts determined that the term could reasonably be read to either include or exclude former employees who are totally disabled.\footnote{154} To resolve this ambiguity, these Courts concluded that a narrow reading would undermine the ADA’s underlying rationale of preventing discrimination regarding, among other things, fringe benefits.\footnote{155}

**Inconsistency 2: Looking At “Regarded As”:**

Must reasonable accommodations be afforded to an employee who falls within any of the ADA’s definitions of disabled including “regarded as”?\footnote{156} Whether the ADA’s reasonable accommodation requirement applies to the regarded-as category of disabled individuals is an issue of first impression in this Circuit and a question on which our sister Circuits are split. The district Court based its holding that it does not on the decisions of the Fifth, Sixth, Eighth, and Ninth Circuits.\footnote{157} The Third Circuit has parted ways with these Courts, holding that under the plain language of the ADA, employers are obliged to provide reasonable accommodations for individuals falling within any of the ADA’s

\footnote{150} Ford v. Schering-Plough Corp., 145 F.3d 601 at 606 (3d Cir.1998).

\footnote{151} Castellano v. City of NY, 142 F.3d 58 at 68 (2d Cir.1998).

\footnote{152} Id. at 69.

\footnote{153} Ford v. Schering-Plough Corp., 145 F.3d 601 at 606 (3d Cir.1998).

\footnote{154} Id.

\footnote{155} Id.

\footnote{156} D’Angelo v. ConAgra, 2005 WL 2072131 who therein joined the 3rd circuits reasoning in the holding.

\footnote{157} See Kaplan v. N. Las Vegas, 323 F. 3d 1226 at 1233 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F. 3d 907 at 916-17 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F. 3d 460 at 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F. 3d 276 at 280 (5th Cir. 1998).
definitions of disabled, including those “regarded as” being disabled. Because a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we join the Third Circuit in holding that regarded-as disabled individuals also are entitled to reasonable accommodations under the ADA. The First Circuit has also addressed the issue but only indirectly, assuming without expressly holding that the ADA requires reasonable accommodations for employees regarded as disabled. 159 In interpreting a statute, it is by now axiomatic that our first step “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”

Inconsistency 3: Requirements Transfer To Another Position

In light of 42 U.S.C. 12111(9)(B) which outlines the scope of reasonable accommodations required of employer, there has been uncertainty as to whether an employer is required to reassign a qualified, disabled employee to a vacant equal position in opposition to an existing seniority rule. The 10th Circuit in Smith v. Midland Brake Inc. 161 and the D.C. Circuit in Aka v. Washington Hospital Center 162 contend it violates the ADA by forcing disabled employees to compete with non-disabled employees. The 7th Circuit in EEOC v. Humiston-Keeling, Inc. 163, the 8th Circuit in Cravens v. Blue Cross and Blue Shield of Kansas City, 164 and the Fifth Circuit in Turco v. Hoechst Celanese Corp. 165 say that the ADA only requires the employee to apply and be able to compete for the position; nothing more and nothing less. 166 Certiorari was granted by the Supreme

159 Katz v. City Metal Co., 87 F. 3d 26 at 32-34 (1st Cir. 996).
160 Robinson v. Shell Oil Co., 519 U.S. 337 at 340 (1997); see also, e.g., Country Best v. Christopher Ranch, LLC, 361 F. 3d 629 at 632 (11th Cir. 2004).
161 Smith v. Midland Brake Inc., 180 F. 3d 1154 at 1164-1165 (10th Cir. 1999) (en banc).
162 Aka v. Washington Hospital Center, 156 F. 3d 1284 (D.C. Cir. 1998).
164 Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F. 3d 1011 at 1019 (8th Cir. 2000).
165 Turco v. Hoechst Celanese Corp., 101 F. 3d 1090 at 1094 (5th Cir. 1996).
166 Id at 1094.
Inconsistency IV: Release of Medical Information

The Courts have found themselves split on the application of Title II. The Supreme Court held in Garrett, 531 US 356 that the 11th Amendment does not categorically bar suits for damages on confidentially of medical information. The law is unsettled as to whether Title II of the ADA covers employment discrimination. Without answering the question itself, the Supreme Court has acknowledged a split of opinion among the circuits. Nor has the Second Circuit offered an answer. Two circuits that have confronted the question directly have reached opposite results.

