Georgetown Journal on Poverty Law and Policy
Volume XXVI, Number 3, Spring 2019

# Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus

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## I. INTRODUCTION

The Americans with Disabilities Act (ADA) was passed in 1990 with broad bipartisan support.[1] It was not long, however, before courts began giving the definition of disability under the ADA a very narrow interpretation.[2] Conditions such as "diabetes, cancer, AIDS, bipolar disorder, multiple sclerosis, monocular vision, epilepsy, cerebral palsy," and many others were found *not* to be disabilities under the ADA.[3] Even when there was compelling evidence that the employer had taken an adverse action against the employee because of the impairment, courts would dismiss their ADA claims because they did not fall into the narrow definition of disability as interpreted by the courts. This led to an entire body of scholarship claiming that there was a "backlash" against the ADA.[4]

This backlash is especially troubling when one considers that individuals with disabilities are disproportionately living in poverty,[5] and are employed at a much lower rate than non-disabled individuals.[6] Thus, because individuals with disabilities already experience significant disadvantages, the difficulty in bringing a claim when they are discriminated against by their employers makes this "backlash" against individuals with disabilities even more pernicious.

Congress was unhappy with the backlash against the ADA, and therefore passed the ADA Amendments Act of 2008 ("ADAAA" or the "Amendments") to broaden the class of individuals that would fall into the ADA's protected class.[7] As discussed in more detail below, Congress did not change the basic definition of disability—a physical or mental impairment that substantially limits one or more major life activities[8]—but it did add several interpretive provisions so that courts would give the statute a broad, rather than miserly construction.

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1. RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 5–6 (2005).

2. Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 938 (2012) (stating that Congress enacted the amendments to overturn a set of decisions that had narrowly interpreted the definition of disability); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 3 (2014) (hereinafter Porter, *Backlash*).

3. Porter, *Backlash*, *supra* note 2, at 3 (citations omitted).

4. COLKER, *supra* note 1, at 96–125 (2005); MATTHEW DILLER, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA 64–65 (Linda H. Krieger ed., 2006); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 48–58 (2005).

5. U.S. SENATE COMMISSION ON HEALTH, EDUCATION, LABOR & PENSIONS, FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 2 (2014), https://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf (noting that twice as many Americans with disabilities live in poverty compared to non-disabled individuals). Over 28% of individuals with disabilities ages 21–64 live in poverty. *Id.*

6. *Id.* at 3 (stating that less than 30% of individuals with disabilities are in the workforce). Even when working, individuals with disabilities make less than their non-disabled counterparts. *Id.* (stating that American households with an adult member with a disability earn 38.4% less than households with no adult with a disability).

7. Porter, *Backlash*, *supra* note 2, at 4.

8. 42 U.S.C. § 12102(2) (2012). The definition also includes having a "record of" such an impairment or "being regarded as" having such an impairment. *Id.* This Article will focus on the "actual disability" prong and the "regarded as" prong, but because there is not nearly as much litigation under the "record of" prong, it will not be discussed. *But see* Quinn v. Chi. Transit Auth., No. 17 C 3011, 2018 WL 4282598, at

After the Amendments went into effect,[9] several scholars predicted that many more individuals will be able to fall into the ADA's protected class, and therefore will have the merits of their claims heard.[10] I agreed with this prediction, and in 2013–14, I set out to explore how courts had been interpreting the definition of disability after the ADAAA.[11] Specifically, I attempted to include every case decided under the Amendments until December 31, 2013.[12] In that article, I concluded that "courts have taken Congress's mandate to broadly define 'disability' seriously. Many of the courts specifically cite to the Amendments . . . ."[13] I also found only a handful of cases that were, in my opinion, incorrectly decided.[14]

As of this writing, it has been five years since that prior article, and ten years since Congress passed the ADAAA. While working on another project exploring ADA retaliation cases after the Amendments,[15] I discovered several post-Amendments cases that held that the plaintiff did not have a disability under the ADA. Based on the impairments of most of these plaintiffs, I was surprised by the results. I collected them in a Westlaw folder, and eventually had accumulated about forty cases where the courts had (in my opinion) erroneously held that the plaintiff did not meet the definition of disability as broadly defined after the ADAAA. This was quite surprising given the conclusions I drew in my earlier article. Accordingly, I set out to explore this body of cases in a more systematic way.

Specifically, I set out to find and read every case that addressed the definition of disability from the point my last article left off until the present (January 1, 2014 through December 31, 2018). This resulted in 976 cases. Of those 976 cases, the court erroneously held that the plaintiff was not disabled in 210 of them. To be clear, I only included cases where I believed that the plaintiff should have been found to have a disability under the ADA, as amended. There were certainly cases where the plaintiff did not meet the definition of disability, but I believed they were correctly decided. I did not include those cases in my dataset.

This Article attempts to explain what went wrong—why did courts incorrectly hold that the plaintiff was not disabled in more than 200 cases? The answer, I've concluded, is a little bit of ignorance (courts and parties that were apparently unaware that the ADAAA was passed); a little bit of incompetence (plaintiffs who did not adequately plead their claims and did not use all of the interpretive tools available under the ADAAA); and possibly, a little bit of animus. I don't make this last conclusion lightly. And it is admittedly hard to tell whether mistakes made by

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*6 (N.D. Ill. Sept. 7, 2018) (plaintiff successfully uses the "record of" definition of disability for a broken finger).

9. The Amendments went into effect on January 1, 2009, but they do not apply retroactively, so they only apply in cases where the alleged unlawful actions occurred after January 1, 2009. Porter, *Backlash*, *supra* note 2, at 14.

10. *Id*. at 4.

11. *See generally id*.

12. *Id*. at 19 n.21.

13. *Id.* at 19.

14. *Id.* at 41–42 (discussing cases).

15. *See* Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L. J. (forthcoming 2019).

the courts are good faith but erroneous interpretations of the law, or whether the prior backlash against the ADA is rearing its head again.

This Article will proceed in three additional parts. Part II will provide a background of the ADA—from the first eighteen years of the ADA's existence, to the passage and provisions of the ADAAA, and to a summary of cases interpreting the definition of disability in the first five years after the ADAAA was passed. Part III will discuss the various errors made by courts and parties. Finally, Part IV will briefly address the implications of this research and identify potential areas of future exploration.

