

1-1-2017

## Lowering The Threshold: How Far Has The Americans With Disabilities Act Expanded Access To The Courts in Employment Litigation?

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### Recommended Citation

Curtis D. Edmonds, *Lowering The Threshold: How Far Has The Americans With Disabilities Act Expanded Access To The Courts in Employment Litigation?*, 26 J. L. & Pol'y 1 (2018).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol26/iss1/1>

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**LOWERING THE THRESHOLD: HOW FAR HAS THE  
AMERICANS WITH DISABILITIES ACT AMENDMENTS  
ACT EXPANDED ACCESS TO THE COURTS IN  
EMPLOYMENT LITIGATION?**

*By Curtis D. Edmonds\**

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## I. INTRODUCTION

The Americans with Disabilities Act Amendments Act (“ADAAA”) was passed by Congress and signed by President George W. Bush in 2008.<sup>1</sup> The purpose of the ADAAA was to restructure and clarify the definition of the legal term “disability”<sup>2</sup> in the Americans with Disabilities Act of 1990 (“ADA”).<sup>3</sup> One of the three prongs of the ADA’s definition of disability is “a physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>4</sup> Among other changes, the ADAAA incorporated a list of “major life activities” into the

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<sup>1</sup> ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>2</sup> *Id.* § (2)(b)(1).

<sup>3</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2008)).

<sup>4</sup> 42 U.S.C. § 12102 (1)(A)(2008).

statute, such as “seeing, hearing, eating, sleeping, walking, [and] standing.”<sup>5</sup>

The ADAAA was the result of a compromise reached after thirteen weeks of negotiations between representatives of the business and disabilities communities over its provisions.<sup>6</sup> Like many other compromises, the ADAAA did not leave either side fully satisfied. Almost from its inception, the ADAAA has been a target for legal scholars on both sides of the partisan divide. Some commenters have argued that the law did not go far enough in protecting access to the courts for people with disabilities, and others have argued that the law went too far and would unleash a flood of frivolous litigation.<sup>7</sup>

In 2012, E. Pierce Blue, a special assistant to an Equal Employment Opportunity Commissioner, wrote an article for *Federal Lawyer* that reviewed the implementation of the ADAAA.<sup>8</sup> Blue concluded his article by stating:

The ADAAA remains on shaky ground four years after it was signed into law. The positive changes made by the law are often ignored and many of the new terms are misread or applied incorrectly. The good news is that these problems are readily fixable through education and outreach. As more attorneys and courts become familiar with the changes made by the Amendments and the EEOC regulation, we should see the errors in legal reasoning and pleading decrease. Hopefully, in another four years, we will be able to say that the ADAAA is a great success.<sup>9</sup>

Has the ADAAA become a great success in those intervening years? A review of the case law indicates cause for optimism on several fronts. Now that federal judges have had the opportunity to

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<sup>5</sup> *Id.* Major life activities are those activities that are of “comparative importance” and which have “significance” to an individual’s life. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

<sup>6</sup> Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 *TEX. J. C.L. & C.R.* 187, 230 (2008).

<sup>7</sup> See discussion *infra* Part VIII.

<sup>8</sup> See E. Pierce Blue, *Arguing Disability Under the ADA Amendments Act: Where Do We Stand?*, 59 *FED. LAW.* 38, 39 (2012).

<sup>9</sup> *Id.* at 42.

issue new decisions interpreting the “major life activity” provision of the ADAAA, it appears that the concerns of both sides have been overstated.<sup>10</sup> The empirical evidence indicates that the ADAAA has, so far, met its goal of making life easier for employment law plaintiffs to show that they meet the definition of disability and thereby cross the summary judgment threshold.<sup>11</sup> Furthermore, the predicted tide of frivolous litigation has not yet materialized, and courts have not allowed plaintiffs with dubious claims to disability status to proceed.

Although the ADAAA has so far met any reasonable expectation for success from a policy standpoint,<sup>12</sup> there are still issues regarding its implementation.<sup>13</sup> Some federal courts have interpreted the ADAAA in an uneven and inconsistent manner. Courts have failed to apply or misapplied the new standards,<sup>14</sup> reapplied case law from the prior standards,<sup>15</sup> and struggled with

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<sup>10</sup> See *infra* Part VII.

<sup>11</sup> Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013); Ruth Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 2010 UTAH L. REV. 1029, 1047 (2010) [hereinafter Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*].

<sup>12</sup> See generally NAT’L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 8 (July 23, 2013), [https://ncd.gov/rawmedia\\_repository/7518fc55\\_8393\\_4e76\\_97e4\\_0a72fe9e95fb.pdf](https://ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb.pdf) (“The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits.”) [hereinafter NAT’L COUNCIL ON DISABILITY, A PROMISING START].

<sup>13</sup> Blue, *supra* note 8, at 41 (“Implementation of the ADAAA in the courts has been mixed to date.”).

<sup>14</sup> See Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 41–42 (2014) (discussing cases). See, e.g., *Andrews v. City of Hartford*, No. 15-CV-00684-BJR-SRW, 2016 WL 4154685, at \*2–3 (M.D. Ala. Aug. 3, 2016) (providing an example of a court that failed to consider presence of plaintiff’s insulin pump as a mitigating measure).

<sup>15</sup> See, e.g., *E.E.O.C. v. BNSF Ry. Co.*, 124 F. Supp. 3d 1136, 1146 (D. Kan. 2015) (noting that the court found that plaintiff’s hand injury claim “cannot satisfy the rigorous standard for proving an actual disability set forth by the Supreme Court” in the *Toyota* decision); *Nance v. Ira E. Clark Detective Agency, Inc.*, 3:15-CV-00073-RLY-MPB, 2017 WL 590249, at \*8 (S.D. Ind.

the complexities and inconsistencies in the new law.<sup>16</sup> Plaintiffs and their attorneys have not always understood the principles of the ADAAA themselves,<sup>17</sup> which can result in additional challenges for ADA plaintiffs who appear *pro se*, and already experience substantial challenges in their ability to litigate employment discrimination cases.<sup>18</sup>

This Article reviews selected employment litigation cases since the implementation of the ADAAA and determines whether courts have been able to apply the changes to the major life activity standard in an effective and reasonable manner. Part II of this Article discusses the historical background of the ADAAA. In Parts III-V, this Article discusses the ongoing attempts to find or create new major life activities, the new bodily functions amendments to the major life activity standard, and the Equal Employment Opportunity Commission (“EEOC”) guidance that classifies some impairments as being “predictable assessments” for disabilities. In Part VI, this Article discusses an empirical study of cases where ADA plaintiffs lose at the motion to dismiss or summary judgment stages. In Parts VII and VIII, this Article discusses the competing scholarly perspectives as to whether the ADAAA has gone too far, or not far enough, in terms of who should or should not be covered, and examines whether experience has proven or disproven the various claims made by scholars, as well as discussing several of the unintended consequences from the law’s implementation.

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Feb. 14, 2017) (noting where the court applied the *Toyota* decision against a plaintiff with a back injury who failed to properly plead major life activity).

<sup>16</sup> Blue, *supra* note 8, at 38; Kevin Barry et al., *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 2 (2013) (citing NAT’L COUNCIL ON DISABILITY, A PROMISING START, *supra* note 12, at 50); Deborah A. Widiss, *Still Kickin’ After All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 930 (2015).

<sup>17</sup> Widiss, *supra* note 16, at 930.

<sup>18</sup> Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*, *supra* note 11, at 1050–51.

## II. BACKGROUND OF THE ADA AND THE ADAAA

The ADA was passed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”<sup>19</sup> and to “invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”<sup>20</sup> Title I of the ADA prohibits employment discrimination “against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>21</sup>

The question of whether an individual plaintiff has an impairment that meets the definition of “disability” in the ADA is a threshold issue, in that only plaintiffs that fall within the protected class of individuals with disabilities are entitled to reasonable accommodation.<sup>22</sup> As federal courts began to hear employment-related suits brought under the ADA, several decisions resulted in counterintuitive results, with courts dismissing lawsuits by people with various physical impairments on the grounds that they did not meet the ADA’s definition of disability.<sup>23</sup> The focus on whether or not individual plaintiffs met the definition of disability may be viewed as part of an overall trend wherein decisions about disability cases were made by conservative judges in the summary judgment process instead of

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<sup>19</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (b)(1) (2008).

<sup>20</sup> *Id.* at § 12101 (b)(4).

<sup>21</sup> *Id.* at § 12112 (a).

<sup>22</sup> Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 255 (2005). Title I also provides a degree of protection to individuals who are “known to have a relationship or association” with an individual with a disability. 42 U.S.C. § 12112 (b)(4).

<sup>23</sup> Michelle T. Friedland, Note, *Not Disabled Enough: The ADA’s “Major Life Activity” Definition of Disability*, 52 STAN. L. REV. 171, 172 (1999).

more hospitable juries.<sup>24</sup> This created a “windfall” for employers, with a 1998 study showing that plaintiffs had prevailed in only 6 percent of cases at the trial court level in ADA cases.<sup>25</sup>

Four ADA employment cases involving the definition of disability were decided by the Supreme Court, all of them resulting in a substantial narrowing of the protected class of individuals with disabilities.<sup>26</sup> The “*Sutton* trilogy”<sup>27</sup> of cases, all decided by the Supreme Court on the same day in 1999, overturned an EEOC regulation which required that employers could not consider “mitigating measures,” such as eyeglasses or hearing aids, in determining whether an employee met the definition of disability under the ADA.<sup>28</sup> These cases were followed by *Toyota Motor Manufacturing v. Williams*,<sup>29</sup> a decision that limited the “major life activity” component of the ADA disability definition to those activities that had a “central importance to most people’s daily lives.”<sup>30</sup> The *Sutton* and *Toyota* decisions strictly interpreted the provisions of the ADA<sup>31</sup> so as to limit the applicability of the ADA by reading certain individuals with disabilities out of the Act’s

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<sup>24</sup> See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 160 (1999) [hereinafter Colker, *The Americans with Disabilities Act*].

<sup>25</sup> See *id.* at 107–08.

<sup>26</sup> Porter, *supra* note 14, at 9–11 (citing *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), all overturned by legislative action, ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008) (emphasis added)).

<sup>27</sup> Porter, *supra* note 14, at 9 (indicating the *Sutton* trilogy includes the following cases: *Sutton*, 527 U.S. 471 (1999), *Murphy*, 527 U.S. 516 (1999), and *Albertson’s*, 527 U.S. 555 (1999)).

<sup>28</sup> See *id.*

<sup>29</sup> *Toyota Motor Mfg., Kentucky, Inc.*, 534 U.S. 184 (2002), superseded by statute, ADA Amendments Act of 2008, Pub.L. No. 110–325, 122 Stat. 3553 (2008) (emphasis added).

<sup>30</sup> *Toyota Motor Mfg., Kentucky, Inc.*, 534 U.S. at 198.

<sup>31</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101–12213 (2008).



coverage.<sup>32</sup> These decisions sharply narrowed the protected class of individuals with disabilities, resulting in individuals with impairments such as “epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder” from bringing discrimination claims in federal court.<sup>33</sup> As a result of judicial backlash against the ADA, Congress passed amendments to the statute designed to bring the class of individuals covered under the ADA into congruence with the original expectations of coverage.<sup>34</sup>

By its own terms, the ADAAA was specifically passed to counter the Supreme Court’s decisions in *Sutton* and *Toyota*.<sup>35</sup> The ADAAA, and its implementing regulations,<sup>36</sup> sought to reify the promise of the ADA by recasting the ADA’s definition of disability to cover more individuals with various types of impairments.<sup>37</sup> Congress also sought to reverse the “windfall” for defendants by taking the focus of litigation off of the definition of disability and refocusing the attention of judges on discriminatory conduct instead of the plaintiff’s standing to bring an employment lawsuit.<sup>38</sup>

Perhaps somewhat counterintuitively, the ADAAA did not make any changes to the actual definition of disability in the ADA:

- (1) Disability. The term “disability” means, with respect to an individual—
  - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

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<sup>32</sup> Befort, *supra* note 11, at 2037 (“The most obvious impact of these decisions was to narrow the ADA’s protected class and to raise the bar for ADA plaintiffs in litigation.”); *see also* Scott Johnson, *The ADAAA: Congress Breathes New Life Into the Americans with Disabilities Act*, 81 J. KAN. B. ASS’N 22, 23–26 (2012) (discussing impact of *Sutton* and *Toyota* cases).

<sup>33</sup> Jana K. Terry, *The ADA Amendments Act Three Years After Passage: The EEOC’s Final Regulations and the First Court Decisions Emerge at Last*, 58 FED. LAW. 49, 49 (2011).

<sup>34</sup> Porter, *supra* note 14, at 14.

<sup>35</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2 (b)(2)–(5) (2008).

<sup>36</sup> 29 C.F.R. §§ 1630.1–16 (2011).

<sup>37</sup> Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 509, 532–33 (2011).

<sup>38</sup> Befort, *supra* note 11, at 2029.

- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>39</sup>

Due to frequent litigation on the definition of disability,<sup>40</sup> each of these terms has been the subject of a great deal of judicial analysis. The term “physical or mental impairment” is the easiest to deal with, because it has been interpreted so broadly that it is rarely disputed in most cases.<sup>41</sup> The term “major life activity” includes everyday activities like walking, talking, hearing and seeing, but its re-definition has been a recurring issue in ADA litigation.<sup>42</sup> An ADA employment plaintiff seeking to make a *prima facie* case for discrimination must establish that she is disabled, demonstrate that she is capable of performing the “essential functions of the position,” and that the “employer took an adverse action against [her] because of the disability.”<sup>43</sup> In terms of the second prong of the definition, the plaintiff must show that, although her impairment does not limit her currently, it did limit her in the past and that there is a “record of” such a disability.<sup>44</sup> For the third “regarded as” prong, a plaintiff need not show that she has an actual disability, but that her employer discriminated against her as though she had an actual disability.<sup>45</sup>

Instead of making direct changes to the definition of disability, the ADAAA uses several strategies to drastically lower the threshold to allow more individuals with disabilities to be covered

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<sup>39</sup> Compare 42 U.S.C. § 12102 (1) (1990) with 42 U.S.C. § 12102 (1) (2008).

<sup>40</sup> See Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of “Major Life Activity” in the Americans with Disabilities Act*, 33 TEX. TECH L. REV. 321, 324 (2002) (citing prior study conducted by the author showing that over 1100 cases had been litigated on this issue) [hereinafter Edmonds, *Snakes and Ladders*].

<sup>41</sup> Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 406–08 (2000).

<sup>42</sup> Jennifer Gozdowski Brown, Note, *Mitigating Measures and the ADA After Sutton: Can Employers Limit Our Ability to Care for Ourselves in the Workplace?*, 7 J. SMALL & EMERGING BUS. L. 113, 120–21 (2003).

<sup>43</sup> Michael Edward Olsen, Jr., *Disabled but Unqualified: The Essential Functions Requirement as a Proxy for the Ideal Worker Norm*, 66 HASTINGS L.J. 1485, 1489 (2015) (citing 42 U.S.C. §§ 12111–12112).

<sup>44</sup> 42 U.S.C. § 12102 (1)(B).

<sup>45</sup> See *id.* § (1)(C).

under the terms of the legislation.<sup>46</sup> The ADAAA mandates that “mitigating measures,” such as hearing aids or insulin pumps, should not be considered when evaluating whether a given impairment is substantially limiting under the first prong of the ADA definition of disability.<sup>47</sup> The ADAAA also expands the “regarded as” prong to cover minor impairments that are regarded as being disabling. The ADAAA specifically admonishes courts to construe the definition of disability “in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”<sup>48</sup>

The most consequential element of the ADAAA was the revamping of the “major life activity” requirement. The ADA did not define the term “major life activity,” and the issue of whether an individual’s impairment did or did not impact a specific life activity, and whether said activity was “major” or not, was the subject matter of a great deal of litigation and commentary.<sup>49</sup> The ADAAA overhauled the interpretation of “major life activity” by identifying certain activities as always being major life activities, and by adopting a non-exclusive list of bodily functions that could be substituted for major life activities.<sup>50</sup> The EEOC, the federal agency that enforces the employment provisions of the ADA,<sup>51</sup> issued implementing regulations for the ADAAA that further expanded the universe of major life activities by stating that certain impairments are always disabling, and that certain other bodily functions can also be considered as meeting the major life activity requirement.<sup>52</sup> Both the statutory changes in the ADAAA and the new regulations adopted by the EEOC were designed to reverse the narrowing effect of the *Toyota* decision and other precedents and

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<sup>46</sup> Johnson, *supra* note 32, at 26; Stone, *supra* note 37, at 532.

