

MEMORANDUM 08-124

SEPTEMBER 25, 2008

TO: HR Policy Prime Representative
Associate Representatives
Washington Representatives
Employment Rights Committee

FR: Jeffrey C. McGuiness
President

RE: **HR Policy-Supported “ADA Amendments Act” Offers
Balanced Approach to Revising the ADA**

*S.3408 Clarifies When an “Impairment” Is Severe Enough to Warrant Statutory
Protection as a “Disability”*

On September 25, 2008, President Bush signed the ADA Amendments Act (ADAAA) into law. It began in the House, when on June 25, 2008, the ADAAA (H.R. 3195) passed by a vote of 402 to 17. Shortly thereafter, Senators Harkin (D-IA) and Hatch (R-UT) introduced a slightly different version of the ADAAA (S. 3406), which passed the Senate by unanimous consent on September 11, 2008. On September 17, 2008, the House passed the Senate version by an unopposed voice vote. The ADAAA is a compromise worked out between HR Policy, other major business organizations and disability groups. In the negotiations, the Association was guided by our Employment Rights Committee, chaired by Sue Lueger, Vice President, Human Resources, Northwestern Mutual.

ADARA would have been an overreaching expansion and sweeping rewrite of the Americans With Disabilities Act (ADA) requiring employers to provide “reasonable accommodations” to any impairment, regardless of its severity. By contrast, the ADAAA would:

- Maintain the current definition of disability but refine the level of severity impairments must reach to substantially limit a major life activity;
- Consider a disability to be protected even if the individual has taken steps to mitigate its effects, with the exception of eyeglasses; and
- Clarify when a discrimination claim is limited to employment actions (hiring, firing, promotions, etc.) without triggering a reasonable accommodation requirement.

The following memorandum provides an overview of the ADA, explains how ADARA would have radically changed the law, and provides an analysis of the more measured ADAAA and the rationale for minor revisions of the Senate bill. ADAAA takes effect January 1, 2009.

IN BRIEF

The bill would ensure that employers would not have to accommodate every minor or moderate impairment.

The bill would maintain the ADA’s requirement that employees prove that they are qualified to perform the essential functions of the job.

On HRPolicy.org

View the ADA Amendments Act at
http://www.hrpolicy.org/downloads/2008/HR_3195.pdf

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I. Background on the Americans with Disabilities Act: Law and Policy

An understanding of the compromise ADA Amendments Act of 2008 requires, at the outset, a grasp of certain fundamental aspects of the Americans With Disabilities Act (ADA) as well as key court decisions that have given rise to the controversy Congress is seeking to address.

The ADA Prohibits Discrimination against Individuals with a “Disability”

The ADA was signed into law¹ by President George H.W. Bush on July 26, 1990, after being passed by substantial majorities in the House (377 to 28) and Senate (91 to 6). It prohibits employers from discriminating “against a qualified individual with a disability because of the 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.”² A unique and critical feature of the ADA is its expansive definition of “discrimination” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.”³ A “qualified individual” is one who “can perform the essential functions of the job.”⁴

The law creates a protected class of individuals with a “disability” that is quite different from protected classes covered by other nondiscrimination statutes. Under the other federal nondiscrimination statutes, it is typically easier to determine whether a person falls within the class (*i.e.*, race, color, religion, sex, national origin, or age) intended to be protected. By contrast, the “protected class” under the ADA is much more fluid. For example, individuals can be born with disabilities or disabilities may develop throughout one’s life. Similarly, a person can be disabled for periods of time and then no longer suffer from the disability. As one court aptly noted, “some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.”⁵ Because of the unique and fluid nature of disabilities, Congress sought clarity by drawing from the existing definition of “handicap” in § 504 of the Rehabilitation Act of 1973 in defining “disability” in the ADA. Adopting the functional approach used under the Rehabilitation Act was intended to insure that an individual’s impairment have a serious impact on their daily life in order to be protected under the new law.

Disabled Individual Must Be Substantially Limited in a Major Life Activity

The ADA employs a three prong definition of “disability,” any one of which may establish protection under the statute:

- (1) “a physical or mental impairment that substantially limits one or more major life activities,”
- (2) “a record of such an impairment” or
- (3) “being regarded as having such an impairment.”⁶

An employee's threshold burden is to establish that he or she has a condition that constitutes a "disability" under the ADA.⁷ Because of the statute's functional definition, all such determinations must be made on an individualized case-by-case basis.⁸

Tracking the first prong of the definition, the U.S. Supreme Court has established a basic test to measure whether an individual has a "disability," which asks:

- whether the individual's condition is a mental or physical impairment,
- whether the impairment limits a major life activity, and
- whether the limitation on the major life activity is substantial.⁹

For an individual to be within the statute's "protected class," his or her condition must satisfy all three elements.¹⁰ As we will see, the first element is relatively easy to establish so most cases hinge on the latter two.

The Expansive Definition of a "Physical or Mental Impairment"

Establishing that an individual's condition is a "physical or mental impairment" is the first and easiest step in determining whether the individual has a "disability." While the ADA does not define "physical or mental impairment," courts have adopted the broad definitions of those terms¹¹ promulgated by the Department of Justice (DOJ) and Equal Employment Opportunity Commission (EEOC). The regulations define a "physical impairment" as:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting...neurological, musculoskeletal, special sense organs, (respiratory including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine).¹²

A "mental impairment" includes:

Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.¹³

There are very few exclusions from the regulation's sweeping definition of "impairments." For instance, general physical characteristics (such as eye color, hair color or left-handedness), common personality traits (such as being irresponsible or showing poor judgment),¹⁴ cultural, environmental, or economic disadvantages, homosexuality, bisexuality, pregnancy,¹⁵ and normal deviations in height,¹⁶ weight,¹⁷ or strength are not impairments.¹⁸ Similarly, "characteristic predispositions to illness or disease" due to social, economic or environmental conditions are not impairments under the ADA.¹⁹ In practice, the definition of "impairment" is so broad and its exclusion so infrequent that almost any physical or mental health condition —no matter how minor or transitory— will satisfy the impairment requirement.²⁰ Thus, in almost every situation the disability determination is made in step two and three —*i.e.*, whether the impairment substantially limits a major life activity.

An Impairment's Limitation on a Major Life Activity Must be Substantial

As with "physical or mental impairments," Congress failed to define "substantially limits" and "major life activities" in the statute. As the law now stands, the determination

of whether an impairment affects a major life activity is guided by the U.S. Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,²¹ which adopted a relatively narrow interpretation of these terms.