## II. BACKGROUND

### *A. The First 18 Years of the Americans with Disabilities Act of 1990*[16]

The ADA was passed in 1990 with overwhelming support in the House and the Senate.[17] The ADA is made up of several titles. Of most significance here is Title I, which applies to employers with fifteen or more employees.[18]

One of the unique features of the ADA is its definition of the protected class. Unlike Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, and national origin,[19] and protects ALL individuals from discrimination based on those protected categories,[20] the ADA only provides protection to a narrow class of individuals, those who can show that they meet the definition of disability.[21]

Despite the optimism surrounding the ADA, it wasn't long before courts began narrowly construing the definition of disability under the ADA. There was only one arguably pro-plaintiff ADA case—*Bragdon v. Abbott*.[22] There, the Court held that asymptomatic HIV might be a disability under the ADA.[23] After that case was decided in 1998, the rest of the Supreme Court cases addressing the definition of "disability" have interpreted the term very narrowly.

In what has been referred to as the *Sutton* trilogy of cases, the Supreme Court held that courts must consider the ameliorative effects of mitigating measures when deciding whether an individual has a disability.[24] *Sutton* involved twin sisters with severe myopia who applied for positions as global airline pilots for United Airlines.[25] They were both rejected because their uncorrected vision did not meet the uncorrected vision standard United Airlines set as a job requirement, even

16. This Section was derived in significant part from Porter, *Backlash*, *supra* note 2, at 7–11.

17. Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5 (2013).

18. 42 U.S.C. § 12111(5)(A) (2012) (defining employer to include "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day"). There are a few cases in my dataset that are not employment cases, but the overwhelming majority are.

19. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2012).

20. Nicole B. Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 535–36 (2013).

21. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between the Disabled Employees and their Coworkers*, 34 FLA. ST. U. L. REV. 313, 316 (2007).

22. 524 U.S. 624 (1998).

23. *Id*. at 641.

24. Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).

25. *Id.* at 475.

though they both had 20/20 vision with glasses or contacts.[26] The Court held that the Sutton sisters did not have a disability because that determination needs to be made considering any mitigating measures, which in that case, included their corrective eyewear.[27]

The Court decided two other cases on the same day as *Sutton* (hence the "trilogy" moniker). In *Murphy v. United Parcel Service*,[28] the plaintiff was a mechanic for UPS and had high blood pressure. Because of his high blood pressure, he failed the medical exam for Department of Transportation (DOT) certification, which he was required to pass because his job as a mechanic required that he drive the trucks he was servicing.[29] The Court applied the mitigating measures rule it has just announced in *Sutton* and held that, in determining whether Murphy was had a disability under the Act, he should be viewed in his mitigated state, which includes the medication he takes for his high blood pressure.[30]

Finally, in *Albertson's, Inc. v. Kirkingburg*,[31] the third of the trilogy, the Court considered whether the plaintiff's monocular vision constituted a disability. The plaintiff in this case, similar to the *Murphy* case, also had a job that required DOT certification.[32] During a fitness-for-duty physical exam, the doctor noted that Kirkingburg had monocular vision and therefore did not meet the vision requirement for DOT certification.[33] Even though Kirkingburg did not have eyeglasses, medication, or any other devices to assist with his monocular vision, the Court elaborated on its mitigating measures holding and stated that courts should not only consider artificial assistive devices, but should also look at how someone's brain can mitigate his vision impairment by developing techniques to cope with the monocular vision.[34]

As several scholars have discussed, after the Court's announcement of the mitigating measures rule, the lower courts used this rule to hold that many impairments were not disabilities because those impairments, in their mitigated state, did not cause a substantial limitation on any major life activities.[35] For instance, if an employee has diabetes, and must regulate his blood sugar by a closely monitored regimen of eating frequent and proper meals, testing blood sugar levels, and occasionally using insulin to regulate his blood sugar, courts have held that such an employee was not disabled, because in his mitigated state, his diabetes did not cause a substantial limitation on a major life activity.[36]

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26. *Id.* at 476.
27. *Id.* at 488.
28. 527 U.S. 516 (1999).
29. *Id.* at 519–20.
30. *Id.* at 521.
31. 527 U.S. 555 (1999).
32. *Id.* at 558.
33. *Id.* at 559.
34. *Id.* at 565–66.
35. *See* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192–93 (2007); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 220 (2008) (stating that, as a result of the mitigating measures rule, "numerous individuals with fairly severe physical or mental impairments have been found not to have a disability under the ADA").
36. *See, e.g.*, Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002).

A few years after the *Sutton* trilogy of cases, the Court struck a final blow against ADA plaintiffs in *Toyota Motor Manufacturing v. Williams*.[37] In this case, the Court clarified the proper meaning of "substantially limits" and "major life activities." The Court held that when looking at the major life activity of "manual tasks," those tasks have to be of "central importance to most people's daily lives."[38] Furthermore, the Court defined "substantially limits" as "considerable" or "to a large degree,"[39] stating: "We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[40] Finally, the Court also stated that these terms need to be interpreted strictly to create a "demanding standard."[41]

Between the mitigating measures rule in *Sutton* and the more stringent test for substantially limiting a major life activity under *Toyota*, the protected class shrunk substantially. As stated above, conditions like diabetes, cancer,[42] AIDS,[43] bipolar disorder,[44] multiple sclerosis,[45] monocular vision, epilepsy,[46] cerebral palsy,[47] mental retardation,[48] and many others, were found not to be disabilities under the original statute.[49]

As to the why—why did courts so narrowly construe the definition of disability—there have been several theories posited,[50] but the one that has gained the most traction is perhaps also the simplest explanation: Courts were hostile to the ADA and were engaging in a "backlash" against it, deliberately construing the class of individuals who could claim protection of the Act narrowly.[51] As explained by Professor Matthew Diller, after exploring and dismissing other reasons for the poor results in ADA cases, such as weak claims, poorly drafted statute, and confusion over a new statute, the higher failure rate is attributable to a judicial backlash against the ADA.[52] He stated: "The term *backlash* suggests a hostility to the statute and toward those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."[53] Other scholars have devoted entire books or sections of books discussing the

