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The Underwhelming Impact of the Americans with Disabilities Act Amendments

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ABSTRACT

The 2008 amendments to the Americans with Disabilities Act (ADA) were intended to expand the protection against discrimination for persons with disabilities beyond the Supreme Court’s narrow interpretation of who is “disabled.” While the amendments and the proposed Equal Employment Opportunity Commission regulations address some of the Court’s narrow interpretations of the ADA, lower courts may still be able to limit coverage of persons with disabilities who are still able to perform tasks which utilize the major life activity which is limited by their impairment, and persons who have impairments with temporary or intermittent effects. Claimants may also be excluded if they fail to make a concrete comparison of their impairment to others in the general population and to other plaintiffs with similar impairments who have come before them, or if they fail to present professional evidence supporting the substantiability of their limitations. More importantly, courts may continue to make the largely factual determinations regarding whether the claimant is substantially limited in a major life activity, rather than allowing a jury to decide whether the claimant is covered by the ADA.
The Underwhelming Impact of the Americans with Disabilities Act Amendments

Stacy A. Hickox

The Americans with Disabilities Act Amendments Act (ADAAA) was intended to reverse the effects of several Supreme Court decisions which limited the coverage of the ADA, and to broaden the coverage of the ADA suggested under the guidelines issued by the Equal Employment Opportunity Commission (EEOC). Yet the ADAAA may not solve all of the issues that Congress or disability advocates wanted to address. Neither the ADAAA nor the proposed EEOC regulations provide sufficient guidance for courts on how to determine whether a person is substantially limited in a major life activity so as to be considered disabled under the ADA. Moreover, courts may still be free to dismiss claims on employers’ motions for summary judgment by making factual determinations about whether the claimant is substantially limited, rather than allowing juries to make those decisions about ADA coverage.

Some sections of the ADAAA specifically reverse the effects of the targeted Supreme Court decisions, including defining what is a major life activity and reversing decisions regarding mitigating measures and the determination of whether an employee is “regarded as” disabled. Congress also took aim at the limitations on the scope of who is “substantially limited” in major life activities so as to be considered a person with a disability. Yet Congress may have missed the mark by failing to specify more clearly how a person can establish a substantial limitation. Referring the issue of defining “substantial limitation” to the EEOC may also fail to make the ADA more inclusive, as Congress intended.

The EEOC has issued proposed regulations to help define who is “substantially limited,” as directed by Congress. The agency even took a stab at expanding the coverage of who is substantially limited in their ability to work, which their previously regulations had also defined more narrowly. Yet the proposed ADAAA regulations fail to resolve some of the most exclusionary issues for ADA plaintiffs when faced with a motion for summary judgment. These issues include exclusion from coverage based on one’s ability to complete some tasks that might require the performance of the major life activity relied upon for ADA coverage. In addition, claimants with impairments having temporary or intermittent effects but who are still significantly limiting may find themselves excluded. Lastly, claimants may still need to establish a substantial limitation based on a comparison to the members of the general population and by providing medical or other expert testimony. Without specific language from Congress or more specific guidelines from the EEOC to reverse the limiting effects of decisions interpreting the ADA, ADA plaintiffs may still find themselves with claims dismissed on summary judgment by courts which choose to continue to interpret “substantially limited” narrowly. At the same time, plaintiffs bringing claims in other courts may continue to enjoy a more inclusive definition of “disability” which has allowed claims to at least get in front of a jury to determine if the persons is substantially limited in a major life activity.
This potential for continued narrow ADA coverage is strongest where Congress failed to include specific language in the ADAAA. Both the ADAAA and the EEOC’s proposed regulations fail to provide sufficient guidance for courts with respect to the implications of a person’s ability to perform some significant life activities, like working, despite their impairment, and whether a limitation that is intermittent occur often enough to be substantially limiting. Courts also lack restrictions on requiring medical and other expert evidence in establishing ADA coverage, as well as the method for comparing the extent of a person’s limitations to the abilities of the general public (most people vs. average person).

Some courts may continue their more expansive definition of “disability” in line with their pre-ADAAA decisions, but other courts may interpret the failure to address these significant issues as a “green light” to continue with their pre-ADAAA limiting interpretations of what it means to be substantially limited. Therefore, at least some courts may continue to dismiss claims on motions for summary judgment without allowing juries to engage in the fact-intensive determination of whether a claimant should be treated as a person with a disability. For these reasons, the impact of the amendments to the ADA may be underwhelming at best.

I. The ADA Legacy

Persons with disabilities and their advocates had high hopes for the ADA when it was passed 20 years ago. The ADA was intended to provide protection against discrimination in employment for people with a “range of health conditions, even those not traditionally considered ‘disabilities.’” The goal was to provide more job opportunities for the disabled and to integrate them into the workplace once they were hired. More fundamentally, the ADA’s proponents strived to “change the public's cognitive understanding of ‘disability’” by covering persons with “a range of medical conditions.” The hope was that the ADA would provide "a clear and comprehensive national mandate for the elimination of discrimination" on the basis of disability, and "clear, strong, consistent, enforceable standards" for addressing such discrimination, similar to other nondiscrimination statutes’ protections against discrimination based on race, color, sex, national origin, religion, or age.

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2 Id.


In its employment section, the ADA was intended to cover those who are able to work, because they are the ones who may face employment discrimination based on “myths, fears, ignorance, or stereotypes about their medical conditions.”\(^5\) The National Commission on Disability ("NCD") has explained that Congress did not intend the ADA to treat nondiscrimination as something “special” that can be “spread too thin by granting it to too many people.”\(^6\) According to the NCD, the ADA is premised on “fairness and equality, which should be generally “available and expected in American society.”\(^7\)

Despite the high hopes for the ADA, employees who sought its protection against discrimination based on a disability have faced “long odds.”\(^8\) After just seven years of the ADA’s application to employers, defendant employers had prevailed in 94% of cases at the federal trial court level and in 84% of cases taken up to the court of appeals by losing plaintiffs.\(^9\) These dismissals were attributed to employers’ success on motions for summary judgment, where courts created an "impossibly high threshold of proof" for ADA plaintiffs.\(^10\)

Experts have since found significant empirical evidence that ADA plaintiffs rarely succeed in litigated cases.\(^11\) Win rates have decreased from 7.9% in the 1990’s to 3% in 2004.\(^12\) By 2006,

\(^5\) Id. at 217.
\(^7\) Id.
\(^9\) Colker, supra note 8, 34 HARV. C.R.-C.L. L. REV. at 100. In contrast, plaintiffs litigating cases under Title VII of the Civil Rights Act of 1964 (Title VII) obtained reversals in 34% of the cases they appealed.
\(^10\) Id. at 126.
more than 97% of the 218 employment discrimination decisions that resolved an ADA claim resulted in the dismissal of the claim.\textsuperscript{13}

Beyond litigation, employees with disabilities may be more successful. One review showed that employers have been reasonably responsive to employees’ internal requests for accommodation, EEOC conciliations, and settlement negotiations.\textsuperscript{14} Despite this potential impact of informal resolution of ADA claims, the ADA has not proven to improve employment opportunities for persons with disabilities. A 2007 review determined that there is “no evidence that the statute has substantially improved their employment opportunities as a group.”\textsuperscript{15} The data on employment rates confirms this conclusion.\textsuperscript{16} The Bureau of Labor Statistics report for 2009 shows an unemployment rate of 14.5% for persons with disabilities, compared to a rate of 9% for workers without a disability, and the labor force participation rate for persons with disabilities is 21.5% compared to a participation rate of 73.7% for persons without disabilities.\textsuperscript{17}

The effects of the courts’ narrow interpretation of the ADA have been significant, as shown by these low success rates for claimants and the underemployment of persons with disabilities. Many believe that the U.S. Supreme Court weakened the ADA by “severely constricting the scope of who qualifies for its protection.”\textsuperscript{18} Another expert concluded that “[t]he expectations of Congress with regard to the ADA have not been met,” because of the courts’ narrowing of its coverage.\textsuperscript{19} Similarly, the NCD has stated that the Supreme Court’s “harsh and restrictive

\textsuperscript{13} Allbright (2007), supra note 12, 31 MENTAL & PHYSICAL DISABILITY L. REP. at 328.

\textsuperscript{14} Hoffman, supra note 3, 59 ALA. L. REV. at 307.


\textsuperscript{19} Feldblum, et al., supra note 4, 13 Tex. J. on C.L. & C.R. at 232.
approach” in defining who is disabled placed “difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.”

Another expert has called the courts’ narrow interpretations of the ADA “quite substantial in their detrimental effects” because many people with disabilities have found that “they no longer have the rights” provided in the ADA. Profesor Burgdorf went on to explain that the Supreme Court’s approach to the ADA placed “difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.”

Courts often have dismissed ADA claims at a high rate because the plaintiff has an impairment that is not substantially limiting - the plaintiffs are simply "not disabled enough." According to the NCD, the Supreme Court’s narrow interpretations of the ADA definition of “disability” was “directly contrary to what the Congress and the President intended when they enacted the ADA law.” In passing the ADAAA, Congress explained that “[w]hile [in enacting the ADA] Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”

Some experts attribute ADA plaintiffs’ lack of success in workplace discrimination claims to a lack of acceptance of the ADA’s protections among the courts, employers, and other members of society, and an unwillingness to accept the disabled or the notion that the ADA is about rights and equality. Courts interpreting the ADA may have been responding to a perception that ADA plaintiffs were really just lazy, malingerers or whiners. Courts resistance to the

20 NCD Report, supra note 6.


22 Id. at 258 (citing NCD, Righting the ADA at II.A).

23 Areheart, supra note 18, 83 IND. L.J. at 217 (citing Ruth O’Brien, DEFINING MOMENTS: (DIS)ABILITY, INDIVIDUALITY, AND NORMALCY, IN VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT 100 (Ruth O’Brien ed., 2004)).

24 NCD Report, supra note 6, at II.A.


27 Selmi, supra note 1, 76 GEO. WASH. L. REV. at 544.
disability category of civil rights protection may also stem from a perceived connection between a disability and job performance. 28 Professor Feldblum believes that there are health conditions that the general public will not accept as protected disabilities because of the “negative stereotyping that comes with being disabled.” 29

In addition, courts may be reluctant to place the burden of accommodation on employers to assist this group of employees and applicants, 30 based on a public perception that disability accommodations are “potentially costly.” 31 Specifically, Professor Selmi suggests that the Supreme Court did not want the ADA to become another vehicle for employees to recover damages based on workplace injuries, in addition to workers' compensation claims. 32

More generally, the vagueness of the statutory language itself may have led to its narrow interpretation. Experts agree that the original ADA’s definition of “disability” was vague. 33 This lack of clarity as to who is “disabled” generally has led to a lack of consensus regarding who is disabled under the ADA. 34 Courts may have responded to this vagueness by summarily agreeing with employers that plaintiffs were not disabled, rather than applying a “flexible, individualized definition of disability.” 35 Professor Miller agrees: “Coverage under the statute is determined by applying a contextual, flexible, individualized definition of disability, and our judicial system abhors vagueness.” 36


29 Id. at 489.

30 Hoffman, supra note 3, 59 Ala. L. Rev. at 327.

31 Selmi, supra note 1, 76 Geo. Wash. L. Rev. at 530.

32 Id. at 556.

33 Long, supra note 8, 103 Nw. U. L. Rev. Colloquy at 218.

34 Selmi, supra note 1, 76 Geo. Wash. L. Rev. at 529.


A group of experts have theorized that the narrow interpretation of the ADA’s coverage may be based in part on a “medical paradigm” for understanding disability.\textsuperscript{37} Under this model, a person’s disability is "a personal, medical problem, requiring an individualized medical solution" and it is assumed that people with disabilities do not face a common societal problem so there is no need for social policy to address the issue.\textsuperscript{38} The medical model views the physiological condition itself as the problem.\textsuperscript{39} In other words, "the individual is the locus of disability."\textsuperscript{40} Under the medical model, some would see discrimination against disabled people as rational, because it results from their own bodies’ deficiencies, unlike discrimination against other groups.\textsuperscript{41}

The medical model contrasts with the social model, under which “the experience of being a disabled person consists largely of encounters with the many barriers erected by society-physical, institutional, and attitudinal-that inhibit full participation in mainstream life."\textsuperscript{42} Under the social model, the experience of disability is not inherent or inevitable based on a person’s particular medical condition.\textsuperscript{43} Instead, the focus is on the particular social context in which a person with a disability lives and functions.\textsuperscript{44} Some believe that the ADA was adopted under this social model, with a goal of addressing “unwarranted and irrational discrimination on the basis of disability.”\textsuperscript{45} Courts’ narrow application of the definition of disability may reflect their rejection of this broader social model in favor of the medical model described earlier.

\textsuperscript{37}Areheart, supra note 18, 83 Ind. L. J. at 183.

\textsuperscript{38}Id. at 187-88 (citing Mary Johnson, \textit{Make Them Go Away: Clint Eastwood, Christopher Reeve & The Case Against Disability Rights} 27 (2003)).

\textsuperscript{39}Paul T. Jaeger & Cynthia Ann Bowman, \textit{Understanding Disability: Inclusion, Access, Diversity, and Civil Rights} 13-14 (2005) (examining the influence the media’s portrayal of disability has on public perception).

\textsuperscript{40}Areheart. supra note 18, 83 Ind. L. J. at 185-86.

\textsuperscript{41}Id. at 190.


\textsuperscript{43}Talk of the Nation: Beyond Affliction: Culture of Disability (NPR radio broadcast May 4, 1998).

\textsuperscript{44}Id.

The narrowing of the ADA’s coverage also may have occurred because of a lack of “political will” through public support or influential lobbyists to push for a broader interpretation of the ADA.\textsuperscript{46} With these forces at work, one expert concluded that “[a]bsent either inexplicably clear statutory language or broad public support, it was surely a mistake to think these nontraditional disability issues might be favorably received in the courts.”\textsuperscript{47}

Regardless of the reasons for the overall narrowing of the ADA’s coverage, there is no disagreement that the Supreme Court has interpreted the statute’s coverage so as to exclude many persons with impairments from its definition of “disability.” This may be based on the Court’s “preferences, both ideologically and institutionally, as guided by reigning social norms.”\textsuperscript{48} Yet despite the Court’s restrictive interpretation of some aspects of whether an impairment “substantially limits” a major life activity, some appellate courts have interpreted the ADA more broadly than others.

This variation in application of both the ADA and the Supreme Court’s decisions is particularly apparent in the areas of considering a claimant’s remaining abilities, requiring medical or other expert testimony, and comparing the claimant to members of the general population. The question remaining is whether the ADAAA will resolve those conflicts and ensure that the ADA’s protections and rights extend to everyone that Congress intended to cover.

II. The Americans with Disabilities Act Amendments Act

Only Congress could rewrite the ADA to protect people who can work but whose disabilities have been excluded from coverage under the statute by the courts.\textsuperscript{49} In 2008, that is what Congress intended to do. As early as 2004, the National Council on Disability (“NCD”) had suggested that the language of the ADA should be changed to correct the narrowing of the ADA’s coverage by the courts, so that courts would be forced to make determinations about whether discrimination had occurred, rather than focusing on the extent of the claimant’s physical or mental condition.\textsuperscript{50} As envisioned under the social model described earlier, the goal was for ADA claims to mirror litigation under Title VII of the Civil Rights Act, with the focus on whether discrimination occurred because of one’s membership in a protected group.\textsuperscript{51}

The ADA Amendments Act (ADAAA) attempts to clarify the meaning of a substantial limitation of a major life activity as the basis for ADA coverage. Generally, the ADAAA requires that the definition of "disability" “be construed in favor of broad coverage of individuals under [the

\begin{footnotes}
\item[46] Selmi, \textit{supra} note 1, 76 Geo. Wash. L. Rev. at 527-28, 540.
\item[47] Id. at 546.
\item[48] Id. at 525-26.
\item[50] Feldblum, et. al., \textit{supra} note 4, 13 Tex. J. on C.L. & C.R. at 224-25.
\item[51] Id.
\end{footnotes}
ADA], to the maximum extent permitted by the terms of [the ADA].”\(^{52}\) Congress stated in its Findings and Purposes section that the EEOC’s regulations that “defin[e] the term ‘substantially limits’ as ‘significantly restricted’ ” “express[es] too high a standard” and is “inconsistent with congressional intent.”\(^{53}\) The amendments further reject the Supreme Court’s directive that the ADA’s terms should be “interpreted strictly.”\(^{54}\)

Congress also instructed courts that “[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under this Act.”\(^{55}\) In addition, the ADAAA directs the EEOC to define “substantially limits” through regulations, and specifically gives the EEOC the authority to do so\(^{56}\) This may have been a compromise to get the bill moving, since the ADAAA bill had been moving slowly down when it included a definition of “substantially limits” as “materially restricts.”\(^{57}\)

In its stated purposes, the ADAAA also suggests that “[t]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”\(^{58}\) However, the revised definition of disability in the ADAAA does not include specific language fulfilling this purpose. The Findings and Purposes section also expresses “Congress’ expectation that the EEOC will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this Act, including the Amendments made by this Act.”\(^{59}\)

The definition section of the ADAAA provides some specific guidance, and yet it also neglects some controversial issues regarding ADA coverage. This section changes the definition of “disability” to exclude consideration of “the ameliorative effects of mitigating measures,” such as medication, artificial aids, assistive technology, reasonable accommodations, and “learned behavioral or adaptive neurological modifications.”\(^{60}\) Impairments are to be evaluated in their

\(^{52}\) Pub. L. No. 110-325 § 4(a), 122 Stat. 3555 (to be codified at 42 U.S.C. § 12102(4)(A)).