<sup>47</sup> See Blue, *supra* note 8, at 39.

<sup>48</sup> 42 U.S.C. § 12102 (4)(A); see also Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 360–61 (2010) (noting that the ADAAA uses the word “broaden” in its text at least five times).

<sup>49</sup> Stone, *supra* note 37, at 523.

<sup>50</sup> 42 U.S.C. § 12102 (2).

<sup>51</sup> See 42 U.S.C. § 12117 (b).

<sup>52</sup> 29 C.F.R. § 1630.2 (h)(1)(2), (i)(1)(ii), (i)(2), (j)(1)(ii) (2011).

expand the universe of the protected class of people with disabilities.<sup>53</sup>

### III. UNDERSTANDING THE NEW “MAJOR LIFE ACTIVITY” CLASSIFICATION

The ADA, as passed in 1990, did not contain any clear guidance on what a “major life activity” might or might not be.<sup>54</sup> The initial EEOC regulations adopted in 1991 included a partial list of major life activities (seeing, hearing, walking, and working), but stressed that this list was not exclusive.<sup>55</sup> Over time, litigants attempted to add various activities to the list, such as lifting, bending, twisting, driving, and eliminating waste, with various degrees of success.<sup>56</sup> The ADAAA attempted to clarify the jumble of precedents by including both a non-exclusive list of major life activities and a list of bodily functions that could be substantially limited by various impairments.<sup>57</sup> The EEOC would augment this list in its 2011 regulations implementing the ADAAA.<sup>58</sup>

Since those reforms, major life activities can be classified into six loose categories:

*Statutory major life activities*, as listed in the text of the ADAAA, which are “caring for oneself, performing manual tasks, seeing,<sup>59</sup> hearing, eating, sleeping, walking, standing, lifting,

<sup>53</sup> See Jason Mustard, Comment, *Nothing to Sneeze at: Severe Food Allergy as a Disability Under the ADA Amendments Act of 2008*, 45 GOLDEN GATE U. L. REV. 173, 174 (2015).

<sup>54</sup> Johnson, *supra* note 32, at 26.

<sup>55</sup> 56 Fed. Reg. 35726 (July 26, 1991) (codified at 29 C.F.R. § 1630).

<sup>56</sup> See generally Edmonds, *Snakes and Ladders*, *supra* note 40, at 340–64 (discussing pre-ADAAA cases where plaintiffs sought to expand the universe of major life activities).

<sup>57</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>58</sup> See Equal Employment Opportunity Commission, Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16, 978 (Mar. 25, 2011) (codified at 29 C.F.R. § 1630.1–16).

<sup>59</sup> 42 U.S.C. § 12102 (2)(A). However, the ADAAA also specifically did not include ordinary glasses and contact lenses in its list of “mitigating measures” which could trigger coverage. See 42 U.S.C. § 12012 (4)(E)(i)(I).

bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>60</sup>

*Regulatory major life activities*, as listed in the text of the EEOC regulations but not specifically in the text of the ADAAA, which are sitting, reaching, and interacting with others.<sup>61</sup>

*Unlisted major life activities*, which are not specifically listed in the ADAAA or the EEOC regulations, have been recognized by some courts, such as climbing.<sup>62</sup>

*Statutory bodily functions*, as listed in the text of the ADAAA, which include 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.”<sup>63</sup>

*Regulatory bodily functions*, as listed in the EEOC regulations but not specifically in the ADAAA, which include special sense organs and skin, genitourinary, hemic, lymphatic, and musculoskeletal functions.<sup>64</sup>

“*Predictable assessment*” *impairments*, as listed in the EEOC regulations implementing the ADAAA, which the EEOC finds that it “should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated,” and which include deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.<sup>65</sup>

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<sup>60</sup> 42 U.S.C. § 12102 (2)(A).

<sup>61</sup> 29 C.F.R. § 1630.2 (i)(1)(i) (2011); *see also* *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572–73 (4th Cir. 2015) (finding that the EEOC’s inclusion of “interacting with others” was entitled to *Chevron* deference).

<sup>62</sup> *See infra* Section IV.A.

<sup>63</sup> 42 U.S.C. § 12102 (2)(B).

<sup>64</sup> 29 C.F.R. § 1630.2 (i)(1)(ii).

<sup>65</sup> *Id.* § (j)(3)(iii); *see* *Blue*, *supra* note 8, at 40 (“A careful reader will note that in almost all cases the impairments are framed as ‘substantially limiting’ a

Fortunately for litigants, individuals need only prove a substantial limitation in one of these areas.<sup>66</sup> Additionally, Congress mandated that the interpretation of the definition of disability by courts, including the interpretation of major life activities, be construed, to the “maximum effect,” in favor of broad coverage of individuals with disabilities.<sup>67</sup>

At first, these six categories of major life activities seem fairly comprehensive. However, disability is a profoundly large and variable category of human experience. No matter how disability and major life activities are defined, courts will likely continue to struggle with the issue of whether a given individual is or is not within the protected class of individuals with disabilities. The ADAAA has done what Congress has intended in expanding the protected class, but has sacrificed a degree of clarity in the process.

#### IV. UNLISTED MAJOR LIFE ACTIVITIES

The revamping of the “major life activity” requirement in the ADAAA included the incorporation of several life activities which were previously unlisted but that were generally considered to be “major” by courts—such as eating, concentrating, thinking, and reading.<sup>68</sup> However, the ADAAA specifies that the list is not exclusive,<sup>69</sup> which provides plaintiffs with an opportunity to add new activities to the list.

##### *A. Climbing*

Before the passage of the ADAAA, courts had generally not considered climbing to be a major life activity.<sup>70</sup> Even after the

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major bodily function, not a major life activity—for example, ‘cancer substantially limits normal cell growth’ and ‘multiple sclerosis substantially limits neurological function.’”).

<sup>66</sup> 42 U.S.C. § 12012 (4)(C).

<sup>67</sup> *See id.* § (4)(A).

<sup>68</sup> Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 674–75 (2010).

<sup>69</sup> 42 U.S.C. § 12102 (2)(A).

<sup>70</sup> *Compare* Otting v. J.C. Penney Co., 223 F.3d 704, 710 (8th Cir. 2000) (climbing ladders not a major life activity); *Kelly v. Drexel University*, 94 F.3d

passage of the ADAAA, the majority of courts have cited these earlier decisions and found that climbing is not a major life activity.<sup>71</sup> However, some courts have been willing to consider

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102, 107–08 (3d Cir. 1996) (discussing prior cases where plaintiffs with climbing restrictions were found not to be disabled); *Robinson v. Glob. Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (climbing stairs not a major life activity); *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 758 n. 2 (5th Cir. 1996) (climbing not a “basic, necessary function” that qualifies as a major life activity); *Addoo v. New York City Bd. of Educ.*, No. 04 CV 2255(ARR)(LB), 2006 WL 5838977, at \*6 (E.D.N.Y. Dec. 18, 2006) (climbing should be considered part of the major life activity of walking); *Harding v. Cianbro Corp.*, 436 F. Supp. 2d 153, 173 (D. Me. 2006) (climbing does not meet the *Toyota* standard for major life activity); *Piascyk v. City of New Haven*, 64 F. Supp. 2d 19, 26 (D. Conn. 1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000) (climbing is “not sufficiently significant” to be a major life activity) *with* *Nodelman v. Gruner & Jahr USA Publ’g*, No. 98 CIV 1231(LMM), 2000 WL 502858, at \*7 (S.D.N.Y. Apr. 26, 2000) (“The Court finds that climbing stairs qualifies as a ‘major life activity.’”); *Sussle v. Sirina Protection Sys. Corp.*, 269 F. Supp. 2d 285, 299 (“Climbing stairs likewise qualifies as a major life activity.”). *See also* *Forrisi v. Bowen*, 794 F.2d 931, 933–35 (4th Cir. 1986) (Rehabilitation Act case) (noting this case is further discussed in *Edmonds, Snakes and Ladders, supra* note 40, at 325).

<sup>71</sup> *See* *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 188 (1st Cir. 2011) (following pre-ADAAA law); *Ray v. Weit*, 13-CV-6416(RRM)(CLP), 2016 WL 1229056 at \*8 (E.D.N.Y. Mar. 28, 2016); *Khoury v. McHugh*, No. 2:12-6695-SDW-SCM, 2016 WL 310748 at \*6 (D.N.J. Jan. 26, 2016) (stating that climbing was not a major life activity in the pre-ADAAA analysis); *Wehrley v. American Family Mutual Ins. Co.*, No. 10-CV-01567-PAB-BNB, 2012 WL 415421 at \*8 (D. Colo. Feb. 9, 2012); *Miller v. McHugh*, 814 F.Supp.2d 299, 317 (S.D.N.Y. 2011); *Hustedde v. Midway Arms, Inc.*, No. 09-4003-CV-C-MJW, 2010 WL 3724533, at \*5 (W.D. Mo. Sept. 15, 2010); *Duffy v. McHugh*, No. 09-00337 SPK-BMK, 2010 WL 2900673, at \*7 (D. Haw. July 22, 2010) (climbing stairs not a major life activity); *Brown v. City of Waterbury Bd. of Educ.*, 722 F. Supp. 2d 218, 227 (D. Conn. 2010) (climbing stairs and ladders not a major life activity); *Mastrolia v. Potter*, No. 08-5967 (PS), 2010 WL 1752531, at \*7 (D.N.J. Apr. 27, 2010); *Missick v. City of N.Y.*, 707 F. Supp. 2d 336, 353 (E.D.N.Y. 2010); *Cobey v. Geren*, No. 1:08-CV-406, 2010 WL 629845, at \*5 (E.D. Va. Feb. 18, 2010), *aff’d*, 424 F. App’x 209 (4th Cir. 2011); *Lejeune v. Omni Energy Servs. Corp.*, No. 6:09-CV-0194, 2010 WL 378305, at \*8 (W.D. La. Jan., 29, 2010); *Matthias v. Ready Workers Mgmt. Corp.*, No. 08 Civ. 7245(PAC)(GWG), 2009 WL 2985696, at \*8 (S.D.N.Y. Sept. 18, 2009); *Perez-Rosario v. Hambleton Grp.*, No. 08-1459(JAF), 2009 WL 1076701, at \*3 (D.P.R. Apr. 21, 2009).

climbing as a major life activity under the “expansive coverage as required by the ADAAA.”<sup>72</sup>

In *Mullins v. Mayor and City Council of Baltimore*, the District Court for the District of Maryland heard a complaint from a plaintiff who was limited by a knee injury.<sup>73</sup> The plaintiff worked as an auto repairer for the city of Baltimore, and, after his injury in March of 2000, was restricted from climbing ladders.<sup>74</sup> The city ordered the plaintiff to undergo a medical evaluation to determine if he could continue to perform the essential functions of his job.<sup>75</sup> The results of the medical examination determined that the plaintiff could no longer perform the essential functions of his job due to his knee injury.<sup>76</sup> The plaintiff filed a complaint with the EEOC after receiving a letter from the city threatening to terminate his employment.<sup>77</sup> In dismissing the defendant’s summary judgment motion, the district court found that, when applying “the pre-ADAAA version of the ADA, [the plaintiff’s] lifting and climbing restrictions do not pose a significant enough restriction on any major life activity to constitute a disability.”<sup>78</sup> However, in applying the post-ADAAA analysis, the district court found that climbing was a major life activity, and that a reasonable jury could conclude that that the plaintiff’s knee injury was a substantial limitation of that activity.<sup>79</sup>

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<sup>72</sup> *Mullins v. Mayor and City Council of Baltimore*, No. TJS-14-2698, 2016 WL 4240069 at \*5 (D. Md. Aug. 11, 2016); *see also* *Gucker v. U.S. Steel Corp.*, 212 F. Supp. 3d 549, 560 (W.D. Penn. 2016) (noting where a district court judge included climbing as a major life activity in jury instructions); *Maxwell v. County of Cook*, No. 10 CV 00320, 2014 WL 3859981 at \*3 (N.D. Ill. Aug. 4, 2014); *Gorbea v. Verizon N.Y. Inc.*, No. 11-CV-3758 (KAM)(LB), 2014 WL 917198 at \*6 (E.D.N.Y. Mar. 10, 2014); *D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1146 (C.D. Cal. 2010) (Title II case).

<sup>73</sup> *Mullins*, 2016 WL 4240069, at \*1.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*2 n.2.

<sup>78</sup> *Id.* at \*4.

<sup>79</sup> *Id.* at \*4–5 (comparing *Harrison-Khatana v. Washington Metro. Area Transit Auth.*, No. DKC 11-3715, 2015 WL 302820, at \*9 (D. Md. Jan. 22, 2015)); *see also* *Rosa v. City of Chicago*, No. 12 C 9648, 2014 WL 1715484 at



The decision in *Mullins* provides some insight into how courts approach cases where plaintiffs argue that a given life activity should be considered to be “major” or not. Here, the plaintiff had an injury that specifically impacted his ability to climb ladders, had a job that involved climbing ladders, and was threatened with firing because he could no longer climb ladders.<sup>80</sup> The lesson for plaintiffs from *Mullins* is that arguing that the definition of “major life activity” should be expanded is likely to be more successful for activities that are not only work-related but that are the cause of the alleged discrimination.

### B. *Driving, Traveling and Commuting*

Unlike individuals who experience limitations in climbing, individuals who experience difficulties with traveling and commuting have not had any success in claiming that driving should be considered as a major life activity.<sup>81</sup> The ADAAA and its implementing regulations did not add driving as a major life activity, and the subsequent case law has not been favorable to plaintiffs.

In a 2016 case, a Department of Agriculture employee with post-traumatic stress disorder argued that she was limited in her ability to travel due to anxiety related to her condition.<sup>82</sup> The District Court for the Eastern District of Washington found that the plaintiff “cannot rely on travel as the major life activity impacted by her impairments to establish her disability.”<sup>83</sup> Similarly, a New Jersey court addressing the case of a plaintiff with alleged back

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\*5 (N.D. Ill. May 1, 2014); *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737 at \*8 (E.D. Pa. July 13, 2011).

<sup>80</sup> *Mullins*, 2016 WL 1076701, at \*1–2.

<sup>81</sup> Danielle J. Ravencraft, Note, *Why the “New ADA” Requires an Individualized Inquiry As to What Qualifies as a “Major Life Activity”*, 37 N. KY. L. REV. 441, 451 (2010); see, e.g., *Winsley v. Cook County*, 563 F.3d 598, 603 (7th Cir. 2009); *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329–30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998).

<sup>82</sup> *Stuart v. Vilsack*, No. 2:14-CV-416-SMJ, 2016 WL 6902347, at \*6 (E.D. Wash. Nov. 23, 2016).

<sup>83</sup> *Id.* at \*7. However, the plaintiff was able to argue successfully that she was limited in her ability to interact with others. *Id.*

and thigh pain found that an inability to commute did not qualify as a disability.<sup>84</sup> Additionally, a New York court found that both driving and using public transportation were not major life activities in a case involving a plaintiff with tendonitis.<sup>85</sup>

Although two recent cases have found that driving might be considered a major life activity, these cases do not provide a great deal of support for future plaintiffs.<sup>86</sup> A Kentucky court did find that driving was a major life activity, but found that the plaintiff—who could drive his own car but not a commercial vehicle—was not substantially limited in his ability to drive.<sup>87</sup> Similarly, a Florida court found that driving might “arguably” be a major life activity, but found that the plaintiff was not covered under the ADA due to the temporary nature of his injury.<sup>88</sup>

Given the prevalence of driving in American society, it is somewhat mystifying why judges are so uniformly hostile to the concept of driving as a major life activity. One possible explanation is that most jobs do not require driving as part of the job description—although many jobs do require driving, and all individuals who work outside the home have to find some way to get to their job site. Driving is a common, routine activity that many people perform regularly. There seems to be no good reason why it should not be included as a major life activity.

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<sup>84</sup> *Adesanya v. Novartis Pharm. Corp.*, No. 2:13-cv 05564(SDW)(SCM), 2016 WL 4401522, at \*7 n.13 (D.N.J. Aug. 15, 2016); *see also* *Ray v. Weit*, 13-CV-6416 (RRM) (CLP), 2016 WL 1229056, at \*7 (E.D.N.Y. Mar. 28, 2016) (commuting is not a major life activity).