37. 534 U.S. 184, 203 (2002).
38. *Id.* at 197.
39. *Id*. at 197.
40. *Id.* at 198.
41. *Id.* at 197.
42. Ani B. Satz, *Disability Discrimination After the ADA Amendments Act of 2008: Foreword*, 2010 UTAH L. REV. 983, 984; Long, *supra* note 35, at 218 (discussing one particularly egregious case where, after the plaintiff had died from cancer, the court still decided that he was not substantially limited in a major life activity).
43. Long, *supra* note 35, at 218.
44. *Id.* at 218.
45. Satz, *supra* note 42, at 984.
46. *Id.* at 984.
47. Jeanette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 200 (2010) (citing to a 10th circuit case).
48. *Id.* at 200 (citing to an 11th circuit case).
49. Barry, *supra* note 17, at 9.
50. *See generally* Porter, *Backlash*, *supra* note 2, at 12–14.
51. *Id.* at 13–14.
52. DILLER, *supra* note 4, at 64–65.
53. *Id.* at 64.

backlash against the ADA, and there appears to be very little debate that the backlash does indeed exist.[54]

### *B. The ADA Amendments Act of 2008*[55]

Because of the backlash against the original ADA, Congress amended the statute to bring the coverage of the ADA into line with the high expectations for the original statute.[56] Although there were several attempts at amendments,[57] The ADA Amendments Act was signed into law by George W. Bush on September 25, 2008, and went into effect on January 1, 2009.[58] As summarized by Professor Alex Long in one of the first articles written about the Amendments:

> The ADAAA's most important revisions involve the definition of disability. These revisions include instructions to the courts regarding how the terms of the Act should be interpreted; attempted clarification to the Act's 'substantially limits' language; expansion of the 'major life activities' concept; and dramatic changes to the Act's 'regarded as' prong.[59]

The Amendments did not change the basic definition of actual disability: A physical or mental impairment that substantially limits one or more major life activities. Instead, the Amendments include several rules of construction to help courts interpret the definition of disability.[60] The Amendments made clear that Congress disagreed with both the "demanding standard" language in *Toyota* as well as the mitigating measures rule announced in the *Sutton* trilogy. Congress also disapproved of the Court's interpretation of the "regarded as" prong in *Sutton*.[61]

The Amendments mandate that the Court's "demanding standard" language in *Toyota* was incorrect and thus the Act should be interpreted in favor of broad coverage.[62] In *Toyota*, the Court defined "substantially limits" in the phrase "substantially limits one or more major life activities" as "prevents or severely restricts."[63] Although there was quite a bit of debate on how to define "substantially limits,"[64] Congress ultimately chose to leave the term undefined but deferred to the EEOC to define this term with the admonition that it was Congress's expectation that the "EEOC will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this

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54. COLKER, *supra* note 1, at 96–125; MEZEY, *supra* note 4, at 48–58.

55. This part is derived in significant part from Porter, *Backlash*, *supra* note 2, at 14–19.

56. Long, *supra* note 35, at 217 (stating that expectations for the original ADA had been very high).

57. *See generally* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267 (2009) (discussing the differences between the earlier proposed amendments and the amendments that were ultimately enacted).

58. Long, *supra* note 35, at 217.

59. Long, *supra* note 35, at 218.

60. Anderson, *supra* note 57, at 1287.

61. *See infra* notes 125–27, and accompanying text.

62. Long, *supra* note 35, at 220.

63. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002).

64. Anderson, *supra* note 57, at 1285–86 (discussing the fact that an earlier version of the Amendments, which would have been called the Americans with Disabilities Restoration Act, would have eliminated any reference to substantial limitation of major life activities). In other words, as long as the individual had an impairment, the individual would be considered to have met the definition of disability.

Act, including the Amendments made by this Act."[65] The EEOC promulgated regulations, which are consistent with the broad interpretation mandated by Congress,[66] and will be discussed more below.

The Amendments also overruled *Sutton* by expressly rejecting the mitigating measures rule announced in that case.[67] The ADAAA states that a court should determine whether an impairment substantially limits a major life activity without regard to the ameliorative effects of mitigating measures.[68] The one exception to that rule is that courts can consider the mitigating effects of ordinary eyeglasses or contact lenses.[69] However, Congress also added a section stating that if an employer has a qualification standard based on uncorrected vision, the employer has to justify the standard as being job related and consistent with business necessity.[70]

The ADAAA also made changes to the major life activities provision. The original ADA did not define "major life activity" and the EEOC's promulgated list was very brief, leading to much litigation regarding what is or is not a major life activity.[71] The ADAAA made several changes. First, it clarified that if an impairment limits one major life activity, it need not limit other major life activities.[72] Second, the ADAAA provides a non-exhaustive list of major life activities but one that is much broader than the list in the EEOC's regulations. Major life activities now include (with additions in *italics*): Caring for oneself, performing manual tasks, seeing, hearing, *eating*, *sleeping*, walking, *standing*, *lifting*, *bending*, speaking, breathing, learning, *reading*, *concentrating*, *thinking*, *communicating*, and working.[73]

Very significantly, and also ingeniously (in my opinion), Congress defined major life activity to include "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[74] These bodily functions basically track many of the impairments that lower courts held were not disabilities under the original ADA, impairments such as: Diabetes (endocrine); HIV (immune system); cancer (normal cell growth); multiple sclerosis (neurological); high blood pressure (circulatory), etc.

Congress also addressed the situation where an individual has an impairment that is episodic in nature. The Amendments state that if an impairment is substantially limiting when it is active, it is still considered substantially limiting even when in remission.[75] This is very significant for impairments like multiple sclerosis (MS) and cancer, which are either episodic (MS) or go into remission (cancer). Combined with the major bodily functions addition to major life

65. 42 U.S.C. § 12102(4)(B) (2012); Long, *supra* note 35, at 219–20.
66. 29 C.F.R. § 1630.2 (2018).
67. Long, *supra* note 35, at 220.
68. 42 U.S.C. § 12102(4)(E)(i) (2012); *see* Long, *supra* note 35, at 220–21.
69. 42 U.S.C. § 12102(4)(E)(ii) (2012); Long, *supra* note 35, at 221.
70. 42 U.S.C. § 12113(c) (2009).
71. *See* Long, *supra* note 35, at 222.
72. 42 U.S.C. § 12102(4)(C) (2012); Long, *supra* note 35, at 222.
73. 42 U.S.C. § 12102(2)(A) (2012); Long, *supra* note 35, at 222.
74. 42 U.S.C. § 12102(2)(B) (2012); Long, *supra* note 35, at 222–23.
75. 42 U.S.C. § 12102(4)(D) (2012); Long, *supra* note 35, at 221.

activities, this provision has allowed courts to hold that some impairments like cancer or MS are disabilities.