Meanwhile, "[t]he Fourth, Fifth and Tenth Circuits appear to have assumed, without deciding, that Title II applies to discrimination in public employment." But the Sixth Circuit has observed, in a case concerning Title III, that the only portion of the ADA to address employment discrimination is Title I.

In a 1997 decision, the Second Circuit held that the second clause of Title II's antidiscrimination provision applied to discriminatory zoning

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168 Garrett, 531 U.S. at 360 n. 1, 121 S.Ct. 955 (“[N]o party has briefed the question whether Title II of the ADA ... is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject.... The Courts of Appeals are divided on this issue ....”).

169 See Perry v. State Ins. Fund, 83 Fed.Appx. 351, 354 n. 1 (2d Cir.2003) (“There remain questions regarding ... whether Title II ADA violations can be based on employment discrimination”) (unpublished); Mullen v. Rieckhoff, No. 98-7019, 1999 WL 568040, *1, 1999 U.S.App. LEXIS 18150, at *2 (2nd Cir.1999) (“[P]laintiff rightfully points to a split of authority over whether an employment discrimination plaintiff may avoid the ADA's requirement of an EEOC charge by filing under Title II of that Act [W]e need not reach that question.”).

170 Compare Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 820 (11th Cir.1998) (holding that Title II covered employment discrimination), with Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1183-84 (9th Cir.1999) (holding that it did not).

171 Clifton v. Georgia Merit Sys., 478 F.Supp.2d 1356, 1363-64 (N.D.Ga.2007) (citing Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir.1999); Holmes v. Texas A & M Univ., 145 F.3d 681, 684 (5th Cir.1998); Doe v. Univ. of Maryland Med. Sys., 50 F.3d 1261, 1265 (4th Cir.1995)).

172 Id. at 1364 (quoting Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir.1997)).
decisions, and described that clause as “a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.”173 Some district Courts of this circuit, in holding that Title II applies to employment discrimination, have cited this language.174 As Perry and Mullen demonstrate, however, *Innovative Health Systems* does not answer the question whether Title II covers employment discrimination. Even Courts answering this question in the affirmative have cautioned against over-reading the Second Circuit’s use of the term “catch-all phrase.”175 District Courts in the Second Circuit have taken divergent approaches.176

**Inconsistency V: Retaliation Claims Under the ADA?**

The Fifth Circuit in *Shannon v. Henderson*177 analyzed the question of which standard should be applicable to retaliation claims brought under the

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173 Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir.1997).


175 See, e.g., Transp. Workers Union of Am., Local 100 v. New York City Transit Auth., 342 F.Supp.2d 160, 171 (S.D.N.Y.2004) (“The seemingly broad scope of the Court's language notwithstanding, it is important to read these words in context.”).


177 Shannon v. Henderson, 275 F. 3d 42 (5th Cir. 2001), 2001 WL 1223633.
ADA. In acknowledging a circuit split on the issue, the at least two circuits have explicitly noted that the same standard is applicable to retaliation claims brought under the Rehabilitation Act and the ADA. Similarly, other circuits have applied the McDonnell Douglas framework to retaliation claims brought under the Rehabilitation Act without explicitly noting that the same standard is used for retaliation claims under the ADA. However circuits which agree that the McDonnell Douglas framework is appropriate still cannot agree on what standards are appropriate within its framework.

Inconsistency VI: Other Factors to Consider In Determining a Disability

The Court in McAlindin v. County of San Diego carefully analyzed the Circuit split on the issue of whether “socializing” is a major life activity. Courts have held “socialization” (i.e., “the ability to get along with others”) constitutes a major life activity. A number of Courts have found that recreational activities do not constitute major life activities. Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of “major life activity.”


179 See, e.g., Sherman v. Runyon, 235 F.3d 406, 409 (8th Cir.2000); Williams v. Widnall, 79 F.3d 1003, 1005 n. 3 (10th Cir.1996); Medina v. Ramsey Steel Co., Inc., 238 F.3d 674, 684 (5th Cir.2001).

180 See, e.g., Sanchez v. Henderson, 188 F.3d 740, 747 (7th Cir.1999); Hughes v. Bedsole, 48 F.3d 1376, 1387 (4th Cir.1995) both opposing the Fifth, Eighth and Tenth Circuit standards within the McDonnell Douglas framework.

181 McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999).

182 Compare, Soileau v. Guilford of Maine Inc., 105 F.3d 12, 15 (1st Cir.1997) (expressing doubt that the “ability to get along with others” constitutes a major life activity) with McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir.1999) (“Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity.’”).


