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Lowering the Threshold: Establishing Mental Disability Employment Discrimination Claims after the ADA Amendments Act (updated 9/22/10)

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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 . . .”,² the Americans with Disabilities Act (“ADA”)³ represented a landmark change. In fact, the ADA would serve as a model for future legislation throughout the world.⁴ In the official ADA Signing Statement, President Bush said:

As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.⁵

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⁴ See T. Degener & 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 Id. at 6 (quoting President George Herbert Walker Bush, July 26, 1990, ADA Signing Statement).
Thus, other nations such as Great Britain, Canada and Australia enacted similar legislation, but none were as comprehensive as the ADA.\textsuperscript{6}

Since its inception, the ADA not only protected the rights of the physically disabled, but the rights of those who suffered from a long and sometimes controversial list of mental disabilities as well.\textsuperscript{7} Passage of the ADA was a “significant victory for people with mental disabilities” since there were those in Congress who wished to “exclude them entirely from the Act’s protections,” and, in particular, the protections provided by its employment provisions.\textsuperscript{8} “Although members of Congress were appalled at the mistreatment of people with mobility impairments, cerebral palsy and arthritis . . . congressional disapprobation of discrimination did not necessarily extend to people with psychiatric disabilities.”\textsuperscript{9} During the congressional debates, relying upon the worst possible misconceptions and comparisons, Republican Senator Jesse Helms argued, “How is an employer . . . supposed to find out whether a man is a pedophile or a schizophrenic?”\textsuperscript{10} “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.”\textsuperscript{11} Helms asserted that an employer should be left to his “own moral standards” when deciding whether to hire

\textsuperscript{6} Ruth Colker, \textit{The Disability Pendulum} 6 (2005).
\textsuperscript{7} “In enacting the ADA, Congress chose to protect individuals who have mental impairments as well as those with physical impairments.” \textit{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. 1243 (2000) (citing \textit{Criado v. IBM Corp.}, 145 F.3d 437, 443 (1st Cir.1998); \textit{Holihan v. Lucky Stores, Inc.}, 87 F.3d 362, 365 n. 3 (9th Cir.1996), cert. denied, 520 U.S. 1162 (1997); 29 C.F.R. § 1630.2(h)(2) (1999)).
\textsuperscript{8} Susan Stefan, \textit{Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act} xii (2001).
\textsuperscript{9} Id. at 6.
\textsuperscript{10} 135 CONG. REC. S10765-86 (Daily Ed. Sept. 7, 1989) (Statements of Senator Helms) (Also available on Westlaw at 1998 WL 183216).
\textsuperscript{11} Id.
transvestites, kleptomaniacs, or manic depressives. This idea that individuals with mental disabilities were somehow morally flawed was repeated throughout the congressional debate.

Today, “[s]ocial science research confirms that mental illness is one of the most – if not the most stigmatized of social conditions.” To help illustrate this point, Professor Susan Stefan, in her book “Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act, describes adult individuals with mental disabilities as belonging to two categories. The first group, the larger of the two, is called “the overcomers.” These individuals have “primary identities that do not revolve around their psychiatric diagnosis.” They manage to keep their “diagnosis and treatment secret or at least private.” In other words, they pass for sane. There is another group, however, “the cripples” that have already been “socially and publically identified” as mental patients.

“Work serves as the main distinction” between these two groups. In an empirical study conducted by Professor Stefan, mental disabled respondents were asked in what context had they experienced the worst discrimination. Given several options including

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12 Id. (emphasis added).
15 Id. at 51.
16 Id.
17 Id.
“housing, higher education, insurance, medical treatment and institutionalization,” the leading area was employment.\(^{19}\)

Overcomers generally have jobs. They are the lawyers, doctors, accountants, and department managers, for example, who manage their condition discreetly through medication and sick leave. Cripples, on the other hand, often want to work, but with an unavoidable public history of treatment and hospitalization they cannot get past the hiring process. They are frequently deemed unqualified for anything beyond the simplest of jobs.

Representatives of both categories have turned to the ADA for help, and in particular its employment provisions. The ADA provides a uniform national standard for equal employment rights. It 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.”\(^{20}\) To take advantage of this protection, a claimant must overcome a threshold requirement – whether an overcomer or a cripple, he or she must be “disabled” as it is defined in the ADA.