The Court's interpretation in *Toyota* of "substantially limits a major life activity" had several significant components:

- an impairment is "substantially limiting" if it "prevents" or "severely restricts" an individual from performing a "major life activity;"²²
- the concept of "major life activity" refers to "those activities that are of central importance to daily life;"²³
- an impairment is "substantially limiting" if it "prevents" or "severely restricts" an individual from doing activities that are central to most people's daily lives;²⁴ and
- the phrase "substantially limits one or more major life activities" must be "*strictly interpreted* to create a demanding standard for qualifying as disabled."²⁵

The mandate to strictly interpret "substantially limits one or more major life activities" shocked many disability advocates because under the Rehabilitation Act the same definition had consistently been read broadly by the courts.²⁶

In determining whether an impairment is "substantially limiting" courts look at a number of factors. According to EEOC regulations, to be "substantially limiting," the impairment must make the individual "unable to perform a major life activity that the average person in the general population can perform" or the individual must be "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."²⁷ Consequently, individuals must establish the nature, severity, and long-term nature of the condition for an impairment to be such that it substantially limits a major life activity.²⁸

"Major life activities," on the other hand, have generally been broadly defined to include, among many others, functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, working²⁹ lifting, reaching,³⁰ thinking, concentrating,³¹ reading,³² or sleeping.³³ Courts and the EEOC have also recognized that the operation of bodily functions or systems can be major life activities including functions such as digesting,³⁴ engaging in sexual relations,³⁵ controlling one's bowels,³⁶ the elimination of bodily waste,³⁷ blood cleansing and body waste processing.³⁸

By contrast, activities such as driving,³⁹ physical exertion,⁴⁰ lawn mowing,⁴¹ weight lifting, sport activities,⁴² bowling, camping, restoring cars,⁴³ climbing,⁴⁴ sweeping, dancing,⁴⁵ skiing, golfing, painting, plastering, shoveling snow and shopping in a mall⁴⁶ were not considered of sufficient importance to the daily life of the average person to be "major life activities."

Consideration of Mitigating Measures in Determining Whether an Individual Has a “Disability”

In ascertaining whether an individual has a “disability” under current law, his or her use of mitigating measures are taken into account to determine whether the impairment is “substantially limiting.” In *Sutton v. United Airlines, Inc.*,⁴⁷ and its companion cases,⁴⁸ the U.S. Supreme Court ruled that if a person takes steps “to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity.”⁴⁹ The Court concluded that, “to be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not ‘substantially limit’ a major life activity.”⁵⁰

Critics of the Court’s decision contended that its result was to create a Hobson’s choice for many individuals with disabling impairments. On the one hand, if an otherwise disabled person is able to reasonably control his or her condition through using mitigating measures, this person would lose their protection under the ADA because with the condition controlled they were no longer substantially limited in a major life activity. However, if that individual did not use the mitigating measure he or she may be considered disabled, but they would not be a “qualified individual” because they may be unable to perform the essential functions of the job.

The *Sutton* decision mortified the disability community. They noted that the ADA’s legislative history indicates that mitigating measures should not be taken into account. For example, the committee reports state that “the impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations.”⁵¹ Moreover, both the DOJ and EEOC guidelines directed “that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures.”⁵² What is more, the vast majority of lower court decisions including the First, Third, Fifth, Seventh, Eighth, Ninth and Eleventh federal circuit court of appeals held that an individual’s mitigating measures should not be considered in deciding whether he or she was disabled.⁵³

Individuals Being “Regarded As” Substantially Limited Are Disabled

The *Sutton* Court also addressed the “regarded as” or third prong of the definition of disability. Establishing a “disability” under the “regarded as” prong requires “being regarded as having such an impairment”⁵⁴ that would “substantially limit one or more major life activities.”⁵⁵ In *Sutton*, the Court recognized two ways individuals can satisfy this prong of the “disability” definition.⁵⁶ An employer “must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.”⁵⁷ Thus, a “regarded as” claim must be based on an employer’s perception.

Indeed, the difference between establishing “disability” under the first and third prongs of the definition is that under the first prong one need only show they are substantially limited in a major life activity regardless of their employer’s perception. “Regarded as” claims, however, must be based on an employer’s perceptions or “misperceptions”⁵⁸ about an individual’s condition. As one court aptly noted “under the

regarded as prong, this Court does not even focus on disability, but on the *perception* of the employer regarding the perceived disability.”⁵⁹

Only “Qualified Individuals” Can Prevail in an ADA Discrimination Claim

Reasonable accommodation and disability-based discrimination claims under the ADA, consistent with other federal nondiscrimination laws, require that a person demonstrate that he or she is a “qualified individual with a disability.”⁶⁰ A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁶¹ To be qualified, according to the EEOC, a person must have the requisite skills, experience, education, licenses, etc., and be able to perform the essential functions of the job with or without a reasonable accommodation.⁶²

Similar to other federal nondiscrimination statutes such as Title VII, Section 1981, the ADEA or the Rehabilitation Act, ADA plaintiffs bear the burden of proof in demonstrating that he or she is qualified.⁶³ In a typical disability discrimination case, a plaintiff must show that he or she (1) has a disability (2) is a qualified individual and (3) suffered an adverse employment action because of the disability.⁶⁴ In other words, disability discrimination plaintiffs must establish that they have the necessary knowledge, skills, abilities or licenses *and* are capable of performing the job.⁶⁵

While ADA plaintiffs ultimately bear the burden of proof to establish that they are qualified, employers bear the burden of proving that an aspect of a job is an “essential function” *if* a plaintiff raises the issue.⁶⁶ The term “essential functions” means the “fundamental job duties of the employment position” but does not include “marginal functions of the position.”⁶⁷ In this regard, the courts have properly allocated the burden of proof on the employer to demonstrate which functions are essential, and then put the burden on the individual to show that he or she can do those essential functions.⁶⁸

Employers Must Provide “Reasonable Accommodations” to Disabled Employees

Under the ADA, an employer unlawfully discriminates against a “qualified individual with a disability” when it fails to make “reasonable accommodations to the known physical or mental limitations” of the disabled employee.⁶⁹ To establish a claim for failure to accommodate, a plaintiff must show that: (1) she is a qualified individual; (2) the employer was aware of her disability; and (3) the employer failed to reasonably accommodate the disability.⁷⁰ This standard requires the “employer and employee engage in an interactive process to determine a reasonable accommodation.”⁷¹

Employers are not required to provide the particular accommodation that an employee requests.⁷² At the very least, the employer is obliged to provide an accommodation that effectively addresses the disabled employee’s limitations.⁷³ If a disabled employee shows that his or her disability was not reasonably accommodated, the employer will be liable only if it is responsible for the breakdown of the interactive process.⁷⁴ As with determining whether a person is disabled as defined by the ADA, assessing whether an employee requires a reasonable accommodation and the type and nature of that accommodation is made on an individualized basis.

II. Compromise Americans with Disability Act Amendments Replace Much Broader “ADA Restoration Act”

Soon after the Supreme Court’s decisions in *Sutton v. United Airlines* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁷⁵ the disability rights community began, in earnest, a campaign to revise the ADA.⁷⁶ They asserted that these Supreme Court cases needed to be reversed and other protections should be added to “restore the broad scope of protection available under the ADA.”⁷⁷ The campaign culminated with the introduction, on July 26, 2007, of the ADA Restoration Act of 2007 (ADARA) by Reps. Steny Hoyer (D-MD) and James Sensenbrenner (R-WI) in the House (H.R. 3195)⁷⁸ and Sens. Tom Harkin (R-IA) and Arlen Specter (R-PA) in the Senate (S. 1881). The House bill eventually collected 255 cosponsors, including over 50 Republicans.

The stated purposes of ADARA were to “restore the broad scope of protection available under the ADA”⁷⁹ and “reinstate original congressional intent regarding the definition of disability.”⁸⁰ In truth, however, ADARA would have radically *expanded*—not restored—the ADA.