184 See Criado, 145 F.3d at 442 (plaintiff's mental impairment “substantially limited her ability to work, sleep, and relate to others”); Sherback v. Wright Automotive Group, 987 F.Supp. 433, 438 (W.D.Pa.1997); EEOC on Psychiatric Disabilities at 3.
was too vague to be a major life activity, yet assumed that it was a major life activity for the purposes of its decision. 185 The Court acknowledged that “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity.” 186 In any event, interacting with others is no vaguer than “caring for oneself,” which has been widely recognized as a major life activity. 187

ADA ARGUMENTS

Assuming that most jobs demand proficiency in a variety of tasks, a person must normally possess considerable ability in order to perform a job's essential functions. In fact, rationally, the more ability, the better. Yet herein lies the paradox: if a person has sufficient ability to perform the essential functions of his or her job, he or she will have difficulty simultaneously showing sufficient limitation in a major life activity so as to clear the Courts' “severe limitation” high bar.

The case of Rohan v. Networks Presentations LLC, 375 F.3d 266 (4th Cir. 2004), in which the Courts determined that an actress suffering from post-traumatic stress disorder was both too competent to be disabled and too disabled to be competent, epitomizes this problem. Rohan sued for wrongful termination under the ADA. 188 The district Court ruled that Rohan was not a “qualified individual” under the ADA because her disabilities prevented her from interacting with others—an essential job function. 189 In an ironic twist, the Fourth Circuit disagreed: not only could Rohan perform the essential function of interacting so as to make her a qualified individual, but her disabilities were not sufficiently severe to even trigger ADA protection. 190 In one appeal, Rohan went from being so disabled as to not qualify for the job to being so capable as to not be disabled under the ADA.

In McClure V. General Motors, the plaintiff was held not to be protected by the ADA. 191 Mr. McClure in his oral testimony before the House

185 Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir.1997).

186 Id at 15.

187 See, e.g., Bragdon, 118 S.Ct. at 2205 (citing 45 C.F.R. § 84.3(j)(2)(ii)); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 781 (6th Cir.1998); see also Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir.1995) (defining caring for oneself as including everything from driving and grooming to feeding oneself and cleaning one's home).


189 Id.

190 Id at 279-280.

191 McClure V. General Motors, 75 Fed. Appx. 983 (5th Cir. 2003)
Education and Labor Committee he plead, “Well, you can’t have it both easy – am I disabled or not? If I am, then the ADA should have been there to protect me. If I’m not, then I should be working . . . at GM right now. . . Because I’d adapted so well to living with muscular dystrophy, the Court said I wasn’t protected by the ADA. That doesn’t make any sense to me.”

PROBLEMS UNDER THE ADA

An employee “must show that [he is] highly debilitated by [a] disorder, yet still capable of doing [the] job . . . [with] reasonable “accommodations”’.

Regardless of the impairment, it is always a difficult task for an employee to prove that he is “substantially impaired [] but not so impaired that [he does] not qualify for [the] job in the first place.” Understandably, “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at a trial Court level.” Additionally, when employees appealed the Court’s decision, the judgment was affirmed eighty-four percent of the time. The National Disability Law reporter survey of ADA cases showed that a judge found the plaintiff able to meet the requisite statutory definitions in only 6 of the 110 cases in which the issue was raised. Such results are far worse than those in other areas of law. Because Courts fail to examine the discrepancy between an individual’s own ability and


193 See generally Lisa Belkin, Office Messes, N.Y. Times Mag., July 18, 2004, at 29 (discussing attention deficit disorder within a work environment).

194 Id. at 29 (quoting Latham).


196 Id. at 100.


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achievement, many problems are posed for the disabled who statistically have average to superior intelligence.\footnote{199} For example, the ability to learn at an average level exempts a learning disabled individual from recovery, despite the fact that the individual’s success might be largely due to the accommodations he has received.\footnote{200} While evidence of past academic success is relevant to the ultimate factual determination of whether an employee is disabled, it should in no means entitle the employer to judgment as a matter of law. Otherwise, doctors and lawyers could never be considered to have a learning disability because admittance into medical or law school alone would automatically negate their claim.\footnote{201} To do so places the ADA plaintiff in an untenable situation where “[s]uccess negates the existence of the disability, whereas failure justifies dismissal for incompetency.”\footnote{202} That is not the theory or the purpose of the ADA. The idea of the ADA is to afford equal opportunity to qualified individuals with disabilities; it is not to deny opportunity to the disabled solely because meeting the prerequisites of qualification demonstrates their abilities.\footnote{203}