This article will review the ADA’s original employment provisions, focusing on the threshold question of what is a disability. Further, it will discuss the U.S. Supreme Court cases that, in fact, raised the statutory threshold – making it more difficult for a mentally disabled claimant to qualify as “disabled.” Finally, the article will examine the recent

\(^{19}\) Id. at 4.
\(^{20}\) 42 U.S.C. §12112(a).
changes to the law brought forth by the ADA Amendments Act of 2008 and how they improve the prospects of the mentally disabled claimant.

I. ADA and the ADA Amendments Act

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 . . . .” 21 In furtherance of these objectives, the ADA is composed of three detailed subchapters. 22 The first subchapter addresses employment discrimination. 23 Subchapter II addresses public services including discriminatory lack of access to public transportation. 24 Subchapter III prohibits private entities that operate public accommodations and services from discriminating against the disabled. 25

As a “clear and comprehensive national mandate,” the ADA was originally designed to have broad application. However, since its introduction, we have seen the reach of the ADA increasingly limited by federal case law. The most critical judicial interpretations – involving the question of when is the claimant “disabled” – were addressed in the U.S.

21 42 U.S.C. §12101(b).
22 There is a fourth subchapter, 42 U.S.C. §12201 to 12300 as originally enacted that contains miscellaneous provisions.
23 42 U.S.C. §12111 to 12117
24 42 U.S.C. §12131 to 12165
25 42 U.S.C. §12181 to 12189
Supreme Court decisions *Toyota Motor Manufacturing, Inc. v. Williams*\(^{26}\) and *Sutton v. United Air Lines*.\(^{27}\) These cases, which are discussed in greater detail herein, have made it particularly difficult for individuals with mental disabilities. They have created a very high initial “disability” threshold must be overcome before the issue of discrimination is even addressed.

On September 25, 2008, President George W. Bush signed into law Senate bill 3406, the ADA Amendments Act of 2008, which is intended to circumvent these cases and 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.\(^{28}\) And while there were opponents that rejected this House bill as “extending the protections of the ADA beyond those that the Congress originally intended to provide,”\(^{29}\) the ADA Restoration Act of 2008 (as it was originally named) would soon gain over 240 cosponsors.\(^{30}\) 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).\(^{31}\) A similar bill, this time formerly identified as the ADA Amendments Act of 2008, was subsequently introduced in the Senate by Democratic Senator Tom Harkin of Iowa and Republican Senator Orrin Hatch of Utah.\(^{32}\) This Senate bill was adopted, and

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\(^{26}\) 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).
\(^{27}\) 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).
\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) 154 CONG. REC. H6,081 (2008).
\(^{32}\) 154 CONG. REC. S8,348 (2008).
then ultimately passed unchanged by the House of Representatives. 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.”

In fact, the ADA Amendments Act of 2008 (“ADAAA”) was enacted with several clearly defined purposes. First of all, like the ADA before it, the ADAAA was intended to provide “a clear and comprehensive 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

36 Id. at 3554.
37 Id.
38 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002); 122 Stat. 3553, 3554.
39 122 Stat. 3553, 3554
40 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); 122 Stat. 3553, 3554.
41 122 Stat 3553, 3554
42 Id.
consistent with [the ADAAA].” To accomplish these purposes, the ADAAA provides new rules of construction for interpreting the definition of disability under the ADA.

II. Defining Disability

Disability is defined under the ADA (and its corresponding regulations) as “A) a physical or mental impairment that substantially limits one or more major life activities of such individual; B) a record of such an impairment; or C) being regarded as having such an impairment . . .” Whether a person meets the requirements of this statutory definition is an individualized inquiry. It is clear, however, that a plaintiff “must satisfy at least one of these three prongs to be considered an individual with a ‘disability.’” This article focuses on the first prong, the actual disability test, but will touch briefly on the second (“record of”) and third (“regarded as”) prongs.

In order to define disability under the ADA one must address 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

43 Id.
45 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.”)
46 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.”)
relied upon the Code of Federal Regulations,\textsuperscript{49} the EEOC Compliance Manual,\textsuperscript{50} the Rehabilitation Act of 1973,\textsuperscript{51} and the court’s own interpretation of the ADA’s findings and purposes. To date, the courts have paid little attention to the ADA’s legislative history.