\(^{53}\) Id. at §2(a)(9).

\(^{54}\) Id.

\(^{55}\) Id. at § 4(4)(A).

\(^{56}\) Id. at § 4(a).


\(^{58}\) 122 Stat. at 3554.

\(^{59}\) Id.

\(^{60}\) Id.
unmitigated state. This provision will provide coverage that most courts allowed prior to the 
*Sutton v. United Airlines* decision, so that many more individuals will be considered currently 
disabled.

The ADAAA also provides specific coverage for an employee or applicant who establishes that 
an employer regards him or her as having an "impairment." This coverage no longer requires 
that the employer be shown to regard the person as being substantially limited in a major life 
activity. Thus, the claimant need only prove that the employer believed the employee or 
applicant was impaired and took some action adverse based on that belief, so courts will no 
longer need to determine what the employer believed about the impact of an impairment on a 
major life activity.

Other controversial issues are not directly addressed by the ADAAA, and may therefore continue 
to provide the basis for extensive litigation. First, the ADAAA specifically states in its definition 
of “disability” that an impairment which substantially limits one major life activity need not limit 
other major life activities to be considered a disability. This may address the suggestion by the 
Supreme Court in *Toyota* that if a person can perform most major life activities, they should not 
be covered by the ADA. However, the ADAAA’s statutory amendments do not directly 
address decisions interpreting the language in *Toyota* that a major life activity must be of 
“central importance” to limit coverage for someone who can perform some task which require 
the performance of the major life activity in question.

Second, specific guidance is provided by the definition section’s statement that an impairment 
that is episodic or in remission qualifies as a disability if it would substantially limit a major life 
activity in active state. For those with a condition in remission, courts must consider whether 
the disease would substantially limit a major life activity in its active phase, regardless of 
whether the disease has significant effect on the employee while in remission. This represents

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62 Fram *supra* note 57, 26 *Hofstra Lab. & Emp. L.J.* at 217.
63 122 Stat. at 3555.
65 122 Stat. at 3556.
66 534 U.S. at 197.
67 *Id.*
68 *Id.* at § 4(a).
69 Philip A. Kilgore and John T. Merrell, “Redefining ‘Disabled’: The ADA Amendments Act of 
a subtle, but fairly substantial change in meaning.\textsuperscript{70} This section should address the disparity among courts regarding whether an impairment that is episodic is substantial enough to support ADA coverage. Yet the courts still do not have guidance on how long the effects of an impairment need to be last, or how often an intermittent condition needs to occur, for the impairment to be substantially limiting.

Despite this limited guidance on intermittent conditions, the ADAAA failed to even reference certain controversial issues regarding the specific length of time that a condition must continue to support ADA coverage. This clarification was omitted despite the history of conflicting decisions regarding the length of time an impairment must last to support coverage.\textsuperscript{71} The amendments only state that an individual should not be covered as “regarded as” disabled if the condition is minor and lasts for less than six months. Given the House of Representatives Committee on Education and Labor Report’s statement that this six-month rule does not apply to actual disabilities, actual impairments lasting even less than six months arguably could provide for ADA coverage.\textsuperscript{72}

The ADAAA also lacks any specific language regarding what evidence is needed for a jury to determine whether a person is substantially limited. This omission ignores the conflicting case law discussed below regarding a variety of reasoning among appellate courts on how to compare the effects of a plaintiff’s impairment to the abilities of members of the general population, and the requirement of medical or other expert testimony to support ADA coverage.

The interpretation of “substantially limited” remains murky because nothing in the ADAAA indicates how the limitations of a person claiming a disability should be compared to the abilities of others. The legislative history may provide some guidance, even though the proposed EEOC regulations do not. The House of Representatives Committee on Education and Labor Report states that the individual should be compared to "most people," not simply someone with the same demographics as the employee (such as gender, age, education).\textsuperscript{73} This method of comparison was adopted in the proposed EEOC regulations. Previous EEOC regulations directed a comparison of the employee to an average person in the general population, while some courts compared the plaintiff to the average person of “similar age, education and experience.”

The amendments also fail to address the requirement of medical and other expert evidence imposed by many appellate courts under the ADA. Even though the Supreme Court has not specifically required such evidence to avoid summary judgment, lower courts had often required something more than the individual’s testimony regarding the extent of their limitations. Other

\textsuperscript{70} Long, \textit{supra} note 8, 103 NW. U. L. REV. COLLOQUY at 221.

\textsuperscript{71} Id. at 212.

\textsuperscript{72}Id. at 207.

courts had allowed a claimant to continue to trial based on their own testimony, particularly where their limitations were “obvious” and could be easily understood by a jury. These varying approaches are discussed below.

From a more theoretical perspective, the ADAAA does not resolve the debate about the ADA’s theoretical foundation as a medical model versus a social response similar to the basis for other civil rights statutes, designed to remove the obstacles that persons with disabilities experience. Nor do the amendments take a position on the debate as to whether the ADA represents a “welfare benefits regime” providing preferential treatment to persons with disabilities. This omission may help support the position of those who believe that social factors do not significantly contribute to the segregation and limited opportunities experienced by persons with disabilities.

The revised language in Section 7 of the Findings section includes a more modest depiction of persons with disabilities' subordinated status. It explains that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." Courts could conclude that this language weakens the connection between the ADA and the political subordination rationale for disability-related accommodations.

This failure of the ADAAA to resolve these issues may result in a continuation of dismissal of claims on motions for summary judgment. In fact, courts which have interpreted the ADA narrowly under these controversial issues may feel emboldened by the fact that Congress failed to reverse their interpretations of the original ADA in the ADAAA. In addition, without Supreme Court intervention, plaintiffs will see a variety of outcomes regarding ADA coverage depending on which district or circuit court hears their claim, since the courts vary considerably in their interpretations of what it means to be “substantially limited” in a major life activity. In each of these areas, courts may remain free to resolve these fact-intensive issues rather than allowing a jury to determine whether the claimant is covered by the ADA’s protections.

III. Vagueness of Substantial Limitation Requirement

75 Id. at 190.
76 Id.
77 Id.
78 Id. at 208.
This section will review the controversial issues outlined above which were not resolved by the ADAAA, and will also discuss whether the EEOC has sufficiently addressed these issues in its proposed regulations. Without sufficient guidance from these sources or from the Supreme Court, these issues could continue to be the source of significant litigation to determine who is and is not covered by the ADA as amended.

Both the ADA and the ADAAA require a plaintiff to establish that a major life activity is “substantially limited” for the ADA to provide its protections and right to accommodations. The ambiguity of the term “substantially limits” has led to a substantial amount of litigation in the lower courts regarding whether a person is substantially limited, before the ADAAA came into effect. Although Congress sought to expand coverage under the ADAAA, both the statute and the proposed regulations have failed to address four sources of this ambiguity: the effect of the ability to perform some tasks using a major life activity, the duration element, comparing the impaired person to others in the general population, and the requirement for medical or other professional evidence.

Before considering these four ambiguous areas, trends among the courts in making the more general interpretations of the substantial limitation requirement by the Supreme Court are helpful to understand the potentially underwhelming impact of the ADAAA. These decisions reflect a variety of approaches regarding the amount of evidence needed and the level of deference to be given to allow a jury to engage in the fact-intensive determination of whether a person is substantially limited in a major life activity. They also reflect differences among the courts as to how much “individualized inquiry” is afforded to a claimant who seeks the ADA’s coverage.

Early in the life of the ADA, the Supreme Court held that the impairment of being HIV positive could be substantially limiting on the ability to reproduce, even though reproduction was still possible. That Court explained that the limitation need not rise to the level of “utter inability” to support coverage. Moreover, the limitation could be considered substantial based on legal and economic consequences, not just based on physical constraints.

The 1999 ADA Supreme Court decisions began narrowing the meaning of “substantial limitation.” Emphasis has been on individual determination, meaning that the application of the “substantially limited” requirement must be made on a case by case basis. The Sutton Court dictated that a court examine the effect of the impairment on the life of the individual asserting

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80 Id.

81 Id.

ADA coverage. Yet in the same year, the Court recognized that “some impairments may invariably cause a substantial limitation of a major life activity.”

By 2002, the Supreme Court had further narrowed its view of “substantial limitation,” and yet the Court retained its emphasis on the impact of the impairment on the individual claimant and continued to require that ADA coverage be determined on a case-by-case basis. The Court focused on “the effect of that impairment on the life of the individual,” rather than the nature of the impairment itself.

The EEOC also adopted this focus in individual analysis of the ADA’s coverage. The ADA's original EEOC regulations explained that the term “substantially limits” means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

The regulations go on to explain that these factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

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

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

The Supreme Court’s emphasis on individual analysis and the specific factors referenced in the EEOC regulations strongly suggest that the determination of whether a claimant is “substantially limited” is a factual one. Prior to the passage of the ADA, the Supreme Court had stated that under the Rehabilitation Act, the issue of whether an individual was disabled

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83 Cassimy v. Board of Ed. of Rockford, 461 F.3d 932 (7th Cir. 2006); Didier v. Schwan Food Co., 465 F.3d 838 (8th Cir. 2006) (both citing Sutton, 527 U.S. at 483).

84 Albertson’s, 527 U.S. at 566.

85 Toyota, 534 U.S. at 198.

86 Id.

87 29 C.F.R. §1630.2(o).

88 Id.
was a factual, not legal, question. Some courts hearing ADA claims also have recognized that the interpretation and application of “substantially limited” involves assessing the value of evidence and the credibility of witnesses, “tasks historically given to the jury in our judicial system.” This approach allows juries to resolve the factual issues associated with determining whether a person is “substantially limited.”

On a motion for summary judgment, the question should be whether the claimant has presented sufficient evidence so that a “reasonable jury” could find that the claimant is substantially limited in one or more major life activities. General ADA summary judgment standards require the plaintiff to present "some evidence" of the substantiality of his impairment. As one court explained, this requires only enough information about the disability so the jury does not need to speculate about the extent of the person’s limitations. In a claim involving a sleep disorder, for example, the court denying a motion for summary judgment explained that because other courts had reached conflicting conclusions in the face of similar claims, “borderline cases like this turn on fact questions best left to juries rather than to judges ruling on summary judgment.”


91See Kiphart v. Saturn Corp., 251 F.3d 573, 582 (6th Cir. 2001) (calling for individualized, fact-specific inquiry into the effect of impairment on plaintiff’s life); Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 679 (8th Cir. 2001) (calling determination of whether impairment “substantially limits” a major life activity “highly fact-intensive”); Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 32 (1st Cir. 2000) (determination of question of “substantially limits” is a “fact-specific analysis”); Colwell v. Suffolk Co. Police Dep’t, 158 F.3d 635, 643 (2d Cir. 1998)(substantial limitation” inquiry is “individualized and fact-specific”); Leisen v. City of Shelbyville, 153 F.3d 805, 808 (7th Cir. 1998) (record must include evidence from which reasonable fact finder find substantial limitation).


95Head v. Glacier Northwest, Inc., 413 F.3d 1053, 1060 (9th Cir. 2005)(plaintiff claiming to get “five or six hours a night” for “months” had produced “sufficient evidence to preclude summary judgment”). See also Swanson v. Univ. of Cincinnati, 268 F.3d 307, 316-17 (6th Cir. 2001) (inability to sleep more than 4-5 hours per night did not demonstrate substantial limitation in major life activity of sleeping).
Even the relatively conservative Seventh Circuit has noted that the *Toyota* Court may have set a “higher threshold for the statute than some had believed it contained.” Yet in reviewing the claim of a Sears employee who could walk no more than a city block without her right leg and feet becoming numb, the court still concluded under *Toyota* that a jury could find that she was covered by the ADA, based on her evidence showing her difficulty in walking as well as the juries’ own life experiences.

Despite the factual nature of this inquiry, many courts have relied on the *Toyota* Court’s narrow interpretation of “substantially limits” to dismiss ADA claims on summary judgment rather than referring factual determinations to a jury. These courts require enough evidence to allow a jury to “perform the careful analysis that is necessary” to determine whether the claimant was substantially limited. This approach may stem from the *Toyota* Court’s direction that the ADA’s terms “need to be interpreted strictly to create a demanding standard for qualifying as disabled.” This strict interpretation arose from the finding in the ADA that forty-three million people have disabilities. The Court explained that “if Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number would surely have been much higher.”

Perhaps based on this fear that a broad definition of “disability” would result in an unmanageable number of ADA claims, some courts have refused to cover an employee by the ADA based on a common limitation like lifting restrictions or back injuries alone. This narrowing of ADA’s coverage may be based in part on concerns openly expressed by the Seventh Circuit that recognizing claims arising out of back injuries will result in an “inordinate number” of ADA claims. Back injury claims have been characterized as “a specter that haunts the federal

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96 *EEOC v. Sears, Roebuck & Co.* 417 F.3d 789, 801 (7th Cir. 2005)(citing Dvorak v. Mostardi Platt Assocs., Inc., 289 F.3d 479, 484 (7th Cir. 2002)).

97 Id. at 802.

98 See *Lebron-Torres v. Whitehall Labs*, 251 F.3d 236, 241 (1st Cir. 2001). See also *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 226 F.3d 69, 80 (2d Cir. 1998) (substantial limitation is mixed question of law and fact).

99 *Toyota*, 534 U.S. at 197.

100 Id.

101 Id.

102 See *Mays v. Principi*, 301 F.3d 866, 869 (7th Cir. 2002) (noting great number of Americans restricted by back problems).
judiciary, their worst fear that the ADA has changed them into workers’ compensation forums.”

This narrowing of the meaning of “substantially limits” arguably has “dramatically” narrowed the meaning of disability under the ADA over the past eight years so that it is “almost unrecognizable.” Many claimants with disabilities “are never even given the opportunity to show a jury that they can do the job and were treated unfairly because of their medical condition,” because they cannot meet this narrow definition of “disability.” According to the NCD, the Court’s narrow definition of disability “represents a sharp break from traditional law and expectations, and “ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a ‘comprehensive’ prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability.”

Other experts believe that the effect of the Toyota decision has been limited and that most claims dismissed based on the definition of “disability” were due to plaintiffs’ failure to present sufficient evidence of the extent of their limitations. One commentator concluded that “there is no evidence that the Toyota rationale is adversely affecting the claims of plaintiffs filing suit under the ADA.” This observation may come from some courts’ interpretations of Toyota which still allow a jury to determine whether a claimant is covered by the ADA.

Regardless of the degree of Toyota’s impact overall, the cases outlined below show that several approaches to the definition of “substantially limits” have been taken by different courts. First, the ability to perform some tasks involving a major life activity has resulted in the dismissal of claims in some courts, but not in others. Second, the ADAAA and the proposed regulations do not sufficiently resolve the differences among the courts regarding how long is long enough for an impairment to be considered “substantial.” Third, neither the amendments nor the proposed regulations resolve the differences in interpretation of the EEOC’s original regulations which propose a comparison of the claimant’s abilities to the abilities of members of the general population. Last, the changes to the ADA may not result in consistent requirements that claimants present professional testimony to establish that they are substantially limited.

103 Anderson, supra note 93, 57 AM. U. L. REV. at 446.

104 Feldblum, et al, supra note 4, 13 TEX. J. ON C.L. & C.R. at 216.

105 Id. at 234 (Testimony of Chai R. Feldblum before the Senate Committee on Health, Education, Labor & Pensions, July 15, 2008).