For a potential employee revealing a disability could be a no win situation if employers are unwilling to provide accommodations and an individual is terminated and forced to sue.\footnote{204} Because of this, most employees with learning disabilities believe “[i]mpairment is safer not mentioned at all” and choose to keep their disability to themselves.\footnote{205} One employee reasoned that, “work isn’t like school, where they have to give you more time to take tests. . . . In the real world, if you tell during the interview, they won’t hire you. And if you tell after you’re hired, they can fire you.”\footnote{206}


\footnote{201} Wong v. Regents of the Univ. of Cal., 379 F. 3d 1097 at 1113 (Cal. 2004) (Thomas, J., dissenting). judgment context-and particularly given the history of the case-a history of academic success alone cannot justify the conclusion, as a matter of law, that a plaintiff is not disabled.

\footnote{202} Id. at 1113 (dissent), citing, Andrew Weiss, Jumping to Conclusions in “Jumping the Queue,” 51 Stan. L.Rev. 183, 205 (1998).

\footnote{203} Wong at 1113 (dissent).

\footnote{204} Belkin, supra.

\footnote{205} Susan Wendell, Unhealthy Disabled: Treating Chronic Illness as Disabilities, 16 Hypatia 17, 20 (Fall 2001).

\footnote{206} Belkin supra at 26.
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For all the good intentions of enacting the ADA and positive effects resulting from the ADA since it was enacted in 1990, the current environment in the judiciary has led to questions as to whether the ADA still accomplishes its intended protection. As noted, there has been a trend by the Courts to reduce the broad coverage of the ADA, in many cases disregarding Congress's stated intent. Kevin Barry writes for the Georgetown University Law Center's Federal Legislation Clinic, the first lesson students learn is that statutory language passed by Congress to mean one thing can be interpreted by judges to mean an entirely different thing.

In the legislative history, Congress stated its intent that the ADA's definition of "disability" be interpreted consistent with School Board of Nassau County v. Arline, in which the U.S. Supreme Court broadly interpreted the definition of "disability" under the Rehabilitation Act. Congress also mentioned that the use of medication and other devices should not be taken into account when determining whether an individual has a disability. Nonetheless, the Supreme Court ignored this legislative history when it interpreted the ADA.

Although, the judiciary has systematically narrowed the protective class and reduced those that are protected by the ADA, the ADA has still provided protection for the disabled. As Senator Tom Harkin (D-Iowa) expressed in regards to the ADA enactment, "the ADA was one of the landmark civil rights laws of the 20th century-a long overdue emancipation proclamation for millions of Americans with disabilities. As chief sponsor of the ADA in the Senate, I take pride in the progress we have made as a nation since 1990."

THE 2008 AMENDMENT

The ADA Amendments Act of 2008 (H.R. 3195) passed the U.S. House of Representatives in June by a 402-17 vote. The U.S. Senate approved


210 Id

211 Statement released by the Honorable Tom Harkin, U.S. Senator (July 26, 2007) on 17th anniversary of the signing of the Americans with Disabilities Act available at http://harkin.senate.gov/blog/?i=d0f78425-4c60-4c8d-a7bf-4c09ea9a7cf7

212 22 No. 7 EMLUP 1 (2008).
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its version of the ADAAA (S. 3406)--a slightly different version than the House bill--by unanimous consent on September 11, 2008. On September 17, 2008, the House of Representatives approved the Senate's version (S. 3406), accepting the manner in which the Senate updated the definition of “disability,” along with the Senate's emphasis that a strongly-worded Findings and Purposes section be included in the law itself. Thereafter, the new law was signed by President Bush, who applauded the significantly expanded protections now secured for qualified disabled individuals as memorialized in the ADAAA.

The new legislation which took effect January 1, 2009 specifically repeals the United States Supreme Court rulings of Sutton v. United Airlines Inc. and Toyota Motor Mfg. Kentucky Inc. v. Williams. The purpose of the repeal was to undo the narrowed definitions of the ADA and expand its coverage through liberal expansion of the applicable definitions, particularly the definition of a disability.