III. ADA “Disability” Authority and the ADAAA

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.”\textsuperscript{52} In accordance with the ADAAA, the EEOC drafted proposed changes to these regulations as well as the Appendix.\textsuperscript{53} 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.\textsuperscript{54} 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 I cite to them.

\textsuperscript{49} 29 C.F.R. §1630 et seq. (2010).
\textsuperscript{50} 2 EEOC Compl. Man. (BNA) §902 (2008)
\textsuperscript{52} 29 C.F.R. §§1630.1-1630.16 & Appendix (2010).
\textsuperscript{53} 74 Fed. Reg. 48431 (September 23, 2009).
\textsuperscript{54} Id.
To begin, the amended ADA and the proposed regulations both state that the definition of disability “shall be construed in favor of broad coverage . . . “.\(^{55}\) 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

“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.”\(^{56}\) This requirement remains essentially unchanged by the ADAAA. 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.”\(^{57}\) Proposed changes to the CFR include a minor revision of this definition.\(^{58}\) The term “mental retardation” is replaced with the more politically appropriate “intellectual disability.”\(^{59}\)

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)\(^{60}\) which is published by the American Psychiatric Association. The DSM-IV-TR represents “an important reference by courts and is widely used by American mental health professionals for diagnostic. . .

\(^{55}\) 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.”)


\(^{57}\) 29 C.F.R. §1630.2(h)(2) (emphasis added).


\(^{59}\) Id.

\(^{60}\) Diagnostic and Statistical Manual of Mental Disorders “Text Revision” (DSM-IV-TR) 4th ed. (Am. Psychiatric Ass’n 1994). Note that a new DSM-V is being prepared for publication in 2013.
purposes.” Of course, merely having an impairment that is discussed within the DSM-IV-TR does not make one disabled for purposes of the ADA. The contents of the Manual have grown considerably. The original DSM (published by the American Psychiatric Association in 1952) contained 60 diagnoses. The fourth edition, published in 1994, contains 374 diagnoses. The DSM-IV-TR identifies numerous conditions that are not mental disorders but for which people may seek treatment -- such as problems with a spouse or child. Since these conditions are not traditional disorders, they are not impairments under the Act. Also, several psychiatric disorders have been directly recognized by the proposed regulations of 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

Having identified a mental impairment, the next step is to determine whether it impacts a major life activity. The legal term “major life activity” was not defined in the

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63 Diagnostic and Statistical Manual of Mental Disorders (DSM) 1st ed. (Am. Psychiatric Ass’n 1952).


66 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)).

67 Id.
original statute.68 One had to turn instead to the EEOC regulations and interpretive case law for guidance.69 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.”70 In making this determination, the courts held that one must examine the activity’s “significance.” The 1998 U.S. Supreme Court in the case of Bragdon v. Abbott held that “the touchstone for determining an activity's inclusion under the statutory rubric is its significance.”71 Additionally, the Second Circuit in Reeves v. Johnson Controls World Servs., Inc. held that “[t]he term ‘major life activit[y],’ by its ordinary and natural meaning, directs [one] to distinguish between life activities of greater and lesser significance.”72 Furthermore, the Tenth Circuit in Pack v. Kmart Corporation held that when determining 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.”73

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.”74

69 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).
72 Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 151 (2d Cir.1998).
73 Id.
74 29 C.F.R. §1630.2(i) This list is non-exhaustive and further examples are discussed herein.
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 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. Ultimately, 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.” With this holding, the Supreme Court established a “minimum” level of significance necessary for an activity to qualify.

It is difficult to establish what is of central importance. If you select only those activities that are “central” to most people’s lives, you end up with a fairly

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75 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).
76 Id. at 187, 122 S.Ct. at 686.
77 Id.
78 Id.
79 Id.
80 Id. (emphasis added).
short list – like the major life activities per se list published in the original EEOC regulations.\textsuperscript{81} In a subsequent case, the Third Circuit attempted to further refine this 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’].\textsuperscript{82}

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.\textsuperscript{83} First of all, this definition would include an extensively expanded list of per se activities:

\begin{itemize}
\item[(A)] In general
\hspace{1em} . . . 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.
\item[(B)] Major bodily functions
\hspace{1em} . . . 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.\textsuperscript{84}
\end{itemize}