All of these changes will most certainly affect the number of individuals who can prove that they have an "actual" disability. But Congress also made broad changes to the "regarded as" prong of the definition.[76] The original language of the regarded as prong provided that an individual was only regarded as disabled "if the defendant regarded him as having 'such an impairment,' i.e., an impairment that substantially limits a major life activity."[77] Because of this language, courts concluded that an ADA plaintiff had to do more than show that a defendant based an adverse decision on unfounded stereotypes about the plaintiff's condition. The plaintiff also had to establish that a defendant mistakenly believed that the plaintiff's impairment substantially limited one of the plaintiff's major life activities.[78] The ADAAA changed this significantly by stating that a plaintiff only has to establish that she was subject to an adverse action prohibited by the Act "because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[79] The focus is now on the employer's motivation for its adverse action,[80] rather than focusing on how serious the employer considered the plaintiff's condition.

Virtually everyone who discussed the Amendments agreed that the ADAAA would likely have two inter-related effects. First, many more individuals will be considered disabled under the ADAAA.[81] Second, because many more plaintiffs will proceed past the initial step of proving they have a disability, many more cases will proceed to the merits.[82] I set out to explore those conclusions in my 2014 article, *The New ADA Backlash*.

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76. Long, *supra* note 35, at 223.

77. *Id.*

78. *Id.*

79. 42 U.S.C. § 12102(3) (2012) (emphasis added); Long, *supra* note 35, at 224.

80. Long, *supra* note 35, at 224.

81. Cox, *supra* note 47, at 204; Long, *supra* note 35, at 228; *Cf.* Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, 256 FEB. N.J. LAW. 37, 37 (2009) (stating that the new statute will open the floodgates for employees bring lawsuits).

82. Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who Is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 472, 481 (2011) (stating that because the Amendments expand the definition of who is disabled under the ADAAA, the focus will return to whether the individual is qualified to do the job with or without a reasonable accommodation); Cox, *supra* note 47, at 188 (stating that by enabling more plaintiffs to overcome the initial hurdle of establishing membership in the ADA's protected class, the Amendments will require courts to address many important questions, such as the scope of the amorphous reasonable accommodation provision); Long, *supra* note 35, at 228 ("By amending the ADA's definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff's requested accommodation was reasonable."); Porter, Martin*izing*, *supra* note 20, at 543; Satz, *supra* note 42, at 990 (stating that an emphasis will be placed on whether an individual with a disability is qualified for a position, meaning whether they can perform the essential functions with or without a reasonable accommodation); Travis, *supra* note 2, at 956–57 (stating that most people believe that the expanded definition of disability is broad enough to allow most individuals with disabilities to get the accommodation they need); Wilson & Krulewicz, *supra* note 81, at 40 (stating that the obligation to accommodate will become very important after the amendments).

### *C. The First Five Years of the ADAAA*

The results of my research of the case law from the first five years after the Amendments became effective were very promising. As I concluded in my 2014 article, which surveyed all of the ADA cases decided under the Amendments from the time of their passage until December 31, 2013: "The cases discussed . . . present strong evidence . . . that courts have followed Congress' mandate to broadly interpret the definition of disability under the ADA."[83] That article discusses dozens of cases where courts allowed plaintiffs to survive summary judgment on the issue of the definition of disability in many situations where I am certain courts would have dismissed the plaintiffs' claims pre-ADAAA. Perhaps more importantly, I only identified seven cases that I believed incorrectly held that the plaintiff could not meet the definition of disability,[84] and another eight cases that I concluded were litigated poorly.[85] Overall, I was very optimistic that the days of narrowly interpreting the definition of disability were firmly behind us. Thus, I was very surprised to see the errors discovered in the body of cases interpreting the definition of disability in the second half of the decade after the Amendments became effective.

## III. THE ERRORS

All of the 210 cases in this dataset can be categorized as containing one or more "errors" made by the courts, the parties, or often, both.[86] I will discuss three errors—ignorance, incompetence, and possibly animus, in turn.

To be fair, the vast majority of cases got the analysis right.[87] My search[88] of all cases that discussed the issue of whether the plaintiff was disabled as defined after the Amendments revealed 976 cases that discussed that issue. Of those, there were 210 cases where errors were made. Although this result is not nearly as bad as the pre-ADAAA days when defendants were prevailing in ninety-two percent of the cases brought,[89] it is still a disheartening number. Especially given the types of

83. Porter, *Backlash*, *supra* note 2, at 46.

84. *Id.* at 41–44.

85. *Id.* at 44–46.

86. Many of the cases contained more than one error. In some cases, I included the case twice, under each of the errors. In other cases, I made a judgment call regarding which error was more significant.

87. *See, e.g.*, Marsh v. Terra Intern. (Oklahoma), Inc., 122 F. Supp. 3d 1267, 1277 (N.D. Okla. 2015) (criticizing the plaintiff's counsel for not relying on the ADAAA or the new regulations promulgated under the ADAAA, and stating "Marsh's counsel are experienced federal discrimination lawyers, and their failure to recognize that Congress amended a statutory scheme in a manner that favors their client is disappointing. In most of their briefing, both parties cited and relied upon pre-amendment case law.").

88. Using the Westlaw database of all federal cases (both published and unpublished), I used the search terms of "definition /2 disability & ADA." Despite the breadth of this search, I cannot guarantee that it caught all relevant cases, and I am almost positive it did not. However, there is no reason to believe that the proportion of correctly decided and incorrectly decided cases would vary much in the cases that my search did not uncover.