ADARA Would Have Substantially Expanded ADA Coverage and Changed the Burden of Proof

Under the guise of restoration, ADARA would have gutted the ADA’s definition of disability of any meaningful limitation. ADARA would have redefined “disability” to simply mean “a physical or mental impairment” and abolish the functional requirement that an impairment substantially limit one or more major life activities. In other words, under ADARA, any impairment would have constituted a protected disability. In fact, the terms “impairment” and “disability” were used interchangeably in ADARA.⁸¹

As previously discussed, the definitions of physical and mental impairments are so inclusive that almost any health condition, regardless of how minor, would be an impairment. A small scar could be a “cosmetic disfigurement.” A sprained ankle could be a “physiological condition affecting the musculoskeletal system,” and a simple case of the flu could qualify under several criteria as an impairment. These conditions would have all been protected disabilities under ADARA. Indeed, ADARA would have made the concept of a “protected class” on the basis of “disability” meaningless because virtually everyone would be protected by it. The severity of an impairment would become irrelevant. For example, a person with a bunion would be considered just as disabled as a diabetic foot amputee. An individual with occasional headaches would be in the same position as a person who suffered from substantial brain damage resulting from a head injury. Similarly, a person with a cut on their finger requiring seven stitches would be considered just as disabled as a veteran returning home from battle having lost his or her arm in combat.

Under ADARA, any employee with any impairment (*i.e.*, disability) could have requested an accommodation. This would have required the employer to engage in the interactive accommodation process even for minor impairments, which would divert employers’ time and resources from addressing requests for reasonable accommodations from qualified individuals with serious disabilities. Thus, an accommodation request from a blind individual may have to wait while employers engage in the interactive

process with persons having minor impairments such as the flu, an ingrown toenail, or even mild seasonal allergies.

Finally, ADARA would have defied all precedents under discrimination laws by turning the well established burden of proof in employment law on its head. Unlike other federal nondiscrimination laws, ADARA would have eliminated the requirement that a plaintiff establish that he or she is a “qualified individual,” (*i.e.*, able to perform the job with or without accommodation). Instead, the legislation would place the burden on employers to prove that a disability discrimination plaintiff is “not qualified” even though Congress intended for an ADA plaintiff to bear the burden of proof that he or she is “qualified individual with a disability.”⁸²

ADAAA Expands ADA Coverage But Far Less So Than Original Legislation

Although ADARA was a drastic overreaching rewrite of the ADA and would have made expansive changes to regulations governing the workplace, the bill quickly garnered significant bipartisan support in Congress and passage of ADARA was all but certain. Even those leading House Republicans who chose not to cosponsor ADARA called for a compromise to fix the perceived problems with the Supreme Court’s interpretation of the ADA.⁸³ Moreover, the Bush Administration sent a letter to the House noting that even though ADARA was too broad there was certainly room for compromise.⁸⁴ As requests for a compromise mounted, Members of Congress saw a need to facilitate talks between the representatives of the disability community and the business community, including HR Policy Association. The talks between the stakeholders began in February 2008.⁸⁵

By mid-May 2008, after months of negotiation, the disability and business communities informed several Members of Congress of agreements they had reached. The ADAAA reflects these agreements. While the ADAAA is much better than ADARA, it is not perfect and members of the disability and business communities alike believe there are flaws in the compromise proposal. As Rep. Buck McKeon (R-CA), the ranking member of the House Education and Labor Committee, commenting on the ADAAA aptly noted: “It’s often said that true compromise leaves no one with exactly what they wanted. I expect that is the case today. There are those who fear we have expanded the reach of the ADA too far, and there are others who would have preferred us to go further. But on the whole we have found common ground that will allow us to extend strong, meaningful protection to individuals with disabilities without dramatically expanding the law, increasing its burdens, or diluting its effectiveness.”⁸⁶ The ADAAA fills the need to avoid a radical rewrite of the ADA, but provides a balanced approach that would not unduly regulate the workplace while providing adequate protection to the disabled.

Impairments That Constitute A “Disability” Under House And Senate Versions of ADAAA

The House (H.R. 3195) and Senate (S. 3406) versions of the ADAAA are almost identical. Under both versions of the ADAAA, prongs one and two of the definition of disability —“a physical or mental impairment that substantially limits one or more major life activities” and a record of such an impairment—would be unaffected.⁸⁷

The House version, however, defined the phrase “substantially limits” as “materially restricts.”⁸⁸ But to avoid confusion, S. 3406 eliminates “materially restricts,” which was a new undefined phrase in disability law that created concerns about how courts would interpret it. While the phrase “materially restricts” lacks clarity, the reason for using it in H.R. 3195 was to reject the Supreme Court’s interpretation in the *Toyota* case that “substantially limits” means “severely restricts.”⁸⁹ The House used legislative history in an attempt to further express the intention to reject the EEOC’s definition of “substantially limits” as “significantly restricts.”⁹⁰ For example, the House Judiciary Committee Report explained, “while a limitation imposed by an impairment must be important, it need not rise to the level of *severely* or *significantly* restricting the performance of the major life activity in order to qualify as a disability.”⁹¹

The Senate version, however, makes the same point in the statute negating the need to rely on legislative history. Specifically, S. 3406’s purpose provisions provide that “the Supreme Court in the case of [*Toyota*], interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress,”⁹² and that Congress expressly rejects the EEOC’s definition of “substantially limits” as “significantly restricts” as inconsistent with congressional intent, by expressing too high a standard.”⁹³

However, the elimination of the term “materially restricts” does not change the level of severity of an impairment before it would be considered a disability.⁹⁴ In quantifying “substantially limits” or “materially restricts” on an impairment scale, it has been described publicly (including to Members of Congress and the Administration) by the negotiators of the compromise from the employer and disability communities as being a seven on a scale of one to ten where one is a minor impairment and ten equals a severely restricting impairment. The legislative history of H.R. 3195 attempts to clarify where “materially restricts” is on a severity spectrum. The House Committee Report and a joint floor statement by sponsors Hoyer and Sensenbrenner state: “On the severity spectrum, ‘materially restricts’ is meant to be less than ‘severely restricts,’ and less than ‘significantly restricts,’ but more serious than a moderate impairment which would be in the middle of the spectrum.”⁹⁵ Arguably, the level of severity set forth by these standards, while used to explain the position of “materially restricts” on the severity spectrum, would equally apply to the term “substantially limits” in the Senate version of the bill. However, the use of “severity spectrum” in the House Committee Report and Representatives Hoyer and Sensenbrenner’s joint floor statement was seriously questioned by the Senate Statement of Managers and other lawmakers.⁹⁶ Regardless, it remains to be seen exactly how the EEOC and the courts will apply the definition.

But even with a statutory language rejecting the Supreme Court and the EEOC’s definition of “substantially limits” it would continue to exclude “[p]ersons with minor, trivial impairments as Congress originally intended.”⁹⁷ Indeed, although the ADAAA’s rejection of the strict and demanding standard would expand the group of individuals who may request a reasonable accommodation it would not open the reasonable accommodation door to every minor or moderate impairment as ADARA would have done.

The Functional Definition of Disability Maintained

While the ADAAA rejects *Toyota's* strict severity standard it retains the use of a functional definition. Under ADAAA, “a person is considered an individual with a disability...when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”⁹⁸ This determination would continue to be made on a case-by-case basis.