These examples are also incorporated into the proposed EEOC regulations.\textsuperscript{85} The EEOC indicates that this list is non-exhaustive.\textsuperscript{86} And as an example, in its

\begin{itemize}
\item[81] 29 C.F.R. §1630.2(i)
\item[82]  Fiscus v. Wal-Mart Stores, Inc., 385 F.3d 378, 384 (3rd Cir. 2004)
\item[83]  42 U.S.C. §12102(2) (2010).
\item[84]  \textit{Id.}
\item[85]  74 Fed. Reg. 48440 (September 23, 2009 (to be codified at 29 C.F.R. §1630.2(i)(1)).
\item[86]  \textit{Id.}
\end{itemize}
proposed language, the EEOC has included “interacting with others” as an activity, although it is not part of the statutory list.\(^{87}\)

Instead of the higher standard set by Toyota (“central importance”), the new regulations essentially return us to the original definition of the term.\(^{88}\) “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.”\(^{89}\) 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.\(^{90}\)

C. Substantial Limitation

The next step is to determine whether the aforementioned major life activity is “substantially limited” by the impairment. This legal term was also left undefined in the original statute.\(^{91}\) According to the original EEOC regulations, in order to determine whether a disability "substantially limits" a major life activity, the following must be

\(^{87}\) 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 (2\(^{nd}\) 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 (8\(^{th}\) Cir. 2003); *McAlindin v. County of San Diego*, 192 F.3d 1226 (9\(^{th}\) Cir. 1999); *EEOC v. Voss Elec. Co. dba Voss Lighting*, 257 F.Supp.2d 1354 (W.D. Okla. 2003). *But see, Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1\(^{st}\) Cir. 1997) (Ability to get along with others is too vague to be a workable definition).

\(^{88}\) Id.

\(^{89}\) Id.


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." These
considerations are conspicuously missing from the revised regulations. They are
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 as compared to most people in the general population.” Further, a temporary
psychological impairment resulting from a physical condition, with minimal residual
effects, cannot form the basis of a claim under the ADA.

In 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.” The
proposed EEOC language, drawing from the ADAAA, rejects this holding. It states

\[92\text{29 CFR § 1630.2(j)(2).}\]
\[93\text{74 Fed. Reg. 48446 (September 23, 2009) (to be codified at Appendix, 29 C.F.R. §1630.2(j) (‘Although
the Senate Managers Statement...made reference to the terms ‘condition, manner, or duration’ under which
a major life activity is performed, the Commission has deleted that specific language from the expression of
the standard itself to effectuate Congress’s clear instruction in the Amendments Act that ‘substantially
limits’ is not to be misconstrued to require the ‘level of limitation, and intensity of focus’ applied by the
Supreme Court in Toyota.’)).}\]
\[94\text{74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(1)) (emphasis added).}\]
\[95\text{See e.g. Johnson v. Foulds, Inc., 14 A.D.D. 885 (N.D. Ill. 1996); Sanders v. Arneson Products, Inc., 91
F.3d 1351, 1354 (9th Cir. 2005).}\]
\[96\text{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.”); Eshelman v. Agere Systems, Inc., 397 F.Supp.2d 557, 573
144L.Ed.2d 518 (1999)) (“Although substantial limitations should be considerable, ‘utter inabilities’ are not
required.”).}
instead “*an impairment need not prevent, or significantly or severely restrict*” the individual from performing a major life activity in order to be considered a disability.\(^\text{97}\)

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.\(^\text{98}\) Examples of such impairments may include “psychiatric disabilities such as depression, bipolar disorder and post-traumatic stress disorder.”\(^\text{99}\) 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.”\(^\text{100}\)

In *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.\(^\text{101}\) In *Sutton*, twin sisters Karen Sutton and Kimberly Hinton brought suit against United Airlines for rejecting their employment applications.\(^\text{102}\) Both sisters were experienced pilots, but severely myopic.\(^\text{103}\) This condition was improved by corrective lenses.\(^\text{104}\) Accordingly, with lenses, they were both able to “function identically to individuals without a similar impairment.”\(^\text{105}\)

The Federal District Court for the District of Colorado “dismissed [the twins’]
complaint for failure to state a claim upon which relief could be granted,

106 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. 107 The very thing that would allow them to temporarily 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 court’s judgment. 108

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. 109 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. 110 The Supreme Court also ignored the ADA’s legislative history which clearly supports a broader application of the statute. 111 The Court even makes note that it was aware of the legislative history since it was introduced by Justice Stevens in his dissent. 112 To support its decision, the Court makes one major assumption. Drawing the