106 NCD Report, supra note 6.


108 Id. at 506.
A. Ability to Perform Some Major Life Activities

Under the Toyota decision, many courts tend to focus on the activities which an employee can do, rather than the extent of their limitations. Professor Samuel Marcosson has noted that the Toyota Court "framed the inquiry not in terms of what activities the individual cannot do or is substantially limited in doing ... but in terms of what the person can still do."\textsuperscript{109} Lower courts often have relied on the claimant’s existing abilities to conclude on motions for summary judgment that the person is not substantially limited in a major life activity.

The ADAAA specifies that a person can be covered by the ADA based on a substantial limitation of just one major life activity. However, this clarification may not be enough to prevent the exclusion of claimants who can still perform some tasks that involve a major life activity that is the basis for the claimant’s ADA coverage. Before the ADAAA, lower courts relied on a claimant’s remaining abilities to grant a motion for summary judgment for an employer because the remaining abilities established that the claimant was not substantially limited in the major life activity relied upon to establish ADA coverage.

Therefore, the ADAAA’s admonition against requiring a limitation of more than one major life activity may not result in any fewer dismissals in these types of claims. One expert has warned that the ADAAA reversed Toyota only as to how severe the impairment must be, not as to the relevant evidence on whether the impairment is substantially limiting, so that courts might still be willing to accept and rely on evidence of claimants’ abilities to perform other activities.\textsuperscript{110}

Pre-ADAAA courts consistently granted summary judgment for employers based on the claimant’s ability to perform some tasks.\textsuperscript{111} Summary judgment has often been granted to the employers of plaintiffs who sought ADA coverage based on an inability to care for themselves because the plaintiffs were able to perform certain self-care tasks such as bathing, dressing and driving.\textsuperscript{112} For example, a nurse lost on a motion for summary judgment in part due to her inability to show a substantial limitation in caring for herself because of her back injury, despite her testimony that that she had difficulty performing certain tasks and was limited in performing household tasks like cooking and cleaning.\textsuperscript{113} With deference to the decision in Toyota, the court concluded that because she


\textsuperscript{110} Fram, supra note 57, 26 Hofstra Lab. & Emp. L.J. at 210.

\textsuperscript{111} Id. at 208.

\textsuperscript{112} Thomas v. Avon Products, Inc., No. 07-3924, 2008 U.S. App. LEXIS 10327 at *2 (6th Cir. May 8, 2008); Squibb v. Memorial Medical Center, 497 F.3d 775, 784 (7th Cir. 2007).

\textsuperscript{113} Squibb, 497 F.3d at 784.
could drive, bathe, brush her teeth and dress herself, she was not substantially limited in the ability to care for herself.\textsuperscript{114}

Even though Toyota was addressing the ability to perform manual tasks only, many appellate courts have applied this broad approach to impairments which do not affect the ability to perform manual tasks.\textsuperscript{115} For example, one court refused to extend ADA coverage to three firefighters with ADHD, in part because the court was looking for an inability to perform a “variety of tasks central to most people’s daily lives” under Toyota.\textsuperscript{116} The court applied this approach even though the firefighters relied on a substantial limitation on their abilities to learn, not to perform manual tasks.\textsuperscript{117}

Most courts have not provided much explanation of their application of the Toyota standard to other major life activities beyond the performance of manual tasks. Yet one court explained its focus on the activities which could be performed: “a finding of disability depends not on whether the plaintiff can perform every one of those functions [listed in the EEOC regulations], but on whether the net effect of the impairment is to prevent or severely restrict the plaintiff from doing the set of activities that are “of central importance to most people's daily lives.”\textsuperscript{118}

The ability to perform personal care tasks has also defeated coverage based on the ability to perform some tasks that involve the major life activity alleged to be substantially limited. For example, an employee with degenerative joint disease that limited his abilities to grip, reach, lift, stand, sit and walk at work did not warrant ADA coverage where he still mowed his grass,

\begin{itemize}
\item \textsuperscript{114}Id. (citing Toyota, 534 U.S. at 198 (2002)). See also Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 763 (10th Cir. 2006) (individual who has difficulty eating, cannot cut nails & sometimes needs help buttoning clothes not substantially limited in major life activity of caring for herself).
\item \textsuperscript{115} Mack v. Great Dane Trailers, 308 F.3d 776, 781 (7th Cir. 2002) (no reason to limit Toyota’s analysis to cases involving performing manual tasks); EEOC v. United Parcel Service, Inc., 306 F.3d 794, 802-803 (9th Cir. 2002) (impairment must prevent or severely restrict use compared with how unimpaired individuals normally function). See also Mulholland v. Pharmacia & Upjohn, Inc., Case No. 01-1325, 2002 WL 31681919, at *3 (6th Cir. Nov. 22, 2002) (applying the Toyota analysis to the major life activity of learning); Waldrip v. General Electric Co., 325 F.3d 652, 655 (5th Cir. 2003), available at 2003 WL 1204429, at *2 & n.4 (effects of impairment affecting eating must be severe). But see Rakity v. Dillon Companies, Inc., 302 F.3d 1152, 1158-60 (10th Cir. 2002) (assuming without discussing that Toyota’s holding was limited to major life activity of performing manual tasks).
\item \textsuperscript{116} Knapp v. City of Columbus, 192 Fed. Appx. 323, 328 (6th Cir. 2006) (citing Toyota, 534 U.S. at 200–01).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Nuzum v. Ozark Automotive Distributors, Inc., 432 F.3d 839, 844 (8th Cir. 2005) (citing Toyota, 534 U.S. at 198).
\end{itemize}
dressed and fed himself, and used stairs at home.\textsuperscript{119} Similarly, another court refused to find substantial limitations in the ability to stand, turn, bend or lift, based on the claimant’s continued ability to perform household tasks such as laundry, washing dishes, and taking out the trash, even though he could only perform those tasks if they did not “involve a lot of bending.”\textsuperscript{120} The courts seemed to be allowing ADA coverage only where the claimant was prevented from or at least severely limited in performing any task that involved the major life activity or activities that were offered as the basis for ADA coverage.

Even for impairments that are not physically limiting, courts have looked at the ability to perform some tasks as evidence that the claimant was not limited in the major life activity they are relying on for coverage. For example, a claimant was not allowed to proceed to a jury trial based on a substantial limitation on his ability to think and interact with others, because he was able to do many things involving these major life activities, such as working and teaching three days per week, serving as a local councilman, engaging in family and social outings, and working on weekends.\textsuperscript{121}

The extreme effects of considering a claimant’s abilities is illustrated by the claim of an applicant for a cart pusher position with Wal-Mart, who had mental retardation for which he received social security disability benefits.\textsuperscript{122} Despite evidence that he was not hired because of his mental retardation and evidence of his limitations on his ability to learn, think, communicate, socially interact and work, this applicant was unable to survive a motion for summary judgment.\textsuperscript{123} Although the court acknowledged that the evidence showed that he was “somewhat limited in his ability to learn,” summary judgment was granted based on his graduation from high school (but only with a certificate in special education), his attendance at a technical college, and his ability to read, perform “various types of jobs,” and drive a car.\textsuperscript{124}

Like his ability to learn, this claimant’s ability to communicate was not substantially limited based on his ability to be interviewed for a job without any accommodation, the fact that he was "very verbal," and did not need a job coach to communicate effectively with other people in the workforce.\textsuperscript{125} This case illustrates how even a person who was not hired because of his disability could not turn to the ADA for relief, when a court focused on his ability to do certain tasks as evidence that he was not substantially limited in any major life activity.

\begin{footnotesize}
\begin{enumerate}
\item[119] Philip v. Ford Motor Co. 328 F.3d 1020, 1025 (8th Cir. 2003).
\item[123] Id.
\item[124] Id.
\item[125] Id.
\end{enumerate}
\end{footnotesize}
Some courts interpreting the ADA have excluded claimants because they could perform one major life activity, like working, even though they based their coverage on a limitation of another activity. The Supreme Court stated in Toyota that determining whether an impairment constitutes a disability should not be based only on “the effect of the impairment in the workplace.” Yet lower courts often considered the activities that a claimant could do in granting an employer’s motion for summary judgment.

The ability to work has often undermined an employee’s ADA coverage. An extreme example of this focus on the ability to perform other activities appeared in the claim of an employee with multiple sclerosis (MS), who alleged limitations on her ability to care for herself and her family due to fatigue associated with her MS. With only a very short discussion, the court upheld the dismissal of her claim on summary judgment because she did not establish a limitation on her ability to work, despite the court’s agreement that she often experienced the symptoms of MS “to the extent that she is often temporarily unable to function as the average person would.”

Similarly, an employee with depression was unable to establish ADA coverage despite her presentation of evidence that it caused her difficulty in sleeping and getting along with others. The court granted summary judgment for the employer because she did not show “how these limitations prevented her from performing her job “or that she was “unable to perform any of the life activities completely.”

Even an obvious major life activity such as sight may not be considered substantially limited if the person is still able to work. A claim by an employee with limited sight in one eye was denied ADA coverage in part because he continued to work in his assigned position for several months after he suffered the eye injury, and he continued to drive a truck and passed a vision test for his license. Similarly, the claim of a bus driver with asthma was dismissed without discussion of limitations on his ability to breathe, where the court found that he failed to establish his inability

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126 Toyota, 534 U.S. at 198.
127 Croy v. COBE Laboratories, Inc. 345 F.3d 1199 (10th Cir. 2003).
128 Id. at 1204.
129 McWilliams v. Jefferson County, 463 F.3d 1113, 1117 (10th Cir. 2006).
130 463 F.3d at 1116-17 (citing Croy, 345 F.3d at 1204).
to perform a class of jobs or a broad range of jobs.\textsuperscript{132} That court referenced \textit{Toyota's} requirement that the impairment interfere with an activity that is “of central importance to most people’s daily lives.”\textsuperscript{133} Thus, these courts focus on the ability to work or perform some other tasks as evidence that the person is not substantially limited in any major life activity.

In contrast to this focus on “abilities,” some courts interpreting the ADA have refused to dismiss claims based on employees’ abilities rather than their limitations. When compared to the decisions just described, these outcomes illustrate the variance in ADA coverage across different circuit courts for claimants who are able to perform some tasks associated with major life activities. One illustration of this more expansive coverage comes from the Third Circuit, which reversed the dismissal of a claim of an employee with right side paralysis and difficulties learning due to cerebral palsy.\textsuperscript{134} The trial court had dismissed the claim because he had graduated from high school (in a special education track), worked as a custodian, and volunteered in his community in several capacities.\textsuperscript{135}

The appellate court stated bluntly that the trial court’s reliance on what the claimant had managed to achieve “misses the mark.”\textsuperscript{136} His ability to become a productive member of society was no justification for dismissing his ADA claim, because he still had “significant disability-related obstacles he has overcome” and he was still had “significantly restricted ability” to learn and perform numerous manual tasks.\textsuperscript{137} This appellate court also noted the need for individualized inquiry: “We are mindful of the extraordinarily fact-intensive nature of the inquiry; even if two different plaintiffs alleging substantial limitations suffer from the same impairment, the nuances of its effect on their daily lives will invariably manifest themselves in distinct ways.”\textsuperscript{138}

Similarly, the Fifth Circuit specifically rejected a focus on the claimant’s ability to work, even though an employee with chronic fatigue syndrome was able to perform her job while experiencing the symptoms of that impairment.\textsuperscript{139} Relying on \textit{Toyota}, the court held that an assessment of whether an individual is disabled should be made not just with respect to the workplace, but also by looking at the effect of the impairment on the individual’s entire life.\textsuperscript{140}

\begin{footnotes}
\item[133] Id. (citing Toyota, 534 U.S. at 198).
\item[134] Emory v. AstraZeneca Pharmaceuticals, LP, 401 F.3d 174 (3d Cir. 2005).
\item[135] Id. at 178-79.
\item[136] Id. at 181.
\item[137] Id.
\item[138] Id. at 182.
\item[139] EEOC v. Chevron Phillips Chemical Co., 570 F.3d 606, 2009 U.S. App. LEXIS 12148 at * 37 (5th Cir. 2009).
\item[140] Id. (citing Toyota, 534 U.S. at 201).
\end{footnotes}
That court explained that using a claimant’s abilities to perform his or her job as evidence that they are not disabled under the ADA would create a catch-22 for plaintiffs: “if their disabilities prevented them from doing their jobs altogether they would not be qualified individuals for the job under the ADA, and if they were able to work through their disabilities they would then not be considered disabled.”

The ADAAA does not specifically address the impact of a person’s ability to engage in some tasks that might involve the major life activity relied upon for ADA coverage. The proposed ADAAA regulations from the EEOC state that “in determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of the impairment.” The regulations provide the example of an individual with a learning disability who is substantially limited in the ability to read, learn, think or concentrate, but still achieves a high level of academic achievement such as graduating from college.

The proposed regulations should address the situation where a claimant can perform some tasks that involve a major life activity, but is still substantially limited in that activity. But the proposed regulations may not be clear enough to resolve the conflict among the circuit courts regarding how the remaining abilities of claimants affect their claim that they are substantially limited in a major life activity that involve the use of those abilities. Courts may continue to conclude that if a claimant can engage in tasks such as working that involve that major life activity, the person is not substantially limited in it. Further, nothing in the ADAAA or the proposed regulations directly prevents a court from making the factual determination about whether the person is substantially limited in a life activity even though he or she can perform some tasks that involve that activity.

B. Duration of the Impairment

Numerous ADA claims have been dismissed without a trial because the claimant’s impairment was seen as temporary or because the impairment was not disabling when it was not “active.” Although the original ADA did not specifically address the necessary duration of the impairment, the EEOC’s original regulations stated that the impairment should be “permanent.

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141 Id. at 38 (citing Gillen, 283 F.3d at 24) (declining to adopt rule that would impose “an unenviable ‘catch-22:’ in order to demonstrate that she is disabled, the plaintiff would also have to demonstrate why she is unqualified to do the job to which she aspires”).

142 29 C.F.R. at 1630.2(j)(vi).

143 29 C.F.R. at 1630.2(j)(6)(i)(C).

144 NCR Report, supra note 6.
or long term” to be considered substantially limiting. The Toyota Court excluded impairments that only interfered with a major life activity in a minor way, and reiterated the EEOC’s requirement that the impairment must be “permanent or long term.”

In the ADAAA, Congress rejected the Toyota Court’s overall narrow definition of disability, and specifically stated that an impairment should be assessed based on its effects when it is active. However, the ADAAA does not explain how temporary impairments should be assessed under the disability definition. The proposed ADA regulations state that “an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.” The use of the word “may” in that one sentence that addresses this issue may keep the door open to find that at least for some activities, a limitation lasting less than 6 months or even longer is still not substantial. In addition, neither the ADAAA nor the proposed regulations address the question of how often an intermittent impairment would need to occur to constitute a substantially limiting condition. Therefore, disputes about whether an impairment’s limitations are “substantial” because the impairment is not permanent or long term may continue despite the changes included in the ADAAA.

The EEOC’s original ADA regulations provide the following factors to be considered, in addition to the “nature and severity of the impairment,” in determining whether an individual’s major life activity is substantially limited:

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

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

Similarly, in its Interpretive Guidance, the EEOC elaborated that an impairment is substantially limiting if it “lasts for more than several months and significantly restricts the performance of one or major life activities during that time.” In contrast to the Supreme Court’s decisions, the EEOC’s ADA compliance manual states that if an impairment lasts “at least several months,” it is not short term. Some courts have adopted the EEOC’s broader definition of “substantially limited” despite a limited duration of an impairment. For example, the Tenth Circuit recognized,

145 29 C.F.R. §1630.2(j)(2)(ii)-(iii).

146 534 U.S. at 197.

147 534 U.S at 198 (citing 29 C.F.R. §1630.2(j)(2)(ii)-(iii)).


149 29 C.F.R. §1630.2(j)(2).