<sup>85</sup> *Dechberry v. N.Y. City Fire Dep’t*, 124 F. Supp. 3d 131, 151–52 (E.D.N.Y. 2015); *see also* *Dorgan v. Suffolk Cty. Cmty. Coll.*, No. 12–CV–0330 (SJF)(ARL), 2014 WL 3858395, at \*6 n.12 (E.D.N.Y. Aug. 4, 2014).

<sup>86</sup> *Laferty v. United Parcel Serv., Inc.*, 186 F. Supp. 3d 702 (W.D. Ky. 2016); *Leone v. Alliance Foods, Inc.*, No. 8:14–cv–800–T–27TBM, 2015 WL 4879406, at \*6 (M.D. Fla. Aug. 14, 2015).

<sup>87</sup> *Laferty*, 186 F. Supp. 3d at 709.

<sup>88</sup> *Leone*, WL 4879406 at \*6. *But see* *Nelson v. N. Broward Med. Ctr.*, No. 12–61867–CIV, 2013 WL 6842034, at \*9 (S.D. Fla. Dec. 27, 2013) (citing pre-ADAAA decision as precedent for finding that driving is not a major life activity).

### C. Memory

Only two cases after the passage of the ADAAA have discussed whether memory is a separate major life activity.<sup>89</sup> In a 2016 Indiana case, the plaintiff experienced post-concussion syndrome.<sup>90</sup> The court found that the plaintiff had provided enough evidence through the expert testimony of her neurologist that the question of whether she had a substantial limitation in the major life activity of “short-term memory” could go to a jury.<sup>91</sup>

In a 2013 Maryland case, the plaintiff experienced multiple impairments, including diabetes, sleep apnea, and foot problems, and claimed limitations to the major life activity of memory.<sup>92</sup> The court reviewed the few pre-ADAAA cases that had discussed memory, and determined that it would treat memory as a major life activity for the purposes of the case.<sup>93</sup> But after puzzling over how the plaintiff’s foot problems might affect her memory, the court determined that the plaintiff did not meet the definition of disability.<sup>94</sup>

Given the scant support for memory as a major life activity, it would likely be more reasonable for plaintiffs with memory-related impairments to claim impairment in either the bodily function of brain activity or the major life activity of thinking.<sup>95</sup> As these categories are broad enough to include memory and other mental activities, there seems to be no need to complicate the analysis by breaking them down to include other possible mental activities.

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<sup>89</sup> *Atwell v. Indianapolis-Marion Cty. Forensic Servs. Agency*, 168 F. Supp. 3d 1125, 1136–37 (S.D. Ind. 2016); *Bennett v. Kaiser Permanente*, 931 F. Supp. 2d 697, 709 (D. Md. 2013).

<sup>90</sup> *Atwell*, 168 F. Supp. 3d at 1136.

<sup>91</sup> *See id.* at 1136–37.

<sup>92</sup> *Bennett*, 931 F. Supp. 2d. at 709.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 710–11.

<sup>95</sup> *See, e.g., Modjeska v. United Parcel Serv. Inc.*, 54 F. Supp. 3d 1046, 1059 (E.D. Wis. 2014) (noting a plaintiff with a learning disability who experienced memory loss was substantially limited in major life activity of thinking).

*D. Miscellaneous Major Life Activities*

Plaintiffs have almost uniformly been unsuccessful in “odd or different” attempts to expand the definition of “major life activity.”<sup>96</sup> This tendency has not changed after the passage of the ADAAA. Courts have rejected attempts to add items to the major life activity list, such as undertaking physical exercise,<sup>97</sup> shopping,<sup>98</sup> riding horses,<sup>99</sup> shoveling snow,<sup>100</sup> playing with children,<sup>101</sup> and owning and operating a firearm.<sup>102</sup> These activities have little commonality, other than the fact that they are not usually elements of job descriptions.

In *Kelly v. New York State Office of Mental Health*, the plaintiff argued that her hypertension, anxiety, and depression affected her in several life activities, including “feelings of inferiority,” skipping, and church attendance.<sup>103</sup> The court found

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<sup>96</sup> Edmonds, *Snakes and Ladders*, *supra* note 40, at 363; *see* Ryan v. Santa Clara Valley Transportation Auth., No. 16-CV-04032-LHK, 2017 WL 1175596, at \*14–15 (N.D. Cal. Mar. 30, 2017) (providing an example of a case where the plaintiff’s claim of substantial limitation in ability to “tolerate substandard performance by coworkers” was ignored by court).

<sup>97</sup> *See* Telemaque v. Marriott Int’l, Inc., No. 14 Civ. 6336 (ER), 2016 WL 406384, at \*7 (S.D.N.Y. Feb. 2, 2016) *but see* Villanti v. Cold Spring Harbor Cent. Sch. Dist., 733 F. Supp. 2d 371, 378 (E.D.N.Y. 2010) (noting that the court assumed without deciding, that exercise listed as major life activity).

<sup>98</sup> Mastrolia v. Potter, No. 08-5967 (PS), 2010 WL 1752531, at \*7 (D.N.J. Apr. 27, 2010).

<sup>99</sup> Marsh v. Terra Int’l (Okla.), Inc., 122 F. Supp. 3d 1267, 1279 (N.D. Okla. 2015).

<sup>100</sup> *See* O’Connell v. Onondaga Cty., No. 5:09-CV-364 (FJS/ATB), 2012 WL 12895022, at \*5 (N.D.N.Y. Feb. 9, 2012). The author notes that the plaintiff in this case lives in the Syracuse, New York area, which does get a considerable amount of snow each winter. *Id.*

<sup>101</sup> Griego v. Barton Leasing, Inc., No. 08-cv-02325-LTB-BNB, 2010 WL 618281, at \*4–5 (D. Colo. Feb. 19, 2010).

<sup>102</sup> Perros v. Cty. Of Nassau, 2017 WL 728711, at 4 (E.D.N.Y. 2017); *cf.* Clay v. Campbell Cty. Sheriff’s Office, No. 6:12-cv-00062, 2013 WL 3245153, at \*3 n.4 (W.D. Va. June 26, 2013) (noting that because plaintiff was required to use a firearm as part of his job as deputy sheriff, the analysis is the same as that regarding whether his ability to work was substantially limited).

<sup>103</sup> *Kelly v. New York State Office of Mental Health*, 200 F. Supp. 3d 378, 391 (E.D.N.Y. 2016).

that skipping was not a major life activity, but did not discuss whether her feelings of inferiority might qualify.<sup>104</sup> However, the court found that the question of church attendance was “a closer call,” and gave the plaintiff the benefit of the doubt, assuming that church attendance was a major life activity without deciding as such.<sup>105</sup> Furthermore, in *Marsh v. Terra International (Oklahoma), Inc.*, the court found that “carrying” was a major life activity.<sup>106</sup> The court cited previous cases that found that carrying was a subset of either the “performing manual tasks” activity<sup>107</sup> or the “lifting” activity.<sup>108</sup>

The fact that there are not that many cases wherein plaintiffs attempt to expand the limits of ADA coverage is, in a way, a testament to the success of the ADAAA and its implementing regulations in making the definition of disability more comprehensive. Because the list of major life activities is so much broader than it was before, there should be less incentive for plaintiffs to come up with novel activities. From a practitioner’s viewpoint, given the hostility that courts have continued to show to attempts to expand the major life activity list, it would be wise to make sure that there is not some listed major activity in which the plaintiff experiences some substantial limitation before attempting to argue that a new activity should be added to the list. Also, it is generally inadvisable to include things that are clearly not activities—such as “feelings of inferiority”—as major life activities.

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<sup>104</sup> *Id.* at 392 (citing *Rutherford v. Wackenhut Corp.*, No. 04-CV-1216, 2006 WL 1085124, at \*4 (E.D. Wis. Apr. 25, 2006)).

<sup>105</sup> *Kelly*, 200 F. Supp. 3d at 392. The court eventually found that the plaintiff had not provided enough evidence as to whether she was substantially limited in her ability to attend church. *Id.* at 394.

<sup>106</sup> *Marsh v. Terra Int’l (Okla.), Inc.*, 122 F. Supp. 3d 1267, 1280 (N.D. Okla. 2015).

<sup>107</sup> *Id.* (citing *Amador v. Macy’s East-Herald Square*, N. 12-CV-4884, 2014 WL 5059799, at \*15 (S.D.N.Y. Oct. 3, 2014)).

<sup>108</sup> *Id.* (citing *Hall v. Cablevision of Conn.*, No. 3:09-CV-1347, 2011 WL 4829775, at \*4 (D. Conn. Oct. 11, 2011) and *Demetropoulos v. Derynda Foods, Inc.*, No. 08-C-0420, 2010 WL 2900342, at \*7 (E.D. Wisc. July 20, 2010)).

## V. THE NEW BODILY FUNCTION ACTIVITIES

A. *How the Bodily Function Activities Expand the Coverage of the ADAAA*

The most significant innovation in the ADAAA was the addition of bodily functions to the list of major life activities. By including bodily functions—such as normal cell growth, brain activity, and neurological functioning—in the list of major life activities, Congress made it easier for individuals with cancer, mental illness, or autism to show that they have a disability absent any other limitations in any other major life activities.<sup>109</sup>

An example of how the new bodily function activities should work can be found in the 2015 New York case of *Stevens v. Rite Aid Corp.*<sup>110</sup> In August 2011, Christopher Stevens was fired from his job as a pharmacist at the Rite Aid retail pharmacy chain.<sup>111</sup> Mr. Stevens is a person with trypanophobia, which is an unreasonable fear of needles and syringes.<sup>112</sup> Rite Aid required its pharmacists to administer injections, and Stevens was fired for failing to meet this requirement.<sup>113</sup> Stevens sued Rite Aid, claiming disability discrimination, and after an eight-day trial, a New York jury awarded Stevens over \$400,000 in back-pay damages, over \$1.2 million in front-pay damages for the four years of litigation, and \$900,000 in non-pecuniary damages.<sup>114</sup>

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<sup>109</sup> See Barry et al., *supra* note 16, at 53 (“Because the major bodily functions analysis makes it easier for an individual to qualify as disabled, employees’ lawyers should always consider the client’s limitations in major bodily functions. This will often be the clearest path to coverage, and in many cases should be the employee’s primary argument for coverage.”).

<sup>110</sup> *Stevens v. Rite Aid Corp.*, No. 6:13-CV-783, 2015 WL 5602949, at \*1 (N.D.N.Y. Sept. 23, 2015).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* See generally Michael O. Schroeder, *Stuck: Is a Fear of Needles Causing You to Avoid Needed Care?*, U.S. NEWS & WORLD REPORT (Mar. 29, 2016), <http://health.usnews.com/health-news/patient-advice/articles/2016-03-29/stuck-is-a-fear-of-needles-causing-you-to-avoid-needed-care>.

<sup>113</sup> *Stevens*, 2015 WL 5602949, at \*1.

<sup>114</sup> *Id.* However, the court would find that the \$900,000 award was “so high as to shock the judicial conscience,” and remanded the damages award for a new trial unless plaintiff accepted a remittitur of \$125,000. *Id.* at \*22.

Under the pre-ADAAA definition of disability, it is likely that Stevens would not have survived summary judgment. Injecting patients would almost certainly not have been considered to be a major life activity. Stevens might have argued that he was substantially limited in his ability to work, but a court would likely have found that the range of jobs where employees are required to use needles was not sufficiently broad to be substantially limiting. In fact, the court, in evaluating the defendant's post-judgment motion for judgment as a matter of law, did find that Stevens was not substantially limited in his ability to work.<sup>115</sup>

However, in the post-ADAAA era, Stevens was successfully able to argue that he had a substantial limitation in a "bodily function," namely, his neurological functioning.<sup>116</sup> At trial, Stevens provided expert evidence showing that whenever he saw a needle, he would have a parasympathetic reaction that raised his heart rate and respiration, and affected his concentration.<sup>117</sup> The court determined that "there was sufficient evidence for the Jury to conclude that Plaintiff's trypanophobia substantially limited him in the major life activity of neurological functioning."<sup>118</sup>

The *Stevens* case is an excellent example of how the ADAAA is supposed to work in practice. The "bodily function" activities are designed to allow plaintiffs, like Stevens, who have disabilities that are not well-covered under the old "major life activity" rubric to proceed to trial.<sup>119</sup> However, the "bodily function" activities have not yet enjoyed the level of acceptance that would provide

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<sup>115</sup> *Id.* at \*7–9. However, the court did not set aside the jury verdict on those grounds, reasoning that the jury could have concluded that there were no comparable jobs in the area where the plaintiff resides. *Id.*

<sup>116</sup> *Id.* at \*9–10.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*10.

<sup>119</sup> See Paul R. Klein, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 483–84 (2010) ("After the absurdity of numerous court decisions holding employees who suffered from serious medical conditions (such as cancer, [intellectual disability], ovarian cysts, and cerebral palsy) were not substantially limited in any major life activity, Congress expanded the definition of major life activity to include major bodily functions.").

comprehensive assistance to all people with disabilities in similar situations.

Another example of how the new bodily function activities can help plaintiffs is the case of *Calvert v. AmeriCold Logistics*, in which the plaintiff experienced interstitial cystitis, a medical condition that left her unable to control her bladder.<sup>120</sup> The plaintiff could have argued that she was substantially impaired in her bladder function and/or her genitourinary function, which ought to have been a decisive argument. Instead, she argued that she was substantially limited in activities such as “driving more than a limited time, being able to watch a movie, eating out, drinking and shopping at the mall.”<sup>121</sup> This argument did not convince the magistrate judge assigned to the case, who recommended that the defendant prevail on its motion for summary judgment.<sup>122</sup> The plaintiff’s counsel made the argument that her bladder function was substantially limited in a motion to reject the magistrate judge’s recommendation, and the trial court ruled that summary judgment was inappropriate.<sup>123</sup> In this case, the decision to rely on the bodily function activity was literally the difference between victory and defeat for the plaintiff.

### *C. How the Bodily Function Activities are Neglected and Misused*

Although the “bodily function” activities are conceptually much wider than the more traditional major life activities, there have been several cases in which litigants and courts have failed to

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<sup>120</sup> *Calvert v. AmeriCold Logistics, LLC*, No. 2:10-cv-02765-AJT-dkv, 2012 WL 4343774, at \*4 (W.D. Tenn. Jun. 26, 2012), *report and recommendation adopted in part, rejected in part sub nom.* *Calvert v. Amerigold Logistics, LLC*, No. 10-02765, 2012 WL 4343772 (W.D. Tenn. Sept. 21, 2012).

<sup>121</sup> *Calvert*, 2012 WL 4343774, at \*1

<sup>122</sup> *Id.* at \*5.

<sup>123</sup> *Id.* at \*1. In this case, “Amerigold” seems to be a typographic error; “Americold” is apparently the actual name of the business. See ATLANTA BUS. JOURNAL, *Americold Names Boehler CEO*, ATLANTA BUS. JOURNAL (February 4, 2016), <http://www.bizjournals.com/atlanta/news/2016/02/04/ameriold-names-boehler-ceo.html>.



apply the new law correctly.<sup>124</sup> One recent example is *Andrews v. City of Hartford*,<sup>125</sup> in which the plaintiff alleged that he had diabetes, but did not state how his diabetes affected a major life activity.<sup>126</sup> The plaintiff could have argued he was covered either through the endocrine bodily function or the EEOC “predictable assessment” list, but did neither.<sup>127</sup> The court, relying on two pre-ADAAA cases, found that the plaintiff was not disabled.<sup>128</sup>

The result in *Andrews* is distressing, because the plaintiff is exactly the sort of individual that the ADAAA was intended to protect. If either the plaintiff or the court had cited *Andrews*’s substantial limitation of his endocrine body function, it is likely that he could have prevailed on the issue of his disability status. But the *Andrews* case is far from the only case where plaintiffs or courts have failed to take the bodily function activities into account.

In a 2016 Illinois case, both parties focused their summary judgment briefs on whether a plaintiff with lupus met the “major life activity” criteria.<sup>129</sup> The court stated that “[b]oth parties incorrectly, and inexcusably, focus on the definition of “Major Life Activities In General” in 42 U.S.C. § 12102(2)(A), instead of the definition of “Major Bodily Functions” in 42 U.S.C. §

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<sup>124</sup> See *Blue*, *supra* note 8, at 41–42 (“Attorneys have also been slow to grasp significant portions of the law. The failure to utilize major bodily functions is the most prominent example of this.”).

<sup>125</sup> *Andrews v. City of Hartford*, No. 15-cv-00684-BJR-SRW, 2016 WL 4154685 (M.D. Ala. Aug. 3, 2016).