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106 Id. at 476, 119 S.Ct. at 2144.
107 Id.
108 Id. at 477, 119 S.Ct. at 2144.
110 Id. at 481, 119 S.Ct. at 2146 (citations omitted)
111 Id. at 482, 119 S.Ct. at 2146.
112 Id.
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. Consequently, the Court held that disability under the ADA
must be determined “with reference to corrective measures.” Further, the Court held
that both the positive and negative effects of the corrective measures must be
considered. Unfortunately, this meant that an individual with obsessive compulsive
disorder who was prescribed regular medication was not protected by the statute, even
during the periods of time when he missed said medication. On the other hand, if the
same individual had a serious negative reaction to their medication, under *Sutton* they
would, in fact, be considered disabled under the ADA.

The amended ADA and the proposed EEOC language both reject the all
encompassing rule established by *Sutton* regarding corrective measures, except in the
case of “ordinary eyeglasses or contact lenses.” 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.” Consequently, when determining whether an individual
with mental disabilities is “disabled” under the statute, he or she is viewed as if they were

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113 *Id.* at 487, 119 S.Ct. at 2149.
114 *Id.* at 488, 119 S.Ct. at 2149.
115 *Id.* at 482, 119 S.Ct. at 2146.
116 42 U.S.C. §12102(4)(E)(i). Regrettably, even with the changes, the Sutton twins still have no cause of
action.
117 *Id.*
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.”\(^{118}\) 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.\(^{119}\)

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.”\(^{120}\) The most common example being someone who has recovered from cancer, who is still presumed to be too sick to function in their job.

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.\(^{121}\)

“The determination of whether a person has a record of disability must be made on a case-by-case basis.”\(^{122}\) 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

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\(^{119}\) 74 Fed. Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(k)(ii)).

\(^{120}\) Id.

\(^{121}\) 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)).

substantial limitation on one or more of the plaintiff’s major life activities.”  

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 “when compared to most people in the general population.”  

If a plaintiff cannot meet the requirements of the above-mentioned disability test, “she cannot recover even if her employer terminated her expressly because she had a record of her condition.”  

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.”

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;

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123 Sinkler v. Midwest Prop. Mgmt. Ltd. P’ship, 209 F.3d 678, 683 (7th Cir. 2000) (citing Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 520 n.7 (7th Cir. 1998)).
125 Eshelman, 397 F.Supp.2d at 574 (citing Sinkler, 209 F.3d at 683 (citation omitted)).
126 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. Eshelman, 397 F.Supp.2d at 574.
127 EEOC Compl. Man. (BNA) §902.8 (2009)
(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.\textsuperscript{128}

In \textit{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.\textsuperscript{129}

In \textit{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.’”\textsuperscript{130} “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 sufficient to satisfy the statutory definition of a perceived disability.”\textsuperscript{131} 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{132} The focus is on the intent of the employer.\textsuperscript{133}

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

\textsuperscript{128} 29 C.F.R. §1630.2(l).
\textsuperscript{129} \textit{Sutton}, 527 U.S. at 489, 119 S.Ct. at 2149-2150.
\textsuperscript{130} \textit{Mickens v. Polk County School Bd.}, 430 F.Supp.2d 1265, 1273 (M.D.Fla. 2006) (quoting \textit{Sutton} 527 U.S. at 489, 119 S.Ct. at 2150).
\textsuperscript{131} \textit{Deane v. Pocono Medical Center}, 142 F.3d 138, 144 (3rd Cir. 1998).
\textsuperscript{132} \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)).
\textsuperscript{133} \textit{Capobianco v. City of New York}, 422 F.3d 47, 57 (2nd Cir. 2005).
his employer as disabled, his employer regarded him as “disabled within the meaning of
the ADA”\textsuperscript{134}. 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 \textit{whether or not the impairment limits or is
perceived to limit a major life activity}.\textsuperscript{135}
\end{quote}

Through the ADAAA, the restrictive \textit{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{136} In simple
terms (per EEOC proposed regulations):

\begin{quote}
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, \textit{whether or not the impairment limits or is perceived to limit a
major life activity}.\textsuperscript{137}
\end{quote}