Maintaining the functional nature of the definition of disability for the first prong is necessary to remain true to Congress’s original understanding of the ADA. In measuring the severity of an individual’s condition on a major life activity, Congress intended that he or she be compared to “most people” or “the average person in the general population.” The various committee reports in the 1990 enactment noted, for example “a person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.”⁹⁹

The Concept of Major Life Activities Maintained and Defined But With a Wrinkle

The ADAAA defines the phrase “major life activity” by setting forth a non-exhaustive illustrative list of activities, which would constitute a “major life activity.” Such activities include: caring for oneself, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.¹⁰⁰ ADAAA would simply codify these major life activities, all of which have been recognized by federal circuit courts and the EEOC, as major life activities. ADARA, by contrast, would have eliminated the need to even consider major life activities because any impairment, no matter how it affected an individual, would have been a disability.

In addition to the activities listed above, the operation of “major bodily functions” is also incorporated as a major life activity by the ADAAA. Major bodily functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.¹⁰¹ An impairment can substantially limit the operation of a major bodily function “if it causes the operation to overproduce or under-produce in some harmful fashion.”¹⁰²

As noted above, under current law, the operation of bodily functions are generally considered a major life activity but it is framed differently under ADAAA. For example, operations of bodily functions that have been considered major life activities include “blood cleansing and body waste processing,” “ability to perform cognitive functions,” and “controlling one’s bowels” among others.¹⁰³ Under the ADAAA, such major bodily functions would be characterized as the operation of the circulatory, digestive, and bowel functions. This will be a challenge for the courts as they become familiar with the major bodily function framework.

No Mitigating Measures Considered Except Ordinary Eyeglasses and Contacts

Like ADARA, the ADAAA would overturn *Sutton v. United Airlines, Inc.*, and its progeny. The ameliorative effects of mitigating measures such as taking medicines, using auxiliary aids, assistive technology, prosthetics devices, hearing aids or learned behavioral modifications would be ignored in determining whether an individual is

disabled.¹⁰⁴ In a similar vein, episodic impairments or those that are in remission would be considered a disability if they would substantially limit a major life activity when active under the ADAAA.¹⁰⁵

The ADAAA provides one exception to the broad prohibition of excluding the consideration of mitigating measures. The bill would require courts and employers to consider regular eyeglass or contact lenses in determining whether an individual is disabled.¹⁰⁶ However, if an employer used qualification standards, employment tests or other selection criteria based on uncorrected vision, it would have to show that the standard was job-related and consistent with business necessity.¹⁰⁷

ADA Qualification Standards Remain Unchanged

Contrary to other nondiscrimination laws ADARA would have changed the ADA qualification standard by flipping the burden of proof from the employee to the employer. By contrast, ADAAA would not alter the qualification standards and employees would maintain the burden to prove that they are qualified.¹⁰⁸ Under the ADAAA, an employee or applicant must continue to show that he or she is a “qualified individual,” which means that the individual must be able to perform the essential functions of the job with or without a reasonable accommodation.¹⁰⁹ This is consistent with Congress’s intent under the original ADA that a plaintiff bear the burden of proof that he or she is a “qualified individual.”¹¹⁰

The ADAAA Expands the “Regarded As” Prong of the Definition of Disability

One aspect of the ADAAA that employers will especially need to be aware of is the expansive nature of the “regarded as” prong of the definition of disability. According to the ADAAA, an individual is disabled if he or she is “being regarded as having such an impairment (*as described in paragraph 3*).”¹¹¹

Paragraph 3 explains that an individual establishes a disability under the “regarded as” prong if he or she has been subjected to an adverse employment action because of a perceived *or actual* mental or physical impairment *regardless of whether it limits a major life activity*, as long as it is not minor or temporary.¹¹² (Note, as discussed below, ADAAA explicitly states that employers do not need to provide accommodations under the “regarded as” prong, so this would only apply to terms and conditions adverse employment actions.)

This would alter current “regarded as” law as interpreted by the courts. A “regarded as” claimant would no longer have to establish that he or she was being perceived as “having an impairment” that would “substantially limit one or more major life activities.”¹¹³ By contrast, a “regarded as” claimant simply must establish that he or she suffered an adverse employment action because of an *actual or perceived impairment*. By including “actual impairments” the “regarded as” inquiry would no longer exclusively focus on an employer’s misperceptions.¹¹⁴ Indeed, a person merely has to show that he or she has an impairment and experienced an adverse action based on that impairment regardless of the employer’s perception.

As noted above, the broad definition of “mental or physical impairments” includes almost any health condition. Although the ADAAA does not define physical or mental

impairment the legislative history provides that the broad definition promulgated—and discussed above—by the DOJ and EEOC should be used.¹¹⁵

Practical Implications of the Broad “Regarded As” Prong of the Definition

Because the “regarded as” prong, as amended by the ADAAA, would lower the burden required to establish a disability under that prong of the disability definition claims for discrimination based on adverse employment actions concerning the terms and conditions of employment (*i.e.*, hiring, firing, promotions, demotions, compensation issues, etc.) will almost certainly be brought under the “regarded as” prong. Under this prong, an individual can establish disability by showing that he or she has an actual or perceived impairment that is not minor or temporary. A “regarded as” disability claim would be very similar to a discrimination claim under Title VII, Section 1981 or the ADEA. In many cases, the issue of whether the individual falls within the protected class would be dispensed with quickly. Then the plaintiff must show that he or she is qualified to perform the job and that an adverse action was taken because of the impairment. At that point the employer must articulate a legitimate nondiscriminatory reason for the contested action.

Significantly, an individual seeking a reasonable accommodation must use prong one of the definition and show that he or she has an impairment that substantially limits (*i.e.*, materially restricts) a major life activity. ADAAA explicitly states that employers do not need to provide accommodations under the “regarded as” prong. Therefore, a claim for a reasonable accommodation would change very little.

Statutory Limitations on the “Regarded As” Prong

There are two very important statutory limitations that would limit this otherwise expansive prong. First, the impairment cannot be transitory and minor.¹¹⁶ A “transitory” impairment has a duration (or expected duration) of six months or less.¹¹⁷ Examples of minor impairments in the legislative history include common ailments such as a cold or the flu.¹¹⁸

Second, an employer has no obligation to even consider a request for a reasonable accommodation under the “regarded as” prong of the definition.¹¹⁹ This would reject certain some court decisions that have required reasonable accommodations under the “regarded as” prong.¹²⁰ The reasonable accommodation exception “makes [it] clear that the duty to accommodate or modify arises only when an individual establishes coverage under the first or second prong of the definition.”¹²¹ Thus, “regarded as” discrimination claims may only address discrimination in the terms and conditions of employment (*i.e.*, terminations, demotions, failure to hire or promote, etc.).