<sup>126</sup> *Id.* at \*2. Mr. Andrews uses an insulin pump, but he did not argue—and the court did not consider whether this was a “mitigating measure” under the ADAAA. *Id.* See 42 U.S.C. § 12102 (4)(E)(i)(I).

<sup>127</sup> *Andrews*, 2016 WL 4154685, at \*2–3. The plaintiff in *Andrews* also used an insulin pump, and could have argued that he should have been evaluated without reference to that mitigating measure. 42 U.S.C. § 12102 (4)(E)(i)(I).

<sup>128</sup> *Andrews*, 2016 WL 4154685, at \*3–4 (citing *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1156 (11th Cir. 2005) and *Cash v. Smith*, 231 F.3d 1301, 1306 (11th Cir. 2000)). See also *Dominelli v. N. Country Acad.*, 1:15-cv-0087 (LEK/CFH), 2016 WL 616375, at \*5 (N.D.N.Y. Feb. 16, 2016) (“Diabetes is often held not to constitute a disability.”).

<sup>129</sup> *Wilton v. Amedisys, Inc.*, No. 14 C 7896, 2016 WL 4678307, at \*4 (N.D. Ill. Sept. 6, 2016).

12102(2)(B).”<sup>130</sup> The court determined that, as lupus is an autoimmune disorder, the plaintiff qualified as having a disability for the purposes of the summary judgment motion.<sup>131</sup>

Similarly, in *Nall v. BNSF Railway Co.*,<sup>132</sup> the plaintiff, a person with Parkinson’s disease, claimed to be substantially limited in the major life activity of working.<sup>133</sup> The major life activity of working is considered to be the “major life activity . . . [of] last resort,” because claiming a limitation in working raises the issue as to whether the employee can perform the essential functions of the job.<sup>134</sup> However, the court, taking into account the nature of Parkinson’s disease, found that the ADAAA “is clear that the operation of the neurological system is a ‘major life function.’”<sup>135</sup> The court pointed out that Parkinson’s could affect a number of different major life activities as well, but under the “more relaxed” requirements under the ADAAA, a plaintiff need only reference one of the statutory functions.<sup>136</sup>

Referencing a “bodily function” without including supporting evidence regarding an individual’s resulting limitations is likely not determinative of disability status. In *Alston v. Park Pleasant*, the United States Court of Appeals for the Third Circuit determined that an individual with cancer did not show substantial limitation in her bodily function of normal cell growth.<sup>137</sup> “We agree that cancer can—and generally will—be a qualifying disability under the ADA,” the court stated.<sup>138</sup> However, the court reasoned that because the ADAAA still calls for an individualized

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Nall v. BNSF Railway Co.*, No. 4:14-CV-02819, 2017 WL 607126 (S.D. Tex. Feb. 14, 2017).

<sup>133</sup> *Id.* at \*8.

<sup>134</sup> *Sutton v. United Airlines*, 52 U.S. 471, 492 (1999) (citing 29 C.F.R. § 1630.2(j) (1998)).

<sup>135</sup> *Nall*, 2017 WL 607126, at \*13. *See also* *Day v. Nat’l Elec. Contractors Ass’n*, 91 F. Supp. 3d 1008, 1018 (S.D. Ohio 2015) (plaintiff with obstructed bowel syndrome who claimed substantial limitation in working found by court to be substantially limited in functioning of his bowels).

<sup>136</sup> *Nall*, 2017 WL 607126, at \*13.

<sup>137</sup> *Alston v. Park Pleasant*, 679 Fed. App’x 169, 172–73 (3d Cir. 2017).

<sup>138</sup> *Id.* at 172.

assessment, plaintiffs must offer supporting evidence of a substantial limitation, which the plaintiff had not provided.<sup>139</sup> The court took its analysis a step further, noting that the plaintiff had not claimed a substantial limitation in any other major life activity including “normal cell growth.”<sup>140</sup> Generally, a plaintiff is only required under the ADAAA to identify one major life activity or bodily function.<sup>141</sup> However, the *Alston* case indicates that it may be conceptually difficult for courts to look at bodily functions in the same way that they do life activities. It may be sound practice, therefore, to combine allegations of both life activities and bodily functions in pleading disability status.<sup>142</sup>

*Yazzie v. Mohave County* demonstrates how reliance on a “bodily function” argument without further explanation can harm plaintiffs.<sup>143</sup> The plaintiff claimed that she was substantially limited in her musculoskeletal function.<sup>144</sup> However, she did not provide any further information as to her exact medical condition, stating only that “some of her disabilities have yet to be diagnosed.”<sup>145</sup> The court denied the defendant’s motion to dismiss due to a missed deadline, but indicated that the defendant should file for summary judgment on the issue of whether the plaintiff met the threshold of disability.<sup>146</sup>

Courts have generally declined to expand the “bodily function” definition past its statutory limits. In a 2016 case, a Rhode Island plaintiff filed multiple claims after experiencing difficulties in finding time in her work day to express breast milk.<sup>147</sup> The plaintiff

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<sup>139</sup> *Id.* (citing 29 C.F.R. § 1630.2 (j)(1)(iv) (2011)).

<sup>140</sup> *Id.*

<sup>141</sup> 42 U.S.C. § 12102 (4)(C) (2008).

<sup>142</sup> *But see* Blue, *supra* note 8, at 42 (“When arguing ‘actual disability,’ nearly every plaintiff should start with major bodily functions. The old major life activities are, of course, still relevant but they are often weighed down by old case law and are generally more difficult to prove.”).

<sup>143</sup> *See* *Yazzie v. Mohave County*, No. CV-08153-PCT-JAT, 2015 WL 7567488, at \*5 (D. Ariz. 2015).

<sup>144</sup> *Id.* at \*4.

<sup>145</sup> *Id.* at \*5.

<sup>146</sup> *See id.* at \*5.

<sup>147</sup> *Mayer v. Prof'l Ambulance, LLC*, 211 F. Supp. 3d 408, 411 (D.R.I. 2016).

alleged that she experienced “lactation dysfunction,” in that she had difficulty producing enough breast milk at times.<sup>148</sup> The court found that the plaintiff had not explained why such a dysfunction was a disability, and granted defendant’s motion to dismiss.<sup>149</sup> In a 2017 case, a plaintiff alleged that she had a high level of radiation exposure due to working around medical equipment.<sup>150</sup> The court found that radiation exposure did not qualify as a disability under the ADA absent substantial limitations on other major life activities.<sup>151</sup>

Again, the good news for the ADAAA is that there have overall not been many cases where courts or plaintiffs have misused or neglected the bodily function activities. But there have likewise not been many positive precedents, either. The bodily function activities are an instance where education about the ADAAA provisions for judges, practitioners, and plaintiffs is seriously warranted.

## VI. THE NEW “PREDICTABLE ASSESSMENTS” REGULATION

The new EEOC regulations implementing the ADAAA set forth certain impairments as having “predictable assessments,” which would counsel courts to find that plaintiffs with those assessments met the definition of disability. Following the decisions in *Sutton* and *Toyota* that limited the scope of the ADA definition of disability, courts interpreting the ADA tended to find various severe impairments not to meet the revised standards, including diabetes, cancer, epilepsy, and depression.<sup>152</sup> The EEOC’s response in developing its regulations implementing the ADAAA was to include a list of certain impairments, which it

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<sup>148</sup> *Id.* at 420. The plaintiff in the case alleged problems with lactation issues, but failed to plead a specific difficulty with lactation in her complaint. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Jansson v. Stamford Health, Inc.*, No. 3:16-cv-260(CSH), 2017 WL 1289824, at \*13 (D. Conn. Apr. 5, 2017).

<sup>151</sup> *Id.* at \*15. The court did find that the plaintiff in this case properly alleged that she had a disability based on her arthritis and hearing loss. *Id.* at \*14.

<sup>152</sup> *Befort*, *supra* note 11, at 2038–39.

described as being “predictable assessments.”<sup>153</sup> The EEOC’s stated intent in listing these impairments was to “provide for more generous coverage and application of the ADA’s prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.”<sup>154</sup>

However, the EEOC regulations also require an individualized assessment of whether an individual with a disability meets the “substantial limitations” standard.<sup>155</sup> This requirement was enunciated by the Supreme Court in *Bragdon v. Abbott*.<sup>156</sup> As Justice Rehnquist stated in his concurring and dissenting opinion, the issue of whether a given impairment is “covered by the ADA is an individualized inquiry. The Act could not be clearer on this point.”<sup>157</sup> The “individualized inquiry” requirement is in tension with the list of impairments in the new EEOC regulations.<sup>158</sup> In applying the ADA to cases where plaintiffs allege that their impairment should be considered disabilities pursuant to the “predictable assessments” list, courts have to balance the two requirements. As a practical matter, this balancing process means that individuals with diabetes, cancer, epilepsy, depression, or other impairments listed in the EEOC regulations cannot expect to automatically qualify as having a disability.

In a *Case Western Reserve Law Review* article, Paul Klein posits that Congress “may have overreached” by broadening the definition of disability at the expense of the individualized inquiry:

[C]ourts should be careful not to blindly find all people with a particular disorder disabled for the purposes of the ADA. Perhaps every sufferer of a very serious condition will meet the statutory

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<sup>153</sup> 29 C.F.R. § 1630.2 (j)(3) (2011).

<sup>154</sup> *Id.* § 1630.2 (j)(3)(i).

<sup>155</sup> *Id.* § 1630.2 (j)(3)(ii).

<sup>156</sup> *Bragdon v. Abbott*, 524 U.S. 624, 639–42 (1998); *see also* Ravencraft, *supra* note 81, at 443–44 (“No disease or impairment is a disability *per se*; instead, each ADA claimant is subject to an ‘individualized inquiry’ as to whether he or she is substantially limited by the condition at issue.”).

<sup>157</sup> *Bragdon*, 524 U.S. at 657.

<sup>158</sup> *Rodríguez-Álvarez v. Municipality of Juana Díaz*, No. CV 14-01924-WGY, 2017 WL 666052, at \*3 (D.P.R. Feb. 17, 2017).

definition, but the courts must continue to make individualized findings as to the extent of the plaintiff's infirmity . . . Courts must not, therefore, be lured into branding particular diseases as per se disabling under the ADAAA, despite a temptation to do so.<sup>159</sup>

In one Puerto Rico case, the court assessed evidence regarding the plaintiff's infection with HIV.<sup>160</sup> The plaintiff introduced evidence that she experienced vomiting, incontinence, and drowsiness, but did not provide any medical expert evidence with regard to the extent of her impairment.<sup>161</sup> The court, conceding that the ADAAA provided a "particularly low bar," found that the plaintiff met the summary judgment threshold "by the thinnest of margins."<sup>162</sup> Effectively, the court in this case used the presence of HIV to serve as a tiebreaker, enabling the plaintiff to prevail despite a lack of evidence of the seriousness of her impairment.<sup>163</sup>

The United States District Court for the Western District of Tennessee took a similar approach in the case of a plaintiff with severe depression.<sup>164</sup> In that case, the court found that the inclusion of "major depressive disorder" in the EEOC list should be considered a "strong presumption," rather than a guarantee, that the plaintiff should prevail.<sup>165</sup> An Indiana court reached a similar conclusion in a case involving a plaintiff with post-traumatic stress disorder, ruling that the EEOC regulation only lent support to the conclusion that the plaintiff had a disability.<sup>166</sup> An Oklahoma

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<sup>159</sup> Klein, *supra* note 119, at 484–85.

<sup>160</sup> *Rodriguez-Álvarez*, 2017 WL 666052, at \*4.

<sup>161</sup> *Id.*; *see also* *Rodriguez v. HSBC Bank USA, N.A.*, No. 8:14 cv-945-T-30TGW, 2015 WL 7429273, at \*8 (M.D. Fla. Nov. 23, 2015) (noting a case where a plaintiff with HIV infection with no other limitations arguably did not meet ADA disability standard).

<sup>162</sup> *Rodriguez-Álvarez*, 2017 WL 666052, at \*4; *see also* *Morissette v. Cote Corp.*, 190 F. Supp. 3d 193, 205 (D. Me. 2016) (noting a case where a plaintiff met the "low bar" for summary judgment).

<sup>163</sup> *Rodriguez-Álvarez*, 2017 WL 666052, at \*4.

<sup>164</sup> *Williams v. AT&T Mobility Serv.*, 186 F. Supp. 3d 816, 823 (W.D. Tenn. 2016).

<sup>165</sup> *Id.* at 825.

<sup>166</sup> *Rodgers v. Gary Cmty. Sch. Corp.*, 167 F. Supp. 3d 940, 951 (N.D. Ind. 2016).

district court found that the presence of multiple sclerosis on the EEOC list was “not dispositive,” but was “persuasive at the motion to dismiss stage.”<sup>167</sup> Taken together, these cases indicate that the EEOC regulations will likely not be dispositive in any case, and may only be a factor in some courts.

The list of “predictable assessment” impairments formulated by the EEOC does not include any language indicating whether the list is exhaustive or not.<sup>168</sup> Plaintiffs who have argued that their impairment should be treated as a *per se* disability have not met with success. In the Rehabilitation Act case of *Cheung v. Donahoe*, a postal employee with psoriasis argued that her condition should be treated as a *per se* disability, even though it is not on the EEOC list.<sup>169</sup> The court rejected this argument, stating:

This abstract argument splinters at the touch of legal scrutiny. Not only does plaintiff’s briefing fail to provide a single case or even legislative cite to support her theory, but it is apparent that, subsequent to the 2008 amendments, courts have refused to adopt the position she advances here. In fact, the clear consensus is that psoriasis is *not* a disability *per se*, and that functional impairment beyond that condition itself must still be demonstrated after the 2008 amendments.<sup>170</sup>

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<sup>167</sup> *Chaney v. Wal-Mart Stores Inc.*, No. Civ-15-592-R, 2015 WL 6692108, at \*6 (W.D. Okla. Nov. 3, 2015) (citing *Johnson v. Farmers Ins. Exch.*, No. Civ-11-963-C, 2012 WL 95387, at \*1 (W.D. Okla. Jan. 12, 2012) (noting a case where the plaintiff with sleep apnea stated a claim); *Owens v. City of Barnsdall*, No. 13-CV-749-TCK-PJC, 2014 WL 2197798, at \*3 (N.D. Okla. May 27, 2014) (noting a case where the plaintiff with anxiety and depression stated a claim); *Stiles v. Judd*, No. 8:12-cv-02375-T-27EAJ, 2013 WL 4714402, at \*8 (M.D. Fla. Aug. 30, 2013) (noting a case where the plaintiff with mental impairments stated a claim in Title III case); *Mecca v. Sch. Bd. of Broward Cnty.*, No. 12-60828-Civ, 2012 WL 2735066, at \*3 (S.D. Fla. July 9, 2012) (noting a case where the plaintiff with post-traumatic stress disorder stated a claim)).

<sup>168</sup> 29 C.F.R. § 1630.2 (j)(3) (2011).

<sup>169</sup> *Cheung v. Donahoe*, No. 11-CV-0122 (ENV) (RLM), 2016 WL 3640683 at \*1, \*6 (E.D.N.Y. June 19, 2016).

<sup>170</sup> *Id.* at \*6 (citing *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 689 (7th Cir. 2010); *O’Kane v. Lew*, No. 10-CV-5325 (PKC), 2013 WL 6096775, at \*6

Similarly, district courts in North Carolina and Texas rejected arguments that a recovering alcoholic had a *per se* disability, requiring that the plaintiff show that his impairment limited a major life activity.<sup>171</sup>

Although this is an area where there has not been a great deal of litigation, the message for plaintiffs is clear enough: merely stating that the existence of an impairment on the EEOC list will not be adequate in most cases to prove disability. Although that may have been the EEOC's intent, courts simply do not give that regulation enough weight for plaintiffs to prevail in every case.

## VII. AN EMPIRICAL ANALYSIS OF LOSING ADA EMPLOYMENT CLAIMS

### A. Methodology

In developing this article, the author analyzed a representative sample of 219 reported and unreported cases in which Title I plaintiffs were unable to show that they met the first prong of the ADA definition of disability. These cases were decided over a four and a half-year period between January 2013 and June 2017.<sup>172</sup>

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(E.D.N.Y. Nov. 20, 2013); *Debell v. Maimonides Med. Ctr.*, No. 09-CV-3491 (SLT) (RER), 2011 WL4710818, at \*4-5 (E.D.N.Y. 2011).