151 EEOC Compliance Manual (BNA), § 902.4(d), at EEOM 902:13 (June 2006).
prior to *Toyota*, that "an impairment need not be permanent" to be a disability, and held that the plaintiff’s flexor tenosynovitis could be a disability since its "anticipated duration was indefinite, unknowable, or was expected to be at least several months."\(^{152}\)

The NCD has been critical of these regulations, citing their departure from the position of the other agencies that have adopted regulations interpreting the other sections of the ADA which apply to public and private services but do not include a duration standard.\(^{153}\) The NCD also has criticized the EEOC for suggesting that statutory protection should be denied for an employee when recovery is more rapid and the impact on the employer’s operations are reduced, while providing coverage if the disruption takes longer and the consequential burden on the employer is greater.\(^{154}\)

Generally, courts have held that the ADA will cover employees with conditions that are “potentially long-term, in that their duration is indefinite and unknowable,”\(^{155}\) but not conditions that are brief or foreseeably temporary.\(^{156}\) Subsequent to the Supreme Court’s holding in *Toyota* that an impairment must be “permanent or long term,”\(^{157}\) appellate court decisions expanded this interpretation to exclude “sporadic or otherwise temporary impairments” from covered substantial limitations.\(^{158}\) One lower court has said that in *Toyota*, the Supreme Court extrapolated, from some estimated numbers of those to be covered, that “severe restrictions of very important activities were what Congress had in mind.”\(^{159}\) Similarly, the Seventh Circuit has held that the *Toyota* Court’s inclusion of the “severely restricts” standard establishes that the

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\(^{152}\) *Aldrich v. The Boeing Company*, 146 F.3d 1265, 1270 (10th Cir. 1998).


\(^{154}\) *Id.*

\(^{155}\) See, e.g., *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 31 (1st Cir. 2000) (internal quotation marks omitted).

\(^{156}\) *Carroll v. Xerox Corp.*, 294 F.3d 231, 240-41 (1st Cir. 2002) (3 month leave for chest pains); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) (5 week leave & 4 month activity restriction because of depressive attack).

\(^{157}\) *Toyota*, 534 U.S. at 198.

\(^{158}\) See *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 276 (4th Cir. 2004); *Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (inability to work while recovering from wrist and elbow surgery did not qualify as a disability under the ADA); *Heintzelman v. Runyon*, 120 F.3d 143, 144-45 (8th Cir. 1997) (temporary back injury not covered); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (recovery from ankle injury and surgery not covered); *McDonald v. Pennsylvania*, 62 F.3d 92, 95-96 (3d Cir. 1995) (recuperation from abdominal surgery not covered).

\(^{159}\) *Guzmán-Rosario v. United Parcel Service Inc.*, 397 F.3d 6, 10 (1st Cir. 2005)(citing *Toyota*, 534 U.S. at 198).
standard for ADA coverage must “remain demanding” and not be weakened through reference to regulations or otherwise.\textsuperscript{160}

As the EEOC recommended, a court often takes into account the nature, severity, duration, and long-term impact of the impairment.\textsuperscript{161} An impairment is substantially limiting only if “an individual is ‘[s]ignificantly restricted as to the condition, manner or duration under which … the average person in the general population can perform that same major life activity.’ ”\textsuperscript{162}

The permanency of a claimant’s impairment may be used by an employer to show that he or she is not otherwise qualified for the position and therefore not covered by the ADA. Therefore, an employee or applicant must establish that the impairment is not so limiting that he or she cannot perform the duties of the position, either with or without a reasonable accommodation.\textsuperscript{163} But a claimant’s presentation of information regarding his remaining or improving ability to perform the duties of a position could often defeat his coverage by the ADA. For example, an employee with a significant back impairment failed to survive a motion for summary judgment even though he could not bend or carry heavy weight to perform daily tasks.\textsuperscript{164} Under Toyota’s “demanding standard,” the employee’s admissions regarding his improvement in his abilities prior to the alleged discriminatory supported the motion for summary judgment in favor of the employer, despite medical evidence that he still could lift no more than 10-20 pounds occasionally.\textsuperscript{165}

The improvement of an area store supervisor under the Fourth Circuit’s jurisdiction also defeated her ability to establish her disability, despite her limitations on lifting and working hours, under the Supreme Court’s guidance from Sutton and Toyota.\textsuperscript{166} Her nine month absence from work due to a back injury was insufficient in duration to establish a disability, where her medical evidence supported the temporary nature of the impairment, even though the doctor later determined that she was permanently disabled.\textsuperscript{167} This case provides an example of how evaluations which indicate improvement in an individual's impairment can be used by an

\textsuperscript{160}EEOC v. Sears, Roebuck & Co., 417 F.3d at 801 (citing Dvorak v. Mostardi Platt Assocs., Inc., 289 F.3d 479, 484 (7th Cir. 2002)).

\textsuperscript{161} Wood, 339 F.3d at 685 (citing 29 C.F.R. §1630.2(j)(2) (2002) and Cooper v. Olin Corp., Winchester Div., 246 F.3d 1083, 1088 (8th Cir. 2001)).

\textsuperscript{162} Moysis v. DTG Datanet, 278 F.3d 819, 825 (8th Cir. 2002) (quoting 29 C.F.R. §1630.2(j)(1)(ii)).

\textsuperscript{163} 42 U.S.C. § 12111(8).

\textsuperscript{164} Lytes v. District of Columbia Water & Sewer Auth. 572 F.3d 936, 943-44 (D.C. Cir. 2009).

\textsuperscript{165} Id. at 944.

\textsuperscript{166} Pollard v. High’s of Baltimore Inc., 281 F.3d 462, 468 (4th Cir. 2002).

\textsuperscript{167} Id. at 469.
employer to show that the impairment is only temporary, and therefore not substantially limiting.\footnote{168}

Like evidence of improvement in a claimant’s condition, the limited duration of an impairment has often defeated ADA coverage. But courts have varied on how long is long enough to establish coverage. Generally, limitations lasting up to several months without residual effects have been considered short-term and therefore do not establish ADA coverage.\footnote{169} Temporary conditions like broken bones or a temporary lifting restriction typically do not support ADA coverage.\footnote{170} Similarly, temporary mental health impairments lasting a short period of time typically do not provide for ADA coverage.\footnote{171}

Some courts have denied ADA coverage even if a claim meets the EEOC’s “several month” rule. For example, the Eighth Circuit dismissed the claim of a teacher whose restrictions were expected to last six months, even though they had already lasted for approximately four months.\footnote{172} Interestingly, the court refused to consider a subsequent workers’ compensation evaluation that she suffered a 60% permanent partial disability of her body as a whole.\footnote{173}

Similarly, the First Circuit dismissed the claim of an employee suffering from ovarian cysts for a period of at least seven months.\footnote{174} Referencing Toyota, the court noted that a condition must have a duration longer than "several months," which had been the same court’s previous standard.\footnote{175} The court instead suggested that the condition must last from six to twenty-four

\footnote{168 Id. (citing Mellon v. Fed. Express Corp., 239 F.3d 954, 956-57 (8th Cir. 2001); Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997)). See also Brunker v. Schwan’s Home Service Inc., 583 F.3d 1004, 1008 (7th Cir. 2009)(employee not covered where symptoms of MS were decreasing); Sánchez-Figueroa v. Banco Popular De Puerto Rico, 527 F.3d 209, 214 (1st Cir. 2008)(good prognosis for situational disorder defeated coverage).}

\footnote{169 Fram, supra note 57, 26 HOFSTRA LAB. & EMP. L.J. at 210.}

\footnote{170 See Vierra v. Wayne Memorial Hospital, 168 Fed. Appx. 492, 496 (3d Cir. 2006)(broken finger requiring a splint for one month not permanent or long term); Velarde v. Associated Regional and University Pathologists, 61 Fed. Appx. 627, 630 (10th Cir. 2003)(lifting impairment for less than two months not 'long-term'.)


\footnote{172 Samuels v. Kansas City School District, 437 F.3d 797, 800 (8th Cir. 2006).

\footnote{173 Id. at 802.}

\footnote{174 Guzman-Rosario, 397 F.3d at 9.

\footnote{175 Id. at 10.}}
months, but implied that more severe impairments might be covered even if they lasted for a shorter period.\textsuperscript{176}

Some courts have been much less demanding in their requirement of permanency. These courts tend to directly reference the EEOC guidelines. For example, the EEOC guidance has been interpreted as making it clear that the relevant time frame for determining a substantial limitation in sleep is measured in months, not years.\textsuperscript{177} Similarly, a police officer who suffered from major depression for about two years as an employee and at least an additional year thereafter survived a motion for summary judgment.\textsuperscript{178} This conclusion was based in part on medical testimony that his condition was recurrent and severe, would have long-term impact, and was likely to persist.\textsuperscript{179} These cases illustrate the variation in how long is long enough for a non-permanent impairment to establish ADA coverage.

Substantial limitation may also be lacking where a claimant is not continuously affected by the impairment. The ADAAA is fairly clear that a person with a chronic condition can establish ADA coverage based on the extent of the limitations at the time the condition is “active.” However, neither the ADAAA nor the regulations directly address how often the chronic condition must be active to establish ADA coverage. Prior to the ADAAA, courts often dismissed the claim of an employee or applicant with a chronic condition because the effects of that condition did not occur often enough. For example, an employee with chronic pancreatitis that caused him to miss a few days of work when his condition “flared up” was not covered by the ADA, because such “temporary effects do not amount to a substantial limit.”\textsuperscript{180}

Similarly, a brittle diabetic employee was unable to show that she was substantially impaired in the ability to care for herself or think, even though when she was unsuccessful in attaining a proper blood sugar level, she could not properly care for herself or think clearly.\textsuperscript{181} She failed to present evidence that she was so unsuccessful in monitoring her blood sugar levels that she was substantially limited in caring for herself, or in her ability to think.\textsuperscript{182} Likewise, another diabetic employee was not entitled to ADA coverage based on a limitation on his sight, despite infrequent episodes of blurred vision, because he was still able to engage in routine daily activities that

\textsuperscript{176} Id.

\textsuperscript{177} Desmond v. Mukasey, 530 F.3d 944, 958 (D.C. Cir. 2008).

\textsuperscript{178} Williams, 380 F.3d at 765.

\textsuperscript{179} Id.

\textsuperscript{180} Waldrip, 325 F3d at 656-57.

\textsuperscript{181} Fraser, 342 F.3d at 1035.

\textsuperscript{182} Id. at 1041-42. Accord Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002).
required sight.\textsuperscript{183} The court failed to specify whether he could perform these activities when he was experiencing the blurred vision.

Even the inability to continue working on a regular basis still was not always enough to establish ADA coverage based on an intermittent condition. For example, an employee with ADHD and depression was unable to establish a substantial limitation, despite numerous problems at work which both he and his psychologist attributed to his ADHD.\textsuperscript{184} The record lacked evidence that plaintiff “could not perform some usual activity compared with the general population, or that he had a continuing inability to handle stress at all times, rather than only episodically.”\textsuperscript{185} The failure of the inability to work to establish ADA coverage in these situations contrasts sharply with the cases discussed earlier, where the ability to work was relied upon to deny ADA coverage.

In contrast to those claims which were dismissed due to the temporary or episodic nature of the impairment, some courts recognized even before the ADAAA’s passage that employees with episodic conditions could be covered. Yet these claimants may have been successful because their symptoms occurred often enough. For example, an employee with end stage renal disease was able to show that his condition was sufficiently persistent to be substantially limiting, where to accomplish the equivalent of urination, he needed to use a dialysis machine three afternoons per week.\textsuperscript{186} The court relied on the fact that at all times relevant to the claim, he was restricted in his ability to urinate.\textsuperscript{187}

Similarly, an employee with chronic fatigue syndrome which was intermittent and temporary in its effects was still able to survive a motion for summary judgment.\textsuperscript{188} This ADA coverage was based on her testimony that her cognitive deficits occurred daily (even though she could perform some tasks during these periods), and suffered headaches at least three times a week and low-grade fevers in the afternoons.\textsuperscript{189} The appellate court found that she submitted sufficient

\begin{itemize}
\item \textsuperscript{183} Carreras v. Sajo, García & Partners  596 F.3d 25, 34 (1st Cir. 2010). See also Turner v. The Saloon Ltd., 595 F.3d 679, 689 (7th Cir. 2010)(employee not covered where psoriasis only occasionally limited ability to walk).
\item \textsuperscript{184} Calef v. The Gillette Company, 322 F.3d 75, 80-81 (1st Cir. 2003).
\item \textsuperscript{185} Id. at 86 (citing Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 31-32 (1st Cir. 2000); Soileau v. Guilford, 105 F.3d 12, 15-16 (1st Cir. 1997)). See also Corley v. Dept. of Veterans’ Affairs, 218 Fed. Appx. 727, 735 (10th Cir. 2007)(monthly seizures insufficient to establish Rehabilitation Act coverage).
\item \textsuperscript{186} Heiko, 434 F.3d at 252.
\item \textsuperscript{187} Id. at 257-58.
\item \textsuperscript{188} EEOC v. Chevron Phillips Co., 2009 U.S. App. LEXIS 12148 at *25.
\item \textsuperscript{189} Id. at *3-5.
\end{itemize}
evidence of limitations on her ability to care for herself based on her limitations on her ability to shower regularly, and her inability to cook, shop for food, zip up her own clothes, or even use the bathroom without her sister’s assistance. The court concluded that the indefinite nature of her impairment did not defeat her claim, even though she had gone fifteen years without symptoms before her relapse, because her chronic fatigue was more like epilepsy or multiple sclerosis than a temporary condition like a broken limb or influenza.

Some claimants have been successful in showing a substantial limitation even if their conditions affected them less frequently. Yet the courts still rely heavily on how frequently these “flare ups” occur. For example, an employee with psoriasis and psoriatic arthritis presented evidence to support the jury’s verdict in his favor regarding ADA coverage, even though his condition was episodic. This employee established a substantial limitation on his ability to walk during times when his condition “flared up.” The court of appeals distinguished another of its decisions which denied ADA coverage under the proposition that an intermittent “flare up” cannot support ADA coverage, because that case involved a plaintiff who only occasionally missed a few days of work due to his condition, described as “few and far between” by the court. This employee, in contrast, spent anywhere from about one-third to about one-half of each month unable to walk without excruciating pain. His ability to work during flare-ups did not undermine his ADA coverage, since he sat and stood to perform his work, and he based coverage on an inability to walk.

The ADAAA states that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” In addition, the EEOC has proposed regulations under the ADAAA which state that “an impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.” However, this limited guidance may be insufficient to address the question of “how long is long enough,” and

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190 Id. at *29 (citing Fenney v. Dakota, Minnesota & E. R. Co., 327 F.3d 707, 715 (8th Cir. 2003); EEOC v. United Parcel Serv., 249 F.3d 557, 562-63 (6th Cir. 2001); Desmond v. Mukasey, 530 F.3d at 956; McAlindin v. County of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999)).

191 Id. at *34-35 (citing Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 780 (6th Cir. 1998); Zande v. State of Wis. Dept of Admin., 44 F.3d 538, 544 (7th Cir. 1995); Ryan v. Grae & Rybicki, 135 F.3d 867, 871-72 (2d Cir. 1998)).

192 Carmona v. Southwest Airlines Co., 604 F.3d 848, 859 (5th Cir. 2010).

193 Id.

194 Id. at 858 (citing Waldrip, 325 F.3d at 652).

195 Id. at 850-51.

196 Id.


198 29 C.F.R. §1630.2(j)(2)(v).
the variations in approaching the question of an intermittent condition, as demonstrated by the decisions outlined above.

As with the ability to perform some activities, the limited duration or sporadic nature of an impairment may continue to be relied upon by court to dismiss a claim on summary judgment. This may be inappropriate given the heavily factual nature of the determination of how long or how often is enough to be substantially limiting. The expectation of a specific time period or frequency to support a claim also conflicts with direction from the Supreme Court that claimants deserve an individualized inquiry into whether their impairment is substantially limiting for them.

C. Comparison to the General Population

The interpretation of “substantially limits” has been significantly influenced by the comparison of a person’s limitations and remaining abilities to the abilities of members of the general population. Nothing in the original ADA required this comparison. The EEOC suggested in its original regulations that the coverage of the ADA depends on a comparison between the effects of the employee’s impairment and the abilities of the average person in the general population.\textsuperscript{199} Even though many claims have been dismissed for failure to present sufficient evidence of how a claimant’s abilities compare to those of the general population, little academic commentary on the ADA focuses on this “average person” requirement.\textsuperscript{200}

The comparison to members of the general population relates back to the emphasis of both the EEOC and the Supreme Court on individualized inquiry into the claimant’s limitations.\textsuperscript{201} Yet courts have used this case-by-case assessment to dismiss claims based on how incompetent the average person is by comparison.\textsuperscript{202} This has meant that someone with a debilitating impairment but who has more education or training than the “average person” may not be disabled enough.\textsuperscript{203}

Using this approach, some courts examine how a person functions generally and compares the disabled person with "normal" ones.\textsuperscript{204} This has resulted in disabled persons lacking the protection of the ADA, often based on showing that they are "qualified" to perform the duties of their job.\textsuperscript{205} Courts have also had a tendency to compare the limitations of the claimant at hand

\textsuperscript{199} 29 C.F.R. § 1630.2(j)(1) (2010).
\textsuperscript{200} Anderson, supra note 93, 57 Am. U.L. Rev. at 411. See also, Peter Blanck, et al., \textsc{Disability Civil Rights Law and Policy} § 3.2(B)(1) (2004).
\textsuperscript{201} Blanck, et al, supra note 200, at § 3.2(B)(1).
\textsuperscript{202} Anderson, supra note 93, 57 Am. U.L. Rev. at 411.
\textsuperscript{203} O’Brien, supra note 35, \textsc{Crippled Justice} at 50.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} at 215.
with other ADA plaintiffs who had similar limitations, using that previous court’s determination that that earlier plaintiff was not more limited than members of the general population.