Finally, as noted previously, a “regarded as” plaintiff still must prove that he or she is qualified as well as establishing the merits of the discrimination claim.¹²²

Congress’s Original Understanding of the “Regarded As” Prong

While the change to the “regarded as” prong of the definition of disability is a departure from current law, some have argued it is consistent with what Congress originally intended.¹²³ For example, the Judiciary Committee’s Report on the ADA provides that “if a person is disqualified on the basis of an actual or perceived physical or mental impairment, and the employer can articulate no legitimate job related reason for

the rejection, a perceived concern about employment of persons with disabilities could be inferred and the plaintiff would qualify for coverage under the ‘regarded as’ test.”¹²⁴ Likewise, the House Education and Labor Committee Report noted that an employer’s negative attitude regarding an individual’s condition would be sufficient to constitute a disability under the “regarded as” prong. “A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity’s negative attitudes toward that persons impairment is treated as having a disability.”¹²⁵ Examples of such discrimination include an employer refusing to hire someone “because of a fear of ‘negative reactions’ of others to the individual,” or if a restaurant (a public accommodation) refused to admit “a person with cerebral palsy because of that person’s physical appearance.”¹²⁶ The courts, however, have generally disregarded such legislative history and strictly applied the text of the ADA, which required that to be disabled under the “regarded as” prong an individual must have been “regarded as having an impairment” that substantially limits a major life activity.”

That said, the aforementioned legislative history provides some support for the argument that Congress intended negative attitudes or actions taken against an individual because of his or her actual or perceived impairment to be sufficient to satisfy the “regarded as” prong. The rationale for this legislative history was articulated by the Supreme Court in *School Board of Nassau County v. Arline*,¹²⁷ a Rehabilitation Act case.¹²⁸ The Court noted that even though a person’s impairment may not in fact substantially limit any major life activity, the reaction of others may prove just as disabling.¹²⁹ The Court ruled that by including the “regarded as” prong as part of the definition of disability, “Congress acknowledged that societies’ accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.”¹³⁰ Indeed, the EEOC regulations indicate that employment actions based on fears or stereotypes may very well constitute discrimination. The regulations state, “if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on ‘myths, fear or stereotype,’ the individual will satisfy the ‘regarded as’” prong and “if the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of ‘myth, fear or stereotype’ can be drawn.”¹³¹

Confirming Amendments & Agency Authority

In addition to not defining the terms “physical or mental impairments,” “substantially limits,” and “major life activities” Congress did not give any agency the authority to issue regulations interpreting the definition of disability.¹³² Even so, the EEOC issued regulations defining these terms but because of Congress’s failure to grant regulatory authority the burden of interpreting the definition of “disability” was ultimately left to the federal courts.

The ADAAA rectifies Congress’s failure to grant authority to the relevant agencies to issues regulations interpreting the definition of disability. For example, the EEOC would have the authority to issues regulations under Title I and the Attorney General would have authority to issue regulations under other titles such as Title III. Because agencies would have authority to issue regulations, courts should generally give deference to the agency’s interpretations.

The bill would also conform the definitions of Section 7 of the Rehabilitation Act of 1973 to those set forth in the ADAAA.

III. Conclusion

Even though the ADAAA would expand current law, it is a far narrower expansion than was contemplated by ADARA and advocated initially by the disability rights community. The bill represents a true compromise in that neither the business community nor the disability rights community is completely satisfied with it, yet both acknowledge that it achieves a balance between adequate protections for the disabled and maintaining a workplace unencumbered by excessive regulation.

Endnotes

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- ¹ P.L. 101-336.
- ² 42 U.S.C. § 12112(a).
- ³ *Id.* at § 12112(b)(5)(A).
- ⁴ *Id.* at § 12111(8).
- ⁵ *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 950 (7th Cir. 2000) (citing *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996)).
- ⁶ 42 U.S.C. § 12102(2). The ADA's legislative history explains that the term "disability" as defined under the ADA is identical to the definitions under the Rehabilitation Act of 1973 and the Fair Housing Act, both of which require that an "individual with a handicap" be "substantially limited in one or more major life activities." The ADA uses the term "disability" instead of "handicap" but Congress explicitly noted that no change in the definition was intended. H.R. REP. NO. 101-485, 101st Cong. 2d Sess., pt. 2, at 50 (1990); H.R. REP. NO. 101-485, 101st Cong. 2d Sess., pt. 3, at 27 (1990); S. REP. NO. 101-116, 101st Cong. 1st Sess., at 21 (1989).
- ⁷ *Moore*, 221 F.3d at 950.
- ⁸ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 199 (2002) ("An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.").
- ⁹ *Bragdon v. Abbott*, 524 U.S. 624, 632-42 (1998) ((1) whether the condition alleged constitutes a physical or mental impairment, (2) whether that impairment affects a major life activity, and (3) whether the impairment operates as a substantial limit on the major life activity asserted.); *see also Toyota*, 534 U.S. at 194-95.
- ¹⁰ Medical *treatment* of a condition that is not itself a "disability" can count as a disability under the ADA. *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052 (7th Cir. 1997) ("Obviously, having high cholesterol is not in itself disabling; it does not prevent a person from engaging in any of the activities of living and working; it is wholly unlike blindness or paraplegia or the other conventional disabilities that trigger the protection of the ADA. But it is lifethreatening, albeit only in the long term, and if a medical condition that is not itself disabling nevertheless requires, in the prudent judgment of the medical profession, treatment that is disabling, then the individual has a disability within the meaning of the Act, even though the disability is, as it were, at one remove from the condition."). *See also Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907 (11th Cir. 1996) (assuming that the effects of chemotherapy treatment for a cancer could be disabling, even though the cancer itself did not substantially limit a major life activity. Although, the cancer did not trigger the protections of the statute because it did not render the individual disabled, the treatment did.)
- ¹¹ The EEOC adopted the definitions of physical or mental impairment, in part, from the Senate and House committee reports. *See* H.R. REP. NO. 101-485, pt. 2, at 51 (1990); H.R. REP. NO. 101-485, pt. 3, at 28 (1990); S. REP. NO. 101-116, at 21-22 (1989).
- ¹² 29 C.F.R. § 1630.2(h)(1).
- ¹³ 29 C.F.R. § 1630.2(h)(2).
- ¹⁴ *Dewitt v. Carsten*, 941 F. Supp. 1232 (N.D. Ga. 1996), *aff'd*, 122 F.3d 1079 (11th Cir. 1997).
- ¹⁵ *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995) (dismissing the complaint because pregnancy is not a disability under the ADA because it is not a disorder and the temporary nature of the condition weighs against considering it an impairment).
- ¹⁶ *Mehr v. Starwood Hotels & Resorts*, 2003 U.S. App. LEXIS 14815 (6th Cir. 2003).
- ¹⁷ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (holding that obesity was not an impairment because it was not caused by a physiological condition).
- ¹⁸ 29 C.F.R. pt. 1630, App. § 1630.2(h).
- ¹⁹ EEOC Compliance Manual § 902.2(c)(2).
- ²⁰ PETER A. SUSSER, *DISABILITY DISCRIMINATION & THE WORKPLACE*, 17 (2005) ("[b]ased on the sheer number of variations in human circumstance, any attempt to draft an exhaustive list covering all the possible types of diseases and conditions that might constitute a protected physical or mental impairment certainly would be impossible."). Similarly, the EEOC acknowledged the futility in attempting to identify all impairments by noting comprehensive publications such as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* does not even include all conditions that may

qualify as mental impairments. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997). The following conditions have been found to be impairments: *Arrieta-Colon v. Wal-Mart, Inc.*, 2006 U.S. App. LEXIS 826 (1st Cir. 2006) (erectile dysfunction); *Dillon v. Roadway Express*, 2005 U.S. App. LEXIS 7490 at *8 (5th Cir. 2005) (the occasional inability to localize sound); *Cella v. Villanova University*, 2004 U.S. App. LEXIS 21740 (3d Cir. 2004) (tennis elbow); *Benoit v. Technical Manufacturing Corp.*, 331 F.3d 166 (1st Cir. 2003) (back and knee strains); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) (knee contusions and back strain); *Christian*, 117 F.3d at 1052 (high cholesterol); *Van Sickel v. Automatic Data Processing*, 952 F. Supp. 1213, 1218 (E.D. Mich. 1995) (a six inch scar along an individual's chin line).