<sup>171</sup> *Chamberlain v. Securian Fin. Grp., Inc.*, 180 F. Supp. 3d 381, 398 (W.D.N.C. 2016); *Radick v. Union Pac. Corp.*, No. 4:14-CV-02075, 2016 WL 639126, at \*5 (S.D. Tex. Jan. 25, 2016), *report and recommendation adopted*, 2016 WL 632039 (S.D. Tex. Feb. 17, 2016), *judgment entered*, 2016 WL 633908 (S.D. Feb 17, Tex. 2016).

<sup>172</sup> Curtis D. Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, (2017), <https://docs.google.com/spreadsheets/d/1rxQIoXqVYQvK1LpytsfXr2w1VTRN9iSQOKCjm3t1-Yo/edit#gid=1991933384> (Google Documents spreadsheet). The methodology used in selecting cases was to conduct a search on the Westlaw federal courts database for the following four search terms: "Americans with Disabilities Act," "amendments," "major life activity," and "employ." This search was calculated to pull out employment law cases that reference the ADAAA where the plaintiff's disability was at question. The survey excluded Title II and Title III cases, and also excluded any cases where the alleged discrimination occurred before the effective date of the ADAAA on January 1, 2009. The survey also only included cases where there was a final disposition of the plaintiff's ADA case, leaving out cases such as those where



The sample size included reported and unreported cases,<sup>173</sup> but excluded cases where the court's decision was based on whether the plaintiff was "regarded as" having a disability.

The purpose in selecting only those cases where the plaintiff lost a motion to dismiss or a summary judgment motion was to examine those factors that resulted in plaintiff defeats,<sup>174</sup> rather than to just compare the number of winning cases to losing cases.<sup>175</sup>

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the plaintiff lost a motion to dismiss but was allowed to file an amended complaint to cure pleading deficiencies.

<sup>173</sup> This approach differs slightly from that used by Professor Befort in his 2013 article. *See* Befort, *supra* note 11. Professor Befort chose to look only at reported decisions, because "the reported cases generally reflect the judiciary's assessment that these decisions are of greater significance. It is likely that courts take a greater degree of care in crafting reported decisions as compared to nonreported decisions." *Id.* at 2047 (citing James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 323 (2007); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1471 (2004)). The author agrees with Professor Befort that there is merit in looking only at reported cases, but since so many of the cases where plaintiffs lose are unreported, the survey includes unreported cases so as to arrive at an understanding as to *why* plaintiffs lose on pretrial motions.

<sup>174</sup> In this respect, the author's approach is similar to that of Professor Ruth Colker in her 2010 *Utah Law Review* article. *See* Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*, *supra* note 11. Professor Colker wrote, "I wanted to understand who the plaintiffs were and some of the problems they experienced in bringing a lawsuit. I was particularly interested in understanding why people might file what we would consider to be hopeless lawsuits—lawsuits filed without assistance of counsel that have virtually no chance of success." *Id.* at 1030–31. But the methodology in this survey differs somewhat. Professor Colker based her research on federal court filings retrieved through the PACER system, thereby capturing information about whether a plaintiff was able to settle a case or not. *Id.* at 1043. While this is a superior method for examining the success rate of plaintiffs, this research examines the reasons why plaintiffs lose at the motion stage, rather than at the relative success or failure of cases. As such, the survey focuses on cases where a judge has made a decision against a plaintiff.

<sup>175</sup> Having said that, there is a great deal of value in knowing the percentage of times that plaintiffs lose ADA cases; earlier studies which showed that plaintiffs lose over 90 percent of ADA claims were undoubtedly instrumental in building support for the passage of the ADAAA. *See* Feldblum

The research showed that there were four primary “risk factors” that were common in cases where plaintiffs were unable to meet the threshold of the definition of disability at the pretrial stage.<sup>176</sup> In these cases, risk factors included whether an individual filed *pro se*, whether the plaintiff made a mistake in pleading, whether the court relied on pre-ADAAA case law, and whether the plaintiff filed other claims beside their ADA claim.<sup>177</sup>

### B. Results

In examining the alleged impairments of the plaintiffs, the most common impairment was musculoskeletal issues, of which the largest sub-groups were back injuries, knee injuries, and shoulder injuries.<sup>178</sup> These impairments made up 36.53 percent of the total number of categories.<sup>179</sup> The next most common category was persons with mental illness, including anxiety, depression, and post-traumatic stress disorder, which made up 16.89 percent of all cases.<sup>180</sup> Individuals with difficulties with their internal functioning, a broad category that included impairments such as colitis, diabetes, and breathing issues, made up 12.3 percent of all

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et al., *supra* note 6, at 202–03 (discussing the process of drafting the ADAAA) (citing Amy L. Allbright, 2006 *Employment Decisions Under the ADA Title I–Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (study showed employers won 97.2 percent of cases); Amy L. Allbright, 2003 *Employment Decisions Under the ADA Title I–Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319–20 (May/June 2003); Colker, *The Americans with Disabilities Act*, *supra* note 34 at 100–01; Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 246 (2001).

<sup>176</sup> Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Risk Factors.

<sup>177</sup> *Id.* The survey did not count state-law disability discrimination claims or claims of retaliation under the ADA as separate claims, because both of those types of claims would require the same type of analysis of whether the plaintiff met the definition of disability. Typically, plaintiffs who filed other types of claims would file complaints under other civil rights statutes, and/or the Family and Medical Leave Act.

<sup>178</sup> *Id.* at Table of Impairments; *see also id.* at Table of Cases (providing cases to support the mentioned injury sub-groups).

<sup>179</sup> *Id.* at Table of Impairments.

<sup>180</sup> *Id.*

cases.<sup>181</sup> The next largest category was people who did not specify their impairment, with 7.31 percent of all cases.<sup>182</sup> The rest of the cases involved people with vision problems, obesity, drug and alcohol addiction, cancer, skin issues, allergies, head injuries, hearing loss, learning impairments, and migraine headaches, seizure disorders and pregnancy (all at 3 percent or under).<sup>183</sup>

Examining the primary<sup>184</sup> major life activity alleged by losing plaintiffs provided helpful information about the difficulties these plaintiffs experienced in court was much more instructive of where plaintiffs begin to go astray in their pleadings. A full 38 percent of plaintiffs failed to allege any major life activity, the largest group of all.<sup>185</sup> As the failure by plaintiffs to identify a major life activity is usually fatal to their discrimination claims, this lapse is especially significant. This was followed by plaintiffs who alleged substantial limitations in working, with 17 percent of plaintiffs filing under the major life activity of last resort.<sup>186</sup> The next three major life activities were walking (11 percent of cases), lifting (6.3 percent of cases), and sleeping (6 percent of cases).<sup>187</sup>

Of the 219 cases in the sample, 74 were decided on motions to dismiss, with the remaining 145 decided on motions for summary judgment.<sup>188</sup> The most common result was that the plaintiff did not provide enough evidence of their disability to defeat the motion to dismiss or summary judgment, which occurred in 71.6 percent of cases.<sup>189</sup> The next most common reason was the plaintiff's inability to identify a major life activity, which occurred in 21 percent of all

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at Table of Major Life Activities. The cases in the survey were categorized based on a single major life activity, although it is common for plaintiffs to cite more than one major life activity. As a rule of thumb, the selected major life activity was the one most commonly associated with the plaintiff's alleged impairment or that was specifically discussed by the court.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at Table of Decisions.

<sup>189</sup> *Id.*

cases.<sup>190</sup> Finally, the plaintiff’s inability to identify an impairment occurred in 6.8 percent of all cases.<sup>191</sup>

Of the four “risk factors” identified, the most prevalent was that losing plaintiffs tended to file multiple causes of action (such as other employment discrimination claims under the Age Discrimination in Employment Act or Title VII, or claims under the Family and Medical Leave Act). Over two-thirds of plaintiffs (68.04 percent) filed multiple claims.<sup>192</sup> Only 54.79 percent of plaintiffs properly plead their cases, meaning a large number of plaintiffs are making pleading mistakes, such as failing to identify an impairment or a major life activity, or only alleging limitations in working.<sup>193</sup> Over a quarter of losing plaintiffs (26.03 percent) were *pro se*. And in 4.57 percent of cases, the judge based his or her decision on pre-ADAAA case law.<sup>194</sup>

The following table shows the overall number of cases per year, with each risk factor broken out. Keep in mind that some cases will have no risk factors, and others will have multiple risk factors:<sup>195</sup>

<i>Year</i>	<i>Number of Cases</i>	<i>Pro Se Plaintiffs</i>	<i>Judges Applying Prior Decisions</i>	<i>Specific Pleading Mistakes by Plaintiffs</i>	<i>Plaintiffs Filing Multiple Claims</i>
2013	38	7	1	20	24
2014	52	12	1	25	39
2015	59	15	3	39	44
2016	51	19	3	26	28
2017 (Jan-June)	19	4	2	10	14
<i>Total</i>	219	57	10	120	149

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at Table of Risk Factors.

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at Table of Years.

In reviewing the table, it is important to realize that the number of cases each year is a small sample size. However, it does appear that at least two of the risk factors—pleading mistakes made by plaintiffs and plaintiffs who file multiple claims—seem to be receding from their 2015 highs.<sup>196</sup> This could be due to several factors, such as a better understanding of basic pleading requirements, and the fact that there is more case law available under the ADAAA. Additionally, the number of cases where judges apply prior law or make other errors in applying the ADAAA appears to be minimal. But the data shows that there are still serious gaps in terms of leveling the playing field for plaintiffs in employment cases.<sup>197</sup>

### C. Discussion

#### 1. Errors Made By Judges

While there are few cases in the sample where a judge made a mistake in applying the ADAA,<sup>198</sup> when a court makes such an error, it can doom an individual's case. One illustrative example from the sample that shows why many plaintiffs fail in arguing that they are part of the ADA protected class of people with disabilities is *Nase v. Bucks County Housing Authority*, a 2016 case in the United States District Court for the Eastern District of Pennsylvania in which the plaintiff was a person who claimed to experience panic attacks, anxiety, and depression.<sup>199</sup> The court noted the passage of the ADAAA, and the EEOC regulations calling for a broad construction of the definition of disability.<sup>200</sup> The plaintiff did not argue that his mental illness affected his brain functioning, but did properly allege substantial limitations in his ability to concentrate, drive, and relate to others.<sup>201</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> *See id.*

<sup>198</sup> *Id.* at Table of Risk Factors.

<sup>199</sup> *Nase v. Bucks County Hous. Auth.*, No. 16-02417, 2016 WL 6876333, at \*5 (E.D. Pa. Nov. 22, 2016).

<sup>200</sup> *See id.* at \*2.

<sup>201</sup> *Id.*

The court, ruling on plaintiff's motion to reconsider on defendant's successful motion to dismiss, found that the plaintiff did "not further specify the extent to which these activities were limited by his medical conditions."<sup>202</sup> The court then went on to find that, since the plaintiff, despite his impairments, was capable of working for forty hours per week, he was therefore not substantially limited in the major life activity of working.<sup>203</sup> "Accordingly," the court ruled, "Plaintiff has failed to allege that he is a qualified individual with a disability."<sup>204</sup>

While it is certainly possible that the plaintiff in *Nase* did not provide the court with adequate evidence to support the limitations that his mental illness imposed on his major life activities, it is inappropriate for the court to ignore plaintiff's stated major life activities without further analysis. The fact that the plaintiff was "capable of" working for forty hours a week simply does not indicate whether or not the plaintiff was substantially limited in his ability to do any other activity.<sup>205</sup>

## 2. Pleading Errors By *Pro Se* Litigants

Pleading deficiencies on the part of ADA employment plaintiffs are not a new development; other scholars have noted that poor pleading is a major factor in why such plaintiffs lose.<sup>206</sup> Plaintiffs who file *pro se* often face serious challenges in filing ADA claims,<sup>207</sup> although the fact that the majority of losing cases

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at \*3.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at \*2.

<sup>206</sup> Barry et al., *supra* note 16, at 3 n.9 (citing Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*, *supra* note 11, at 1032 ("In a considerable number of cases. . . procedural difficulties, such as failing to file a charge with the [EEOC], precluded individuals from any consideration on the merits. If we ever expect the win-loss rate [under the ADA] to approach a more balanced level, we have to find a way to provide individuals with disabilities competent counsel to handle their cases.")); Porter, *supra* note 14, at 44–46 (discussing cases).

<sup>207</sup> Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*, *supra* note 11, at 1049–53 (discussing statistical study of outcomes for *pro se* plaintiffs in ADA cases).

were of plaintiffs who were represented indicates the probability of educational gaps for attorneys.<sup>208</sup> In the sample of losing cases, 16 percent of the cases were instances where a *pro se* plaintiff failed to name a major life activity in a pleading, and almost one-third of the sample was cases where a *pro se* plaintiff made a pleading mistake.<sup>209</sup>

One way that some courts have dealt with the issue of the complexity of ADA analysis is to grant plaintiffs with obvious disabilities a degree of leeway in terms of the quality of their pleadings. For example, in *Arroyo-Ruiz v. Triple-S Management Group*, the plaintiff experienced a cardiac blockage and a kidney disorder that required him to undergo dialysis.<sup>210</sup> The plaintiff did not identify which major life activity was negatively impacted due to these impairments.<sup>211</sup> The failure of a plaintiff to name a major life activity is often fatal to an ADA claim, but Judge Besosa decided “to draw a reasonable inference that [the plaintiff’s] heart and kidney impairments impact several major life activities.”<sup>212</sup> Judge Besosa stated:

It is true that plaintiff could have done a much better job of explaining (even briefly) the ways in which his cardiovascular and genitourinary impairments “substantially limit” his ability to perform major life activities. For instance, the complaint contains very little about how his apparent heart condition affects his ability to work, to perform manual tasks, or to take care of himself. Nevertheless, the Court, mindful of both the low bar for surviving motions to dismiss under the ADA and Congress’ intent that the term “substantially

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<sup>208</sup> Edmonds, *Data from Empirical Survey on Losing ADA Cases*, *supra* note 172, at Table of Pro Se Outcomes. The survey indicates only a weak correlation (under 0.3) between *pro se* status and both failure to name an MLA and pleading errors, which indicates that attorneys may be in need of as much ADA knowledge as *pro se* plaintiffs. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Arroyo-Ruiz v. Triple-S Mgmt. Grp.*, 206 F. Supp. 3d 701, 707–08 (D.P.R. 2016).

<sup>211</sup> *Id.* at 712.

<sup>212</sup> *See id.*

limits” be broadly interpreted, finds that the amended complaint plausibly satisfies the third Bragdon step.<sup>213</sup>

*Arroyo-Ruiz* is an exception to the general rule that courts will not infer the presence of a major life activity when the plaintiff does not identify one.<sup>214</sup> In a recent case, *Abdul-Haqq v. Kaiser Emergency in San Leandro*, involving a *pro se* plaintiff with an anxiety disorder,<sup>215</sup> the court dismissed the claim with leave to amend on grounds that included the plaintiff’s failure to identify a major life activity.<sup>216</sup> However, the plaintiff’s allegation of an anxiety disorder logically ought to have triggered an inference that the plaintiff’s impairment affected the functioning of her brain. However, the court did not make that inference, instead allowing plaintiff to re-plead the issue.<sup>217</sup>

In *Bell-James v. Career Personnel*, the United States District Court for the Middle District of Alabama considered a motion to

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<sup>213</sup> *Id.* at 713; see *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

<sup>214</sup> See, e.g., *Kloth-Zanard v. Malloy*, No. 3:15-cv-00124(MPS), 2016 WL 5661977 at \*9 (D. Conn. Sept. 29, 2016) (court declined to infer major life activity for *pro se* plaintiff in Title II case who alleged post-traumatic stress disorder, stress, and anxiety); *Gallardo v. Chicago Transit Auth.*, 15 CV 7458, 2016 WL 3165768, at \*2 (N.D. Ill. June 7, 2016) (court declined to infer major life activity for *pro se* plaintiff who alleged depression and anxiety); *Clarke v. Mortg. Lenders of Am., LLC*, No. 14-2526-JWL, 2016 WL 1030039, at \*3 (D. Kan. Mar. 10, 2016) (court refused to imply disability from plaintiff’s alleged brain injury); *Paul v. Lenox Hill Hosp.*, No. 13 CV 01566(CBA)(LB), 2016 WL 4775532, at \*19 (E.D.N.Y. Jan. 15, 2016) (court declined to infer major life activity of breathing for *pro se* plaintiff with asthma); *Hamilton v. SMS Tech. Servs., LLC*, No. 14-00560-KD-M, 2016 WL 2642221, at \*6 (S.D. Ala. May 9, 2016) (court declined to infer major life activity for *pro se* plaintiff with bronchitis); *Dechberry v. N.Y. City Fire Dep’t*, 124 F. Supp. 3d 131, 151 (E.D.N.Y. 2015) (court did not infer major life activity of performing manual tasks for plaintiff with hand injury); *Savage v. Texas Workforce Comm’n*, No. A-14-CV-824-LY, 2015 WL 3952357, at \*3 (W.D. Tex. June 29, 2015) (magistrate judge declined to infer major life activity for *pro se* plaintiff with back injury).