89. *See* COLKER, *supra* note 1, at 71–84.

errors I identify and elaborate on below, I am truly concerned about plaintiffs' ability to litigate the merits of their disability discrimination claims.[90]

### *A. Ignorance*

Cases in this section are straightforward—the courts are simply unaware that the ADA was amended. The first sub-part will identify cases where the courts do not cite to the Amendments when discussing the actual disability prong of the ADA (whether the plaintiff has a physical or mental impairment that substantially limits a major life activity). The next sub-part will discuss cases where the courts erroneously apply pre-ADAAA law for the "regarded as" prong of the definition of disability.

#### 1. Courts Who Are Apparently Unaware that the ADAAA Exists

The cases in this section are ones where the courts do not cite to the ADA Amendments Act at all. Therefore, I assume the courts are unaware that the ADA was amended in 2008. This is especially troubling given that these cases are from 2014 to the end of 2018, and therefore, not immediately after the ADAAA was passed. It is also troubling because federal judges generally have judicial clerks, whose job it is to research applicable law when writing bench memorandums that advise the judge on the issues and the possible resolution of the case. I also assume that the parties' lawyers are not citing to the amended law.[91] I, of course, do not know that to be true, but if the parties' lawyers are citing to the correct, amended ADA, and the court is then deliberately ignoring that statutory authority, we have a bigger problem on our hands than simple ignorance.

Overall, there were **fifty-four** cases where the court cited to ***no*** post-ADAAA statutory authority. Below I describe in some detail some of the cases where I found this omission most troubling because the impairments should have clearly been considered disabilities under the ADA, as amended.

##### a. Mobility impairments

Most people would consider mobility impairments to be relatively severe. (In fact, one only needs to look to the fact that our universal symbol for disability is a person in a wheelchair to reach this conclusion). There were several cases dealing with mobility impairments. For instance, in *Hamzat v. Pritzker*,[92] a pro se plaintiff's claim was dismissed despite the fact that the Plaintiff walked with a limp, a fact which all of his coworkers and the relevant decision-makers had observed. Along with his complaint, the plaintiff submitted a letter from his doctor explaining that his limp resulted from a poliomyelitis infection he suffered as a child that

90. To be clear, the issue of disability coverage is so important, because if the plaintiff does not meet the definition of disability under the ADA, the court will generally not hear the merits of her case, even if there is strong evidence that she was discriminated against because of her disability.

91. Contributing to the likelihood that plaintiffs' attorneys are not citing to the correct law is the fact that, of the fifty-four cases in this section where the courts did not cite to any post-ADAAA law, twenty-five of them had pro se plaintiffs.

92. No. 14-6440 (CC-JBC), 2016 WL 3561768 (D.N.J. June 28, 2016).

caused permanent damage to his leg. The court cited to no post-ADAAA law and relied on pre-ADAAA cases that had held that walking with a limp does not result in a substantial limitation on the major life activity of walking.[93]

Other cases involved mobility impairments that should have easily been considered disabilities under the broader provisions of the ADAAA. For example, in *Montesano v. Westgate Nursing Home, Inc*.[94] the plaintiff's impairment was a vitamin B-12 deficiency, which caused motor skill problems, severe enough to require the plaintiff to use a walker. Despite the severity of this impairment, the court neglected to cite to any post-ADAAA law and instead held that because there was no formal physician diagnosis and not sufficient evidence presented about her limitations (other than the walker that she used), she was not disabled.[95] Similarly, in *Romeo v. Dart*,[96] the plaintiff suffered from multiple sclerosis, which by 2011 had deteriorated to the point where he could not walk longer than fifty yards without a cane, and by 2012, he could no longer move his arms and legs. The court did not cite to any post-ADAAA law. Instead, the court only addressed whether driving is a major life activity because the plaintiff had asked for an accommodation to work at a location closer to his home. The court then relied on old cases that had held that driving was not a major life activity.[97]

b. Other Serious Physical Impairments

Although not mobility impairments, several other cases involved relatively serious impairments. For instance, in *Bryant v. Greater New Haven Transit District*,[98] the court only cited to pre-Amendments law, and did not cite to any of the provisions of the ADAAA. In this case, the plaintiff (who was pro se) had a heart condition that required him to be out of work during the summer of 2009. The court held that the plaintiff did not present sufficient evidence to establish that he had a disability.[99] Similarly, in *Randall v. United Petroleum Transports, Inc.*,[100] the plaintiff had a seizure disorder that prevented him from driving so he asked for an accommodation to allow him to work from home. The court did not cite to any post-ADAAA law; instead, the court relied on pre-ADAAA standards. Furthermore, the court used the plaintiff's testimony against him—the plaintiff was asked if he had a "real" disability that prevented him from working and he replied in the negative, claiming that he "just could not drive." The court also relied on pre-ADAAA cases that had held that driving is not a major life activity.[101] The Amendments do not make clear that driving is a major life activity, but the failure to cite to the "broad interpretation" language and the major bodily functions provision and to only focus on driving as the possible major life activity doomed this case. In *Payne v. Goodyear Tire and Rubber Co.*,[102] the plaintiff had a kidney

93. *Id.* at *3.
94. 956 F. Supp. 2d 417 (W.D.N.Y. 2013).
95. *Id.* at 423.
96. 222 F. Supp. 3d 707, 708, 711–12 (N.D. Ill. 2016).
97. *Id.*
98. 8 F. Supp. 3d 115 (D. Conn. 2014).
99. *Id.* at 140
100. 131 F. Supp. 3d 566, 570–71 (W.D. La. 2015).
101. *See id.*
102. No. 1:16-CV-0945-VEH, 2018 WL 1509394, at *13 (N.D. Ala. Mar. 27, 2018).

transplant and lupus, and yet the court, citing to no post-ADAAA law nor mentioning major bodily functions, held that he was not disabled.[103]

Another case involving a serious impairment was *Dufresne v. O.F. Mossberg and Sons, Inc*.[104] In this case, the employer did not hire the plaintiff because of the results of his physical, which revealed heart disease, fainting spells, high blood pressure, and shortness of breath. The court cited to only pre-ADAAA law in stating that the plaintiff was not disabled. In *Bumphus v. Unique Personnel Consultants*,[105] the plaintiff had spinal stenosis that affected his lifting and post-traumatic stress disorder (PTSD). The court did not cite to any post-ADAAA law. The court held that there was insufficient evidence that the plaintiff was disabled, stating that lifting limitations do not qualify to prove a disability.[106]

Finally, the plaintiff in *Dominelli v. North Country Academy*,[107] had diabetes. The court held that the plaintiff had failed to allege that her diabetes qualified as a disability when she only made conclusory allegations that she had diabetes but did not allege which activities it substantially limited. In so holding, the court cited to no post-ADAAA law. [108]

### c. Mental Impairments

There were several cases that involved depression, anxiety, bipolar disorder, PTSD, or other mental illnesses. The EEOC's implementing regulations specify that some impairments will, in "virtually all cases," result in a determination of coverage.[109] The regulations then state: "[M]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function."[110] Despite this language, the courts in the following cases held that the plaintiffs were not disabled, in part because none of these courts applied existing post-ADAAA rules of construction.