²¹ 534 U.S. 184 (2002).

²² *Toyota*, 534 U.S. at 197.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* (emphasis added). A unanimous Supreme Court felt compelled to adopt this rule of construction because of Congress's finding that there were only 43 million disabled Americans.

²⁶ See, e.g., *Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981) (noting that the Rehabilitation Act's "legislative history indicates that the definition is not to be construed in a niggardly fashion.") (citation omitted); *Tudyman v. United Airlines*, 1 AD (BNA) Cases 669 (C.D. Cal. 1984) ("the definitions are generally to be read broadly.").

²⁷ 29 CFR § 1630.2(j)(1); see also *Sutton*, 527 U.S. at 480.

²⁸ *Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 31-32 (1st Cir. 2000) (failed to establish that the "temporary diminution in her right-ear hearing" substantially limited the major life activity of hearing because the plaintiff failed to identify "the overall functional degree of loss suffered" and failed to show that "compared to the average person in the general population, she was significantly restricted in her hearing."); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375 (noting that a temporary impairment is not protected by the ADA). The EEOC and courts have maintained that if an impairment lasts "at least several months" it is not short term. See EEOC Compliance Manual § 902.4(d) at 30; *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that 3 months may be long enough). In *Guzman-Rosario v. United Parcel Service*, 397 F.3d 6, 10 (1st Cir. 2005) the First Circuit suggested that an impairment must have a minimum duration between 6 and 24 months. But other courts have found that periods as short as two to three months may be long enough. *Reg. Economic Comm. Action Program v. City of Middleton*, 281 F.3d 333 (2d Cir. 2002) (noting that somewhere between three and nine months is "long-term"); *Sinclair Williams v. Stark*, 2001 U.S. App. LEXIS 5367 (6th Cir. 2001) (noting that hypertension lasting three months could be considered "substantially limiting"). Likewise, occasional or intermittent impairments (depending upon severity) will generally not be considered a "disability." For instance, in *Dillon v. Roadway Express*, 2005 U.S. App. LEXIS 7490 (5th Cir. 2005), the plaintiff was not substantially limited in the major life activity of hearing where "the only symptom he complains of is an occasional inability to localize a sound" but did not suffer "any actual hearing loss." *Id.* at *8 (emphasis added). Therefore, while he suffered from an impairment, he was not disabled under the ADA.

²⁹ 29 C.F.R. § 1630.2(h).

³⁰ 29 C.F.R. pt. 1630, App. § 1630.2(i).

³¹ EEOC Compliance Manual § 902.3(b) at 15.

³² *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000).

³³ *Greathouse v. Westfall*, 2006 U.S. App. LEXIS 27882 (6th Cir. 2006).

³⁴ *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001).

³⁵ *Miller v. Ameritech Corp.*, 2007 U.S. App. LEXIS 1039 (7th Cir. 2007); *Swart v. Premier Parks Corp.*, 2004 U.S. App. LEXIS 2964 (10th Cir. 2004).

³⁶ *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999).

³⁷ *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (4th Cir. 2006).

³⁸ *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378 (3d Cir. 2004).

³⁹ *Robinson v. Lockheed Martin Corp.*, 2007 U.S. App. LEXIS 331 (3d Cir. 2007); *Collado v. United Parcel Service, Co.*, 419 F.3d 1143 (11th Cir. 2005).

⁴⁰ *MacKenzie v. Denver*, 414 F.3d 1266 (10th Cir. 2005).

⁴¹ *Nuzum v. Ozark Automotive Distributors, Inc.*, 2005 U.S. App. LEXIS 28736 (8th Cir. 2005).

⁴² *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004).

⁴³ *Moore*, 221 F.3d at 950.

⁴⁴ *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996).

⁴⁵ *Toyota*, 534 U.S. at 196.

⁴⁶ *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2d Cir. 1998).

⁴⁷ 527 U.S. 471 (1999).

⁴⁸ *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999).

⁴⁹ *Sutton*, 527 U.S. at 482.

⁵⁰ *Id.* at 483.

⁵¹ H.R. REP. NO. 101-485, pt. 2, at 52 (1990); *see also* H.R. REP. NO. 101-485, pt. 3, 28-29 (1990) (“persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment or controlled by medication.”). The Supreme Court did not turn to the legislative history because it was believed that the language of the statute was unambiguous that mitigating measures should be considered in determining disability.

⁵² *Sutton*, 527 at 482 (citing 29 CFR pt. 1630, App. § 1630.2(j); 28 CFR pt. 35, App. A§ 35.104).

⁵³ *Arnold v. United Parcel Service, Inc.*, 135 F.3d 1089 (1st Cir. 1998); *Taylor v. Phoenixville School Dist.*, 174 F.3d 142 (3d Cir. 1999); *Washington v. HCA Health Services of Texas*, 152 F.3d 464 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996); *Harris v. H&W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996).

⁵⁴ 42 U.S.C. §12102(2)(C).

⁵⁵ *Id.* at § 12102(2)(A); *Sutton*, 527 U.S. at 488.

⁵⁶ *Sutton*, 527 U.S. at 488.

⁵⁷ *Id.*; The EEOC would add that an individual could be “regarded as” disabled if based “on the attitudes of others toward the condition.” 29 C.F.R. § 1630.2(l), pt. 1630 App.

⁵⁸ *Sutton*, 527 U.S. at 488.

⁵⁹ *Mx Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002) (emphasis added).

⁶⁰ 42 U.S.C. § 12112.

⁶¹ *Id.* at § 12111(8).

⁶² 29 C.F.R. § 1630.2(m).

⁶³ *Fenney v. Dakota, Minnesota & Railroad Co.*, 327 F.3d 707, 712 (8th Cir. 2003); *Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C. Cir. 1999).

⁶⁴ *Fenney*, 327 F.3d at 711-12; *Moore*, 221 F.3d at 950; *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51-52 (5th Cir. 1997) (per curiam).

⁶⁵ *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir. 2005) (holding that the plaintiff has the burden of demonstrating the he was capable of performing the essential functions of the job); *Frazier v. Simmons*, 254 F.3d 1247 (10th Cir. 2001) (same).