<sup>215</sup> *Abdul-Haqq v. Kaiser Emergency in San Leandro*, No. 16-cv-05454-PJH, 2017 WL 550235, at \*5 (N.D. Cal. Feb. 10, 2017).

<sup>216</sup> *Id.* at \*8. The plaintiff’s complaint was deficient in several other areas, including a failure to attach EEOC right-to-sue letters. *Id.* at \*5.

<sup>217</sup> *Id.* at \*8.



dismiss filed against an unsophisticated *pro se* plaintiff who alleged that she had end-stage renal disease, and required dialysis.<sup>218</sup> Given the seriousness of the plaintiff's condition, and her need for dialysis, it would not be unreasonable to assume, at least for the purposes of a motion to dismiss, that the plaintiff had met a threshold showing of disability. However, the magistrate judge reviewing the case declined to find that the plaintiff had a disability, and recommended that the case be dismissed because the plaintiff submitted her request for an accommodation for her dialysis to a clerk at her employment agency, instead of her prospective employer.<sup>219</sup> Given both the need for consideration for *pro se* plaintiffs, the seriousness of this particular plaintiff's disability, and the policy considerations manifest in the ADAAA, the magistrate judge ought to have considered finding that the plaintiff met the low bar for pleading her disability at this stage.<sup>220</sup>

Even if courts determine that it is generally inappropriate to assume that a given plaintiff's impairment fits within the "major bodily function" rubric, courts should at least give some consideration to doing so for *pro se* plaintiffs like Abdul-Haqq and Bell-James. Such consideration is especially warranted due to the difficulty that many ADA plaintiffs have in finding counsel.<sup>221</sup> Additionally, one study found that, in a number of *pro se* cases, courts based their decisions on the *Sutton* and *Toyota* decisions that were specifically abrogated by the ADAAA.<sup>222</sup> Such a finding implies not only that courts make mistakes in *pro se* cases that they

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<sup>218</sup> Bell-James v. Career Pers., No. 2:15-cv-484-WKW-WC, 2016 WL 1743354, at \*3 (M.D. Ala. Jan. 4, 2016), *report and recommendation adopted*, No. 2:15-CV-484-WKW [WO], 2016 WL 1737743 (M.D. Ala. May 2, 2016).

<sup>219</sup> *Id.* at \*4.

<sup>220</sup> See Perrywatson v. United Airlines, Inc., 916 F. Supp. 2d 866, 875 (N.D. Ill. 2013), *aff'd sub nom.* Perrywatson v. United Air Lines, Inc., 527 F. App'x 559 (7th Cir. 2013) ("Nowhere in her Local Rule 56.1 submission does Ms. Perrywatson reveal the major life activity in which she is limited. She doesn't go into it in her brief either. One might guess that, with a knee impairment, it could be walking—which could affect working—but guesswork does not stave off summary judgment, and it is not the court's place to construct arguments on a party's behalf.").

<sup>221</sup> See Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments*, *supra* note 11, at 1036.

<sup>222</sup> Widiss, *supra* note 16, at 938–39.

might not make if such plaintiffs were represented by counsel, but that *pro se* plaintiffs are judged by a different standard than what Congress intended.

For example, in *Ward v. City of Gadsden*, the United States District Court for the Northern District of Alabama heard a summary judgment motion against a *pro se* plaintiff with depression.<sup>223</sup> The plaintiff, however, did not identify a major life activity or bodily function that was impacted by his depression.<sup>224</sup> The court stepped in and inferred an implicit reliance on the major life activity of working, although it then determined that the plaintiff had not provided enough evidence to show substantial limitation in his ability to work.<sup>225</sup>

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<sup>223</sup> *Ward v. City of Gadsden*, No. 4:15-CV-0865-VEH, 2017 WL 568556 at \*1–2 (N.D. Ala. Feb. 13, 2017).

<sup>224</sup> *Id.* at \*6.

<sup>225</sup> *Id.* See also *Sanchez v. United Parcel Serv. Inc.*, 625 F. App'x 806, 808 (9th Cir. 2015) (appellate court liberally construed *pro se* plaintiff's complaint to include a claim of being substantially limited in ability to work); *Ramos v. Toperbee Corp.*, No. 15–1462 (CVR), 2017 WL 978983, at \*17 (D.P.R. Mar. 13, 2017) (court inferred that plaintiff who claimed a limitation in driving had a possible limitation in the major life activity of seeing); *O'Dell v. Kelly Servs.*, No. 15-cv-13511, 2017 WL 676945, at \*4 (E.D. Mich. Feb. 21, 2017) (court inferred that *pro se* plaintiff with multiple impairments was at least plausibly limited in sleeping and concentrating); *White v. Roosevelt Union Free Sch. Dist. Bd. of Educ.*, No. 15-CV-1035 (JS) (SIL), 2016 WL 4705674, at \*8 (E.D.N.Y. Aug. 8, 2016), *report and recommendation adopted*, 2016 WL 4703661 (E.D.N.Y. Sept. 8, 2016) (magistrate judge inferred that *pro se* plaintiff was limited in ability to walk); *Dykstra v. Florida Foreclosure Attorneys, PLLC*, 183 F. Supp. 3d 1222, 1231 (S.D. Fla. 2016) (plaintiff not required to use “magic words” to substantiate disability claim); *Thompson v. Wakefern Food Corp.*, No. RDB-15-1240, 2015 WL 9311972, at \*6 (D. Md. Dec. 23, 2015) (court assumed that plaintiff with schizophrenia was limited in several major life activities); *Amador v. Macy's E.-Herald Square*, No. 12 cv. 4884(MHD), 2014 WL 5059799, at \*11 (S.D.N.Y. Oct. 3, 2014) (court reviewed plaintiff's deposition to infer major life activities not listed in complaint); *Makeda-Phillips v. Illinois Sec'y of State*, No. 12-3312, 2014 WL 518938, at \*6 (C.D. Ill. Feb. 10, 2014) (court inferred that *pro se* plaintiff with alleged stress disorder may have substantially limited her ability to work) *but see* *Martinez v. City of Weslaco Tex.*, No. 7:12-CV-417, 2013 WL 2951060, at \*9 (S.D. Tex. June 14, 2013) (court could not infer plaintiff's disability category because plaintiff provided information about his abilities, not his disabilities.).

*Ward* is perhaps not the best example of what courts ought to do in such cases, as inferring that a plaintiff is limited in her ability to work may keep her from meeting the “qualified person with a disability” standard.<sup>226</sup> However, given that the empirical evidence shows that many plaintiffs are screened out on pretrial motions based on a failure to identify a major life activity,<sup>227</sup> this is an area where courts and magistrate judges should consider showing some leniency. Understanding the ADA definition of disability is no simple matter, especially for an unsophisticated *pro se* plaintiff. Making simple, common-sense inferences can help level the playing field for such plaintiffs.

### 3. Throwing Spaghetti Against the Wall

The most prevalent “risk factor” for plaintiffs was the inclusion of ADA claims along with other causes of action, which may indicate that attorneys and *pro se* plaintiffs are essentially throwing spaghetti against the wall to see what will stick.<sup>228</sup> One example of how this can happen is *Scott v. District Hospital Partners, L.P.*, a 2014 District of Columbia case involving a nurse who was fired from her job as the result of a 2010 reorganization plan.<sup>229</sup> The nurse filed a charge with the EEOC in 2011, alleging discrimination on the basis of race and age—but not on disability.<sup>230</sup> Two years later, the nurse filed an amendment to her EEOC charge alleging disability discrimination, but the EEOC rejected this filing, claiming that the nurse’s filing of the new charge was untimely.<sup>231</sup>

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<sup>226</sup> 42 U.S.C. § 12111 (8) (1990).

<sup>227</sup> Edmonds, *Data from Empirical Survey on Losing ADA Cases*, *supra* note 172, at Table of Decisions.

<sup>228</sup> *Id.* at Table of Risk Factors. *See, e.g.*, HOUSE: *Cursed* (Fox television broadcast, March 1, 2005) (“Jeffrey Reilich: What, throw everything against the wall and see what sticks? Dr. Robert Chase: Works for spaghetti.”).

<sup>229</sup> *Scott v. District Hospital Partners*, 60 F. Supp. 3d 156, 159–60 (D.D.C. 2014).

<sup>230</sup> *Id.* at 160. The plaintiff originally also alleged religious discrimination, but would remove that allegation in a 2011 amended EEOC complaint. *Id.*

<sup>231</sup> *Id.* at 160.

The nurse filed a complaint in federal court in 2013, alleging discrimination on four federal counts—disability, race, hostile work environment, and retaliation, and a wrongful termination claim under District of Columbia common law.<sup>232</sup> The court dismissed the nurse’s disability claim on the grounds that it was not filed with the EEOC on a timely basis.<sup>233</sup> The court further addressed the merits of the plaintiff’s disability claim, which alleged that she was substantially limited in her ability to breathe due to dust in her work environment.<sup>234</sup> The court found that since the plaintiff was only limited in her ability to breathe in her work environment, her limitation was not substantial, and she was therefore not able to show that she had a disability.<sup>235</sup>

It is not clear from the case why Scott’s counsel did not advise her to amend her EEOC charge to include disability, or why he included an ADA claim in the complaint. As the ADA complaint did not survive a motion to dismiss,<sup>236</sup> it is easy to second-guess the decision by plaintiff’s counsel to file that particular count. But from a practical litigation perspective, there are not likely to be significant costs associated with adding a claim of disability discrimination to a Title VII employment discrimination complaint, even if the plaintiff’s claim of disability is tenuous at best. It is possible that the ADA, by lowering the threshold for covered status for disability, may be contributing to this tendency, by making secondary or tertiary disability claims more plausible.<sup>237</sup>

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<sup>232</sup> *Id.* at 161. The plaintiff would ultimately lose her racial discrimination claim on a summary judgment motion. *Scott v. Dist. Hosp. Partners, L.P. & UHS of Delaware, Inc.*, 220 F. Supp. 3d 6, 8 (D.D.C. 2016)

<sup>233</sup> *Scott*, 60 F. Supp. 3d at 163.

<sup>234</sup> *Id.* at 163–4.

<sup>235</sup> *Id.* at 164.

<sup>236</sup> *Id.* at 159.

<sup>237</sup> This may be more likely with regards to the “regarded as” prong of the ADA definition of disability, which does not require a plaintiff to prove an actual disability, but this issue is outside the scope of this article.

#### 4. Implications for Employers and Human Resource Professionals

One interesting aspect of the risk factors analysis in the survey is that all four risk factors are out of the control of defendants.<sup>238</sup> Defendant employers have no say one way or another in whether a plaintiff decides to hire a lawyer, whether the plaintiff files on multiple causes of action, or makes pleading mistakes such as failing to identify a major life activity. Defendants may be the beneficiaries of mistaken decisions by judges, but have no control over the judge's decision. This analysis is singularly unhelpful for defense counsel; it amounts to little more than waiting for one's opponent to make a mistake.

The fact that the number of cases in the sample is so small<sup>239</sup> may be due to an unintended consequence of the ADAAA, which is that some employers are reacting to the law in various negative ways. Professor Travis correctly points out that the ADAAA can do very little to affect ingrained social prejudices:

The opposition's focus on how the law would end up protecting workplace misconduct that is stereotypically associated with various disabilities reveals not only a basic misunderstanding of the law (both pre- and post-ADAAA), but also shows that the sentiments fueling the original ADA backlash are alive and well. The unapologetic ease with which opponents conjured up images of individuals with disabilities as lazy, violent, disruptive, and undependable workers who will invoke the law to get away with bad behavior and poor performance - i.e., images of individuals with disabilities as unworthy recipients of special treatment - reveals how little progress has been made on the ground during the same time that enormous strides were made legislatively with the enactment of the ADAAA. This insight should remind disability

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<sup>238</sup> See Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Risk Factors.

<sup>239</sup> *Id.* at Table of Years.

rights activists not to assume that the ADAAA reflects or necessarily will achieve either a transformed and accepting workplace or a tolerant and committed society at large.<sup>240</sup>

Professor Travis is correct that society has not yet been transformed to the point where disability discrimination is a thing of the past, and that the workplace, not just the courthouse, is a necessary venue for this transformation.<sup>241</sup> Professor Porter points out that, while the judicial system may or may not be experiencing a backlash against the ADAAA, such a backlash is occurring with regard to the “structural norms of the workplace.”<sup>242</sup> Such norms include issues related to scheduling, attendance, and leave issues.<sup>243</sup> Professor Porter contends that:

Employers and courts are more reluctant to accommodate when those accommodations involve the structural norms of the workplace than when the accommodation requested involves physical functions of the job. Although cases like the ones above also appeared in the pre-ADAAA case law, we saw relatively few of these cases (compared to all disability cases adjudicated) because so many cases were dismissed solely on the issue of disability. The expanded definition of disability means that many more plaintiffs will survive the hurdle of proving they have a disability; thus, we can expect to continue to see more cases addressing the issue of whether an employee is qualified in light of the structural norms of the workplace. If the above cases are indicative of a trend, we should

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<sup>240</sup> Michelle A. Travis, *The “Part and Parcel” of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL’Y J. 35, 44–45 (2013).

<sup>241</sup> See generally NAT’L COUNCIL ON DISABILITY, EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 74–77, [https://ncd.gov/rawmedia\\_repository/d87db786\\_9053\\_49c2\\_8032\\_092dddde6752.pdf](https://ncd.gov/rawmedia_repository/d87db786_9053_49c2_8032_092dddde6752.pdf) (analyzing the results and methodology of research papers that focus on employment discrimination against people with disabilities in the hiring, salary, and evaluation).

<sup>242</sup> Porter, *supra* note 14, at 70–71.

<sup>243</sup> *Id.* at 70–77.

expect to see more and more plaintiffs who need variations of the structural norms in the workplace losing their ADA claims.<sup>244</sup>

If Professor Porter is correct, by lowering the threshold for disability status, Congress may have inadvertently placed pressure on managers and human resource professionals to strictly enforce workplace standards. As she points out, it is the case that human resources professionals may face issues regarding complaints from other employees when people with disabilities get additional time off or other accommodations, workplace environments where stigma discourages employees with disabilities from asking for accommodations, and employees without disabilities asking for accommodations to which they are not entitled.<sup>245</sup> However, these are issues that human resource professionals should recognize and be trained to deal with. To the extent that there is a backlash against the ADAAA with regard to workplace norms, it is the responsibility of employers, managers, and human resource professionals to understand the provisions of the ADAAA and take affirmative steps to comply with them.<sup>246</sup>

#### VIII. HAS THE ADAAA GONE TOO FAR OR NOT FAR ENOUGH?

Shortly after the passage of the ADAAA, several legal scholars wrote articles predicting either success or failure for the new law. Now that enough time has passed to allow courts to work with the ADAAA provisions, it is useful to go back and review those articles to determine whether the arguments made by both sides have been borne out by experience.

##### *A. Did the ADAAA Go Too Far?*

After the passage of the ADAAA, several critics posited that the expansion of the “major life activity” definition would result in

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<sup>244</sup> *Id.* at 78 (footnote omitted).

<sup>245</sup> *Id.* at 79–82.