Even though the Toyota Court referenced the EEOC regulations for some purposes, and agreed that an individualized inquiry is appropriate, that Court did not accept the EEOC’s approach of comparing how an employee’s ability compares to the abilities of others. The Toyota Court focused instead on the "large potential differences in the severity and duration of the effects" of certain impairments on the major life activity of performing manual tasks. This has not stopped lower courts from making this comparison to members of the general population on a motion for summary judgment.

Because "substantial limitation" is a subjective standard, its definition is subject to "social influences on what one recognizes as significant life activities and a "substantial limitation' of those activities." Therefore, a judgment call must be made as to what is “different enough” to constitute a significant deviation from the average person’s abilities. Like other interpretations of “substantially limits” discussed above, a jury rather than the court should be interpreting facts which determine whether a claimant is “substantially limited” compared to the general population, because the members of the jury are “the best judge of whether the experiences of an individual are outside the norm.” One commentator went so far as to say “[j]ury common sense is preferable to judge-made common sense when the issue is one of common experience.”

Under the ADA, some courts have been more than willing to make the judgment call comparing the claimant’s abilities to members of the general population. Particularly when considering the abilities of the general population, courts should recognize that the jury is in a better position to make that comparison. Despite the jury’s role, courts have often made those factual determinations to support the exclusion of a claimant from the ADA’s coverage. For example, one claim based on an inability to interact with others was dismissed in part based on the court’s

206 Vance, supra note 107, at 508.

207 Toyota, 534 U.S. at 196, 199.


209 Anderson, supra note 93, 57 AM. U. L. REV. at 414.

210 Anderson, supra note 93, 57 AM. U. L. REV. at 477.

211 Id.

212 Id.

213 Id.
conclusions regarding the cause of the employee’s limited interactions with her family, and its interpretation of facts showing that she had made friends at work.  

The commonality of dismissal of claims based on a claimant’s failure to make an influential comparison to the limitations of the general population, or based on the court’s comparison to other ADA plaintiffs, illustrates the difficulties faced by claimants under the ADA. Typically a plaintiff who fails to present sufficient evidence on how her limitations compare to the abilities of the general population will find her claim dismissed on a motion for summary judgment, unless she is “more disabled” than other plaintiffs who have come before her.

Some major life activities seem particularly susceptible to this requirement of comparison to the general population. For the activity of sleeping, commonly relied upon by ADA claimants, it has been difficult for an employee claiming a disability to show that disruption of their sleep is significant, particularly if the employee fails to compare herself to the general population. For example, an employee with depression was unable to establish ADA coverage based on her lack of sleep, even though her medical records reflected that she had disturbed sleep, she was diagnosed with sleep apnea, and was taking medication to help her sleep.

This court concluded that her testimony did not explain the severity of her sleep apnea compared to others in the general population. Similarly, she failed to establish a limitation on her ability to concentrate based on her conclusory statements that she had difficulty concentrating, in part because she did not compare herself to the general population. The burden is on the claimant to produce this information about the general population, so courts often dismiss a claim based on sleep deprivation without any substantive information about the average amount of sleep received by the general population.

Even when a comparison to others is made, a sleep deprived employee may not be substantially limited, according to many courts. Often employees have been unable to establish a disability based on a lack of sleep because difficulty in sleeping is widespread in the general population, among those who do not have a disability. To establish a substantial limitation in the ability to

214 Rohan, 375 F.3d at 275.

215 Heisler v. Metropolitan Council, 339 F.3d 622, 628 (8th Cir. 2003).

216 Id.

217 Id. at 629.

218 Id.

219 See, e.g., Nadler v. Harvey, No. 06-12692, 2007 U.S. App. LEXIS 20272 at *19 (11th Cir. August 24, 2007) (citing Rossbach v. City of Miami, 371 F.3d 1354, 1358 (11th Cir. 2004); Colwell, 158 F.3d at 644).
sleep, a claimant must present evidence that his or her inability to sleep is more severe than the inability to sleep suffered by the average person in the general population.  

In contrast to these uncovered employees, other employees have been able to show a substantial limitation on sleep activity based on either a comparison to others or to the claimant’s past behavior.  

Testimony by one employee that he was sleeping an average of three to five hours per night and then later only two to four hours each night was sufficient for ADA coverage, in light of the fact that after leaving his employment, he received approximately six hours of sleep per night. The court noted the lack of medical or expert testimony regarding his sleeplessness, but referenced the guidance that “a plaintiff’s personal testimony cannot be inadequate to raise a genuine issue regarding his own experience.” This lack of medical testimony may have been compensated by the employee’s comparison of himself to “the average person in the general population,” based on a study showing that seventy-one percent of adults get five to eight hours of sleep per night, which was not contradicted.

Vision is another major life activity for which employees have been required to compare the limitations on their sight to the average person in the general population. A court reviewing the claims of several applicants for driving positions with UPS held that for a monocular individual to show that his impairment is a disability, the impairment must prevent or severely restrict use of his eyesight compared with how unimpaired individuals normally use their eyesight in daily life. This court explained that “it does not follow that seeing as a whole is substantially limited just because the individual has a deficiency in some aspect of vision.” These applicants failed to present sufficient regarding how their vision compared to the average person in the general population.

Like the sleep deprived claimant above who relied on information about the abilities of the general population, a sanitation worker with night blindness was able to survive a motion for

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220 Id. See also Burks v. Wisconsin Dep’t of Transp., 464 F.3d 744, 755 (7th Cir. 2006)(difficulty sleeping for more than three hours is not substantial); Nuzum v. Ozark Auto. Distrib., Inc., 432 F.3d 839, 848 (8th Cir. 2005)(2 1/2 hours at a time and 5 hours a night is not substantially impaired); Swanson v. Univ. of Cincinnati, 268 F.3d 307, 314 (6th Cir. 2001)(less than 5 hours sleep generally not significantly restricted); Squibb, 497 F.3d at 784 (inability to sleep more than 3-4 hours per night due to back pain not substantially limiting).

221 Desmond, 530 F.3d at 955-56; Head, 413 F.3d at 1060 (5-6 hours of sleep enough to raise a genuine issue of material fact).

222 Desmond, 530 F.3d at 955-56.

223 Id. at 956 (citing Haynes, 392 F.3d at 482).

224 Id. (citing Harding v. Cianbro Corp., 436 F.Supp.2d 153, 175-76 (D. Me. 2006)).

225 EEOC v. United Parcel Service Inc., 306 F.3d 794, 803 (9th Cir. 2002).

226 Id.
summary judgment based on the rarity of his condition.\footnote{227}{Capobianco v. City of New York, 422 F.3d 47, 53 (2d Cir. 2005).} One of his medical experts offered evidence that his condition of congenital stationary night blindness affected only 1 in 10,000 people, and that he required more than 100 times as much light to see as did a normally-sighted person.\footnote{228}{Id. at 58.} He also offered evidence that his night blindness prevented him from driving at night or in dim light, which helped the extent of his limitation on seeing in general and in holding jobs that required driving at night.\footnote{229}{Id.} The court referred the claim to a jury, which would be able to conclude that an average person in the general population can drive at night.\footnote{230}{Id.}

More recently, the Ninth Circuit similarly held that a person whose visual impairment affected her ability to walk and drive safely after dark was a person with a disability under the ADA.\footnote{231}{Livingston v. Fred Meyer Stores, Inc., No. 08-35597, 2010 U.S. App. LEXIS 15044 at * 3 (9th Cir. July 21, 2010).} The court reversed the trial court’s dismissal of the claim on summary judgment under the EEOC’s regulations, since the average person can safely drive and walk at night.\footnote{232}{Id.}

These cases demonstrate the different approaches by courts with regard to evidence about the abilities of the general population compared to the claimant’s limitations. Some claims are dismissed without such a comparison, even on a motion for summary judgment, while other courts including the Ninth Circuit will allow a jury to use its common sense or general information about what people typically are able to do so as to make a determination on the ADA’s coverage.

A claimant may be denied ADA coverage despite significant limitations on a major life activity if the claimant is still able to be relatively successful, compared to the achievements of members of the general population. This is similar to a court’s focus on the person’s abilities rather than on the extent of their limitations, discussed above. Courts will consider the abilities on the claimant and make a comparison to abilities that are generally found in others, rather than asking whether this person is more or less limited than others who have similar training and education.

This approach makes it extremely difficult for a well-educated or well-trained person to gain ADA coverage. For example, an employee with ADHD and depression was unable to establish that these impairments substantially affected his ability to learn, compared to the general population.\footnote{233}{Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm., 370 F.3d 763, 769-70 (8th Cir. 2004).} The fact that he found certain subjects or educational contexts challenging or
frustrating was not enough to defeat summary judgment, where he had graduated from high school, successfully completed the first two years of a training program, passed some (but not the majority) of the tests in the program, and held a full-time job.\textsuperscript{234} The court dismissed the claim based on the lack of evidence on how the average person in the general population would perform in the highly specialized courses the claimant was taking.\textsuperscript{235}

By comparing a claimant to anyone in the general population rather than a person with comparable training or skills, the courts are failing to make an individualized inquiry, as suggested by the Supreme Court and the EEOC.\textsuperscript{236} Moreover, the courts are ignoring the effects of the impairment on that particular claimant, who might need more than average abilities to continue to function both at home and at work. Such a comparison also fails to recognize the difference between that particular claimant’s abilities before and after the onset of their impairment.

While giving recognition to this notion of comparing a claimant to members of the general population, courts have often conducted such a comparison by measuring the abilities of an employee asserting coverage of the ADA against other plaintiffs who have come before them. This is an easy way for courts to support the dismissal of an ADA claim on summary judgment. However, comparison to a few other plaintiffs does not equate with consideration of the abilities of members of the general population. At most, the second court is relying on the first court’s comparison of that first plaintiff’s abilities to those of the general population. In addition, reliance on such comparison across types of disabilities and personal work and home situations flies in the face of the requirement of the Supreme Court and the suggestion of the EEOC that courts conduct an individualized assessment of a person’s coverage.

In addition to looking for evidence on the abilities of the general population, courts hearing claims based on an inability to sleep commonly have compared the limitations of the claimant in question to another plaintiff or two to find that the current claimant is not covered by the ADA. For example, an employee who could not sleep more than five hours per night and whose sleep was not restful because of his eczema was not covered by the ADA based in part on a comparison to one other plaintiff who was not covered by the ADA despite an inability to sleep more than five hours.\textsuperscript{237}

This same employee also failed to show a substantial limitation on his ability to care for himself, despite his testimony regarding his limitations in cleaning himself and wearing normal clothes, when found to be less impaired than one other plaintiff with psoriasis and a second plaintiff with

\textsuperscript{234} \textit{Id.} at 766-67.

\textsuperscript{235} \textit{Id.} at 770.

\textsuperscript{236} Toyota, 534 U.S. at 198; 29 C.F.R. §1630.2(j).

\textsuperscript{237} \textit{Verhoff v. Time Warner Cable Inc.}, 299 Fed. Appx. 488, 492 (6th Cir. 2008)(citing Swanston v. Univ. of Cincinnati, 268 F.3d 307, 314 (6th Cir. 2001)).
allergies in another unpublished case.\textsuperscript{238} Using the same methodology, the court compared his limitations on his ability to think due to his eczema to one plaintiff with a mental illness that affected memory and focus, despite his testimony that the impairment was so distracting that his cognitive processes were impaired.\textsuperscript{239}

As that case illustrates, courts often make cross-case comparisons even if the impairments are completely different. Courts also do not seem concerned that the circumstances of an individual claimant may make a condition more limiting, disregarding the emphasis of the Supreme Court and the EEOC on individualized inquiry.\textsuperscript{240} In addition, these comparisons do not consider the claimant’s previous abilities as a point of reference for determining if the impairment has limited those abilities.

Instead, this comparison to other plaintiffs seems to hold more weight than a comparison to the claimant’s previous abilities prior to the onset of his or her impairment. For example, an employee’s testimony that he slept fewer hours than he felt he needed was disregarded in favor of evidence that his average amount of sleep was greater than the sleep average by other plaintiffs who had been found to lack the coverage of the ADA by other courts.\textsuperscript{241} This comparison to other ADA plaintiffs was more influential for the court than the employee’s medical testimony that his condition “substantially limited his sleep activity compared to the normal population” and the health care provider’s opinion that the claimant was suffering “a severe sleep disorder,” which was relegated to a footnote.\textsuperscript{242} At the same time, this court noted that assessment must be made on a case-by-case basis.\textsuperscript{243}

Learning difficulties have also been compared across plaintiffs to support a motion for summary judgment finding no ADA coverage. For example, the Eighth Circuit compared the limitations of a person with learning difficulties because of his ADHD and depression to another plaintiff who was unable to establish ADA coverage based on her emotional impairments which

\textsuperscript{238} Id. at 493 (citing Cehrs v. Northeast Ohio Alzheimer Research Center, 155 F.3d 775, 781 (6th Cir. 1998); Cantrell v. Nashville Electronic Serv., No. 97-5839, 1999 U.S. App. LEXIS, 1999 WL 68571, at *3 (6th Cir. 1999)).

\textsuperscript{239} Id. (citing Head, 413 F.3d at 1061). See also, EEOC v. Chevron Phillips Co., 570 F.3d at 31-32 (comparing her limitations to other plaintiffs with different impairments but had similar limitations).

\textsuperscript{240} Toyota, 534 U.S. at 198; 29 C.F.R. § 1630.2(j).

\textsuperscript{241} Nadler, 2007 U.S. App. LEXIS 20272 at *20. See also Simpson v. Vanderbilt University, 359 Fed. Appx. 562, 564, 567 (6th Cir. 2009)(comparing sleep of 2½-3 hours per night to other plaintiffs’ sleep) (citing Boerst v. Gen. Mills Operations, 25 Fed. App’x 403, 407 (6th Cir. 2002); Greathouse v. Westfall, 212 Fed. App’x 379, 383 (6th Cir. 2006) (dismissal based on only general statements from plaintiff and his doctors about his sleep problems); Squibb, 497 F.3d at 784 (unsupported assertions about amount of sleep insufficient).

\textsuperscript{242} Id. at * 21 n. 7.

\textsuperscript{243} Id.
prevented her from passing a few highly specialized courses.\(^{244}\) Both plaintiffs had difficulty passing examinations for their respective professions, but their conditions and the requirements of the examinations were completely different.

Courts have even made more specific comparisons across plaintiffs. In deciding that Dawn Holt, an employee of a mental health clinic, was not substantially limited in performing manual tasks despite the limitations caused by her cerebral palsy, the appellate court compared her limitations in eating and caring for herself to other plaintiffs who were restricted from performing a few specific tasks, but could perform a variety of manual activities.\(^{245}\) The court also compared her to other plaintiffs whose impairment restricted them from performing a wider range of manual tasks.\(^{246}\) Despite her personal testimony that she needed help when chopping, cutting, and slicing food, and cutting her nails, the court dismissed her claim, concluding that a rational jury could not find that she was substantially limited in her ability to perform manual tasks.\(^{247}\)

A comparison of the current claimant can continue back for several generations of cases. For example, the comparison across plaintiffs continued beyond Ms. Holt, described above. A year after that decision, the same court compared an employee with multiple sclerosis (MS) to Ms. Holt.\(^{248}\) The court concluded that the employee with MS was likewise not disabled, because she could perform manual tasks “with sufficient rest” and could rely on her family members to perform some tasks, even though she had testified that she was frequently unable to perform several life activities, such as lifting and performing household chores, because of her fatigue.\(^{249}\)

This comparison across plaintiffs also has been used to deny coverage of a claimant who bases ADA coverage on restrictions on an ability to work. For example, a registered nurse with a back condition that limited her abilities to lift and stand could not establish a substantial limitation of her ability to work despite her testimony that she could not perform any nursing jobs that involved patient care.\(^{250}\) Even though the court recognized that the ADA requires “case-specific, individualized inquiry,” it granted summary judgment for the hospital by comparing her limitations to those of other plaintiffs, both nurses and others, who had the same lifting

\(^{244}\) Ristrom, 370 F.3d at 770 (citing Leisen v. City of Shelbyville, 153 F.3d 805, 806, 808 (7th Cir. 1998)).