For instance, in *Belton v. Snyder*,[111] the plaintiff had anxiety and depression.[112] The court cited to all pre-ADAAA law including *Toyota*,[113] for the proposition that impairments need to be permanent or long term in order to prevent or severely restrict a major life activity. The court used the fact that the plaintiff was asking for an accommodation of being moved away from a particular supervisor against her to demonstrate that the impairment was not permanent or long term.[114] This might not have been objectionable if the ADA as amended required impairments to be permanent or long-term, but as the EEOC highlighted in its regulations,

103. *See id.*
104. *See* No. 3:14cv21(WIG), 2015 WL 3746349, at *3–4 (D. Conn. June 15, 2015).
105. *See* No. 16-CV-312-SMY-DGW, 2018 WL 4144475 (S.D. Ill. Aug. 30, 2018).
106. *See id.* at *3. Recall that lifting is now considered a major life activity after the Amendments.
107. *See* No. 1:16-cv-00203 (MAD/CFH), 2016 WL 6833992 (N.D.N.Y. Nov. 18, 2016)
108. *See id.* at *3.
109. *See* 29 C.F.R. § 1630.2(j)(3)(ii) (2018).
110. 29 C.F.R. § 1630.2(j)(3)(iii) (2018).
111. 249 F. Supp. 3d 14 (D.D.C. 2017).
112. *Id.* at 20.
113. *See id*. at 24 (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002)).
114. *See id.*

impairments that are not long-term can still be considered disabilities in appropriate circumstances.[115]

Another troubling case involving mental illness was *Lee v. Chicago Transit Authority*,[116] where a pro se plaintiff had several medical issues serious enough that he had to be rushed to the hospital. Specifically, plaintiff suffered from anxiety, depression, sleep apnea, and he had previously had a stroke.[117] But the court stated that there were not enough details in the plaintiff's third amended complaint to allow him to survive a motion to dismiss. In so holding the court neglected to cite to any post-ADAAA statutory law or implementing regulations.[118]

In *Echevarria v. Astrazeneca, LP*,[119] the plaintiff had several impairments that the court held were not disabilities, including depression, anxiety, pituitary adenoma, and thyroid nodules. The court did not cite to any post-ADAAA law.[120] Finally, in *Chamberlain v. Securian Financial Group, Inc*.,[121] the plaintiff was an alcoholic. The court did not cite to any post-ADAAA law or standards, and instead relied on pre-ADAAA cases to hold that he was not disabled. Interestingly, the court did apply post-ADAAA law for the "regarded as" claim.[122]

An interesting variation on these cases is when a court only cites to the Amendments for the statutory definition of major life activity. As stated above, "major life activity" was not defined in the original ADA; it was only defined in the regulations promulgated by the EEOC. When it drafted the Amendments, Congress included the definition of major life activity, and expanded it, in the statute itself. There were **eleven** cases in the dataset, where the only acknowledgement of the Amendments' existence was the correct list of major life activities.

As one example, consider *Alexander v. WMATA*.[123] In this case, the plaintiff claimed alcoholism as his disability. The court cited to the correct list of major life activities but did not cite to any other provisions of the ADAAA, and cited to old, pre-ADAAA cases, such as *Sutton*. The court stated that the plaintiff failed to identify any evidence that he was limited in a major life activity. The court never discussed whether the alcoholism substantially limited a major bodily function (brain).[124]

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115. *See* 29 C.F.R. § 1630.2(j)(1)(ix) (2018) (stating that the six-month transitory definition included in the transitory and minor exception to "regarded as" coverage does not apply to the actual disability prong of the definition—the "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.").

116. 696 F. App'x 752 (7th Cir. 2017).

117. *Id.* at 753.

118. *See id.* at 752–53.

119. 133 F. Supp. 2d 372, 392–93 (D. P.R. 2015).

120. *See id.*

121. *See* 180 F. Supp. 3d 381, 398–99 (W.D. N.C. 2016).

122. *Id*. at 399.

123. 82 F. Supp. 3d 388, 394–95 (D.D.C. 2015), *rev'd*, Alexander v. Washington Metro. Area Transit Auth., 826 F.3d 544, 547–48 (D.C. Cir. 2016) (criticizing the court for not considering the regarded as claim, based on its failure to use pre-ADAAA law and reversing on that ground).

124. *See id.*

### 2. Wrong Law for the "Regarded as" Definition of Disability

A subset of the "ignorance" cases involved opinions where the court erroneously cited to pre-ADAAA law for the plaintiff's "regarded as" claim. I discovered **thirty-four** cases where this happened.

Prior to the Amendments, an individual would only be found to be "regarded as" disabled if the employer perceived the individual to have an impairment that substantially limited a major life activity. Therefore, it was not enough for the employer to know (or falsely believe) that the plaintiff had an impairment; the employer had to believe the impairment was "substantially limiting" as that term was narrowly defined by the case law.[125]

As stated earlier, the Amendments redefined this prong of the disability definition by stating that a plaintiff only has to establish that she was subject to an adverse action prohibited by the Act "because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[126] The focus is now on the employer's motivation for its adverse action,[127] rather than on how serious the employer considered the plaintiff's condition. The failure of courts to appreciate this distinction caused many meritorious claims to be dismissed.