<sup>246</sup> See generally Victoria Zellers, *Make A Resolution: ADA Training*, HR TODAY (Jan. 1, 2009), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0109legal.aspx> (discussing the business advantages of implementing a separate ADA training for HR personnel even though the ADAAA does not require one).

people with minor impairments being included in the ADA's protected class, leading to additional litigation and unreasonable costs for employers.<sup>247</sup> At least one author has argued that the ADAAA has "opened the floodgates" for frivolous litigation.<sup>248</sup> The author argued that the original drafters of the ADA intended that it should cover only "true" disabilities.<sup>249</sup> The author found that the "drastic broadening" of the ADAAA flew in the face of the "true" disabilities approach, allowing plaintiffs with impairments such as phobias, internet addiction, "mental problems," irritable bowel issues, heart attacks, and "misdiagnosed conditions" to be covered under the law.<sup>250</sup> The author's conclusion was that failure to amend the ADAAA would result in "an unimaginable amount of employees with a new way to sue their employers," and that the new law "[may very well] devastate American businesses."<sup>251</sup>

However, the author only cited two post-ADAAA cases to support her argument. In *Culotta v. Sodexo Remote Sites Partnership*, a plaintiff with a phobia of traveling over water<sup>252</sup> resigned when she refused to accept an assignment to an offshore

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<sup>247</sup> See generally Samantha Katie Bernstein, *The Americans with Disabilities Act of 1990—As Amended: Remediating the Boundary that Congress Overstepped*, 25 GEO. MASON U. CIV. RTS. L.J. 123, 145 (2014);

Hillary K. Valderrama, Comment, *Is the ADAAA A "Quick Fix" or Are We Out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA*, 47 HOUS. L. REV. 175, 202–03 (2010); Karen R. Harned & Katelynn K. McBride, *The Amendments to the Americans with Disabilities Act: Bad for Business, Boon for the Disabled?*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 99 (2010); Kate S. Arduini, Note, *Why the Americans with Disabilities Act Amendments Act is Destined to Fail: Lack of Protection for the "Truly" Disabled, Impracticability of Employer Compliance, and the Negative Impact it Will Have on our Already Struggling Economy*, 2 DREXEL L. REV. 161, 184–86 (2009); Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 687–89 (2009).

<sup>248</sup> Bernstein, *supra* note 247, at 145–46.

<sup>249</sup> *Id.* at 148 (citing *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

<sup>250</sup> *Id.* at 147.

<sup>251</sup> *Id.* at 156 (citing Arduini, *supra* note 247, at 195).

<sup>252</sup> *Culotta v. Sodexo Remote Sites P'ship*, 864 F. Supp. 2d 466, 475 (E.D. La. 2012).



work location.<sup>253</sup> The plaintiff did not argue that traveling over water was a major life activity, only that she was substantially limited in her ability to work.<sup>254</sup> The court found that the plaintiff was not substantially limited in her ability to work, as the majority of jobs are not offshore.<sup>255</sup> However, the court did find that the defendant had regarded the plaintiff as having a disability.<sup>256</sup> In *Bliss v. Morrow Enterprises, Inc.*, a judge assumed without deciding that a plaintiff with a broken arm met the disability standard, ruling that no reasonable jury could find she experienced an adverse employment action.<sup>257</sup> The author argued that these two cases indicated a “drastic broadening” of the ADA.<sup>258</sup>

However, the cases cited by the author do not support her contention. The plaintiff in *Culotta* clearly had a cognizable form of mental illness, and one of the purposes of the ADAAA was to make it easier for people with mental illness to be protected under the law.<sup>259</sup> Even if one were to disagree with the need for coverage for people with mental illness, the decision made by the court was on a motion to dismiss.<sup>260</sup> The question of whether the plaintiff actually had evidence to support her argument that she was regarded as having experienced this phobia would have been raised at summary judgment, and then left for a jury to decide if the case progressed that far. It is not dispositive as to the question of whether the ADAAA was or was not appropriate litigation. As for the *Bliss* case, it would not be at all uncommon or unreasonable for a court to assume a plaintiff’s disability status in instances where

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<sup>253</sup> *Id.* at 469. The “offshore” location was likely an oil rig in the Gulf of Mexico.

<sup>254</sup> *Id.* at 475.

<sup>255</sup> *Id.* at 475–6. However, the court did find that the plaintiff was “regarded as” having a disability. *Id.* at 476.

<sup>256</sup> *Id.* at 476.

<sup>257</sup> *Bliss v. Morrow Enter., Inc.*, No. 09–CV–3064C PJS/JJK, 2011 WL 2555365, at \*6 (D. Minn. June 28, 2011).

<sup>258</sup> Bernstein, *supra* note 247, at 147.

<sup>259</sup> Jennifer M. Jackson, *The Americans with Disabilities Act, Mental Illness, and Medication: A Historical Perspective and Hope for the Future*, 12 MARQ. ELDER’S ADVISOR 219, 245 (2010).

<sup>260</sup> *Culotta v. Sodexo Remote Sites P’ship*, 864 F. Supp. 2d at 466, 469 (E.D. La. 2012).

the court intends to dismiss a claim made by a plaintiff, or rule against the plaintiff on a summary judgment motion. It is nearly impossible to see how this case could be cited for the proposition that the ADAAA drastically broadened the class of individuals with disabilities to an unreasonable degree.

Professor Jeffrey Douglas Jones has argued that the framers of the ADAAA should not have included bodily functions in the list of major life activities.<sup>261</sup> Jones contended that Congress created the major life activity of “normal functioning,” which “represents a whole new theory of disability-deviation.”<sup>262</sup> The activity of “normal functioning,” Jones contends, is an “umbrella term” which would include any and all limitations due to impairments in the protected class of people with disabilities.<sup>263</sup>

Jones illustrates his point through *Furnish v. SVI Systems*,<sup>264</sup> a 2001 Seventh Circuit case involving a plaintiff with liver fibrosis who was found not to have a disability.<sup>265</sup> Jones contends that a plaintiff like Furnish would be found to have a disability under the ADAAA reforms, as his bodily functions would be impacted by his impairment, even if he was not limited in any substantial way in any other activity.<sup>266</sup> Jones argues that the ADAAA “accepts abnormal bodily function of any degree, no matter how minor, as categorical proof of effect on major life activity.”<sup>267</sup>

However, the empirical evidence does not support Jones’s argument. Courts have not been willing to extend the protection of the ADA to minor injuries or impairments.<sup>268</sup> Furthermore, Jones

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<sup>261</sup> Jones, *supra* note 68, at 672–73.

<sup>262</sup> *Id.* at 677.

<sup>263</sup> *Id.* at 677–78.

<sup>264</sup> *Furnish v. SVI Systems, Inc.*, 270 F.3d 445 (7th Cir. 2001).

<sup>265</sup> Jones, *supra* note 68, at 675–77.

<sup>266</sup> *Id.* at 679–80.

<sup>267</sup> *Id.* at 680.

<sup>268</sup> *See, e.g.*, *Baker v. Roman Catholic Archdiocese of San Diego*, 197 F. Supp. 3d 1210, 1217 (S.D. Cal. 2016) (plaintiff with “very minor symptoms” following concussion not disabled); *Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267, at \*3 (E.D. Pa. Mar. 14, 2016) (plaintiff with work-related stress not disabled); *Cooper v. CLP Corp.*, No. 2:13-cv-02152-JEO, 2015 WL 9311964, at \*4 (N.D. Ala. Dec. 23, 2015), *aff’d*, 679 Fed. App’x 851 (11th Cir. Feb. 9, 2017) (plaintiff with “lazy eye” not disabled).

fails to address three specific relevant points in the *Furnish* case. First, *Furnish* only experienced physical issues after he began taking Interferon, a drug that caused him to experience fatigue, nausea, and achiness as side effects.<sup>269</sup> While the ADAAA may help a plaintiff in a similar situation, such an individual would likely argue that the side effects of the drug, not his or her liver function, was a substantially limiting impairment.<sup>270</sup> Second, *Furnish* might have been found to be disabled under the ADA if he had argued that he was substantially limited in his ability to work or perform any other major life activity then recognized under the law. The plaintiff identified his liver function as his *only* major life activity, and the court could not consider any other alternate way of finding that he had a disability.<sup>271</sup> Third, the court did analyze *Furnish*'s liver function as if it were a major life activity, and found that the plaintiff's liver disease was not a substantial limitation in his liver functioning—far from a finding that a minor ailment should be covered.<sup>272</sup> A court could easily conclude that *Furnish* met the ADAAA criteria for disability without creating a new major life activity of normal functioning, or expanding the population of individuals covered by the ADA to unreasonable levels.

Jones concludes his argument by stating that while the ADAAA “unquestionably lowers the threshold for proving existence of disability, it does so only by making the definition of ‘disability’ less coherent.”<sup>273</sup> This may be the case, but the ADA has never been a model of clarity and coherence.<sup>274</sup> The purpose of

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<sup>269</sup> *Furnish v. SVI Systems Inc.*, 270 F.3d 445, 447 (7th Cir. 2001).

<sup>270</sup> Although the ADAAA disability analysis should normally be made without including the effects of the patient's medication, that analysis only applies when the medication has “ameliorative effects,” that is to say, doing a patient some good. It would not apply in a situation such as that experienced by *Furnish*, where the medication has disabling side effects. See 42 U.S.C. § 12102 (4)(E)(i)(I) (2008).

<sup>271</sup> *Furnish*, 270 F.3d at 450.

<sup>272</sup> *Id.* at 451.

<sup>273</sup> Jones, *supra* note 68, at 680.

<sup>274</sup> See Amy Knapp, *The Danger of the “Essential Functions” Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 729 (2012) (“ADA jurisprudence is wrought with ambiguities”); Scott C. Thompson, *Open for Business: The ADA Beyond an Employer's Front Door*,

the ADA was to combat disability-based discrimination, and the reason for lowering the threshold for proving disability status in the ADAAA was to construe the definition of disability “in favor of broad coverage of individuals.”<sup>275</sup> To the extent that individuals with minor impairments do experience discrimination, the ADAAA may very well provide them with theoretical coverage. But the empirical evidence suggests that the threshold has not actually been lowered to that degree.<sup>276</sup>

Similarly, Professor Amelia Michelle Joiner argued that the ADAAA’s expansion of the protected class of individuals of disabilities had “opened Pandora’s Box,” and thereby loosed potential claims from people with impairments such as “high cholesterol, back and knee strains, colds, the flu, poison ivy, sprained ankles, stomach aches, the occasional headache, a toothache, and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability.”<sup>277</sup> Joiner argued that the result of lowering the threshold for coverage under the ADAAA would be forcing employers to grant additional accommodations, resulting in large corporations spending billions of dollars and smaller corporations not being able to afford such widespread and wide-ranging accommodations.<sup>278</sup> Additionally, Joiner argued again that courts would be burdened by a large number of ADA claimants.<sup>279</sup>

However, the evidence does not show that Professor Joiner’s prediction has come to pass. In one Pennsylvania case, the EEOC sued a health care provider, arguing that the drug testing procedure

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18 TEX. WESLEYAN L. REV. 383, 388 (2011) (ambiguity inherent in both ADA and ADAAA definitions of disability); Klein, *supra*, note 119, at 488 (“Although the ADAAA clears up some of the ambiguities of the ADA, it creates many more.”).

<sup>275</sup> 42 U.S.C. § 12102 (4)(A).

<sup>276</sup> Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Impairments.

<sup>277</sup> Joiner, *supra* note 48, at 366 (citing Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on S. 1881 Before the S. Comm. on Health, Education, Labor, and Pensions, 110TH CONG. 27 (2007) (statement of Camille A. Olson, partner, Seyfarth Shaw, LLP)).

<sup>278</sup> *Id.* at 367.

<sup>279</sup> *Id.*

the employer was using was improper.<sup>280</sup> Several of the individuals who had been screened by the company were taking medication for high cholesterol.<sup>281</sup> However, the court found that none of these individuals met the ADAAA definition of disability.<sup>282</sup> Similarly, in the post-ADAAA era, courts have found that plaintiffs with headaches,<sup>283</sup> the common cold,<sup>284</sup> dental problems,<sup>285</sup> common allergies,<sup>286</sup> nose bleeds,<sup>287</sup> sprained ankles,<sup>288</sup> and influenza<sup>289</sup> are not covered under the ADA definition of disability. If the ADAAA has truly opened the floodgates of litigation for potential plaintiffs

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<sup>280</sup> *E.E.O.C. v. Grane Healthcare Co.*, No. 3:10-250, 2015 WL 5439052, at \*39–40 (W.D. Pa. Sept. 15, 2015). The court found that the drug testing used by the company was legal. *Id.* at \*40.

<sup>281</sup> *Id.* at \*7–8, 20–21.

<sup>282</sup> *Id.* at \*44.

<sup>283</sup> *See, e.g., Jacobs v. York Union Rescue Mission, Inc.*, No. 1:12-CV-0288, 2014 WL 6982618, at \*7 (M.D. Pa. Dec. 10, 2014) (plaintiff with migraine headaches had no evidence to support a finding of disability).

<sup>284</sup> *See, e.g., Kieffer v. CPR Restoration & Cleaning Serv., LLC*, 200 F. Supp. 3d 520, 537 (E.D. Pa. 2016) (plaintiff was not discriminated against with regard to a common cold he experienced).

<sup>285</sup> *See, e.g., Dancause v. Mount Morris Cent. Sch. Dist.*, No. 13-CV-6019, 2013 WL 2946063, at \*5 (W.D.N.Y. 2013), *aff'd*, 590 F. App'x 27 (2d Cir. 2014) (noting a plaintiff with periodontal disease was not disabled).

<sup>286</sup> *Compare Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457, 462 (N.D. Miss. 1997) (finding a plaintiff with allergy to D-Limonene, a substance similar to that found in poison ivy, did not have an impairment) *with Godbolt v. Trinity Protection Serv. Inc.*, No. GJH-14-3546, 2017 WL 2759020 at \*10 (D. Md. June 12, 2017) (finding that a plaintiff with hay fever not in ADA protected class).

<sup>287</sup> *Hovermale v. Illinois Dep't of Human Servs.*, No. 14-cv-00969-JPG-DGW, 2015 WL 2407273, at \*5 (S.D. Ill. May 19, 2015) (noting the plaintiff made no attempt to identify a disability other than a nose bleed, which the court determined was related to his hostile work environment claim).

<sup>288</sup> *See, e.g., Chen v. Ochsner Clinic Found.*, No. 13-5808, 2014 WL 6835881, at \*9 (E.D. La. Dec. 3, 2014), *aff'd*, 630 Fed. App'x. 218, 228 (5th Cir. 2015) (finding a plaintiff with sprained ankle not disabled).

<sup>289</sup> *Valdez v. Minnesota Quarries, Inc.*, No. 12-CV-0801, 2012 WL 6112846, at \*1 (D. Minn. Dec. 10, 2012) (noting plaintiff's alleged exposure to swine flu could not result in his employer regarding him as having a disability); *Lewis v. Florida Default Law Grp.*, No. 8:10-cv-1182-T-27EAJ, 2011 WL 4527456, at \*5 n.21 (D. M.D. Fla. Sept. 16, 2011) (citing EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (Oct. 9, 2009), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)).

with minor impairments, what has actually come through the system amounts to little more than a trickle.

Some scholars have expressed concern that the passage of the ADAAA might trigger a judicial backlash,<sup>290</sup> similar to that which happened after the passage of the ADA with the *Sutton* and *Toyota* decisions.<sup>291</sup> Professor Nicole Porter analyzed recent case law in a *Tennessee Law Review* article, and found that there was little evidence that such a backlash had occurred.<sup>292</sup>

Although there were a number of cases that were decided incorrectly, in my opinion, I do not think the number is high enough to warrant a conclusion that courts are [interpreting] the qualified inquiry or reasonable accommodation issue to unduly restrict protection of the Act. It is possible that, in the

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<sup>290</sup> See generally Knapp, *supra* note 274, at 729; Michelle Stover, Note, “These Scales Tell Us That There Is Something Wrong with You”: How Fat Students Are Systematically Denied Access to Fair and Equal Education and What We Can Do to Stop This, 83 S. CAL. L. REV. 933, 983 n.189 (2010); Hensel, *supra* note 247 at 669; Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009). But see Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1275 (2009) (“While some courts will construe the right of reasonable accommodation narrowly regardless, if there is less potential for dissonance, the narrowing should not happen on the same level that occurred with the original statutory definition. In other words, a second backlash may be avoided.”).

<sup>291</sup> Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 982 (2012) (discussing “socio-legal backlash”) [hereinafter Travis, *Impairment As Protected Status*]; Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1001–03 (2010) (discussing Supreme Court cases that were the basis for the judicial backlash against the ADA); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (“But the idea of backlash need not be understood as a deliberate or intentional campaign. Resistance to the ADA may result from a failure to comprehend and therefore to accept the premises underpinning the statute. Such widespread misunderstanding might generate a pattern of erroneous decisions that on the surface appear unrelated. If backlash is used in this sense, the case for a judicial backlash against the ADA is strong.”).

<sup>292</sup> Porter, *supra* note 14, at 67–70.

future, we might see more of a backlash against the ADA as amended, but we do not have compelling evidence of that now.<sup>293</sup>

The evidence in the empirical study for this article supports Professor Porter's contention. There are very few instances in the research sample where it was clear that a court made an error in interpreting the ADAAA. As argued above, poor pleading is a much bigger risk factor for plaintiffs than judicial backlash.

