Lowering the Threshold: Establishing Mental Disability
Employment Discrimination Claims after the ADA Amendments Act

By

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On July 26, 1990, President George H. W. Bush made history when he signed into law the world’s first comprehensive civil rights legislation designed to protect the interests of the disabled. At a time when disabled people were, “the poorest, least educated and largest minority in America . . . ” the Americans with Disabilities Act (“ADA”) promised change. It would also serve as a model for future legislation throughout the world.

Among its many beneficial attributes, the ADA would be recognized as an important and progressive vehicle for equal employment rights. Moreover, it not only protected the employment rights of the physically disabled but the rights of those who suffered from a long and sometimes controversial list of psychiatric disabilities as well.

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4 See T. Degen & G. Quinn, “A Survey of International, Comparative, and Regional Disability: Law Reform,” Disability Rights Law and Policy: International and National Perspectives, 3 (M.L. Breslin & S. Yee, eds. Transnational Publishers 2002) (The ADA “has had such an enormous impact on foreign legal development that one is tempted to say that the international impact of this law is larger than its domestic effect,” at 20).
5 “In enacting the ADA, Congress chose to protect individuals who have mental impairments as well as those with physical impairments.” McAlindin v. County of San Diego, 192 F.3d 1226, 1232-1233 (9th Cir. 1999), amended on other grounds on denial of reh’g, 201 F.3d 1211 (9th Cir. 2000), cert. denied, 530 U.S.
It is this aspect of the ADA that received the strongest opposition. Relying on arguments built upon the worst misconceptions, its opponents refused to distinguish between, otherwise functional, mentally ill individuals and those people who engaged in the worst kind of dysfunctional and deviant behavior. Republican Senator Jesse Helms argued, “How is an employer . . . supposed to find out whether a man is a pedophile or a schizophrenic?”6 “If this were a bill involving people in a [sic] wheelchair” he said, “or those who had been injured in the war, that is one thing.”7 Helms asserted that an employer should be left to his “own moral standards” when deciding whether to hire . . . “transvestites, kleptomaniacs, or manic depressives.”8 The implication, of course, was that someone who suffered from manic depression (bi-polar disorder), as an example, was not disabled, but morally flawed.

Today, you need only examine the statistics to appreciate the importance of ADA protection to the mentally disabled. When the ADA was adopted, there were approximately 43 million disabled Americans.9 Today, the number of Americans who are burdened by some form of mental illness well exceeds that figure. According to the National Institute of Mental Health (“NIMH”), one in four American adults “suffer from a diagnosable mental disorder in a given year.”10 This translates to 57.7 million people.11 Mental disorders represent the “leading cause of disability in the U.S. and Canada for

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7 Id.
8 Id. (emphasis added).
11 Id.
Studies by the World Health Organization ("WHO"), determined that depression alone affects 121 million people worldwide and, although treatable, it is "among the leading causes of disability." In fact, the WHO projects that by 2020 depression will be the second largest cause of disability in the world -- second only to heart disease. Finally, in a study published in 2008, the American Journal of Psychiatry revealed that in the U.S., major mental disorders amount to $193 billion annually in lost earnings. Once zealously hidden, mental disorders have become commonplace, and they have created staggering drain on our economy. For this growing constituency of the disabled, the ADA insures improved integration into the American workforce.

From the beginning, Congress intended the ADA to serve four primary purposes. 1) It was designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;” then 2) “to provide clear . . . consistent, enforceable standards . . . ;” 3) “to ensure that the Federal Government plays a central role in enforcing [these] standards . . . ;” and 4) “to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination . . . .” In furtherance of these objectives, the ADA is composed of three detailed subchapters.

12 Id.
14 Id.
15 RC Kessler et al., The individual-level and societal-level effects of mental disorders on earnings in the United States: Results from the T.R. Insel, National Comorbidity Survey Replication,' 2008 Am J Psychiatry 165:6 Available at http://ajp.psychiatryonline.org/cgi/content/full/165/6/663
16 42 U.S.C. §12101(b).
17 There is a fourth subchapter, 42 U.S.C. §12201 to 12300 as originally enacted that contains miscellaneous provisions.
The first subchapter addresses employment discrimination.\textsuperscript{18} To be more specific, it prohibits an employer from discriminating against a qualified individual on the basis of disability.\textsuperscript{19} Subchapter II addresses public services including discriminatory lack of access to public transportation.\textsuperscript{20} Finally, subchapter III prohibits private entities that operate public accommodations and services from discriminating against the disabled.\textsuperscript{21} Our examination will be limited to subchapter I (Employment) which prohibits discrimination against qualified disabled individuals in regards to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\textsuperscript{22}

While the ADA is acknowledged, historically, as providing the broadest civil rights protection to America’s disabled, it was not the first. Much of its language is taken from its predecessor, the Rehabilitation Act of 1973, which limited discriminatory actions against disabled persons by the government or entities operating with federal funding.\textsuperscript{23} In fact, the definition of disability under the ADA is almost identical to that found in the Rehabilitation Act.\textsuperscript{24}

Today, the situation has changed. It is now the ADA that provides the definitions. When determining whether there has been an act of employment discrimination under the Rehabilitation Act of 1973, the court looks to standards found in the ADA.\textsuperscript{25}

\begin{itemize}
\item\textsuperscript{18} 42 U.S.C. §12111 to 12117
\item\textsuperscript{19} 42 U.S.C. §12111(8) & 12112(a)
\item\textsuperscript{20} 42 U.S.C. §12131 to 12165
\item\textsuperscript{21} 42 U.S.C. §12181 to 12189
\item\textsuperscript{22} 42 U.S.C. §12112(a).
\item\textsuperscript{24} See 29 U.S.C. §705(21)(A) (2009).
\item\textsuperscript{25} 29 C.F.R. §1614.203(b) (2009).
\end{itemize}
Nonetheless, Congress expressed in the recently passed ADA Amendments Act that the definition of disability be construed in the same manner as the term “handicapped individual” within the Rehabilitation Act.\(^\text{26}\)

Since its introduction, we have seen the reach of the ADA increasingly limited by federal case law. The most significant judicial interpretations revolve around the threshold question – is the claimant disabled? A plaintiff must establish that his condition meets the statutory definition of disability before the question of discrimination is even considered. This issue was addressed in the U.S. Supreme Court decisions *Toyota Motor Manufacturing, Inc. v. Williams*\(^\text{27}\) and *Sutton v. United Air Lines*.\(^\text{28}\) These specific cases, which are discussed in greater detail herein, have made it particularly difficult for anyone to meet the statutory criteria.