For instance, in *Quarles v. Maryland Department of Human Resources*,[128] the plaintiff had diabetes. Despite having cited to the correct post-ADAAA law for the actual disability prong (but still holding her not disabled), the court cited to pre-ADAAA law on her regarded as claim.[129] The plaintiff claimed that the employer had previously given her an accommodation for her diabetes as evidence of the employer's knowledge of her disability. In response, the court stated that there is no legal authority for the argument that a plaintiff is regarded as disabled simply because at some point, the employer acknowledged to the EEOC that the plaintiff had a disability under the ADA.[130]

Similarly, in *Hammonds v. Dolgencorp, LLC*,[131] the plaintiff had a pacemaker and missed work when she had to have the batteries replaced. The employer was aware of this. The court relied on the pre-Amendments' "regarded as" standard. Despite the fact that her managers knew she had been hospitalized when they terminated her, the court held that the employer had no knowledge of her "disability status" and did not perceive her to be limited in working a broad class of jobs or otherwise disabled.[132]

In *Ferrari v. Ford Motor Company*, the plaintiff's alleged disability was opioid use. The court applied the wrong "regarded as" law, stating that he must be regarded as substantially limited in a broad class of jobs.[133] Finally, in *Echevarria v. Astrazeneca, LP*, the plaintiff had several impairments, including depression, anxiety, pituitary adenoma, thyroid nodules. The court applied the wrong law for

125. Long, *supra* note 35, at 223.
126. 42 U.S.C. § 12102(3)(A) (2012) (emphasis added); Long, *supra* note 35, at 224.
127. Long, *supra* note 35, at 224.
128. No. MJG–13–3553, 2014 WL 6941336 (D. Md. Dec. 5, 2014).
129. *See id.* at *3–4.
130. *Id.* at *4–5
131. No. 4:14-CV-0067-HLM-WEJ, 2015 WL 12591769 (N.D. Ga. Oct. 19, 2015)
132. *Id.* at *7–8
133. *See* 826 F.3d 885, 893 (6th Cir. 2016).

regarded as claim, and held that the employer did not regard the plaintiff as disabled.[134]

### *B. Incompetence*

Several cases were not well litigated by the plaintiff's attorney. To be fair, in many cases, the defendant's lawyer also cited to the incorrect law and standard. But it is unclear to me whether that was out of ignorance, incompetence, or simply trying to avoid disclosing the law that would make their case more difficult to win (at least on the question of disability). Because this study involved cases where the plaintiff lost on the disability issue, the plaintiff's attorney's incompetence was obviously more damaging. As should be obvious, I assume that in the cases above ("Ignorance"), the plaintiffs did not cite to post-ADAAA standards.[135] All of those cases could obviously be considered "incompetence" by the plaintiffs' lawyers because they failed to cite to the law that had been amended in favor of their clients. But in this part, I am referring to other kinds of mistakes made by plaintiffs' attorneys. Some of these mistakes included: Not specifically claiming which major life activities were limited; not identifying the plaintiff's impairment; and not explaining how that impairment substantially limited the major life activity identified. As a whole, I classify these mistakes as "pleading failures." After I discuss those general pleading failures, I will move to a specific kind of failure, which was the plaintiff's failure to use "major bodily functions" in cases where doing so would have made the disability analysis much more straightforward.

#### 1. Pleading Failures

As an initial disclaimer, in some of these cases, the court does grant the plaintiff leave to amend. Initially, I was deleting those cases. A few of them snuck through. But I subsequently realized these opinions are important, even if the plaintiff is able to successfully amend his complaint and survive a subsequent motion to dismiss. They are important because later courts will rely on their holdings regarding what constitutes a plausible pleading for claiming a disability under the ADA. There were **nineteen** cases I identified with pleading failures aside from not citing to the ADAAA at all or not using the "major bodily functions" provision, as will be discussed more below. The reader should keep in mind that this number is undoubtedly much higher if one considers the cases that were not included in the dataset because the court granted the plaintiff leave to amend.

As one example of a pleading failure, in *Weems v. Dallas Independent School District*,[136] despite the plaintiff's restrictions on walking, standing, and his needing to use a cane, the court held that he was not disabled. The mistake made by the plaintiff was that he claimed working as his major life activity rather than walking.[137] Relying on "working" as the major life activity was a very common

134. *See* 133 F. Supp. 2d 372, 392–93 (D. P.R. 2015).

135. As mentioned earlier, many of the cases involved pro se plaintiffs. In total, of the 210 cases in the dataset, 59 involved pro se plaintiffs. In those cases, it is not surprising that the plaintiffs did not properly plead their claims.

136. 260 F. Supp. 3d 719, 729 (N.D. Texas 2017).

137. *See id.* (stating that while the plaintiff mentioned walking, he never developed the argument).

mistake made by plaintiffs in these cases.[138] This is a mistake because working is not the most straightforward way of proving disability.[139]

Some plaintiffs relied on activities that are not likely to be considered major life activities even after the ADAAA broadened that definition. For example, in *Vasnaik v. Providence Health & Services–Oregon*,[140] the plaintiff had a torn meniscus in his knee. He argued that he was substantially limited in "quickness on his feet" which the court held was not a major life activity.[141] Another example was *Scheidt v. Floor Covering Associates, Inc*.,[142] where the plaintiff was pregnant and had a 10-pound lifting restriction. Instead of arguing lifting as the major life activity that was substantially limited, she argued that her ability to reproduce and carry her pregnancy to term were substantially limited.[143] Finally, in *Kelly v. New York State Office of Mental Health*,[144] the plaintiff's impairments included anxiety, depression, and hypertension. She argued several major life activities, including activities that are not normally considered major life activities, such as going to church and skipping.[145]

Another common mistake was plaintiffs whose complaints contained only "conclusory allegations" and did not specify either what their impairment was,[146] which major life activities it limited,[147] or more commonly, did not specify how

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138. *See, e.g.*, Weber v. Don Longo, Inc., No. 15–2406 (KM)(MAH), 2018 WL 1135333, at *9 (D. N.J. Mar, 2, 2018) (plaintiff had an injured hand, but only argued working as major life activity, which still has limitations); Ward v. City of Gadsden, No.: 4:15-CV-0865-VEH, 2017 WL 568556, at *6 (S.D. Ga. Feb. 13, 2017) (holding that pro se plaintiff had not successfully pleaded that he was substantially limited in the major life activity of working when he was diagnosed and treated for depression after his partner died of cancer); Wiseman v. Convention Ctr. Auth. of the Metro. Gov't of Nashville & Davison Cty., No. 3:14 C 01911, 2017 WL 54922, at *11 (M.D. Tenn., Jan. 5, 2016) (arguing working as a major life activity for arthritis in both knees rather than bending or walking).