\textsuperscript{134} 386 F.3d 192, 201 (2nd Cir. 2004) (quoting Colwell v. Suffolk County Police Dep’t, 158 F.3d 635, 646
(2nd Cir. 1998), cert. denied, 536 U.S. 1018 (1999)).
\textsuperscript{135} 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.”)
\textsuperscript{136} 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
also those who are regarded as impaired and who, as a result, are substantially limited in a major life
activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease
are as handicapping as are the physical limitations that flow from actual impairment.”) Nassau, 480 U.S. at
284, 107 S.Ct. at 1129.
\textsuperscript{137} 74 Fed.Reg. 48443 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(l)) (emphasis added).
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. 138

As an example, an employer may refuse to hire someone as a driver because they take anti-seizure medication for a condition they have under control. 139 No longer can an employer draw conclusions about an individual’s condition and penalize an otherwise functional person.

IV. ADAAA Assistance to Individuals with Mental Disabilities.

The amended ADA makes it much simpler for an individual with mental disabilities to enforce equal employment rights. It includes an expanded statutory list of per se major life activities including 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 what encompasses a substantial limitation, acknowledging that there are varying degrees of disability. It eliminates the mitigating measures exception for psychotropic medications.

139 Id.
And, it includes generous EEOC interpretative guidelines that establish “per se” mental disabilities.

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

Prior to the ADAAA, plaintiffs were left with a comparatively short list\(^{140}\) of activities that qualified as per se major life activities. In response, plaintiffs began to propose major life activities for consideration that were outside the list.\(^ {141}\) Before a new activity was accepted, the court would ask if it met the \textit{Toyota} test – was this activity “of central importance to daily life?”\(^ {142}\) This test gave the courts the opportunity to reject those activities that they didn’t consider important enough to meet this standard. Today, some of the very same activities that were once rejected by many 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 perform with little or no difficulty.”\(^ {143}\) The court will no longer be asked to make the value judgment of whether the proposed activity rises to the level of being of central importance to daily life. 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

\(^{140}\) Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.


\(^{142}\) \textit{Toyota}, 534 U.S. at 198, 122 S.Ct. at 691.

\(^{143}\) 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(i)).
person, even in the case of a common diagnosis. One individual with depression may have difficulty concentrating, while for another this issue is communicating with others. Individuals with mobility impairments share many common difficulties with major life activities. Further, many of these difficulties remain constant. For example, someone who is deaf will always have problems with communications. Individuals with mental disabilities, on the other hand, may run into episodic problems with their major life activities – ie. sleeping and eating during a manic phase, interacting with others during a depressive phase. Identifying the applicable major life activities for individuals with mental disabilities requires some flexibility. The new standard offers that flexibility by substantially broadening this list to include almost every imaginable basic activity from caring for oneself to the operation of a major bodily function.

Before the ADAAA, most claims for mental disability were based upon the major life activities of caring for oneself and working. Further, these were both difficult activities for one to prove a case of substantial limitation under the statute. Having considered other major life activities that are equally relevant to individuals with mental disabilities, Congress (and the EEOC) provided new statutorily recognized activities including, inter alia, concentrating, thinking, communicating, interacting with others, and the major functions of the brain. These are significant additions that have not been recognized in all courts.

145 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 is one of the toughest major life activities to effectively claim. 74 Fed. Reg. 48442 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(7).
1) Major Life Activity – Concentrating

The major life activity of concentration has historically received a mixed review, 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

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147 Pack, 66 F.3d at 1305.
148 Id.
150 385 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).
151 92 F.3d 1130, 1 133-34 (11th Cir. 1996), amended on other grounds, 102 F3d 1118, cert. denied, 117 S. Ct. 2453 (1997)
152 See supra n.60
se list, we eliminate the need for the Court to answer the question -- can an average individual concentrate with little or no difficulty?

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

Thinking is 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 recently been accepted at the district court level in many of the circuits. Therefore, the decision to add it to the per se list of major life activities is an extension of that case law. It is commonly combined with the major life activity of concentrating. The Third Circuit Court of Appeals, in Fiscus provides, perhaps, the best explanation of how this activity fits 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.”


154 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).

155 Fiscus, 385 F.3d 378, 383 (3rd Cir. 2004).
As the court points out, the major life activity of thinking has both a cognitive and biological component. It is part of the larger category of functions of the brain. This broad category appears to be the most effective catch-all category, covering virtually any conceivable condition involving a chemical imbalance, particularly one that is treated by psychotropic drugs. This would cover all of the major diagnoses such as depression, bipolar disorder, anxiety disorder, obsessive compulsive disorder and schizophrenia.