⁶⁶ *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561 (8th Cir. 2007) (noting that the employer has the burden of proving which functions are essential when it disputes the plaintiff’s claim that he or she is qualified). However, as noted above, the individual bears the burden of proving that s/he can perform the essential job functions. *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir. 2005) (holding that the plaintiff has the burden of demonstrating that he is capable of performing the essential functions of the job); *Breitfelder v. Leis*, 2005 U.S. App. LEXIS 21821 (6th Cir. 2005) (holding that the plaintiff had the “burden of showing he could perform the essential tasks” of the job); *Fenney v. Dakota, Minnesota & Railroad Co.*, 327 F.3d 707 (8th Cir. 2003) (“the plaintiff retains the ultimate burden of proving that he is a qualified individual,” the employer must show which functions are essential if that issue is disputed).

⁶⁷ 29 C.F.R. § 1630.2(n)(1). *See also* *Kapche v. City of San Antonio*, 176 F.3d 840, 843 (5th Cir. 1999). Several factors are considered in determining whether a function is “essential” or merely “marginal” including the employer’s judgment as to which functions are essential, written job descriptions prepared before advertising or interviewing applicants for the job, the amount of time spent on the job performing the function, and the work experience of both past and current employees in the job. *EEOC v. E.I. Du Pont de Neumours & Co.*, 480 F.3d 724, 730 (5th Cir. 2007). The most important factor, however, is whether employees actually perform the specific function. *See, e.g., Canny v. Dr. Pepper/Seven-Up*

Bottling Group, Inc., 439 F.3d 894 (8th Cir. 2006) (holding that “driving” was not an “essential function” where the employee had “consistently arranged for his own transportation between customer locations”); *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001) (questioning whether “climbing” was an “essential function” when the employee had worked for over 3 years “without ever having to perform overhead work”).

⁶⁹ 42 U.S.C. §§ 12112(a), and (b)(5)(A). Reasonable accommodations may include but are not limited to “making existing facilities used by employees readily accessible to and usable by individuals with disabilities,” *Id.* at § 12111(9) providing unpaid leave, 29 C.F.R. pt. 1630, App. § 1630.2(o); *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1335-36 (10th Cir. 1998) (holding that providing leave for four months to be treated for post traumatic stress disorder was a reasonable accommodation) (the amount of leave is highly fact specific based on the individual and workplace), The analysis of the length of leave is fact specific depending on whether the leave would impose an undue hardship on the employer. *See, e.g., Garcia-Alaya v. Lederle Parenterals, Inc.*, 212 F.3d 638, (1st Cir. 2000) (noting that it may not have been an undue hardship for the employer to hold the employee’s secretarial job open for an extended period of time given that the company was able to fill her position with temporary help) restructuring an employee’s job, 42 U.S.C. § 12111(9)(B); *see also Benson v. Northwest Airlines*, 62 F.3d 1108, 1113 (8th Cir. 1995) (noting that reallocating marginal functions of the job is a reasonable accommodation) providing an assistant or job coach, 29 C.F.R. § 1630.2(o)(2)(ii) a modified work schedule, 42 U.S.C. § 12111(9) reassignment, 42 U.S.C. § 12111(9)(B). *But see Denszak v. Ford Motor Co.*, 2007 U.S. App. LEXIS 2435 (6th Cir. 2007) (holding that employer was not required to displace existing employees to create an opening for reassignment) or even monitoring an employee’s medications.

⁷⁰ *Fenney v. Dakota, Minnesota & Railroad Co.*, 327 F.3d 707, 712 (8th Cir. 2003); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001); *Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000).

⁷¹ *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 633 (7th Cir. 1998).

⁷² *Jay v. Internet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000).

⁷³ *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (“An *ineffective* ‘modification’ or ‘adjustment’ will not *accommodate* a disabled individual’s limitations.”).

⁷⁴ *Keane v. Sears, Roebuck & Co.*, 417 F. 3d 789, 797 (7th Cir. 2005).

⁷⁵ 534 U.S. 184 (2002).

⁷⁶ *See e.g.*, National Council on Disabilities, RIGHTING THE ADA (December 1, 2004). From October 2002 through October 2003, the National Council on Disabilities produced 19 white papers comprising the “Righting the ADA” series.

⁷⁷ *See American With Disabilities Act Restoration Act (ADARA)*, H.R. 3195, § 2(b)(1), 110th Cong., 1st Sess., (2007).

⁷⁸ A similar bill—H.R. 6258—was introduced in the House in the 109th Congress by Reps. Sensenbrenner and Hoyer, with the former as the lead sponsor.

⁷⁹ *See ADARA*, H.R. 3195 § 2(b)(1).

⁸⁰ *See ADARA*, H.R. 3195 § 2(b)(3).

⁸¹ *See, e.g., ADARA*, H.R. 3195 § 2(b)(3) (stating that the purpose of the legislation is to reinstate original congressional intention “regarding the definition of *disability* by clarifying that ADA protection is available for all individuals who are subjected to adverse treatment based on actual or perceived *impairment*, or record of *impairment* or are adversely affected by prejudiced attitudes, such as myths, fears, ignorance, or stereotypes concerning *disability*...” (emphasis added).

⁸² *See H.R. REP. NO. 101-485*, pt. 3 at 31-34 (1990) (“This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer’s determination of essential functions is considered. A plaintiff may challenge the employer’s determination of what is an essential function.”).

⁸³ *See e.g.*, Hearing on “H.R. 3195, ADA Restoration Act of 2007,” House of Representatives, Committee on Education and Labor, at 50-51 (January 29, 2007) (statement by Rep. McKeon (R-CA) ranking member on the House Education & Labor Committee).

⁸⁴ Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to the Honorable George Miller, Chairman of Education and Labor Committee of the United States House of Representatives, (January 28, 2008).

⁸⁵ Disability community representatives included (in alphabetical order) the American Association of People with Disabilities; Bazelon Center for Mental Health Law; Epilepsy Foundation; the National Council on Independent Living; and National Disability Rights Network whereas business representatives included (in alphabetical order) by the HR Policy Association; National Association of Manufacturers; Society for Human Resource Management; and the United States Chamber of Commerce.

⁸⁶ CONG. REC. H6069 (June 25, 2008) (statement of Rep. McKeon).

⁸⁷ Americans With Disabilities Act Amendments Act, H.R. 3195, § 4(a)(1)(A-B), 110th Cong. 2d Sess. (2008).

⁸⁸ H.R. 3195, § 4(a)(2).

⁸⁹ *Id.* at § 2(b)(4-5).

⁹⁰ H.R. REP. NO. 110-730, pt 2, at 16 (2008); CONG. REC. H6068 (June 25, 2008) (Joint Statement of Representatives Hoyer and Sensenbrenner on the “Origins of the ADA Restoration Act of 2008, H.R. 3195”).

⁹¹ H.R. REP. NO. 110-730, pt 2, 110th Cong., 2d Sess. at 16 (2008).

⁹² Americans With Disabilities Act Amendments Act, S. 3406, § 2(a)(7), 110th Cong. 2d Sess. (2008).

⁹³ S. 3406, § 2(a)(8).

⁹⁴ CONG. REC. H8294 (September 17, 2008) (Joint Statement of Representatives Hoyer and Sensenbrenner) (“Hence, the Report of the House Committee on Education and Labor and the Report of the House Committee on the Judiciary, as well as our Joint Statement introduced into the CONGRESSIONAL RECORD on June 25, 2008, continue to accurately convey our intent with regard to the bill we are passing today.”); CONG. REC. H8289 (September 17, 2008) (statement of Rep. Gerald Nadler); *cf.* H.R. REP. NO. 110-730, pt 2, at 16 (2008); CONG. REC. H6068 (June 25, 2008) (Joint Statement of Representatives Hoyer and Sensenbrenner on the “Origins of the ADA Restoration Act of 2008, H.R. 3195”).