On September 25, 2008, President George W. Bush signed into law Senate bill 3406, the ADA Amendments Act of 2008, which many believe will restore the ADA to its former glory. The original bill was introduced on September 29, 2006 in the House of Representatives by Representative Steny Hoyer of Maryland and Representative Jim Sensenbrenner of Wisconsin.\(^\text{29}\) And while there were opponents that rejected this House bill as “extending the protections of the ADA beyond those that the Congress originally

\(^{26}\) 42 U.S.C. §12101 note (2009) (quoting ADA Amendments Act of 2008, Findings and Purposes). The definition of Handicapped Person under the Rehabilitation Act is “any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.” 28 C.F.R. §41.31 (2010)

\(^{27}\) 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).


intended to provide,“30 the ADA Restoration Act of 2008 would soon gain over 240 cosponsors.31 A final compromise version of this House bill was passed on June 25, 2008 by a vote of 402 to 17 (with 15 not voting).32 A similar bill, this time formerly identified as the ADA Amendments Act of 2008, was subsequently introduced in the Senate by Democratic Senator Tom Harkins of Iowa and Republican Senator Orrin Hatch of Utah.33 This Senate bill was adopted, and then ultimately passed unchanged by the House of Representatives.34 On the day of its signing, the White House introduced the ADA Amendments Act as legislation which “clarifies and broadens the definition of disability and expands the population eligible for protections under the Americans with Disabilities Act of 1990.”35

In this article, we will examine the ADA Amendments Act of 200836 (“ADAAA”) and its impact on the Americans with Disabilities Act, focusing specifically on how it has changed the way the ADA defines disability for a mentally impaired plaintiff. We will then review how specific changes have strengthened the claims of these individuals. The examples discussed herein are largely cases involving psychiatric disabilities, although the principles would apply equally to the intellectually disabled.

The ADAAA was designed with several express purposes. First of all, like the ADA before it, the ADAAA was intended to provide “a clear and comprehensive

30 Id.
31 Id.
32 154 CONG. REC. H6,081 (2008).
33 154 CONG. REC. S8,348 (2008).
34 154 CONG. REC. H8,298 (2008).
national mandate for the elimination of discrimination,” as well as enforceable standards intending to reinstate the “broad scope of protection” available under the ADA. Additionally, the ADAAA was created to specifically reject the standards established by the U.S. Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams regarding the strict interpretation of the term disability. And, it was intended to reject the decision of the Supreme Court in Sutton v. United Air Lines pertaining to mitigating measures exception and the rules that are applied when one has been “regarded as” having a disability. It was also put in place to voice Congress’ intent that “the question of whether an individual’s impairment is a disability…should not demand extensive analysis.” Finally, the ADAAA expressed “Congress’ expectation that the [EEOC] . . . revise . . . its current regulations…to be consistent with [the ADAAA].” To accomplish these purposes, the ADAAA provides new rules of construction for interpreting the definition of disability under the ADA.

I. Defining Disability

Disability is defined under the Act (and its corresponding regulations) as “A) a physical or mental impairment that substantially limits one or more major life activities

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37 Id. at 3554.
38 Id.
40 122 Stat. 3553, 3554
41 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); 122 Stat. 3553, 3554.
42 122 Stat 3553, 3554
43 Id.
44 Id.
of such individual;\(^{45}\) B) a record of such an impairment;\(^{46}\) or C) being regarded as having such an impairment . . . \(^{47}\) Whether a person meets the requirements of this statutory definition is an individualized inquiry.\(^{48}\) It is clear however, that a plaintiff “must satisfy at least one of these three prongs to be considered an individual with a ‘disability.’”\(^{49}\) In this article, we will focus on the first prong, the actual disability test, then we will touch briefly on the second (“record of”) and third (“regarded as”) prongs.

The definition of disability under the ADA creates five specific issues, namely: 1) What is a physical or mental impairment? 2) What is a major life activity? 3) What is a substantial limitation? 4) When does one have a record of a disability? 5) When is one regarded as having a disability? To answer these questions the federal courts have relied upon the Code of Federal Regulations,\(^{50}\) the EEOC Compliance Manual,\(^{51}\) the Rehabilitation Act of 1973,\(^{52}\) and the court’s own interpretation of the ADA’s findings and purposes.

II. ADA “Disability” Authority and the ADAAA

\(^{46}\) 42 U.S.C. §12102(1)(B) (2010); 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(k)) (“An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”)
\(^{47}\) 42 U.S.C. §12102(1)(C) (2010); 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(l) (“An individual is ‘regarded as’ having a disability if the individual is subjected to an action prohibited by [Subchapter I Employment]…based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.”)
\(^{48}\) Sutton, 527 U.S. at 2147 (citing Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)).
\(^{49}\) 2 EEOC Comol. Man. (BNA) §902 (2008)
\(^{50}\) 29 C.F.R. §1630 et seq. (2010).
The changes to the ADA, as required by the ADA Amendments Act, went into effect on January 1, 2009. Presently, the ADA is supported by 29 C.F.R. §§1630.1-1630.16 and its appendix, “Interpretive Guidance on Title I of the Americans with Disabilities Act.”53 In accordance with the ADAAA, the EEOC drafted proposed changes to these regulations as well as the Appendix.54 The proposed language was published in the Federal Register on September 23, 2009 and the public was given to November 23, 2009 to make comments.55 At the time of the writing of this article, the EEOC is reviewing these comments and working towards the final rule publication. Because the EEOC has been provided with specific instructions and objectives through the ADAAA it is safe to assume that the final rules will be similar if not the same as the proposed language, and therefore we cite to them.

To begin, the amended ADA and the proposed regulations both state that the definition of disability “shall be construed in favor of broad coverage . . . “56 This, of course, means that the individual elements of each of the three prongs are to be construed broadly. The first element involves the identification of the impairment.

A. Mental Impairments

55 Id.
56 42 U.S.C. §12102(4)(A) (2009); 74 Fed. Reg. 48439 (September 23, 2009) (to be codified at 29 C.F.R. §1630.1(c)(4) (“The definition of disability in this part shall be construed broadly, to the maximum extent permitted by the terms of the ADA.”)
“To qualify as disabled under subsection (A) of the ADA’s definition of disability, a claimant must initially prove that he or she has a physical or mental impairment.”