Thus, the purpose of the ADA Amendments Act of 2008 was summarized as:

1. Providing a “clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” through broadening the scope of ADA protection.
2. Rejecting the U.S. Supreme Court decision in Sutton, concerning the interpretation of “substantially limits a major life activity” being tied to the “ameliorating effects of mitigation measures”.
3. Overcoming the U.S. Supreme Court's holding in Sutton, by replacing the current ADA definition of disability with the definition of handicap spelled out under the Rehabilitation Act of 1973.
4. Rejecting the standards set out in the U.S. Supreme Court's decision in Toyota Motor, specifically the terms “substantially” and “major” in the phrase: “…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.’”
5. Creating a new definition of “substantially limits” to show Congressional intent to relax the strict, demanding standards established by the U.S. Supreme Court in the Toyota Motors case.

A major purpose of the ADA Amendments of 2008 is to create a new definition of “substantially limits” to show Congressional intent to relax the strict, demanding standards established by the U.S. Supreme Court in the Toyota Motors case.

213 Id

214 Id


217 42 U.S.C. § 12102
New Definitions

While there are numerous changes to the ADA, the most significant to employers and educators are the following (as 42 U.S.C. 12101 §3(2) would read):³⁹

- “Substantially Limits. The term ‘substantially limits’ means materially restricts.”

- In the Section (4)(B)(1)(c). An individual will not be “regarded as” having an impairment, if the impairment is “transitory and minor”, which is defined as “an actual or expected duration of 6 months or less.”

Other key definitions listed under Section (5) Rules of Construction Regarding the Definition of Disability in paragraph (1) include the following:⁴⁰

(A) To achieve the remedial purposes of this Act, the definition of ‘disability’ in paragraph 1 shall be construed broadly.

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

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

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

   (I) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

   (II) Use of assistive technology;

   (III) Reasonable accommodations or auxiliary aids or services; or

   (IV) Learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

   (I) The term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractory error; and

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²¹⁸ 22 No. 7 EMLUP 1.

²¹⁹ 42 U.S.C. § 12102
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(II) The term ‘low-vision devices' means devices that magnify enhance, or otherwise augment a visual image.”

POST-GRADUATE UNIVERSITIES AND THE ADAAA

While employers face the prospect of providing a proper environment so that the employee can be an effective producer for the business, post-secondary schools are in a unique position regarding the ADA. The ultimate product of post-secondary schools is not a widget or a service but the production of a learned individual. As they fulfill their mission, a duty still exists for the institution to provide appropriate accommodations. Public institutions clearly are covered by Title II of the ADA which addresses discrimination in the provision of public service by state and local governments. Title III, which prohibits discrimination in the provision of public services and accommodations operated by private entities applies to private institutions. Additionally, institutions that receive federal funds have been prohibited from discriminating based on a disability under section 504 of the Rehabilitation Act. The Civil Rights Restoration Act of 1987 confirmed that the section 504 prohibition of discrimination against the disabled applies to the entire institution even if only one aspect of the institution receives federal funds. As such, both private and public post-graduate institutions must provide accommodations for those with both physical, emotional and learning disabilities. The ADA specifically says that, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public

221 42 U.S.C. § 12182(a).
224 Singh v. George Washington University School of Medicine and Health Sciences, 597 F.Supp.2d 89, 98 (D.D.C. 200) Under instructions by the D.C. Circuit Court on remand, the Court, while finding that the plaintiff did not have a learning disability acknowledged that correctly diagnosed learning disabilities are covered under the ADA. However, the standard used by the D.C. Circuit (Singh v. George Washington University School of Medicine and Health Sciences, 508 F.3d 1097, 1104 (D.C.Cir.2007)) of requiring disruption of a major life activity is no longer a valid standard under the ADAAA.
accommodation... As such, each program must provide reasonable accommodations to all disabled in a fair and equitable manner while still maintaining their duty as a gatekeeper to the professions they are training. While in many cases this should not be a problem, it will require each post-graduate university to determine exactly what are the true requirements for their product. For example, it is easy to determine that a blind individual probably should not be a surgeon for example. However, the possibility exists that a blind man could become an excellent psychiatrist. Thus, if requested, the ADAAA could require and accommodate the blind student in his clinical education.