⁹⁵ H.R. REP. NO. 110-730, pt 2, at 16 (2008); CONG. REC. H6068 (June 25, 2008) (Joint Statement of Representatives Hoyer and Sensenbrenner on the “Origins of the ADA Restoration Act of 2008, H.R. 3195”).

⁹⁶ CONG. REC. S8844 (September 16, 2008) (Statement of Managers—S. 3406 n.14—“We have chosen not to adopt the House’s term ‘materially restricts’ or the House Committees’ use of a range or spectrum of severity to defined ‘materially restricts’ because we are concerned both by the lack of clarity in the terms ‘material’ ‘moderate’ and ‘severe’ and because we believe that such terms encourage the courts to engage in an inappropriate level of scrutiny as to the severity of an impairment when determining whether an individual has a disability.”); CONG. REC. S8355 (September 11, 2008) (Statement of Senator Ted Kennedy) (“The House version of the bill defined ‘substantially limits’ as ‘materially restricts’ and the House Committee reports explained this term with reference to a spectrum or range of severity. the term ‘materially restricts’ in the House bill and these portions of the House reports set an inappropriately high standard for the determination of whether an individual is substantially limited in a major life activity and pose the risk of confusing the threshold determination of who is covered by the act. Fortunately, our Senate bill avoids this problem and provides the broader coverage needed to correct the excessively restrictive and unintended interpretation in the litigation.”) CONG. REC. H8289 (September 17, 2008) (statement of Rep. Gerald Nadler) (“Thus, while the approach taken is different, the intent—and the standard established by both bills—is identical. As such, the guidance provided in House reports regarding application of this less burdensome standard for showing a ‘substantial limitation’ remains valid and relevant, with the exception of our use of a ‘spectrum’, we accept concerns expressed by Senator Kennedy that this could be construed as keeping the standard inappropriately high, and reject the usefulness of this approach.”).

⁹⁷ S. REP. NO. 101-116, at 23 (1989) (emphasis added); H.R. REP. NO. 101-485, pt. 2 at 52 (1990).

⁹⁸ S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485, pt. 2, at 52 (1990); *see also*, H.R. REP. NO. 110-730, Part 1, at 9-10 (2008); H.R. REP. No. 110-730, Part 2, at 16 (2008);.

⁹⁹ S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 101-485, pt. 2 at 52 (1990).

¹⁰⁰ S. 3406, § 4(a)(2)(A); H.R. 3195, §4(a)(3)(A).

¹⁰¹ S. 3406, § 4(a)(2)(B); H.R. 3195, §4(a)(3)(B).

- ¹⁰² H.R. REP. NO. 110-730, pt 2, at 17 (2008).
- ¹⁰³ *Miller v. Ameritech Corp.*, 2007 U.S. App. LEXIS 1039 (7th Cir. 2007); *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249 (4th Cir. 2006); *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378 (3d Cir. 2004); *Swart v. Premier Parks Corp.*, 2004 U.S. App. LEXIS 2964 (10th Cir. 2004); *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999).
- ¹⁰⁴ S. 3406, §4(a)(4)(E); H.R. 3195, §4(a)(5)(E).
- ¹⁰⁵ S. 3406, §4(a)(4)(C); H.R. 3195, §4(a)(5)(C).
- ¹⁰⁶ S. 3406, §4(a)(4)(D)(ii); H.R. 3195, §4(a)(5)(D)(ii).
- ¹⁰⁷ S. 3406, § 5(c); H.R. 3195, §(5)(c).
- ¹⁰⁸ CONG. REC. S8844 (September 16, 2008) (Statement of Managers—S. 3406 n.10 “This bill does not change any current statutory requirement that an individual must be qualified to perform the essential functions of the job.”)
- ¹⁰⁹ 42 U.S.C. § 12111(8).
- ¹¹⁰ *See* H.R. REP. NO. 101-485, pt. 3 31-34 (1990) (“This additional language adopted by the Committee is not meant to change the current burden of proof. This language simply assures that the employer’s determination of essential functions is considered. A plaintiff may challenge the employer’s determination of what is an essential function.”).
- ¹¹¹ S. 3406, §4(a)(1)(C); H.R. 3195, § 4(a)(1)(C) (emphasis added).
- ¹¹² S. 3406, §(4)(a)(3)(A); H.R. 3195, § 4(a)(4)(A) (emphasis added).
- ¹¹³ 42 U.S.C. § 12102(2)(C); *Id.* at § 12102(2)(A); *Sutton*, 527 U.S. at 488.
- ¹¹⁴ *Sutton*, 527 U.S. at 488.
- ¹¹⁵ H.R. REP. NO.110-730, pt 1, at 9 (2008).
- ¹¹⁶ S. 3406, §4(a)(3)(B); H.R. 3195, § 4(a)(4)(B).
- ¹¹⁷ S. 3406, §4(a)(3)(B); H.R. 3195, § 4(a)(4)(B)..
- ¹¹⁸ H.R. REP. NO. 110-730, pt 1, at 14 (2008); H.R. REP. NO. 110-730, pt 2, at 18 (2008).
- ¹¹⁹ S. 3406, § 6(a)(1)(h); H.R. 3195, § 6(a)(1)(g); H.R. REP. NO. 110-730, pt 1, at 14 (2008); H.R. REP. NO. 110-730, pt 2, at 21-22 (2008).
- ¹²⁰ *See, e.g., Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005); *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005); *Williams v. Philadelphia Housing Auth. Police Dept*, 380 F.3d 751 (3d Cir. 2004); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996).
- ¹²¹ H.R. Rep. No. 110-730, pt 1, at 18 (2008); H.R. Rep. No. 110-730, pt 2, at 22 (2008).
- ¹²² H.R. Rep. No. 730, Part 1, 110th Cong., 2d Sess. (2008) at 17.
- ¹²³ Chai R. Feldblum, Testimony Before the Senate Committee on Health, Education, Labor and Pensions on “The Americans with Disabilities Act and the ADA Amendments Act of 2008” (July 15, 2008).
- ¹²⁴ H.R. REP. NO. 101-485, pt. 3, at 30 (1990).
- ¹²⁵ H.R. REP. NO. 101-485, pt. 2, at 53 (1990).
- ¹²⁶ S. REP. NO. 101-116, at 24 (1989); H.R. REP. NO. 101-485, pt. 2 at 53 (1990).
- ¹²⁷ 480 U.S. 273 (1987).
- ¹²⁸ *See* S. REP. NO. 101-116, at 24 (1989); H.R. REP. NO. 101-485, pt. 2, at 53 (1990); H.R. REP. NO. 101-485, pt. 3, at 30 (1990).
- ¹²⁹ *Arline*, 480 U.S. at 283.
- ¹³⁰ *Id.* at 284.
- ¹³¹ 29 C.F.R. pt. 1630, App. § 1630.2(l).
- ¹³² *Toyota*, 534 U.S. at 194; *Sutton*, 527 U.S. at 479.