\(^{245}\) Holt, 443 F.3d at 766 (citing Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 797 (9th Cir. 2001); Chanda v. Engelhard/ICC, 234 F.3d 1219, 1223 (11th Cir. 2000)).

\(^{246}\) Id. (citing Emory v. AstraZeneca Pharmaceuticals LP, 401 F.3d 174, 181 (3d Cir. 2005).

\(^{247}\) Id. at 767.

\(^{248}\) Berry v. T-Mobile USA Inc., 490 F.3d 1211, 1218 (10th Cir. 2007) (citing Holt, 443 F.3d at 767).

\(^{249}\) Id. at 1215.

\(^{250}\) Squibb, 497 F.3d at 778-79.
restiction.\textsuperscript{251} The court did not consider any difference in job duties between the claimant and these other plaintiffs. It is notable that the courts sometimes referenced the commonality of back issues among all workers whom the court assumed were “not disabled.”\textsuperscript{252}

Like this nurse, claimants with lifting restrictions are often compared to other plaintiffs with similar restrictions. For example, one grocery store clerk who had been restricted to lift no more than 40 pounds occasionally and 10-15 pounds frequently was unable to establish a significant limitation on his ability to lift.\textsuperscript{253} The court compared his abilities to plaintiffs in other ADA cases, without regard to his particular lifting needs or personal situation, and found that he could lift more than others who had not been covered by the ADA.\textsuperscript{254} The court noted that other appellate courts had been even more stringent in their lifting restrictions as a basis for coverage.\textsuperscript{255}

Common limitations like back problems may not be enough to establish an ADA disability, particularly when shared by earlier unsuccessful ADA plaintiffs. For example, an employee who suffered a back injury that prevented both standing for long periods without a break and standing on one leg was compared to another employee who was unable to walk or stand for more than 50 minutes, as well as other plaintiffs who lacked an ability to stand for long periods, all of whom were not covered by the ADA.\textsuperscript{256} In denying these claims, courts may be reacting to the fears expressed by the \textit{Toyota} Court that a broad interpretation of ADA coverage could result in a large proportion of the workforce being covered by its protections.\textsuperscript{257}

\textsuperscript{251} \textit{Id. at 782} (citing \textit{Mays v. Principi}, 301 F.3d 866, 869-70 (7th Cir. 2002); \textit{Contreras v. Suncast Corp.}, 237 F.3d 756, 763 (7th Cir. 2001)).

\textsuperscript{252} \textit{Id.} (citing \textit{Mays v. Principi}, 301 F.3d at 869).

\textsuperscript{253} \textit{Rakity v. Dillon Cos.}, 302 F.3d at 1159-60.

\textsuperscript{254} \textit{Id. at 1160} (citing \textit{Lusk v. Ryder Integrated Logistics}, 238 F.3d 1237, 1240-41 (10th Cir. 2001)).

\textsuperscript{255} \textit{Id.} (citing \textit{Pryor v. Trane Co.}, 138 F.3d 1024, 1025 n.2 (5th Cir. 1998) (20 pounds); \textit{McKay v. Toyota Motor Mfg., U.S.A., Inc.}, 110 F.3d 369, 373 (6th Cir. 1997) (10 pounds); \textit{Wooten v. Farmland Foods}, 58 F.3d 382, 384, 386 (8th Cir. 1995) (10-20 pounds); \textit{Thompson v. Holy Family Hosp.}, 121 F.3d 537, 541 (9th Cir. 1997) (25 pounds).

\textsuperscript{256} \textit{Williams v. Excel Foundry & Machine Inc.}, 489 F.3d 309, 312 (7th Cir. 2007) (citing \textit{Taylor v. Pathmark Stores, Inc.}, 177 F.3d 180, 186 (3d Cir. 1999); \textit{Dupre v. Charter Behavioral Health Sys. of LaFayette, Inc.}, 242 F.3d 610, 614 (5th Cir. 2001); \textit{Colwell}, 158 F.3d at 644; \textit{Oesterling v. Walters}, 760 F.2d 859, 861 (8th Cir. 1985)). \textit{See also Lytes v. District of Columbia Water & Sewer Auth.}, 572 F.3d at 944 (citing \textit{Colwell}, 158 F.3d at 644; \textit{Marinelli v. City of Erie}, 216 F.3d 354, 363-64 (3d Cir. 2000); \textit{Duncan v. Wash. Metro. Area Transit Auth.}, 240 F.3d 1110, 1116 (D.C. Cir. 2001)).

\textsuperscript{257} \textit{Toyota}, 534 U.S. at 197.
Like the sleep cases discussed earlier, a comparison to other unsuccessful ADA plaintiffs with an inability to lift often influences the outcome. One court even suggested that even if the plaintiff presented it with additional evidence concerning his restrictions, it would not have affected the decision to dismiss. That court, like others, placed greater importance on other courts’ rejection of claims of disability based on an inability to lift similar weights.

This ad hoc method of determining what limitation on lifting is substantial has led to inconsistent results. There are a number of simple lifting cases that assert a twenty-five pound restriction is not substantially limiting, and other courts have found that a ten or fifteen pound restriction was insufficient as a matter of law, despite evidence of restrictions on the claimant’s daily activities. Yet in other cases, a twenty-pound restriction was substantial enough to raise a jury question on limited comparative evidence.

Courts are being “inherently inconsistent” by insisting on comparative evidence and then ruling as a matter of law that certain limitations like lifting are not substantial enough based on the person’s particular weight limitation alone. Instead, a court should be considering the impact on the individual plaintiff or a true expert evaluation of deviation from the average abilities of the general population.

Even in claims based on such an individualized activity as the inability to interact with others, courts have compared that employee to other plaintiffs who have asserted a limitation on the same life activity. For example, one court compared an employee with bipolar disorder to another employee with obsessive compulsive disorder who was not covered by the ADA.

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258 Marinelli, 216 F.3d at 363-64.

259 Id.


262 See, e.g., Zarzycki v. United Tech. Corp., 30 F. Supp. 2d 283, 289 (D. Conn. 1998)(lifting restriction interfered with work, citing Snow v. Ridgeview Medical Center, 128 F.3d 1201, 1207 (8th Cir. 1997)); Marinelli, 216 F.3d at 364; Mays, 301 F.3d at 868-70 (restriction of 10 pounds, no work at or above shoulder level, and no patient lifting).


265 Id.
apparently because they both had problems interacting with coworkers. Like employees who have not been covered because they can perform at least some life activities, these employees were not covered because they did not establish that they had problems with interacting with others outside of work.

Similarly, an actor was not substantially limited in her interactions with others compared to the plaintiff in the Ninth Circuit case which recognized such a disability. The court reasoned that because the claimant was not as reclusive as the other covered plaintiff, she was not substantially limited, despite her testimony that her impairments caused her to avoid interaction with her family, avoid making friends or having a social life, and caused her to have “episodes,” during which her employer admitted that she was unable “to behave in a normal manner.” So even for such a “personal” disability as the inability to interact with others, courts have rejected an individualized approach in favor of comparing the current claimant to other plaintiffs with somewhat similar limitations.

These comparisons to other plaintiffs are more rarely used to support a decision to deny a motion for summary judgment for the employer. For example, an employee who was required to refrain from prolonged walking, frequent bending, or stooping with the knee or standing for more than two hours survived a motion for summary judgment based on the court’s comparison of him to another employee who also was limited in his ability to walk or stand and had a similar impairment rating. Similarly, in a brief discussion of why she had not ADA coverage, another court compared an employee with an inability to sit for more than two hours without a break to just one other plaintiff who had been denied ADA coverage despite an inability to sit for more than thirty minutes. Of course, the success of these claimants depended on which ADA plaintiffs were chosen for comparison to their limitations.

The ADAAA and the EEOC’s proposed regulations may be insufficient to address the common practice among courts of requiring evidence of the abilities of others in the general population while disregarding the claimant’s own account of their limitations, and the even more common practice of comparing claimants to other plaintiffs with somewhat similar limitations. The proposed EEOC regulations do suggest a shift to comparing the claimant to “most people” in the general population rather than the average person. However, there is no guarantee that the courts will discontinue their requirement of expert testimony. Instead, courts may still require evidence

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266 Doebele, 342 F.3d 1129-30.
267 Id. at 1130 (citing Steele v. Thiokol Corp., 241 F.3d 1248, 1254-55 (10th Cir. 2001)).
268 Rohan, 375 F.3d at 274 (citing McAlindin, 192 F.3d at 1234).
269 Id. at 275.
271 Maclin v. SBC Ameritech, 520 F.3d 781, 787 (7th Cir. 2008) (citing Squibb, 497 F.3d at 781).
supporting a comparison to the abilities of “most people” rather than the average person in the general population.

Courts may also still continue to use the somewhat similar limitations of other plaintiffs’ who have been excluded from ADA coverage to justify the dismissal of new claims, despite personal or even medical testimony regarding the extent of the limitation. As with the reliance on the ability to perform other tasks and the consideration of the duration or frequency of the impairment, these comparisons by the courts tend to take the fact-reliant interpretation of “substantially limits” away from the juries.

D. Professional Evidence of Impairment

Many ADA claims have been dismissed based on a lack of reliable professional testimony to establish that the claimant is substantially limited in a major life activity. Yet the original ADA did not address the role of expert testimony from medical professionals or vocational experts in establishing the scope of the ADA’s coverage.\textsuperscript{272} The legislative history for the original ADA is also silent on this issue.\textsuperscript{273} Even the EEOC’s original regulations failed to indicate whether medical evidence was required to establish the substantial nature of the disability.

The legislative history of the ADA does suggest that a comparison to an "average" person should not be based on a scientifically precise calculation, which likely would come from an expert witness.\textsuperscript{274} Instead, that history suggests that the determination of coverage should be based on commonly understood human capabilities.\textsuperscript{275} The House Report provides this one example: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."\textsuperscript{276} This “non-scientific” language from the ADA’s legislative history suggests that a finding of substantial limitation can be based on a common sense understanding of the claimant’s limitations, and does not support a conclusion that Congress had an exacting standard in mind.\textsuperscript{277}


\textsuperscript{273} Id. at 14.

\textsuperscript{274} Anderson, supra note 93, 57 Am. U.L.Rev. at 416.

\textsuperscript{275} Id.


\textsuperscript{277} Anderson, supra note 93, 57 Am. U. L. Rev. at 417.
The EEOC provides some support for requiring expert testimony to establish a substantial limitation on the ability to work. With respect to the limitation on the ability to work, the EEOC guidance stated that

[t]he terms ‘number and types of jobs,’ … , are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. ‘few,’ ‘many,’ ‘most’) from which an individual would be excluded because of an impairment.”

This section suggests that even vocational expert testimony should not be required.

The lack of additional guidance from either the ADA or the EEOC regulations has led to a variety of approaches among courts either presented with expert testimony or who seek but do not receive it. Unfortunately, neither the ADAAA nor the proposed EEOC regulations interpreting the amendments provide much additional guidance on this influential issue.

Even though the EEOC did not address the use of medical evidence directly in its original regulations, some experts believe that the regulations’ emphasis on individualized assessment gave courts the basis for requiring expert testimony to establish the coverage of the ADA. The ADA regulations only state that specific information is required regarding the impact of the impairment on the plaintiff, along with comparative evidence regarding how that impact compares with limitations experienced by the average person in the general population.

The 1997 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities provides stronger indication of the agency’s preference for expert testimony:

Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/
her family members, friends, or coworkers may suffice.\footnote{281}

In contrast, in the part discussing the Title I (employment) definition of the term "disability" contained in the Commission's ADA Compliance Manual, a publication directed at EEOC investigators, the EEOC suggests that medical documentation may be necessary as part of an investigation, if the claimed disability is not "obvious" to the investigator.\footnote{282} In those situations, the investigator should take steps to obtain medical documentation.\footnote{283} A footnote also states that medical documentation may be necessary to determine if the impairment results in a substantial limitation of one or more major life activities.\footnote{284}

The Supreme Court has not specifically addressed the issue of whether medical or other professional evidence should be required to establish ADA coverage. After the passage of the ADA, the \textit{Albertsons} Court stated generally that the burden to establish a substantial limitation should not be "onerous."\footnote{285} One expert has interpreted this decision as allowing ADA plaintiffs to prove a disability by offering evidence that the extent of the limitation in terms of their own experience.\footnote{286} One can interpret this decision as establishing that insisting on additional "scientific" evidence of average is unnecessary in many cases.\footnote{287}

Since the ADA regulations and the Supreme Court require an individualized case-by-case review of the impact of an alleged impairment on the individual, the court should focus on the claimant’s individual experience of her disability, particularly as it impacts her major life activities. The claimant has the most direct information about these facts.\footnote{288} Therefore, courts’ focus should be on "barriers in that person's environment," rather than requiring evidence of the medical details about the impairment.\footnote{289} S discussed in more detail below, some courts follow this reasoning and allow a claimant to establish his or her ADA coverage


\footnote{283}Id.

\footnote{284}Id.

\footnote{285}\textit{Albertson's}, 527 U.S. at 566-67.

\footnote{286}Anderson, \textit{supra} note 93, 57 AM. U. L. REV. at 475.

\footnote{287}Id.

\footnote{288}Smith, \textit{supra} note 272, 82 TUL. L. REV. at 70.

\footnote{289}Id. at 74.
using the common sense and life experience of the fact finder, allowing the jury to rely on just
enough evidence to “alert the jury to the individualized nature of her limitations.”290

More often, though, courts criticize and even exclude a claimant’s evidence about the impact
of his or her own impairment because the claimant’s testimony is “self serving” and therefore
insufficient to prevent summary judgment for the employer. 291 Yet generally accepted rules
of evidence would allow an employee to testify regarding medical information which is within
his or her knowledge, including one’s "general condition" and symptoms, as well as the impact
of that condition on daily life.292 Under these general rules, an employee’s opinion about her
own condition is admissible so long as her opinion is "rationally based" upon her own
perception of the condition, rather than upon "scientific, technical, or other specialized
knowledge."293

Despite the fact that claimants often have the most information about the extent of their
impairments, some courts have excluded their testimony on this issue. For example, one trial
court held that the claimant was incompetent to testify about the impact of his HIV infection
on his ability to reproduce, and his claim was dismissed without medical evidence on the
issue.294 Similarly, another claimant was not allowed by a trial court to testify that she had
been diagnosed with certain impairments, although she could generally describe her
"condition."295

Even when the claimant is allowed to present information about the impact of his or her
impairment, a good number of ADA claims have been dismissed based on a failure to present
medical or other professional evidence to establish the extent of the claimant’s limitation.
Several judges have specifically noted that a failure to include expert medical evidence was
the primary basis for granting summary judgment for the employer.296 These courts give
medical evidence a “central and indispensable role” in deciding motions for summary
judgment based on a lack of ADA coverage.297

This “medical model” approach has been criticized by those who view the ADA as an
extension of other civil rights protections. Professor Smith contrasts the medical evidence

290 Anderson, supra note 93, 57 Am. U. L. Rev. at 424-25.
291 Smith, supra note 272, 82 Tul. L. Rev. at 66.
292 Id.
293 Id. at 68.
296 Smith, supra note 272, 82 Tul. L. Rev. at 20.
297 Id.
requirement for ADA plaintiffs with claims of religious discrimination plaintiffs, which are rarely if ever dismissed on a motion for summary judgment because they fail to present expert testimony regarding the sincerity or their religious beliefs, even if there is some question as to their credibility.\textsuperscript{298}

Reliance on expert testimony focuses on the physical effects of an impairment on the claimant rather than its effects on the claimant in their work and home environment. Critics of the medical model have stated that the medical evidence requirement is based on the perspective that the employee's limitations arise only because of a "defective, or abnormal, or pathological feature," rather than the limitations presented by the workplace.\textsuperscript{299}

A requirement of providing expert testimony in defense of a motion for summary judgment furthers the focus on the pathology of the person’s impairment, which is characteristic of the medical model discussed above, rather than considering the “externally-imposed barriers that limit a person's access to all segments of society.”\textsuperscript{300} This focus undermines the role of the ADA as a civil rights statute meant to decrease discrimination, rather than relying on a person’s abilities to exclude them from that protection.\textsuperscript{301}

In dismissing claims, courts often distinguish between a health care provider’s finding of an “impairment” and a conclusion that the impairment is substantially limiting. For example, one court held that the report of a claimant’s doctor was “conclusory” and failed to raise a genuine issue of material fact that the claimant’s inability to localize sound was an impairment that substantially limited the major life activity of hearing.\textsuperscript{302} Combined with an unwillingness to rely on the claimant’s testimony as to the extent of his or her limitations, this approach places a significant burden on claimants to obtain in depth information about the effects of the impairment from their health care provider.