Types of Disabilities Faced in Post-Secondary Schools

At the same time, the nature of competition between students in post-graduate schools is of major paramount importance in developing an overall plan. Students should feel that the policies, rankings and opportunities are fair for the entire student body while at the same time tailoring any accommodation specifically to the student. The EEOC has broadly defined the types of disabilities to include those that impair the ability to care for one-self, perform manual tasks, walking, seeing, breathing, learning, working, sitting, standing, and lifting. As stated above, a “qualified individual with a disability” is identified as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” In turn, a “disability” is defined 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.”

The physical disabilities as such, include impairments of sensory including visual disorders, and hearing loss or deafness. It would also include most other physical impairments.

The mental disabilities can further be divided into cognitive disorders and broadly, personality disorders. For purposes of post-secondary schools, cognitive disorders generally involve deficits or deficiencies in thinking, memory retention and reasoning ability including conditions that are the result of brain injury, amnesia, dementia and delirium. More relevant to post-graduate educators, what are called Axis I diagnoses by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), also would include

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226 29 CFR § 1630.2(i)
227 42 U.S.C. § 12111(8).
228 42 U.S.C. § 12102(2).
Attention Deficit Disorder (ADD) or the more common diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and anxiety disorders. Mood disorders are also part of Axis I. They entail the persistent feeling of sadness or periods of feeling overly happy, or fluctuations from extreme happiness to extreme sadness. The most common mood disorders are depression, mania and bipolar disorder. The other major classification of mental disorders that post-graduate educators may face is Personality Disorders and Mental Retardation. These disorders, classified by DSM-IV-TR as Axis II include but are not limited to Paranoid Personality Disorder, Schizoid Personality Disorder, Mental Retardation, and other Personality Disorders.

These differences are important as classmates and possibly faculty anecdotally appear to support a student’s accommodation for a diagnosis of physical disorders but are more reticent for accommodations for some of the cognitive disorders, including those with ADHD. Whether or not this is the case deserves further study. However, the issue of providing accommodation for Axis I students will not decrease but only increase with time as the diagnosis of these conditions increase the prevalence in the population. While often associated, learning disabilities and ADHD are not the same. The percentage of children diagnosed with ADHD has steadily increased from 1997 through 2006. In 2006, 4.5 million United States school children possessed a diagnosis of ADHD. Also, as of 2006, 4.6 million school children had been diagnosed at some time with a Learning Disability. Learning Disabilities, while not a reflection of IQ, can manifest themselves in various ways including dyslexia for

231 Description of psychiatric disorders. May be found at http://www.webmd.com/mental-health/mental-health-types-illness.
232 Id
234 Id
235 Center for Disease Control Vital and Health Statistics. “Diagnosed Attention Deficit Hyperactivity Disorder and Learning Disability,” United States, 2004-2006, Series 10, #237 (July 2008). This information was compiled through a survey of parents with the inherent shortcomings in that type is survey.
236 Id @ 5
237 Id.
example. They are often found with other diagnosis such as mental retardation, blindness or ADHD and may have difficulty at performing a specific task as with dyslexia and reading skills or dysgraphia and handwriting skills. While most often diagnosed in childhood, these conditions can persist into adulthood.

Post-graduate schools are the gatekeepers of the professions. Their task is not just to educate the future members of the profession but to eliminate those that do not possess the ability to be a credit to that profession. While the stated purpose of the ADAAA and the ADA is to bar discrimination and to ensure opportunity for the disabled to take part in activities enjoyed by others who are not disabled, it does not absolve post-graduate institutions from their primary mission of educating in a fair and equitable manner. At some point, a learning disability may be too severe for success in a particular field. A student’s failure in school may be related to some other reason other than the particular disability. Yet, Courts have found that ADHD and Learning Disabilities come under the purview of the ADA. And while some Courts have found that the ADA requires that the disability must hinder a major life activity, that same Court has found that learning disability is a major life activity. Regardless, under the ADA as modified by the ADAAA, learning disability would likely be “regarded as” a disability by the general population and as such post-graduate institutions would clearly need to provide an appropriate accommodation. The very fact that the student was able to perform well enough to qualify for admission to the university undermines the argument that the disability is too great of a burden that an accommodation would not aid the student in succeeding. While post-graduate schools may not discriminate against the disabled in admissions, they need not decrease their academic standards in their admissions. Specifically, “it is beyond question that it would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program. An educational institution is not required by the Rehabilitation Act or the ADA to lower its academic standards for a professional degree.” Despite this, questions still


239 Id.


241 See Gluckenberger, 974 F.Supp. 106 (D.Mass 1997) in which Attention Deficit Disorder (ADD), ADHD and Learning Disabled students brought suit against Boston University for discrimination based on their disability.