Existing regulation, 29 C.F.R. §1630.2(h)(2), defines a mental impairment as “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” Proposed changes to the CFR include a minor revision of this definition. The term “mental retardation” is replaced with the more appropriate “intellectual disability.”

A starting point when ascertaining whether someone has a “mental or psychological disorder” under the Act has generally been the Diagnostic and Statistical Manual of Mental Disorders “Text Revision” (DSM-IV-TR) which is published by the American Psychiatric Association.” The Diagnostic and Statistical Manual of Mental Disorders represents “an important reference by courts and is widely used by American mental health professionals for diagnostic. . . purposes.” Of course, merely having an impairment that fits within the DSM-IV-TR or one of the specific categories identified in the statute does not make one disabled for purposes of the ADA. The DSM-IV-TR


58 29 C.F.R. §1630.2(h)(2) (emphasis added).


60 Id.


“includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child). Because these conditions are not disorders, they are not impairments under the ADA.” Several psychiatric disorders have been recognized by the EEOC as impairments including: major depression, bipolar disorder, obsessive compulsive disorder, post-traumatic stress disorder, schizophrenia, panic disorder, and anxiety disorder.

B. Major Life Activities

The next step is to determine whether the impairment impacts a major life activity. In the original statute, the legal term “major life activity” is not defined. One had to turn instead to the EEOC regulations and interpretive case law for guidance. Originally, a major life activity was described as “a basic activity that the average person in the general population can perform with little or no difficulty.” This definition appears straightforward and to the point. However, when considering a proposed activity the court was also asked to examine its significance. As an example, the Second Circuit in Reeves v. Johnson Controls World Servs., Inc. held that “[t]he term ‘major life

65 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §§1630.2(i)(5)(H) & 1630.2(i)(6)(E)).
66 Id.
68 Id. One must note, however, that because no agency had been granted authority to issue regulations implementing the provisions of the ADA, there has always been a question of how much deference the court should give this list. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 194, 122 S.Ct. 681, 689, 151 L.Ed.2d 615 (2002).
activit[y],’ by its ordinary and natural meaning, directs [one] to distinguish between life activities of greater and lesser significance.” Of greater importance, this reasoning is supported by the 1998 U.S. Supreme Court case of *Bragdon v. Abbott* which held that “the touchstone for determining an activity's inclusion under the statutory rubric is its significance.” Furthermore, the Tenth Circuit in *Pack v. Kmart Corporation* held that whether a particular activity is a “major life activity,” one must ask “whether that activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual.”

Of course, certain activities have long been considered significant enough to be major life activities per se. These are set forth in the Code of Federal Regulations and they include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

In 2002, the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, established a new standard to be used when identifying major life activities. In this case, an assembly line worker named Ella Williams sued Toyota, her employer, claiming that she was disabled by carpal tunnel syndrome and related conditions and that her employer refused to make the reasonable accommodations necessary for her to continue her employment. The Federal District Court for the Eastern District of Kentucky granted Toyota’s Motion for

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70 *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir.1998).
72 *Id.*
73 29 C.F.R. §1630.2(i)
74 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).
75 *Id.* at 187, 122 S.Ct. at 686.
Summary Judgment finding that Ms. Williams’ physical impairment(s), “did not substantially limit any of her major life activities.” The Sixth Circuit disagreed and reversed, “finding that the impairments substantially limited [Ms. Williams] in the major life activity of performing manual tasks.” Accordingly, it held that Ms. Williams met the statutory requirements and was, in fact, disabled under the ADA. The U.S. Supreme Court reversed the Court of Appeals, in part because it “failed to ask whether [Ms. Williams] impairments prevented or restricted her from performing tasks that are of central importance to most people’s daily lives.” Through this holding, the Supreme Court established a “minimum” level of significance necessary for an activity to qualify.

What is of central importance varies from one individual to another. If you select only those activities that are “central” to most people’s lives, you end up with a fairly short list – like the major life activities per se list published in the current EEOC regulations. In a subsequent case, the Third Circuit appears to have broadened the definition when it held that “[a] major life activity need not constitute volitional or public behavior; it need not be an activity that is performed regularly or frequently; but it does have to have importance to human life comparable to that of activities listed in the regulatory examples [-- ‘the per se major life activities list’].”

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76 Id.
77 Id.
78 Id.
79 Id. (emphasis added).
80 29 C.F.R. §1630.2(i)
When the ADAAA amendments went into effect on January 1, 2009, a new ADA definition for “major life activities” was incorporated into the actual language of the statute. First of all, this definition would include an extensively expanded list of per se activities:

(A) In general
. . . major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions
. . . a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

These examples are also incorporated into the proposed EEOC regulations. The EEOC indicates that, like the one that came before it, this list is non-exhaustive. And as an example, in its proposed language, the EEOC has included “interacting with others” as an activity, although it is not one of the newly minted additions to the statutory list.

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83 Id.
84 74 Fed. Reg. 48440 (September 23, 2009 (to be codified at 29 C.F.R. §1630.2(i)(1)).
85 Id.
86 Id. It is interesting that Congress failed to include interacting of others among the other recognized activities since it has been accepted in most circuits. See e.g. Lemire v. Silva, 104 F. Supp.2d 80 (D.Mass. 2000); Jacques v. DiMarzio, 386 F.3d 192 (2nd Cir. 2004); Peter v. Lincoln Technical Institute, Inc., 255 F.Supp.2d 417 (E.D.Pa. 2002); Perkins v. Ameritech Corp., 2004 WL 2032656 (N.D.Ill. 2004); Heisler v. Metropolitan Council, 339 F.3d 622 (8th Cir. 2003); McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999); EEOC v. Voss Elec. Co. d/b/a Voss Lighting, 257 F.Supp.2d 1354 (W.D. Okla. 2003). But see, Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997) (Ability to get along with others is too vague to be a workable definition).
Instead of the standard set by *Toyota* ("central importance"), the new regulations return us to the original definition of the term. Major Life Activities are those basic activities, including major bodily functions, that most people in the general population can perform with little or no difficulty. This represents a much easier standard than that provided in *Toyota*, since no longer must the activity be so significant that it is one of central importance. In fact, the proposed EEOC regulations specifically state:

An individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of *central importance to daily life* in order to be considered an individual with a disability.