Furthermore, the overall small number of cases—219 cases in the sample spread out over four and a half years—indicates that the concern that the ADAAA would overburden courts were overblown.<sup>294</sup> Since many of these cases were brought under more than one civil rights statute, courts would have had to rule on at least some of those cases even if the ADAAA were never passed.

There is a valid concern that the ADAAA might have gone too far, and that the courts might someday be deluged with individuals claiming discrimination on the basis of impairments like hangnails and indigestion. If such activity occurs, Congress may find that it needs to once again reconsider whether the ADAAA has gone too far. But nothing like the predicted wave of frivolous litigation has occurred. At least at this point, lowering the threshold has not opened the floodgates.

### *B. Has the ADAAA Not Gone Far Enough?*

Other scholars have argued that the ADAAA did not go far enough in its reforms. Professor Kerri Stone argues that the “major life activity” requirement be scrapped entirely in employment accommodation cases.<sup>295</sup> Professor Stone points out that:

The main rationale for dropping the major life activity requirement from the statute's imposition of the duty to accommodate, and for dropping it from

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<sup>293</sup> *Id.* at 67.

<sup>294</sup> See Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Years.

<sup>295</sup> Stone, *supra* note 37, at 540–43. Some states, such as Connecticut, do not require a plaintiff to identify a major life activity. See *Gomez v. Laidlaw Transit, Inc.*, 455 F. Supp. 2d 81, 88 (D. Conn. 2006) (citing CONN. GEN. STAT. § 46a-51(15) (2016)).

the statute itself, is that the inability to perform a commonly performed, “basic” activity like digestion or reproduction has no significant connection to either the discrimination that employees face in the workplace or to the nature of the accommodations that they require in order to perform their jobs.<sup>296</sup>

Such a result, Stone concedes, would seem “drastic,”<sup>297</sup> but Stone’s argument that courts are primarily using the “major life activity” standard as an “artificial screening function”<sup>298</sup> is a valid one. In fact, Congress did remove the “major life activity” requirement from plaintiffs arguing that they were “regarded as” having a disability.<sup>299</sup> Professor Michelle Travis contends that, in doing so, Congress effectively placed impairment “alongside race, color, national origin, sex, religion, age, and disability as a legally protected status in federal antidiscrimination law.”<sup>300</sup>

The empirical evidence shows that, while a more universal approach may have its merits, the ADAAA in its current format does not screen out very many individuals overall on the issue of whether or not their impairments arise to the level of a disability, at least in the pretrial stage.<sup>301</sup> At least some of those individuals who are screened out would not meet anyone’s definition of disability, no matter how lenient.<sup>302</sup> At this time, there is not adequate evidence that would lead to the conclusion that many deserving individuals who ought to be part of the ADA protected class are

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<sup>296</sup> Stone, *supra* note 37, at 549.

<sup>297</sup> *Id.* at 563.

<sup>298</sup> *Id.* at 555.

<sup>299</sup> See 42 U.S.C. § 12012 (3)(A) (2011).

<sup>300</sup> Travis, *Impairment as Protected Status*, *supra* note 291, at 955.

<sup>301</sup> Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Decisions.

<sup>302</sup> *Id.* See, e.g., *Groth v. Grove Hill Med. Ctr., P.C.*, No. 3:14-CV-01563 RNC, 2015 WL 4393020, at \*3 (D. Conn. 2015) (finding plaintiff with temporary skin abscess caused by earpiece not disabled); *Witham v. Intown Suites Louisville Ne., LLC*, No. 3:13-CV-1167-DJH, 2015 WL 3646802, at \*6 (W.D. Ky. 2015), *aff’d*, 815 F.3d 260 (6th Cir. 2016) (finding plaintiff with broken pinkie finger not disabled); *Scott v. Dist. Hosp. Partners, L.P.*, 60 F. Supp. 3d 156, 164 (D.D.C. 2014) (finding plaintiff with shortness of breath caused by dust in office not disabled).



being left out on a consistent basis. Additionally, it is very unlikely that any legislative approach that would allow anyone with any kind of impairment access to the courts for alleged discrimination, no matter how trivial the impairment, could attain a majority in Congress.

This is not to say that the ADAAA is perfect; it is not. But in those cases where plaintiffs with arguably serious impairments have not been able to meet a threshold showing of disability in pretrial motions, the issue more often is due to poor pleading rather than flaws in the ADAAA reforms.<sup>303</sup>

Professor Stacy Hickox points out another area where the ADAAA may not have gone far enough, arguing that the amendments “fail to address the requirement of medical and other expert evidence imposed by many appellate courts under the ADA.”<sup>304</sup> The empirical evidence shows that the most common reason why individuals with disabilities are defeated in motions to dismiss and summary judgment motions is that courts find that they have not submitted adequate evidence to support their allegations of disability.<sup>305</sup> Neither the statutory text nor the EEOC regulations provide courts with guidance to determine exactly what degree of evidence that plaintiffs need to provide to courts.<sup>306</sup>

In practice, courts generally discount evidence provided directly by plaintiffs, whether through deposition or complaint, as “self-serving,” even though individuals with disabilities are generally the most knowledgeable about their own disabilities.<sup>307</sup> Individuals who do not, or cannot, present expert medical evidence to support their allegations will often lose a motion to dismiss or a summary judgment motion.<sup>308</sup> Even if a plaintiff can find an expert to testify with regard to his or her disability, the court may still rule against the plaintiff if the plaintiff’s testimony conflicts with the

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<sup>303</sup> Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Risk Factors.

<sup>304</sup> Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Amendments Act*, 40 U. BALT. L. REV. 419, 470 (2011).

<sup>305</sup> Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Decisions.

<sup>306</sup> Hickox, *supra* note 304, at 472.

<sup>307</sup> *Id.* at 474.

<sup>308</sup> *Id.*

expert's.<sup>309</sup> This leaves poorer plaintiffs, who may also be struggling as *pro se* litigants, with substantially less opportunity to show that they did in fact experience disability discrimination.

Hickox argues that the ADAAA did nothing to correct this situation, and in fact may have made matters worse through its “mitigating measures” provision, which will generally require expert testimony regarding the effect of such measures on an individual’s symptoms.<sup>310</sup> She calls for efforts by the circuit courts and the Supreme Court to lower the evidentiary standard for analyzing the definition of disability at the motion stage, stating that:

[Courts] must fulfill the promise of the ADA to protect working people with disabilities against discrimination by referring arguably valid claims to juries. Then, a jury can interpret the evidence in light of its common understanding of the abilities of a non-disabled person to determine if the claimant with an impairment deserves protection against discrimination.<sup>311</sup>

However, most courts have not seen fit to expand the ADAAA in such a manner. One of the few exceptions is a recent unpublished Alabama decision in which the court heard the case of a special education teacher who alleged that she had dyslexia, a condition that affected her ability to read.<sup>312</sup> However, she provided no evidence of this impairment other than her own statement.<sup>313</sup> After citing the ADAAA, the court determined that it was “not permitted at this stage to make any credibility determination” with regard to the plaintiff’s discrimination claim.<sup>314</sup> The court found that the plaintiff had met her *prima facie* case of discrimination for the purposes of defendant’s summary

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<sup>309</sup> *Id.* at 476.

<sup>310</sup> *Id.* at 491–92.

<sup>311</sup> *Id.* at 494.

<sup>312</sup> *Hetzel v. Bibb Co., Ala. Bd. of Ed., No. 7:14-cv-00292-SGC, 2016 WL 5724700 at \*2 (N.D. Ala. Sept. 30, 2016).*

<sup>313</sup> *Id.* at \*6.

<sup>314</sup> *Id.*

judgment motion, despite the lack of supporting evidence.<sup>315</sup> However, the court eventually decided against the plaintiff on the summary judgment motion on other grounds.<sup>316</sup>

Courts often require plaintiffs to submit more evidence of the limitations that they experience due to an impairment than a bare statement. For example, in *Felkins v. City of Lakewood*, the United States Court of Appeals for the Tenth Circuit heard an appeal of a summary judgment motion filed by a plaintiff who alleged that she had avascular necrosis, a condition where bone tissue dies because it does not receive an adequate blood supply.<sup>317</sup> However, the plaintiff did not provide any medical evidence that she actually experienced avascular necrosis.<sup>318</sup> Judge Hartz ruled that the plaintiff's statement that she had avascular necrosis was inadmissible because she was not a medical expert. Citing a 1957 case, the judge found that a plaintiff could testify with regard to "conditions which are susceptible to observation by an ordinary person," but not with regard to conditions that would require "skilled and professional persons" to diagnose.<sup>319</sup>

Felkins argued that the ADAAA lowered the standard of proof for summary judgment to the point that she was not required to provide expert testimony.<sup>320</sup> The court rejected this argument, finding that the ADAAA only lowered the standard of proof with regard to whether a plaintiff with a given impairment was limited

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<sup>315</sup> *Id.* See also *Hoskins v. Valcor Eng'g*, No. 14-65362017, 2017 WL 1023353, at \*7 (D.N.J. Mar. 16, 2017) (citing *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 360 (3d Cir. 2000) ("Additionally, failure to present expert medical evidence of a disability or a substantial limitation in a major life activity is not dispositive at the summary judgment stage.")); *Monroe v. State of Indiana*, No. 1:14-cv-00252-SEB-DML, 2016 WL 1270202, at \*7 (S.D. Ind. Mar. 31, 2016) (finding plaintiff's self-serving testimony adequate under "less demanding standard of the ADAAA"); *Green v. Teddie Kossof's Salon & Day Spa*, No. 13 C 6709, 2015 WL 5675463, at \*4 (N.D. Ill. Sept. 24, 2015) (noting plaintiff with ovarian cyst did not need to provide evidence to defeat defendant's summary judgment motion).

<sup>316</sup> *Hetzel*, 2016 WL 5724700, at \*13.

<sup>317</sup> *Felkins v. City of Lakewood*, 774 F.3d 647, 648 (10th Cir. 2014).

<sup>318</sup> *Id.* at 651.

<sup>319</sup> *Id.* at 652 (citing *Franklin v. Shelton*, 250 F.2d 92, 97 (10th Cir. 1957)).

<sup>320</sup> *Id.*

compared to the general population.<sup>321</sup> In this case, the court ruled that plaintiff needed to prove that her substantial limitations were caused by her alleged impairment. Felkins could not do so, because she had no other evidence that the impairment existed other than her statement.<sup>322</sup>

*Felkins* arguably opens the door for plaintiffs to meet the summary judgment threshold for impairments that are obvious enough for a layman to diagnose. But it seems likely that such impairments would be so obvious (such as deafness or paraplegia) that a defendant would concede that the plaintiff had a disability, or at least to not contest the question of whether a plaintiff had a disability at the summary judgment stage. Either way, *Felkins* firmly establishes that some degree of medical evidence must be supplied by plaintiffs who claim to have a disability, and that plaintiffs who proceed without such evidence may fail in their claims.

Professor Hickox's point is well taken, especially with regard to plaintiffs who cannot afford to hire an expert, or even to have their medical records copied and submitted to the court. However, courts should not be required to disregard the standards of evidence in ADA pleadings that they would use on any other summary judgment motion.<sup>323</sup> The challenge for courts in cases involving poorer plaintiffs, much as it is with *pro se* plaintiffs, is to balance the need for leniency with the unambiguous requirements of litigation.

As stated above, the empirical evidence clearly shows that the metaphorical waters of frivolous ADA litigation have not risen with the passage of the ADAAA.<sup>324</sup> However, liberalizing the ADAAA to allow even more potential plaintiffs into the protected

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<sup>321</sup> *Id.* (citing 29 C.F.R. § 1630.2 (j)(1)(v) (2011)).

<sup>322</sup> *Id.* at 652–53.

<sup>323</sup> *See, e.g.,* *Ariza v. Loomis Armored US, LLC*, 132 F. Supp. 3d 775, 791 (M.D. La. 2015) (“[T]he record must contain some credible evidence of each requisite element; this standard is designed to weed out truly spurious cases. The record, however, need not “prove” the matter, as the making of a *prima facie* case is intended to trigger a proceeding, i.e. a trial, intended to test, i.e. prove, the evidence’s veracity and cogency.”).

<sup>324</sup> *See* Edmonds, *Data from Empirical Survey on Losing ADAAA Cases*, *supra* note 172, at Table of Years.

class may in fact be the impetus for a host of new claims. Removing the requirement that plaintiffs show some form of medical evidence supporting their disability status would make filing ADA employment litigation claims easier and simpler. It is difficult to speculate, but changes to the ADAAA to make its coverage expand farther may make the opening of the litigation floodgates a matter of fact rather than speculation.

## IX. CONCLUSION

Can we now say that the ADAAA is a “great success,” as Pierce Blue predicted four years ago? Like most questions, it depends on the metric used. If we look solely at the ADAAA as an instrumental tool to increase the likelihood of a given plaintiff to meet the threshold of disability status, it is clear that at least some progress has been made. If we look at the ADAAA as a screening tool to keep individuals with impairments that do not rise to the level of what we generally think of as a disability, then the case law seems to indicate that this aspect of the ADAAA is working well, despite the dire predictions of the critics. If we see the ADAAA as a means of increasing access to the courts for everyone, the complexity of the law is at least arguably keeping some litigants out of the ADA protective class due to failure to plead properly.

If we look at the ADAAA as a means to narrow the employment gap between the able-bodied and persons with disabilities, the law has clearly not been effective. Even twenty-five years after the passage of the ADA, the unemployment rate for non-institutionalized people with disabilities still lags behind the national average, with 10.5 percent of people with disabilities out of work as opposed to 4.9 percent of people in the general population.<sup>325</sup> In this context, it is helpful to remind ourselves that

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<sup>325</sup> See BUREAU OF LAB. STAT., *Table 1. Employment Status of the Civilian Noninstitutional Population By Disability Status and Selected Characteristics, 2016 Annual Averages*, <https://www.bls.gov/news.release/disabl.t01.htm> (last updated June 21, 2017). It is also helpful to remember that a significant number of working-age people with disabilities are institutionalized in facilities like state-run psychiatric hospitals and developmental centers. See generally Peiyun She & David C. Stapleton, *A Review of Disability Data for the Institutional*

the ADAAA is a law with a very limited scope. Although the ADAAA has lowered the threshold of coverage for many people with disabilities, merely providing access to legal remedies cannot address the constellation of issues that affect unemployed people with disabilities in the labor market, or achieve the social transformation that will be necessary for people with disabilities to achieve full participation in the workplace.<sup>326</sup>

From a practitioner's perspective, however, the main question in evaluating the ADAAA is whether it is doing the job Congress intended to do. The ADAAA has largely—if not wholly—erased the negative decisions of the *Sutton* and *Toyota* Courts. By increasing the scope of coverage to include people that ought to have been covered under the ADA from the outset, the ADAAA has increased fairness for litigants with disabilities while meeting its function of screening out individuals with minor impairments that do not result in substantial limitation. The ADAAA has restored a degree of predictability to the pretrial motions practice, making it easier for attorneys to identify which cases will likely survive past summary judgment on the basis of disability, and which cases will require the plaintiff to provide medical evidence to defeat a skeptical defendant.<sup>327</sup>

In doing so, the ADAAA has managed to push the conflict in at least some ADA cases away from the issue of whether a plaintiff meets the arcane and complex definition of disability, and toward the question of whether the plaintiff actually experienced discrimination. This is a very limited outcome, but a welcome one. As attorneys and judges develop their facility in working with

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*Population*, CORNELL UNIV. INST. FOR POLICY RES. 1–2, 5 (May 2006), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1205&context=edicollect>.

<sup>326</sup> See NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 96–100 (2015), [https://ncd.gov/system/files\\_force/Documents/s/2015NCD\\_Annual\\_Report\\_508.pdf?download=1](https://ncd.gov/system/files_force/Documents/s/2015NCD_Annual_Report_508.pdf?download=1) (discussing barriers to full employment for people with disabilities, such as ineffective work incentive programs, increased opportunities for employment, sheltered workshops, physical accessibility, and employer engagement).

<sup>327</sup> Having said that, it is also “predictable” that a *pro se* ADA plaintiff will face challenges in bringing a case, and that a plaintiff who fails to identify an impairment or a major life activity in which he is substantially limited will not be found to have a disability. Predictability cuts both ways.

these issues, and as the case law matures, we may be well on the way to hailing the ADAAA as a great success indeed.