3) Major Life Activities – Communicating and Interacting with Others

Communication has traditionally been covered by the major life activity of speaking. Speaking, of course, involves both a physical and mental component. Physical issues include neurological disorders and related speech impediments. The mental component may involve the impact of depression, ADHD, bipolar disorder and panic disorder upon an individual’s ability to communicate. 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 verbal communication. Moreover, the cognitive trio, concentrating, thinking and communicating, naturally fit together when introducing a mental disability claims.

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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{158} As an example, it was rejected by the First Circuit Court of Appeals in \textit{Soileau v. Guilford of Maine, Inc.}\textsuperscript{159} because it was considered too vague.\textsuperscript{160} In \textit{Soileau}, the plaintiff unsuccessfully argued that his depressive disorder interfered with his ability to interact with others. \textit{Other} courts have merely accepted interacting with others as an activity for argument sake, focusing instead on the crucial issue of substantial limitation.\textsuperscript{161} As an example, in \textit{Peter v. Lincoln Technical Institute, Inc., Inc.}, the court reasoned that

\begin{quotation}
[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{162}
\end{quotation}

However, some courts have acknowledged interacting with others as a legitimate category.\textsuperscript{163} For example, in \textit{Lemire v. Silva},\textsuperscript{164} the District Court of Massachusetts offered the following reasoning:

\begin{quotation}
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 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
\end{quotation}


\textsuperscript{159} 105 F.3d 12 (1\textsuperscript{st} Cir. 1997)

\textsuperscript{160} Id.

\textsuperscript{161} See e.g. Peter, 255 F.Supp.2d 417 (E.D.Pa. 2002); Steele v. Thiokol Corp., 241 F.3d 1248 (10\textsuperscript{th} Cir. 2001); King v. Autoliv, APS, Inc., 2004 WL 724400 (D.Utah 2004).

\textsuperscript{162} 255 F.Supp.2d at 432.

\textsuperscript{163} 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); Winterlin v. Dakota County Sch. Dist., 2002 WL 31422848 (D.Neb. 2002); McAlindin v. County of San Diego, 288 F.3d 1036 (9th Cir. 2002).

\textsuperscript{164} 104 F. Supp.2d 80 (D.Mass. 2000)
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{165}

The Ninth Circuit Court of Appeals in \textit{McAlindin v. County of San Diego}\textsuperscript{166} 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{167}

It is interesting that Congress did not incorporate interacting with others directly into the statute.\textsuperscript{168} The EEOC writes, however, in its proposed regulations 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{169}

B) Simplifying Substantial Limitation

The ADAAA further supports mental disability claims by simplifying the definition of “substantial limitation.” In \textit{Toyota}, an impairment created a substantial limitation when it \textit{prevented or severely restricted} a person from engaging in a major life activity.\textsuperscript{170} To make this determination the court performed the “condition, manner and duration” analysis.\textsuperscript{171} As previously discussed, the proposed EEOC language is much simpler. It asks what is substantially limiting when compared to most people in the general population? How does this relaxed standard help individuals with ADA mental disability

\textsuperscript{165} \textit{Id.} at 86-87.
\textsuperscript{166} 192 F.3d at 1234.
\textsuperscript{167} \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{168} It also failed to incorporate the activities of sitting and reaching.
\textsuperscript{169} 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{170} \textit{Toyota}, 534 U.S. at 196-197, 122 S.Ct. at 691 (emphasis added).
\textsuperscript{171} 29 CFR § 1630.2(j)(2).
claims? There are a number of scenarios where this change could benefit individuals with mental disabilities. For example, imagine a factory worker with ADHD who cannot sit still at his workstation and concentrate for longer than forty-five minutes without having to get up and move around. He meets his quotas but his sporadic walks around the factory floor violate company policy. Again, it is not impossible for him to be compliant, but it is substantially more difficult when compared to others. This employee is arguably disabled. Another case might involve a secretary with obsessive compulsive disorder who has trouble processing the tasks of her job unless she performs them in a specific sequence. Her thought processes may not be completely or severely limited, but they are when compared to most people. And, a lawyer who suffers from anxiety disorder may have difficulty communicating with others during periods of extreme stress. When forced to, he can engage in conversation, but he has far more trouble than most with this activity.