**C. Substantial Limitation**

The next step is to determine whether the major life activity is substantially limited by the impairment. This legal term was also left undefined in the original statute. According to the existing EEOC regulations, in order to determine whether a disability "substantially limits" a major life activity, the following must be considered: "(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 long term or permanent impact of or resulting from the impairment." This language is conspicuously

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87 *Id.*
88 *Id.*
91 29 CFR § 1630.2(j)(2).
missing from the revised regulations.\textsuperscript{92} It is replaced with the general rule that “[a]n impairment is a disability within the meaning of this section if it ‘substantially limits’ the ability of an individual to perform a major life activity \textit{as compared to most people in the general population.”}\textsuperscript{93} A temporary psychological impairment resulting from a physical condition, with minimal residual effects, cannot form the basis of a claim under the ADA.\textsuperscript{94}

In \textit{Toyota}, the Supreme Court provided a very strict interpretation of what is a substantial limitation. The Court held that “an individual must have an impairment that prevents or severely restricts the individual from doing [major life] activities.”\textsuperscript{95} The proposed EEOC language, drawing from the ADAAA, rejects this holding. It states instead “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.\textsuperscript{96}

Further, although the impairment must be more than temporary, under the proposed rules, an impairment that results in episodic substantial limitation is still a disability.\textsuperscript{97}

\textsuperscript{92} 74 Fed. Reg. 48446 (September 23, 2009) (to be codified at Appendix, 29 C.F.R. §1630.2(j) (\textquoteleft\textquoteleft Although the Senate Managers Statement…made reference to the terms \textquoteleft\textquoteleft condition, manner, or duration\textquoteright\textquoteright\ under which a major life activity is performed, the Commission has deleted that specific language from the expression of the standard itself to effectuate Congress’s clear instruction in the Amendments Act that \textquoteleft\textquoteleft substantially limits\textquoteright\textquoteright\ is not to be misconstrued to require the \textquoteleft\textquoteleft level of limitation, and intensity of focus\textquoteright\textquoteright\ applied by the Supreme Court in \textit{Toyota}.\textquoteright\textquoteright\).

\textsuperscript{93} 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(1)).

\textsuperscript{94} See e.g. \textit{Johnson v. Foulds, Inc.}, 14 A.D.D. 885 (N.D. Ill. 1996); \textit{Sanders v. Arneson Products, Inc.}, 91 F.3d 1351, 1354 (9th Cir. 1996), \textit{cert. denied}, 520 U.S. 1116, 117 S. Ct. 1247, 137 L. Ed. 2d 329 (1997).

\textsuperscript{95} \textit{Toyota}, 534 U.S. at 196-97, 122 S.Ct. at 691 (emphasis added). \textit{See also Fiscus v. Wal-Mart Stores, Inc.}, 385 F.3d 378, 384 (3rd Cir. 2004) (‘a substantial limitation of a major life activity does not mean impossibility or even great physical difficulty; rather, substantial limitation is weighed in a broad, practical sense, and may include non-physical factors.’); \textit{Eshelman v. Agere Systems, Inc.}, 397 F.Supp.2d 557, 573 (E.D.Pa. 2005) (citing \textit{Albertson's Inc. v. Kirkingburg}, 527 U.S. 555, 565, 119 S.Ct. 2162, 2168, 144L.Ed.2d 518 (1999)) (‘Although substantial limitations should be considerable, ‘utter inabilities’ are not required.’).

\textsuperscript{96} 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(1)) (emphasis added).

\textsuperscript{97} 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(4)).
Examples of such impairments may include “psychiatric disabilities such as depression, bipolar disorder and post-traumatic stress disorder.”\(^\text{98}\) Finally, when evaluating an individual’s limitations with reference to the general population, the EEOC states that it “may be made using a common-sense standard without resorting to scientific or medical evidence.”\(^\text{99}\)

In \textit{Sutton v. United Airlines, Inc.}, the Supreme Court held that a claimant does not satisfy the substantial limitation prong of the definition of disability, if mitigating measures will correct the condition.\(^\text{100}\) In \textit{Sutton}, twin sisters Karen Sutton and Kimberly Hinton brought suit against United Airlines for rejecting their employment applications.\(^\text{101}\) Both sisters were experienced pilots, but severely myopic.\(^\text{102}\) This condition was improved by corrective lenses.\(^\text{103}\) Accordingly, with lenses, they were both able to “function identically to individuals without a similar impairment.”\(^\text{104}\)

The Federal District Court for the District of Colorado “dismissed [their] complaint for failure to state a claim upon which relief could be granted,”\(^\text{105}\) finding, inter alia, that because the twins could fully correct their vision with lenses, there was no actual substantial limitation of a major life activity.\(^\text{106}\) The very thing that would allow them to overcome their disability -- to allow them to function as pilots -- extinguished their right to protection under the law. The Tenth Circuit Court of Appeals affirmed the lower

\(^{98}\) \textit{Id.}\n\(^{99}\) 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(2)(iv)).\n\(^{100}\) 527 U.S. at 487-88, 119 S.Ct. at 2149.\n\(^{101}\) \textit{Id.} at 475-476, 119 S.Ct. at 2143-2144.\n\(^{102}\) \textit{Id.}\n\(^{103}\) \textit{Id.} at 475, 119 S.Ct. at 2143.\n\(^{104}\) \textit{Id.}\n\(^{105}\) \textit{Id.} at 476, 119 S.Ct. at 2144.\n\(^{106}\) \textit{Id.}\n
court’s judgment.\textsuperscript{107}

At the time of this decision, the Circuit Courts were split on the issue of whether disabilities should be ascertained without reference to mitigating measures.\textsuperscript{108} Consequently, the U.S. Supreme Court granted certiorari. In a decision drafted by Justice Sandra Day O’Connor, the Supreme Court ruled in favor of the defendant. In doing so, the Court rejected regulatory recommendations of both the EEOC and the Department of Justice.\textsuperscript{109} The Supreme Court also ignored the ADA’s legislative history.\textsuperscript{110} The Court even makes note that it is aware of the legislative history since it was introduced by Justice Stevens in his dissent.\textsuperscript{111} To support its decision, the Court made one major assumption. Drawing the conclusion that because 1) the ADA contained a finding that there were 43 million disabled Americans, and 2) because that figure that could not possibly include every person with a correctable physical limitation, the Court reasoned that Congress did not intend to include everyone.\textsuperscript{112} Consequently, the Court held that disability under the ADA must be determined “with reference to corrective measures.”\textsuperscript{113}