Experts also have criticized the reliance on medical evidence to interpret “substantial limitation” because health care providers might not be most proficient in providing the information that is most relevant to that determination.\textsuperscript{303} Even though health care providers can measure average capacity versus diminished capacity, they may not be sufficiently able to measure how an impairment does or does not satisfy the statute’s definition of “disability.”\textsuperscript{304}

\textsuperscript{298} Id. at 38.
\textsuperscript{299} Id. at 12-13.
\textsuperscript{300} Anderson, supra note 93, 57 AM. U. L. REV. at 414-15; Smith, supra note 272, 82 Tul. L. Rev. at 3.
\textsuperscript{301} Id.
\textsuperscript{302} Walton v. U.S. Marshals Service, 492 F.3d 998, 1008 (9th Cir. 2007)(citing Broussard v. Univ. of Cal., at Berkeley, 192 F.3d 1252, 1258-59 (9th Cir. 1999)).
\textsuperscript{303} Anderson, supra note 93, 57 AM. U. L. REV. at 467.
\textsuperscript{304} Id. at 470.
This inability comes from a health care provider’s focus on symptoms and treatment rather than a comparison of that individual to some average ability amongst the general population.\(^{305}\)

Relying on medical evidence to interpret the scope of a “substantial limitation” poses difficulties of proof for claimants. Because courts are treating "average" as an issue of medical science, the comparative evidence must have sufficient scientific validity to be admissible, and must assist the trier of fact in understanding a fact in issue. This information may not be available, if there is no science of "average" in regard to the impairment at issue.\(^{306}\) For example, one court rejected the testimony of a physician who used a percentile formula to compare a plaintiff’s ten-pound lifting restriction to the overall population, where the court found that the physician’s report provided no basis for the percentile comparison.\(^{307}\)

If neither the ADA nor the regulations clearly require medical evidence to establish a substantial limitation, what is the basis of this requirement? The expectation of medical evidence could arise from courts’ skepticism about the genuine extent of a claimant’s limitations.\(^{308}\) The concern about malingering is demonstrated by courts' “persistence in assigning physicians the role of screening out specious claims of disability.”\(^{309}\) Consequently, a claim is often dismissed if a claimant’s description of her impairment varies with the health care provider’s description, even though this can be seen as a disputed issue of fact to be resolved by a jury.\(^{310}\)

This deference to the health care provider’s view may be inappropriate, especially on summary judgment, because the provider may not be fully aware of the obstacles faced by the claimant, since these factors may not be relevant to their diagnosis and treatment.\(^{311}\) Several studies also point out that physicians may be unable to accurately judge patients' subjective complaints, especially pain.\(^{312}\)

\(^{305}\) Id.

\(^{306}\) Id. at 471.


\(^{308}\) Id.

\(^{309}\) Smith, supra note 272, 82 Tul. L. Rev. at 40-41.

\(^{310}\) Id. at 41.

\(^{311}\) Id. at 57.

In ADA cases, courts have tended to look to expert witnesses to make credibility determinations and take away the fact-finding role of the jury by interpreting evidence about issues that should be decided by the finder of fact, including whether or not the plaintiff is reliable.\textsuperscript{313} At the same time, doctors do not claim to be able to ascertain disability or malingering or to accurately assess limitations on major life activities to any degree of accuracy.\textsuperscript{314} In addition, medical research establishes that physicians cannot reliably detect malingering.\textsuperscript{315}

Dismissing claims on summary judgment based on a lack of medical evidence may be undermining the role of juries in ADA claims. By excluding or discounting the testimony of claimants regarding the extent of their limitations, juries are not being allowed to determine the validity of those limitations.\textsuperscript{316} Instead, expectations of medical evidence to defend against summary judgment motions places requirements on ADA claimants that are beyond the statutory requirements and which misapply the core principles of summary judgment analysis.\textsuperscript{317}

In reviewing a motion for summary judgment, a court should not weigh the evidence to determine if the claimant is substantially limited in a major life activity, but should only determine if there is a genuine issue of material fact for trial.\textsuperscript{318} Juries should make the factual determination as to whether a claimant is truly disabled or is overstating her limitations to gain ADA’s protections, since the probative value of both expert and non-expert testimony is a question for the fact finder.\textsuperscript{319}

\footnotesize{Between Patients’ and Physicians’ Health Perceptions: The Patient-Physician Discordance Scale,” 26 J. BEHAV. MED. 245, 260 (2003).}


\footnotesize{314 Smith, supra note 272, 82 TUL. L. REV. at 4.}


\footnotesize{316 Smith, supra note 272, 82 TUL. L. REV. at 30, 36.}

\footnotesize{317 Id.}

\footnotesize{318 Id. at 35 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).}

\footnotesize{319 Id. at 4.}
Despite the lack of requirements for expert evidence in the ADA, courts often have required expert evidence that clearly outlines what is "average" and how the claimant deviates from that standard.\textsuperscript{320} Comparative evidence is required even more often where the disability is not plain "on its face."\textsuperscript{321} Thus, some courts are willing to allow fact finders to determine ADA coverage without expert testimony if the effects of the impairment are obvious, such as a person confined to a wheelchair being substantially limited in the major life activity of walking.\textsuperscript{322} Although courts do sometimes recognize that some impairments are obviously limiting, many courts will still fail to credit evidence from non-experts, including the claimants themselves, that is sufficient for the fact finder to judge whether the impairment presents a substantial limitation.\textsuperscript{323}

Some courts place so much value on medical or other expert evidence that a jury will play a more influential role if they agree with that evidence. For example, a jury verdict in favor of an employee with depression, anxiety and obsessive-compulsive disorder was upheld on appeal based on medical evidence establishing the extent of the employee’s impairment.\textsuperscript{324} The employer challenged the verdict based on the physician’s credibility, but the court concluded that the credibility of the physician’s testimony was a question of fact that should be resolved by the jury.\textsuperscript{325}

Medical evidence can also help a claimant survive a motion for summary judgment. For example, a utility company employee who was unable to sit for more than three hours per day survived a motion for summary judgment because in granting the motion, the lower court had mischaracterized the medical evidence submitted, particularly where that testimony was consistent with the employee’s own testimony that sitting during the training was “difficult” and that “others noticed his discomfort.”\textsuperscript{326} The court concluded that the employee’s ability to sit was “significantly more restricted than the average person.”\textsuperscript{327}

For some courts, for the purposes of both summary judgment and trial, an individual’s testimony may be sufficient to support a finding against the defendant, assuming that the witness can present admissible testimony on each element of the claim.\textsuperscript{328} For example, the lack of a thumb

\textsuperscript{320} Anderson, supra note 93, 57 Am. U. L.Rev. at 424-25.
\textsuperscript{321} Id. at 430.
\textsuperscript{322} Id. at 433.
\textsuperscript{323} Id. at 474.
\textsuperscript{324} Battle v. United Parcel Service Inc. 438 F.3d 856, 862 (8th Cir. 2006).
\textsuperscript{325} Id. (citing Kammueller v. Loomis, Fargo & Co., 383 F.3d 779, 788 (8th Cir. 2004)).
\textsuperscript{326} Jenkins v. Cleco Power LLC, 487 F.3d 309, 315 (5th Cir. 2007).
\textsuperscript{327} Id. (citing 29 C.F.R. §1630.2(j)(1)(ii)).
\textsuperscript{328} Smith, supra note 272, 82 Tul. L. Rev. at 32-33.
and a finger on the right hand of an employee was sufficient to defeat a motion for summary judgment under the *Toyota* standard to establish a significant limitations in caring for oneself. The court relied on the claimant’s testimony that it took him twice as long to perform tasks like shaving or preparing a meal, but he also submitted a supportive letter from his doctor that confirmed these difficulties. It is important to note that the employer did not produce contradictory medical evidence, only attacking this employee’s credibility.

In contrast to “less obvious” impairments like lifting restrictions or limitations on working, some conditions have been seen as sufficiently "obvious" and therefore did not require expert testimony at least to survive a summary judgment motion. Those conditions have included arm and neck pain, back and abdominal pain, and hearing loss. Thus, claimants with physically obvious impairments may be more likely to survive a motion for summary judgment. For example, an employee who lost his thumb and part of a finger and presented general evidence from his doctor that it took longer for him to perform personal tasks such as changing his clothes, as well as his own statement that it took twice as long as the average person to perform other care tasks such as bathing and preparing a meal.

Even some lifting restricted claimants have not required medical evidence, where the limitations are based on an obvious physical condition. For example, an applicant for an EMT position who could not perform the two hand lift because of her lack of a hand and lower arm on one side was able to establish ADA coverage. Even without any medical testimony, the court recognized that a one-handed individual must develop an array of skills to overcome her obvious limitation. Similarly, the Tenth Circuit accepted, with little question, a fifteen-pound weight

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330 *Id.* at 715-16.

331 *Id.* at 716.

332 Smith, *supra* note 270, 82 Tul. L. Rev. at 60.

333 *Marinelli*, 216 F.3d at 361.


337 *Gillen v. Fallon Ambulance Service Inc.*, 283 F.3d 11, 18 (1st Cir. 2002).

338 *Id.* at 23.
restriction while noting that the restriction was the result of the plaintiff's multiple sclerosis.\textsuperscript{339} The trial court relied merely on the facts that she had multiple sclerosis, a long-term, incurable disease, and as a result, was unable to lift more than fifteen pounds.\textsuperscript{340}

At the other extreme from these claims involving “obvious” limitations, some courts that require medical evidence to prove disability in ADA claims also require that any medical evidence be limited to a physician’s "independent" assessment of the nature of the impairment and the extent of any limitations.\textsuperscript{341} The medical testimony is then rejected as a basis for ADA coverage if it is based on statements of the claimant, even if those statements were a part of the person’s treatment, because the medical evidence is treated as lacking objectivity.\textsuperscript{342}

Decisions in ADA cases provide numerous examples of the importance attached to medical and other expert testimony. Claimants who lack any professional description of their limitations often fail at the summary judgment stage. The Second Circuit established early in the life of the ADA that medical evidence was required to demonstrate that the claimant was substantially limited in a major life activity, although medical evidence was not required to establish the existence of the impairment itself.\textsuperscript{343} In a claim of an employee with a heart condition that affected his breathing and walking, the court explained that there is “no general rule that medical testimony is always necessary to establish disability,” including long-term impairments that would be obvious to jury members.\textsuperscript{344} The court allowed that some claimants could provide a description of treatments and symptoms over a substantial period that would allow a jury to find ADA coverage.\textsuperscript{345} This decision was one of the first to directly require the presentation of medical evidence to establish ADA coverage, depending on the nature and the "obviousness" or long term impact of the impairment, and whether the limitations from the impairment would be understood by a lay jury without the assistance of expert testimony.\textsuperscript{346}

The effects of this emphasis on the need for medical evidence are seen in the more recent Seventh Circuit claim of a woman diagnosed with fibromyalgia, for which she sought a reasonable accommodation.\textsuperscript{347} Her claim was dismissed on summary judgment despite her evidence that her symptoms included "fatigue, insomnia, shortness of breath and muscle pain,

\textsuperscript{339} Lowe v. Angelo’s Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996).

\textsuperscript{340} Id.

\textsuperscript{341} Smith, supra note 272, 82 Tul. L. Rev. at 54-55.

\textsuperscript{342} Id.

\textsuperscript{343} Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996).

\textsuperscript{344} Id.

\textsuperscript{345} Id.

\textsuperscript{346} Smith, supra note 272, 82 Tul. L. Rev. at 25-26

\textsuperscript{347} McPhaul v. Board of Commissioners, 226 F.3d 558 (7th Cir. 2000).
including sore hands and joints” and "that her condition made it difficult for her to concentrate, bathe, walk, write and work." The court noted the absence of medical evidence, and stated that her “self-serving testimony” was not sufficient for a reasonable jury to find that she was a qualified individual with a disability.

In 2009, the Seventh Circuit also dismissed the ADA claim of an employee with leukemia who was unable to establish a substantial limitation on his ability to walk despite his own testimony that he was unable to walk for "the same period of time or in the same way" as a "normal individual" because of muscle and joint fatigue. Without any medical testimony to support his position, the court compared his walking abilities to other employees who had been included or excluded under the ADA by other courts. Despite his own testimony that he occasionally became winded when walking up stairs and grew tired while grocery shopping, the court concluded that he failed to demonstrate that his ability to walk diverged significantly from that of the general population.

Some courts take a somewhat more lenient approach, requiring medical testimony only to support the coverage of employees with less obvious impairments. For the less obvious impairments, a physician’s opinion is still required to establish a substantial limitation. Under this approach, conditions still requiring expert testimony have included a heart condition, deep vein thrombosis, fibromyalgia, a learning disorder or cognitive impairment, sleep disorders, as well as anxiety disorders and agoraphobia. For

348 Id. at 562.
349 Id. at 564.
350 Fredricksen v. United Parcel Service Co., 581 F.3d 516, 521 (7th Cir. 2009).
351 Id. at 522.
352 Id. at 522-23.
353 Smith, supra note 272, 82 Tul. L. Rev. at 60.
354 Katz, 87 F.3d at 32.
example, the Eighth Circuit granted summary judgment against an employee who could not perform tasks with his right arm, in part because he did not provide medical testimony.\(^{361}\)

Where the disability is less than obvious, courts find a lack of substantial limitation as a matter of law if there is no comparative evidence because the claimants cannot establish that their abilities are less than some "average" norm.\(^{362}\) In claims based on inability to lift, in particular, courts have been relatively more demanding of comparative evidence, often find lifting restrictions not substantially limiting as a matter of law.\(^{363}\)

For example, the Sixth Circuit rejected a lifting disability claim, despite evidence showing the claimant could lift nothing over ten pounds.\(^{364}\) Because the doctor's report only discussed the limitation with respect to work-related activities, the claimant failed to present any evidence showing that her inability to lift more than ten pounds substantially affected her daily life outside of work.\(^{365}\) It seems contradictory that in its decision, the court had earlier acknowledged that specific comparative evidence generally was not required and that common sense and life experience are a sufficient basis for the fact finder to draw a conclusion, but apparently this common sense approach did not extend to lifting restrictions.\(^{366}\)

Concerns about the review of lifting restrictions have included a lack of a consistent doctrine as to when the claimant can rely on his or her own testimony regarding the limitations, and when expert comparative evidence is required.\(^{367}\) Overall, some courts dismiss the claim simply because the claimant failed to present evidence of average ability.\(^{368}\) In contrast, other courts make substantive assumptions about the importance of what the claimant can and cannot do, regardless of whether he claimant has presented comparative evidence to support that assumption.\(^{369}\) Thus, expert comparative evidence may be needed to prevent a court's erroneous


\(^{361}\) Didier v. Schwan Food Co., 465 F.3d 838, 842 (8th Cir. 2006) (distinguishing Fenney and citing Bass v. SBC Commc'ns, Inc., 418 F.3d 870, 873-74 (8th Cir. 2005) (plaintiff's opinions that he could have returned to work insufficient evidence to survive summary judgment)).

\(^{362}\) Anderson, supra note 93, 57 Am. U. L. Rev. at 433.

\(^{363}\) Id. at 434.


\(^{365}\) Id. at 166.

\(^{366}\) Id. at 165.

\(^{367}\) Anderson, supra note 93, 57 Am. U. L. Rev. at 412.

\(^{368}\) Id. at 426.
assumptions about average lifting ability, even though what is "average" for lifting could be seen as a matter of common sense and life experience that a jury could apply.  

Other less obvious limitations have likewise required expert medical testimony to support ADA coverage, similar to the lifting cases. The D.C. Circuit Court failed to recognize an employee’s disability based on a severe skin irritation from the work environment, in the absence of specific medical evidence regarding the extent to which the skin irritation impacted his ability to sleep. The claim was dismissed on summary judgment based on the employee’s failure to submit expert medical testimony, even while referencing the Supreme Court’s guidance that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.  