These examples demonstrate how everything is a question of degrees. Mental impairments are not black and white. Problems may be minor when handled with medication and reasonable accommodations; but if you take these away, a mental condition may become so severe that eventually an employee cannot work at all. By allowing them to raise the issue before things fully deteriorate one insures that the focus remain on the act of discrimination and not on an uncharacteristically weakened employee.
In 1997, the EEOC published the EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities.\textsuperscript{172} The EEOC Guidance has been used by the courts\textsuperscript{173} 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 the EEOC Enforcement Guidance,

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{174}

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities also 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 provides 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

\textsuperscript{172} EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997) 1997 WL 34622315 (E.E.O.C. Guidance)
\textsuperscript{173} See e.g. McAlindin v. County of SanDiego, 192 F.3d 1226 (9th Cir. 1999); Winterlin v. Dakota County Sch. Dist., 2002 WL 31422848 (D.Neb. 2002).
without medication. Accordingly, he is an individual with a disability as defined by the ADA.\textsuperscript{175}

Finally, another manner in which ADAAA supports mental disability claims is through the proposed EEOC regulation that states that while a substantial limitation must be more than temporary, an episodic substantially limiting impairment is still a disability.\textsuperscript{176} Therefore, someone with bipolar disorder who is fine most of the year, except for the months of February and June when he typically cycles into a manic phase, would likely be considered disabled under the law.

C) Eliminating the Mitigating Measures Exception

The ADAAA made another important change when it eliminated the mitigating measures exception. In \textit{Sutton}, the Supreme Court held that a determination of whether an individual is disabled should be made with reference to mitigating measures.\textsuperscript{177} This position was rejected by Congress and replaced in the ADAAA with a rule that “ameliorative effects of mitigating measures shall not be considered in determining...”

\textsuperscript{175} ) 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. Alternatively, in \textit{Jacques v. Dimarzio}, the Second Circuit held that:

“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.” \textit{Jacques v. Dimarzio, Inc.}, 386 F.3d 192, 203-204 (2nd Cir. 2004).


\textsuperscript{177} 527 U.S. at 487-88,119 S.Ct. at 2149.
whether an impairment substantially limits a major life activity.” 178 This becomes important when considering a mental disability claim because of the issue of medication. A simple example is incorporated into the proposed 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.” 179 It is not uncommon for someone with a psychiatric disorder to discontinue treatment plan – to “go off their meds.” Without this situation, the plaintiff may be a fully functional member of a management team. Yet, with a lapse in his medication he becomes so anxious that he needs time off. By eliminating the mitigating measures exception, this mentally impaired plaintiff is not denied protection under the law simply because he chooses to do the responsible thing and manage his condition with medication.

D) Per Se Disabilities

Finally, mental disability claims are supported by a section of the EEOC regulations that offers “Examples of Impairments that Will Consistently Meet the Definition of Disability.” 180 These specific examples include major depression, bipolar disorder, obsessive compulsive disorder, post traumatic stress disorder and schizophrenia. 181 Further, the EEOC offers a list of major life activities that would be limited by such impairments. These include: functions of the brain, thinking, concentrating, interacting

178 74 Fed. Reg. 48440 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(3)(i)).
180 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(5)).
181 74 Fed. Reg. 48441 (September 23, 2009) (to be codified at 29 C.F.R. §1630.2(j)(5)(H)).
with others, sleeping, and caring for oneself. If a Court is willing to accept the EEOC regulations as guidance, 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. It is simply laid out before you in the language of the regulation.

V. Conclusion

Individuals with mental disabilities represent a growing minority that cannot be ignored. Today, according to the National Institute of Mental Health ("NIMH"), one in four American adults “suffer from a diagnosable mental disorder in a given year.” This translates to 57.7 million people. Mental disorders represent the “leading cause of disability in the U.S. and Canada for [individuals] 15-44.” 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.

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182 Id.
184 Id.
185 Id.
187 Id.
188 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
Because of the changes to the threshold disability requirement, the ADA Amendments Act of 2008 offers far greater support to mentally impaired plaintiffs. However, we really cannot project as of yet what its full impact will be or how the courts will respond. Because the ADAAA has been held to be non-retroactive,\(^{189}\) 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, since we do not have a final rule publication. Although, it is anticipated that the EEOC will publish final regulations some time in the next few months. Until then, we wait.

\(^{189}\) 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).