Further, the Court held that both the positive and negative effects of the corrective

\begin{footnotes}
\noindent \textsuperscript{107} \textit{Id.} at 477, 119 S.Ct. at 2144.
\noindent \textsuperscript{109} \textit{Id.} at 481, 119 S.Ct. at 2146 (citations omitted)
\noindent \textsuperscript{110} \textit{Id.} at 482, 119 S.Ct. at 2146.
\noindent \textsuperscript{111} \textit{Id.}
\noindent \textsuperscript{112} \textit{Id.} at 487, 119 S.Ct. at 2149.
\noindent \textsuperscript{113} \textit{Id.} at 488, 119 S.Ct. at 2149.
\end{footnotes}
measures must be considered.\textsuperscript{114}

The amended ADA and the proposed EEOC language both reject the rule established by \textit{Sutton} regarding the corrective measures, except in the case of “ordinary eyeglasses or contact lenses.”\textsuperscript{115} 42 U.S.C. §12102(4)(E)(i) provides that the determination of whether a major life activity has been substantially limited by a physical or mental impairment “shall be made without regard to the ameliorative effects of mitigating measures” including, but not limited to, “medication, medical supplies, equipment, or appliances.”\textsuperscript{116}

D. Record of a Disability

According to ADA legislative history, the second part of the disability test was created to prevent discrimination against those who have been “classified or labeled, correctly or incorrectly, as having a disability.”\textsuperscript{117} As an example:

An employer who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.\textsuperscript{118}

It was also intended to help “persons who have recovered, in whole or in part, from a disability but are subjected to discrimination because of their history of a substantially limiting impairment.”\textsuperscript{119} The most common example being someone who has recovered from cancer.

\textsuperscript{114} \textit{Id}. at 482, 119 S.Ct. at 2146.

\textsuperscript{115} 42 U.S.C. §12102(4)(E)(i). Regrettably, even with the changes, the Sutton twins still have no cause of action.

\textsuperscript{116} \textit{Id}.


\textsuperscript{118} 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(k)(ii)).

\textsuperscript{119} \textit{Id}.
This is an area of law that has not been changed significantly by the ADAAA. The EEOC regulations, existing and proposed, both state that:

An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.\(^{120}\)

\("The determination whether a person has a record of disability must be made on a case-by-case basis.\)\(^{121}\) Further, one must demonstrate more than a record of a simple diagnosis. It must be a “record reflecting the kind of impairment that would impose a substantial limitation on one or more of the plaintiff’s major life activities.”\(^{122}\)

The proposed EEOC regulations provide some additional interpretive guidance. First, they repeat the new actual disability (impairment/activity/limitation) test, stating that the impairment must substantially limit one or more major life activities “\textit{when compared to most people in the general population}.\)\(^{123}\) If a plaintiff cannot meet the requirements of the actual disability test, “she cannot recover even if her employer terminated her expressly because she had a record of her condition.”\(^{124}\) Furthermore, according to the proposed Appendix to the EEOC regulations, a record may take many forms “including, but not limited to, education, medical or employment records.”\(^{125}\)

\(^{120}\) 29 C.F.R. §1630.2(k); 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(k)(1)).
\(^{122}\) \textit{Sinkler v. Midwest Prop. Mgmt. Ltd. P’ship}, 209 F.3d 678, 683 (7th Cir. 2000) (citing \textit{Davidson v. Midelfort Clinic, Ltd.}, 133 F.3d 499, 520 n.7 (7th Cir. 1998)).
\(^{123}\) 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(k)(2)) (emphasis added).
\(^{124}\) \textit{Eshelman}, 397 F.Supp.2d at 574 (citing \textit{Sinkler}, 209 F.3d at 683 (citation omitted)).
\(^{125}\) 74 Fed. Reg. 48448 (September 23, 2009) (to be codified at Appendix, 29 C.F.R. §1630.2(k)). A record of a leave of absence from work, however, does not, in and of itself, establish a record of a disability under the ADA. \textit{Eshelman}, 397 F.Supp.2d at 574.
E. Being Regarded as Having a Disability

The final prong of the disability test – whether an individual is regarded as having an actual disability -- was included in the ADA to reflect “Congressional intent to protect all persons who are subjected to discrimination based on disability, even if they do not in fact have a disability.” In the original regulations, one was regarded as having an impairment if he:

1. [had] a physical or mental impairment that [did] not substantially limit major life activities but [was] treated by [his employer] . . . as constituting such limitation;
2. [had] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
3. [had] none of the impairments [identified within the ADA and its regulations] . . . but [was] treated by [his employer] . . . as having a substantially limiting impairment.

In Sutton, the U.S. Supreme Court, interpreted this original language to read that one may be “regarded as” disabled when “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limited one or more major life activities.” In Jacques v. DiMarzio, the Second Circuit Court of Appeals held that “[t]o trigger the ‘regarded as’ provision of the ADA, ‘it is necessary that a covered entity entertain misperceptions about the individual.’” “Even an innocent misperception based on nothing more than a simple mistake of fact as to the severity . . . of an individual’s impairment can be

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126 EEOC Compl. Man. (BNA) §902.8 (2009)
127 29 C.F.R. §1630.2(l).
128 Sutton, 527 U.S. at 489, 119 S.Ct. at 2149-2150.
sufficient to satisfy the statutory definition of a perceived disability.”\textsuperscript{130} Further, “evidence that the company created a pretextual reason for [the plaintiff’s] firing may tend to prove that it regarded [the plaintiff] as a disabled employee.”\textsuperscript{131} The focus is on the intent of the employer.\textsuperscript{132}

The current “regarded as” rules remain pretty much the same with one major exception. Under the old law, the plaintiff had to show that not only was he regarded by his employer as disabled, his employer regarded him as “disabled within the meaning of the ADA”\textsuperscript{133} Today, the analysis is much simpler and focused solely on the employer’s recognition of an impairment – whether it truly exists or not. In the amended ADA at 42 U.S.C. §12102(3)(A) it now states that:

\begin{quote}
An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.\textsuperscript{134}
\end{quote}