Even for less than obvious limitations, a limited amount of medical evidence may be sufficient in some courts to establish a substantial limitation. For example, an employee with multiple sclerosis (MS) was able to survive a motion for summary judgment in the Third Circuit based in part on testimony from her doctor that her abilities to concentrate and remember were the result of her MS, and there was no cure for MS. It is interesting that neither this medical expert nor the personal testimony establishing her fatigue compared her ability to concentrate and remember to the abilities of her prior to the illness or to others in the general population. 

Like this MS claimant, an employee with asthma was able to survive a motion for summary judgment in the Tenth Circuit based on a combination of her testimony and information from her health care providers. Together, this evidence established that her asthma prevented her from engaging in a variety of activities, such as exposure to cold air and cleaning agents, that the effects could not be completely controlled by medication, and that she is symptomatic most of the time. The court also compared her ability to breathe to the general population and found that her reactions to common substances, the limitations on her activities, her multiple hospitalizations, and her frequent trips to the emergency room all supported her allegations that she was substantially limited in her ability to breathe.  

369 Id.  
370 Id. at 426-27.  
372 Id. at 485 (citing Anderson, 477 U.S. at 255).  
373 Gagliardo, 311 F.3d at 569-70.  
374 Albert, 356 F.3d at 1245-46.  
375 Id. at 1250-51.  
376 Id. at 1251. See also Talley v. Family Dollar Stores of Ohio Inc., No. 07-3971, 542 F.3d 1099, 2008 U.S. App. LEXIS 19342 at *14 (6th Cir. 2008)(employee with degenerative osteoarthritis of her
In contrast to some of the claims discussed above, some appellate courts will allow a claim to proceed to trial based on the evidence from the claimant alone, even if the limitations are not overtly obvious. These courts are more willing to allow a jury to make the final determination on the ADA’s coverage, as long as the claimant sufficiently explains the extent of his or her limitations. For example, a truck driver with a heart condition was able to survive a motion for summary judgment challenging his ADA coverage in the Ninth Circuit, based on his testimony that his impairment caused him to become light-headed, have difficulty concentrating and breathing, chest pain when undertaking activities in extreme heat for extended periods of time, and similar symptoms when lifting weight over 50 pounds.377

The trial court had based its dismissal of the truck driver’s claim on the lack of a comparison to the average person in the general population, but the appellate court held that the employee’s testimony alone was enough to create genuine issues of material fact regarding his ADA coverage.378 Even so, the court referenced the deposition testimony of the employee’s cardiologist regarding his limitations, in combination with the employee’s own description of his limitations in breathing, in denying summary judgment.379 It is notable that summary judgment was not granted even though no comparison was made to the breathing capacities of the average person in the general population or other ADA plaintiffs.

Another Ninth Circuit decision, relied upon in the truck driver’s case, provides a more thorough explanation of that court’s reasoning.380 The trial court had granted partial summary judgment for the employer because the claimant failed to present medical evidence in support of his claim that he was disabled due to depression and bipolar disorder.381 The claimant had submitted a detailed affidavit describing the impact of these conditions on his ability to sleep, interact with others, read, and think.382 The appellate court explained its reversal:

Ninth Circuit precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a
cervical and lumbar spine who was unable to stand for long periods survived a motion for summary judgment based on her testimony regarding extent of her inability to stand, testimony of coworkers regarding her pain while standing at work and doctors’ letters and evaluations).

377 Gribben v. United Parcel Service Inc., 528 F.3d 1166, 1169-70 (9th Cir. 2008).
378 Id. at 1170 (citing Head, 413 F.3d at 1058).
379 Id. at 1171. See also Fraser, 342 F.3d at 1041 (diabetic employee survives motion for summary judgment based on her testimony and information from doctor regarding risks of condition).
380 Head, 413 F.3d at 1058.
381 Id. at 1058.
382 Id. at 1060-62.
major life activity at the summary judgment stage. Rather, our precedent supports the principle that a plaintiff’s testimony may suffice to establish a genuine issue of material fact.\(^{383}\)

The appeals court did still note that any supporting affidavits "must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment."\(^{384}\) Even so, the court’s denial of summary judgment was based on the employee’s own declaration outlining the extent of his limitations in his interactions with others.\(^{385}\)

Like the court that require medical evidence to support claims based on other less obvious limitations on other major life activities, courts typically have looked for specific expert evidence regarding the extent of a claimant’s limitations on working. Inability to work just one job typically is not enough to establish ADA coverage.\(^{386}\) Although not required under the ADA, courts often have adopted the EEOC’s regulatory requirement that a person be prevented from performing a broad class of jobs or a wide range of jobs to be substantially limited in their ability to work.\(^{387}\)

Despite this direction to establish an inability to perform more than just one job, the EEOC regulations do not require expert testimony to show an inability to perform a broad class or wide range of jobs. Yet courts often require such evidence, even in response to a motion for summary judgment. For example, an alcoholic was not disabled as a matter of law despite limitations on his ability to work, where he failed to produce evidence concerning the accessible geographic area, the numbers and types of jobs in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs.\(^{388}\)

Either in response to a motion for summary judgment or to support a jury verdict, a claimant typically must offer specific evidence about relevant labor markets to show a substantial limitation of their ability to work.\(^{389}\) This requirement is illustrated by the District of Columbia’s

\(^{383}\)Id. at 1058.

\(^{384}\)Id. at 1059. See also McAlindin, 192 F.3d at 1235-36 (employee’s “alleged ‘fear reaction’ and ‘communicative paralysis’ are sufficiently severe to raise a genuine issue of material fact about his ability to interact with others).

\(^{385}\)Id. at 1060-61.

\(^{386}\)29 C.F.R. 1630.2(j)(3)(i). See Colwell, 158 F.3d at 644 (inability to perform narrow range of jobs not enough); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806 (5th Cir. 1997)(claimant could perform other work at plant).

\(^{387}\)Id.

\(^{388}\)Bailey v. Georgia-Pacific Corp., 306 F.3d 1162 (1st Cir. 2002)(citing 29 C.F.R. §1630.2(j)(3)(ii)(A)-(C); Duncan, 240 F.3d at 1115-16)).

\(^{389}\)Thornton, 261 F.3d at 795-96.
Circuit Court’s decisions in a claim by an employee suffering from degenerative disc disease that
limited his ability to lift and to work. The original appellate opinion including a strong dissent
by Justice Edwards, that the majority required too much evidence from the claimant on a motion
for summary judgment. This position was later adopted by the court.

In this same case, the court later reversed a jury verdict in the claimant’s favor, based on a lack
of evidence establishing a substantial limitation on the ability to work, such as the number and
type of jobs from which he was excluded. Even though the court recognized that a claimant
need not necessarily produce expert vocational testimony, it apparently reversed based on a lack
of such evidence, and noted that such evidence “might be very persuasive.” Justice Edwards
again dissented, because the claimant had presented some evidence of his personal
characteristics and the job market from which a jury could conclude that he was covered by the
ADA.

The ramifications for an employee who fails to present what the court finds to be sufficient
professional evidence in support of his or her impairment can be severe. In another District of
Columbia case, a police officer who could not engage in activities which could result in trauma
because he was taking a blood-thinning medication was successful in front a jury, only to have
the court of appeals reverse and enter judgment for the employer. The court based its reversal
on the lack of evidence from the vocational expert regarding the number of jobs he could not
perform because they posed a risk of trauma, even though he did provide evidence that the
employee was precluded from all but 28.6% of the jobs for which he was eligible without his
impairment, assuming that he could only perform duties that resembled the desk duties he was
performing while placed on limited duty.

Even with medical evidence describing one’s limitations, the failure to present an expert opinion
about relevant labor markets and the employee’s particular training, knowledge, skills or abilities
typically has been fatal. In one claim, a medical expert’s testimony that the claimant could not

390 Duncan, 240 F.3d at 1115-16.
391 201 F.3d at 489.
392 240 F.3d at 1115-16.
393 240 F.3d at 1115-16.
394 Id. at 1117.
395 Id. at 1124-25.
397 Id. at 761-62, 764-65.
398 See Walton, 492 F.3d at 1009; Bristol v. Clear Creek County Commissioners, 281 F.3d 1148, 1162
(10th Cir. 2002 ) , vacated in part on other grounds, 312 F.3d 1213 (10th Cir. 2002)(citing Bolton v.
perform a substantial number jobs or even a medical opinion that the claimant could not work at all has been insufficient. Courts have also rejected “conclusory” testimony from a doctor that the claimant was “significantly restricted” in their ability to work “compared to the average person in the working community” and the doctor’s opinion that “the condition, manner or duration under which she can work are significantly restricted.”

Even where a claimant presents expert testimony regarding his or her inability to work, the court sometimes engages in a determination of the value of the expert evidence to support a decision to deny ADA coverage on a motion for summary judgment. Such “fact finding” by the courts is comparable to the discounting of some medical expert testimony discussed earlier. For example, the Sixth Circuit held that a truck driver was not substantially limited in his ability to work where he could drive trucks if they were equipped with cruise control, and the record established that a high percentage of his employer’s trucks and trucks in general included cruise control as standard equipment.

Even though the truck driver’s employer could not guarantee that he would only be required to drive trucks with cruise control, the court wanted to know how many trucking jobs would require the ability to drive trucks without cruise control. The employee’s vocational expert opined that with his limitations, he would be prevented from working in approximately 75% of the jobs for which he did not have the skills, but could have performed prior to his knee injury. This expert opinion was insufficient to avoid summary judgment because the expert did not provide any evidence regarding the number of trucking jobs from which the employee was disqualified, because of the need to drive without cruise control, or the number of other jobs from which he was disqualified.

Cases discussed earlier show how a claimant’s remaining abilities can defeat ADA coverage. Similarly, even expert testimony regarding an inability to work a class or range of jobs may not prevent a court from focusing on the claimant’s remaining abilities related to working. A Federal Express employee, for example, was unable to establish a substantial limitation on his ability to lift or to work, despite testimony from a vocational expert that he was unable to

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Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994); Breitkreutz v. Cambrex Charles City Inc., 450 F.3d 780 (8th Cir. 2006)).

399 Bristol, 281 F.3d at 1162. See also Zwygart v. Bd. of County Comm’rs of Jefferson County, Kan., 483 F.3d 1086, 1092 (10th Cir. 2007)(doctor opinion that he could not work was insufficient without vocational expert).

400 Gonzalez v. El Dia Inc., 304 F.3d 63, 74 (1st Cir. 2002).


402 Id. at 453 (citing Best v. Shell Oil Co., 107 F.3d 544, 548 (7th Cir. 1997)).

403 Id. at 454.

404 Id. at 454-55.
perform 57% of the jobs for which he was qualified absent his impairment.\textsuperscript{405} Instead of sending the claim to a jury, the Fourth Circuit dismissed it based on the employee’s continued ability to perform a range of daily activities requiring “endurance, flexibility and some strength” and his continued qualification for over 1,400 different types of jobs and over 130,000 actual jobs in his geographic area.\textsuperscript{406} Making its own interpretation of that evidence, that court concluded that “a reasonable juror could not find that his impairment substantially limits his ability to work, or for that reason renders him disabled for purposes of the ADA.”\textsuperscript{407}

Other employees who have presented what the courts see as powerful expert testimony regarding their restrictions on working have been more successful. One employee who was denied a position as a shift supervisor successfully survived a motion for summary judgment in the Eighth Circuit using expert testimony showing an exclusion from at least 70% of the jobs listed in the Dictionary of Occupational Titles.\textsuperscript{408} Similarly, an employee who offered expert testimony that her potential occupational base was substantially reduced by her impairments established sufficient support for a jury verdict in her favor.\textsuperscript{409} The Tenth Circuit reviewing that verdict noted that the expert’s testimony was “detailed and was supported by his description of the workplace ramifications of her condition.”\textsuperscript{410} These cases establish that fairly detailed, well-supported expert testimony has been required to establish a limitation from a “less than obvious” condition or in the ability to work.

The ADAAA and the proposed EEOC regulations do little to resolve these drastically different approaches to the necessity of medical or vocational expert evidence. Neither of these standards explain when expert medical or vocational testimony should be required on a motion for summary judgment. In some courts, including the Ninth Circuit, a claimant may survive a motion for summary judgment based on his or her testimony alone.

In other courts, claimants may be required to present expert medical or vocational testimony even in response to a motion for summary judgment. This requirement comes in some courts only with less obvious types of impairments, such as the inability to lift or work. Without further clarification, these requirements will continue to place a significant burden on ADA claimants seeking a trial on the substance of their discrimination claim. Moreover, the reliance on expert testimony or the lack thereof in granting employers motions for summary judgment will continue

\textsuperscript{405} Taylor v. Federal Express Corp., 429 F.3d 461, 464 (4th Cir. 2005).

\textsuperscript{406} Id.

\textsuperscript{407} Id. at 465.

\textsuperscript{408} Chalfant v. Titan Distribution, Inc., 475 F.3d 982, 989 (8th Cir. 2007).

\textsuperscript{409} Praseuth v. Rubbermaid Inc., 406 F.3d 1245, 1252 (10th Cir. 2005).

\textsuperscript{410} Id.
to undermine the role of the jury in making factual determinations associated with determining whether an impairment is substantially limiting.

V. Conclusions

These decisions which interpret the meaning of “substantially limits” illustrate how the original ADA may not have lived up to the hopes of persons with disabilities and their advocates. Some circuits in particular are often willing to make factual determinations about the extent of the effects of an employee’s impairment. If excluded from ADA coverage based on these determinations, these employees have no protection against discrimination based on their disability and no right to reasonable accommodations.

After years of criticism of the Supreme Court for limiting the ADA’s coverage, Congress responded with the ADAAA and directed the EEOC to broaden coverage through its regulations. Some barriers to ADA created by the Supreme Court, such as the effect of mitigating measures and the requirements to establish a “regarded as” claim, have been directly addressed by the ADAAA’s language. Yet other ambiguities regarding the application of the ‘substantially limits’ requirement, described above, have not been addressed by either the ADAAA’s language or the proposed EEOC regulations. This may prove to be an influential gap in the ADAAA’s protection, since these ambiguities have resulted in the exclusion of numerous ADA claimants from coverage prior to the ADAAA’s passage.

Leaving these issues once again to the Supreme Court, even with the broad purposes stated in support of the ADAAA, may not result in sufficiently broad ADA coverage. Even the EEOC’s proposed regulations may be insufficient. Professor Selmi has explained that the Court adopts EEOC interpretations when they support their decisions and ignores them when they do not, and the Court “emphasizes statutory language and sentence structure in some cases but turns its eye on clear language in others.”

Without an effective social movement to positively influence courts’ interpretation of the ADA, claimants may still have their claims dismissed because they are not limited in all tasks that require the performance of a major life activity, because the effects of their impairment are not permanent or frequent enough, or based on a comparison to the general population or with the support of sufficient expert testimony. As Professor Selmi observed before the passage of the ADAAA, with greater social pressure or attention to these more specific issues, Congress could have drafted more protective legislation, or at least addressed some of the issues more clearly.

Without such amendments or more specific guidance from the EEOC, courts may be free to continue to dismiss claims on motions for summary judgment because the impairment has not

411 Selmi, supra note 1, 76 GEO. WASH. L. REV. at 570.

412 Id. at 571.

413 Id. at 573.
been shown to “substantially limit” a major life activity of the claimant. Therefore, plaintiffs are well-advised to continue to present evidence regarding the extended duration or frequency of the limitations, as well as the abilities of either the average person or most people in the general population. Perhaps most importantly, plaintiffs facing summary judgment may need to continue to present medical or vocational testimony regarding the extent of the limitation rather than relying on the plaintiff’s own description of his or her limitations.

Even if ADA claimants present this evidence of substantial limitation that has been required under the un-amended ADA, they may still be unsuccessful unless courts respect the fact finding role of juries. In light of the failure of either the ADAAA or the proposed EEOC regulations to command this respect, the Supreme Court or at least the circuit courts must fulfill the promise of the ADA to protect working people with disabilities against discrimination by referring arguably valid claims to juries. Then a jury can interpret the evidence in light of its common understanding of the abilities of a non-disabled person to determine if the claimant with an impairment deserves protection against discrimination. Without attention to these continuing barriers to ADA claims, the impact of the amendments to the ADA may be at most underwhelming.