243 Mershon v. St. Louis University 44 F.3d 1039, 1076 (8th Cir. 2006).
abound. What is the role of academic freedom? At what point does the requested accommodation interfere with the stated mission of the school?

**When Universities Can Deny An Accommodation**

Post-graduate schools must ordinarily provide a reasonable accommodation to those with a disability. However, if the accommodation will fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations provided by that post-graduate institution, then it is reasonable for the university to deny that modification.\(^{244}\) They may not however, continue, add, or develop qualifications or eligibility criteria that hinder or screen out the disabled as defined by the ADA as modified by the ADAAA unless the post-graduate-institution finds that it is necessary for the “provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.”\(^{245}\) Post-graduate programs need not provide an accommodation that would create an undue burden on the program, either financial or administrative.\(^{246}\) Accordingly, an institute which qualifies as a place of public accommodation may not require payment from the disabled for the accommodation made.\(^{247}\) Note that by financial, the ADA requires that costs are significant or very difficult to perform before one can use costs as a defense to providing an accommodation.\(^{248}\) Thus, as the percentage of the student population with a disability increases, post-graduate schools will increasingly have to project costs into their budget for accommodations.

Traditionally, universities allow the Professor the academic freedom to teach in a manner that he sees fit to provide the student with the information necessary to master the particular subject. With the variety of professors, academic freedom works for the university as an experiment in various pedagogies that can be evaluated as to what are the best teaching methods for the various students. While this is desirable, it is not enough to use individual academic freedom as a reason not to afford an accommodation. Great deference is traditionally given by Courts and the Office of Education’s Office of Civil Rights\(^{249}\) to decisions made by post-graduate institutions\(^{250}\) regarding the


\(^{246}\) See Golden, supra note 223 @ 382.


\(^{248}\) Golden, supra note 245.

\(^{249}\) 49 C.F.R. § 1.70(g) (2006). The Office of Civil Rights is delegated the authority to review and evaluate the operating administrations’ enforcement of the Americans with Disabilities Act of 1990.
academic requirements to successfully complete the area of study. As such, when the accommodation involves an academic decision, great respect should be given to the faculty by the Courts for their professional judgment on the matter.\footnote{Amir v. St. Louis University 184 F.3d 1017, 1028 (8th Cir. 1999).}

CONCLUSION

Post-graduate institutions and their accrediting body logically are in the best position to determine what is necessary for the specialty. Even accepting that, tradition is not a valid reason to deny an accommodation. Neither is a dislike of the accommodation by the individual professor. As more students that were diagnosed with disabilities as a child grow into adulthood and attend post-graduate schools, greater pressure will be put on institutions to reconsider some of their treasured beliefs. For example, can a law school refuse to a student suffering from anxiety disorder or panic attacks an accommodation exempting them from stressful questions using the Socratic Method? If the Law school incorporates the ADA recommendation on attendance, can it refuse to provide an accommodation to a student with depression who finds it difficult due to their documented condition to get out of bed each morning? The argument of academic freedom or tradition in the face of a documented disability will not survive a challenge if the school knows that not every professor follows the Socratic Method or keeps attendance. However, if the academic community reviews its records and makes a decision that is not arbitrary about what is important to the completion of the degree, the Office of Civil Rights and the Courts would normally agree with that decision. Thereafter, incoming students should be notified prior to matriculation and again at matriculation of the schools policies regarding disabilities. Information, to this effect should be placed in the student handbook and should include a description of the documentation needed by the institution. Even with this documentation, any qualified expert may provide the necessary documentation.\footnote{Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1995)} While some deference should be given to the physician’s recommendation for an accommodation based on the physician’s expertise on the condition, the institution and its faculty are the experts on the best means to educate the students in that field.

Because of the increased students with disabilities, including a marked increase of students with learning disabilities, ADHD and anxiety disorders, each faculty as a whole should review its policies to prospectively consider what policies should be necessary to train the post-graduate student. It may be time for the way professors train their students to change.

\footnote{See Gluckenberger, supra note 241 @ 140, 154. Court ruled against Boston University requirement that the previous evaluation not valid and that only an evaluation from a physician or a licensed clinical psychiatrist as expensive and unnecessary. Previous testing by other qualified individuals was acceptable. Exception was made for ADHD.}
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