Through the ADAAA, the restrictive Sutton rule and its progeny are rejected and replaced with a broader interpretation of the “regarded as” prong based upon an earlier U.S. Supreme Court case, \textit{School Board of Nassau County, Florida v. Arline}.\textsuperscript{135} In simple terms (per EEOC proposed regulations):

\begin{itemize}
\item \textsuperscript{130} \textit{Deane v. Pocono Medical Center}, 142 F.3d 138, 144 (3rd Cir. 1998).
\item \textsuperscript{131} \textit{Moorer v. Baptist Memorial Health Care System}, 398 F.3d 469, 481 (6th Cir. 2005) (citing \textit{Ross v. Campbell Soup Co.}, 237 F.3d 701, 708 (6th Cir. 2001)).
\item \textsuperscript{132} \textit{Capobianco v. City of New York}, 422 F.3d 47, 57 (2nd Cir. 2005).
\item \textsuperscript{133} 386 F.3d 192, 201 (2nd Cir. 2004) (quoting \textit{Colwell v. Suffolk County Police Dep’t}, 158 F.3d 635, 646 (2nd Cir. 1998), cert. denied, 536 U.S. 1018 (1999)).
\item \textsuperscript{134} 42 U.S.C. §12102(3)(A) (2009) (emphasis added). It also states that “transitory and minor” impairments are not protected under the ADA. 42 U.S.C. §12102(3)(B) (2009) (“A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”)
\item \textsuperscript{135} 122 Stat. 3553, 3554; 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (“By amending the definition of ‘handicapped individual’ to include not only those who are actually physically impaired, but
\end{itemize}
An individual is [now] ‘regarded as’ having a disability if the individual is subjected to an action prohibited [by the ADA]…including non-selection, demotion, termination, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.\textsuperscript{136}

No longer must the plaintiff prove that the employer believed that they were actually disabled under the statute. Discrimination based upon an actual or perceived impairment is sufficient.

The Appendix in the EEOC regulations also states that:

An employer that takes a prohibited action against an individual because of symptoms related to an impairment or because of mitigating measures, such as medication that an individual uses because of an impairment may also regard the individual as disabled even if the employer is unaware of the underlying impairment.\textsuperscript{137}

As an example, an employer may refuse to hire someone as a driver because they take anti-seizure medication.\textsuperscript{138} No longer can an employer draw conclusions and penalize an otherwise functional employee.

III. How does the ADAAA Assist Plaintiffs with Mental Disabilities.

The amended ADA offers multiple advantages for the mentally disabled plaintiff. It includes an expanded statutory list of per se major life activities with five new categories that are relevant to the mentally ill claimant -- concentrating, thinking, communicating,
interacting with others and major functions of the brain. The amended statute also provides a more relaxed definition of substantial limitation acknowledging that there are varying degrees of disability. It eliminates the mitigating measures exception for medications. And, it includes generous EEOC interpretative guidelines regarding per se mental disabilities.

A. Expanding the Definition and List of Per Se Major Life Activities

Prior to the ADAAA, plaintiffs had a comparatively short list of major life activities per se to which they were expected to conform their disability claims. As such, it became common for plaintiffs to propose other activities outside the list for consideration. And, before the new activity was accepted, the court would ask if it met the Toyota test? – Was this activity “of central importance to daily life?” This test gave the courts the opportunity to reject those grey area activities that they didn’t consider significant enough to meet this standard. Some of the very same activities that were rejected by some courts, such as concentrating, are now incorporated into the statute. With the ADAAA, we have a proposed EEOC regulatory definition that identifies major life activities as “those basic activities that most people in the general population can

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139 Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

140 Although, the EEOC does state that this list is non-exhaustive.


142 Toyota, 534 U.S. at 198, 122 S.Ct. at 691.
perform with little or no difficulty.” The court will no longer be asked to make the value judgment of what type of activity rises to the level of being central. It need only consider how effectively average individuals can perform the activity. The major life activities limited by psychiatric impairments may differ significantly from person to person.

Identifying them requires some flexibility. Lowering the requirement, and hence providing this flexibility, will help ADA claimants with mental impairment (as well as those with physical impairments).

This new broad definition goes hand in hand with the expanded list of per se major life activities. Before the ADAAA, most claims for mental disability were based upon the major life activities of caring for oneself and working, both difficult activities for one to make a case for substantial limitation.

Having considered other major life activities that are equally relevant to individuals with mental disabilities, Congress (and the EEOC) added additional categories including, inter alia, concentrating, thinking, communicating, interacting with others, and the major functions of the brain.

1) Major Life Activity – Concentrating

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143 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(i)).
145 See supra n. 78.
146 Caring for oneself remains an effective option for the mentally disabled. The EEOC discusses this claim in its EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) 1997 WL 34622315 (E.E.O.C. Guidance) at 3. Additionally, Working remains an option, although it remains one of the toughest major life activities to satisfy. 74 Fed. Reg. 48442 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(7)).
The major life activity of concentration has been rejected by some courts and accepted by others. In *Pack v. Kmart Corporation*, the Tenth Circuit Court of Appeals held that concentration was not in and of itself a major life activity. “Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an ‘activity’ itself.” And the Sixth Circuit in *Boerst v. General Mills Operations, Inc.* held that “[s]leeping and working are major life activities under the ADA. Concentrating and maintaining stamina are not.” On the other hand, the Third Circuit in *Fiscus v. Wal-Mart Stores, Inc.* held that “[c]oncentrating and remembering are major life activities.” The Eleventh Circuit in *Pritchard v. Southern Co. Services* agreed holding that depression can substantially limit the major life activity of concentrating.

Lack of concentration is a very common problem among the mentally disabled. It is a symptom of several psychiatric conditions described in the DSM-IV-TR including, but not limited to, generalized anxiety disorder, bipolar disorder, post traumatic stress disorder and depression. By incorporating this activity into the major life activities per se list, we eliminate the need for the Court to answer the question -- Can an average individual concentrate with little or no difficulty? Considering the increasingly hectic

148 Pack, 66 F.3d at 1305.
149 Id.
151 385 F.3d 378, 383 (3rd Cir. 2004); *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569 (3rd Cir. 2002); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 307 (3rd Cir. 1999).
152 92 F.3d 1130, 1 133-34 (llth Cir. 1996), amended on other grounds, 102 F3d 1118, cert. denied, 117 S. Ct. 2453 (1997).
153 See supra n.58.
world we live in, it may not be so easy to make that case, even without the heightened requirement that it be central to our daily lives.

2) Major Life Activities - Thinking and the Functions of the Brain

Thinking is also a fundamental component of many major life activities. We think, therefore we learn. We think, therefore we read. We think, therefore we work. And, the list goes on. Inability to think clearly is also a common symptom of mental illness found within the DSM-IV-TR. Although, thinking was not included among the original major life activities per se list, it has been accepted, at least at the district court level in most of the circuits. It is commonly combined with the major life activity of concentrating. The Third Circuit Court of Appeals, in Fiscus explained why this activity was significant enough to incorporate into the list:

Thinking . . . is largely internal and invisible, although the effects of thought (or its absence) are externally manifested. Indeed, ‘thinking’ well illustrates that the distinction between the physical impairment and the affected life activity is often fine, indeed. For example, a chemical imbalance in the brain can affect thinking. One may view that impairment as characteristic of brain damage but also as a limitation on mental ability and thought. How one characterizes the difference depends on whether one looks to the chemistry of the brain or to the thinking activity of the mind.”


155 See e.g. Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378 (3rd Cir. 2004); Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003), cert. denied, 541 U.S. 937 (2004).

156 Fiscus, 385 F.3d 378, 383 (3rd Cir. 2004).
This brings up a good point. While, the addition of thinking to the master list of per se major life activities is helpful, it could easily be folded into the larger category of functions of the brain. This broad category appears to be a catch-all that would cover virtually any condition involving a chemical imbalance that is treated by psychotropic drugs.

3) Major Life Activities – Communicating and Interacting with Others

Communication has, in the past, been covered by the majoring life activity of speaking. Courts have long recognized that speaking involves both a physical and mental component. Physical issues include neurological disorders and speech impediments. Several courts have also recognized its mental component, such as the impact of depression, ADHD, bipolar disorder and panic disorder. Adding this as a separate major life activity broadens the range of communications that are covered under the statute. We’re no longer limited to talking. Moreover, the cognitive trio, concentrating, thinking and communicating, naturally fit together in mental disability claims.

Although it is a new addition, there doesn’t appear to be an issue as to whether communicating has been accepted by the courts as a major life activity. The question is

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whether any mental impairment is significant enough to create a substantial limitation of the major life activity of communicating.\textsuperscript{159}

Related to the major life activity of communicating is interacting with others. Interacting with others has not been “universally recognized” as a major life activity.\textsuperscript{160} As an example, it was rejected by the First Circuit Court of Appeals in \textit{Soileau v. Guilford of Maine, Inc.}\textsuperscript{161} because it is too vague.\textsuperscript{162} Other courts have merely accepted interacting with others as an activity for argument sake, focusing instead on the crucial issue of substantial limitation.\textsuperscript{163} As an example, in \textit{Peter v. Lincoln Technical Institute, Inc., Inc.}, the court reasoned that “[c]ommunication and sociability problems cover a broad spectrum of severity, and . . . it is a better approach to sort out minor socialization difficulties by using the substantial impairment test rather than to decide that . . . interacting with others is not a major life activity.”\textsuperscript{164} However, some courts have acknowledged interacting with others as a legitimate category.\textsuperscript{165} For example, in \textit{Lemire v. Silva},\textsuperscript{166} the District Court of Massachusetts offered the following supportive reasoning:

\begin{quote}
The ability to interact with others, if defined broadly to include the most basic types of human interactions, is a major life activity. Human beings
\end{quote}

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\textsuperscript{159} Id.  \\
\textsuperscript{161} 105 F.3d 12 (1\textsuperscript{st} Cir. 1997)  \\
\textsuperscript{162} Id.  \\
\textsuperscript{163} \textit{See e.g. Peter,} 255 F.Supp.2d 417 (E.D.Pa. 2002); \textit{Steele v. Thiokol Corp.}, 241 F.3d 1248 (10\textsuperscript{th} Cir. 2001); \textit{King v. Autoliv, APS, Inc.}, 2004 WL 724400 (D.Utah 2004).  \\
\textsuperscript{164} 255 F.Supp.2d at 432.  \\
\textsuperscript{165} \textit{See McAlindin v. County of San Diego}, 192 F.3d 1226 (9\textsuperscript{th} Cir. 1999), amended on other grounds on denial of reh’g, 201 F.3d 1211 (9\textsuperscript{th} Cir. 2000); \textit{Winterlin v. Dakota County Sch. Dist.}, 2002 WL 31422848 (D.Neb. 2002).  \\
\textsuperscript{166} 104 F. Supp.2d 80 (D.Mass. 2000)
\end{flushright}
are fundamentally social beings. The ability to interact with others is an inherent part of what it means to be human. Even if we had the capacity to live without any human interaction, that capacity is immaterial in view of the highly interactive society in which we live. The ability to interact is thus both fundamental in itself and also essential to contemporary life. Beyond doubt, the ability to interact is at least as basic and as significant as the ability to learn or work.\textsuperscript{167}

The Ninth Circuit Court of Appeals in \textit{McAlindin v. County of San Diego}\textsuperscript{168} also held that “[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of “major life activity.”\textsuperscript{169}

It is interesting that Congress did not incorporate interacting with others directly into the statute.\textsuperscript{170} The EEOC writes, however, that “the fact that a major life activity that has previously been identified by EEOC or the courts is not in the statute ‘does not create any negative implication as to whether such activity…constitutes a ‘major life activity’ under the statute.’”\textsuperscript{171}

B) Simplifying Substantial Limitation

The claims of the mental impaired are also assisted by the revised definition of “substantial limitation.” In \textit{Toyota}, an impairment created a substantial limitation when it prevented or severely restricted a person from engaging in a major life activity.\textsuperscript{172} To make this determination the court performed the “condition, manner and duration”

\textsuperscript{167} \textit{Id.} at 86-87.
\textsuperscript{168} 192 F.3d at 1234.
\textsuperscript{169} \textit{Id.} The Second Circuit in \textit{Jacques v. Dimarzio, Inc.} also held that “[i]nteracting with others is a major life activity.” 386 F.3d 192, 202 (2nd Cir. 2004)
\textsuperscript{170} It also failed to incorporate the activities of sitting and reaching.
\textsuperscript{171} 74 Fed.Reg. 48446 (September 23, 2009) (to be codified at Appendix 29 C.F.R. §1630.2(i) (citing Senate Managers’ Statement at 8.)).
\textsuperscript{172} \textit{Toyota}, 534 U.S. at 196-197, 122 S.Ct. at 691.
The proposed EEOC language is much simpler. What is substantial when compared to most people in the general population? How does this relaxed standard help people with mental disability claims? Imagine an inside salesman who suffers from anxiety disorder, and who without his medication and structured breaks finds it difficult to meet new clients. Assume that this doesn’t severely restrict him from doing his job. It just makes it substantially difficult for him to perform as compared to most other people in a similar scenario. Under the new law, he is probably disabled. One can also imagine an employee with ADHD who cannot sit still at her workstation for longer than forty-five minutes without having to get up and move around. She meets her quotas but her walks around the factory floor violate company policy. Again, it is not impossible or severely difficult for her to be compliant, but it is substantially more difficult when compared to others. Again, this employee is arguably disabled. These examples demonstrate that everything is a question of degrees. Unlike many physical impairments, mental impairments are not black and white. Problems may be minor with medication and reasonable accommodations, such as breaks, but if you take these away, issues may become so severe that an employee cannot work at all. By allowing them to raise the issue before things fully deteriorate we insure that the focus remains on the act of discrimination and not what may be a temporarily weakened plaintiff.

In 1997, the EEOC published the EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. The EEOC Guidance has been used by the

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173 29 CFR § 1630.2(j)(2).
courts\textsuperscript{175} when ascertaining whether a mental impairment has substantially limited a particular major life activity such as concentrating or interacting with others. As an example, according to guidance provided by the EEOC Enforcement, “an individual would be substantially limited [in the major life activity of concentration] if [he] was easily and frequently distracted, meaning that his . . . attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if [he] experienced his . . . “mind going blank” on a frequent basis.”\textsuperscript{176}

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities states that “[a]n individual would be substantially limited [in the major life activity of interacting with others] . . . if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”

It then cites the following example:

An individual diagnosed with schizophrenia now works successfully as a computer programmer for a large company. Before finding an effective medication, however, he stayed in his room at home for several months, usually refusing to talk to family and close friends. After finding an effective medication, he was able to return to school, graduate, and start his career. This individual has a mental impairment, schizophrenia, which substantially limits his ability to interact with others when evaluated without medication. Accordingly, he is an individual with a disability as defined by the ADA.\textsuperscript{177}

Alternatively, in\textit{Jacques v. Dimarzio}, the Second Circuit held that:

\textsuperscript{175} See e.g. McAlindin\textit{ v. County of SanDiego}, 192 F.3d 1226 (9th Cir. 1999); Winterlin\textit{ v. Dakota County Sch. Dist.}, 2002 WL 31422848 (D.Neb. 2002).
\textsuperscript{177} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) 1997 WL 34622315 (E.E.O.C. Guidance) at 5
“a plaintiff is ‘substantially limited’ in [the major life activity of] ‘interacting with others’ when the mental or physical impairment severely limits the fundamental ability to communicate with others. This standard is satisfied when the impairment severely limits the plaintiff’s ability to connect with others, i.e., to initiate contact with other people and respond to them, or to go among other people—at the most basic level of these activities. The standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful. A plaintiff who otherwise can perform the functions of a job with (or without) reasonable accommodation could satisfy this standard by demonstrating isolation resulting from any of a number of severe conditions, including acute or profound cases of: autism, agoraphobia, depression or other conditions that we need not try to anticipate today.”

Another manner in which ADAAA assists the mentally impaired is through the proposed EEOC regulation that states that while a substantial limitation must be more than temporary, an episodic substantially limiting impairment is a disability. Therefore, someone with bipolar disorder who is fine most of the year, except for the month of February when she is manic, would be considered disabled under the law.

C) Eliminating the Mitigating Measures Exception

In Sutton, the Supreme Court held that a determination of whether an individual is disabled should be made with reference to mitigating measures. This position was rejected by Congress and replaced with a rule that “ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity.” This is important to the mentally impaired plaintiff because of the issue of medication. A simple example is incorporated into the proposed

180 FOOTNOTE (SHOULD THIS BE QUOTED)
EEOC regulations. It states that “[a]n individual who is taking a psychiatric medication for depression . . . has a disability if there is evidence that the mental impairment . . . , if left untreated, would substantially limit a major life activity.”\(^{182}\) It is not uncommon for someone with a psychiatric disorder to “go off their meds.” They may be a fully functional member of the management team, but with a lapse in their medication they become too anxious to leave the house. By eliminating the mitigating measures exception, they receive protection under the law and they are not penalized for taking steps to function like everyone else.

D) Per Se Disabilities

Finally, the mentally impaired plaintiff is assisted by a section of the EEOC regulations that offers “Examples of Impairments that Will Consistently Meet the Definition of Disability.”\(^{183}\) These include major depression, bipolar disorder, obsessive compulsive disorder, post traumatic stress disorder and schizophrenia.\(^{184}\) Further, it provides a list of major life activities that would be limited by such impairments. These include: functions of the brain, thinking, concentrating, interacting with others, sleeping, and caring for oneself.\(^{185}\) If the Court is willing to accept the EEOC regulations without question, you can make a case for one of these examples without having to work that hard to establish the link between the impairment and the major life activity.

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\(^{182}\) 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(3)(iii)(A)

\(^{183}\) 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(5)

\(^{184}\) 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(5)(H)).

\(^{185}\) Id.
IV. Conclusion

We know that, in principle, the ADA Amendments Act of 2008 helps mentally impaired claimants; however, we really cannot project what its full impact will be. Because the ADAAA has been held to be non-retroactive, and the recently published federal court cases involve conduct that occurred prior to January 1, 2009, we have yet to see a complete application of the new rules. Moreover, we are still operating under the old federal regulations. Although, it is anticipated that the EEOC will publish final regulations some time in the next few months. Until then, we wait.

186 See E.E.O.C. v. Agro Distrib., LLC, 555 F.3d 462, 469 n. 8 (5th Cir. 2009); Winsley v. Cook County, 563 F.3d 598, 600 n. 1 (7th Cir. 2009); Milholland v. Sumner County Bd. Of Educ., 569 F.3d 562 (6th Cir. 2009).