139. Prior to the ADAAA, proving that the plaintiff was substantially limited in the major life activity of working required the plaintiff to prove that she was substantially limited from a "broad class of jobs." *See* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). The pre-ADAAA regulations promulgated by the EEOC stated a similar rule. However, as stated by the EEOC in the Appendix to the current EEOC regulations on the definition of disability:

> The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.
>
> In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act.

29 C.F.R. § 1630.2 (2018), Appendix.

140. No. 3:14–cv–00027–HZ, 2015 WL 2201915, at *8 (D. Or. May 9, 2015).

141. *Id.*

142. No. 16-cv-5999, 2018 WL 4679582, at *6 (N.D. Ill., Sept. 28, 2018).

143. *Id.*

144. 200 F. Supp. 3d 378 (E.D.N.Y. 2016).

145. *Id.* at 391.

146. *See, e.g.*, Baylets-Holsinger v. Penn. St. Univ., 2018 WL 2749629, at *10 (M.D. Pa. May 2, 2018) (holding that plaintiff did not specify what her disability was; instead, she just claimed that she had stress and anxiety caused by the workplace).

147. *See, e.g.*, Rusk v. Fidelity Brokerage Servs., LLC, No. 2:15-cv-00853-JNP, 2018 WL 3231244, at 7–8 (D. Utah Feb. 7, 2018) (holding that plaintiff with autism did not explain how it substantially limited

the limitations compared to most people in the general population[148] as required by the EEOC regulations.[149]

For example, in *Crowell v. Denver Health and Hospital Authority*,[150] the plaintiff had significant injuries to her back and arm from an auto accident. The court affirmed the district court's grant of judgment as a matter of law to the employer. Even though the plaintiff testified that she could only lift five pounds and could only walk about one hundred feet without pain, the court stated that she did not do enough to show how her limitations compared to most people in the general population.[151]

### 2. Failure to Use "Major Bodily Functions"

As stated above, Congress defined "major life activity" to include "major bodily functions," including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[152] These bodily functions basically track many of the impairments that lower courts held were not disabilities under the original ADA, impairments such as: Diabetes (endocrine); HIV (immune system); cancer (normal cell growth); multiple sclerosis (neurological); high blood pressure (circulatory), etc.

In fact, when the EEOC promulgated regulations under the ADA, it stated that the individualized assessment of some types of impairments will, "in virtually all cases, result in a determination of coverage . . . Given their inherent nature, these types of limitations will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity."[153] The Amendments provide the following examples of "predictable assessments" that should, in "virtually all cases" result in a determination of coverage—many of these are major bodily functions.

> For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair

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any major life activity); Kloth-Zanard v. Malloy, No. 3:15-cv-00124 (MPS), 2016 WL 5661977, at *9 (D. Conn. Sept. 29, 2016) (holding that pro se plaintiff with PTSD, anxiety, and degenerative joint disease did not adequately plead which major life activities were affected by her impairments).

148. *See, e.g.*, Vaughan v. World Changers Church Int'l, Inc., No. 1:13–CV–0746–AT, 2014 WL 4978439, at *9 (N.D. Ga. Sept. 16, 2014) (plaintiff with lumbar sprain, muscle spasms, ankle sprain, did not do enough to compare her limitations to general population).

149. 29 C.F.R. § 1630.2(j)(ii) (2018) ("An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.").

150. 572 F. App'x 650 (10th Cir. 2014).

151. *Id.* at 657–58.

152. 42 U.S.C. § 12102(2)(B) (2012); Long, *supra* note 35, at 222–23.

153. 29 C.F.R. § 1630.2(j)(3)(ii) (2018).

> substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.[154]

In many cases, it is going to be much easier to prove an actual disability by pointing to one of these major bodily functions rather than other major life activities. For instance, someone who has diabetes might, because she correctly monitors her disease through checking her blood sugar and eating properly, not be able to claim that she is substantially limited in a major life activity, if we were limited to this list of major life activities: "Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."[155] But diabetes does substantially impair a person's endocrine system. Relying on the major bodily function of the endocrine system is a much easier and more straightforward way of proving that a person with diabetes is disabled.

I was disheartened by how often the plaintiff failed to plead that their major bodily function was substantially limited when it would have been the easiest and most straightforward method of proving their status as an individual with a disability. In total, I identified **thirty-four** cases where the plaintiffs failed to mention major bodily functions at all.[156]

Using the example just discussed, diabetes, the plaintiff in *Dominelli v. North Country Academy*, had diabetes and made the mistake of not arguing that her diabetes substantially limited her endocrine system; she lost her claim.[157]

In *Hardwick v. John and Mary E. Kirby Hospital*,[158] the plaintiff had a stroke, which left her with dizziness, blurred vision, and confusion. She tried to argue that her concentration was substantially limited, but the much easier route would have been to argue that her stroke affected her brain activity.[159]

In *Kelly v. New York State Office of Mental Health*,[160] the plaintiff's impairments included anxiety, depression, and hypertension. She pointed to several major life activities (including going to church and skipping) but she could have more successfully argued that her mental illnesses affected her brain function

154. 29 C.F.R. § 1630.2(j)(3)(iii) (2018).

155. 29 C.F.R. § 1630.2(i)(1)(i) (2018).

156. Again, this is in addition to all of the cases in the "ignorance" section where the plaintiffs presumably did not cite to the ADAAA at all.

157. No. 1:16-cv-00203 (MAD/CFH), 2016 WL 6833992, at *3 (N.D.N.Y. Nov. 18, 2016).

158. 860 F. Supp. 2d 641 (C.D. Ill. 2012).

159. *See id.* at 642.

160. 200 F. Supp. 3d 378 (E.D.N.Y. 2016).

and that her hypertension affected her circulatory function.[161] Similarly, in *Yinger v. Postal Resort, Inc.*,[162] the plaintiff had a heart condition and had a pacemaker installed, which subsequently became infected. The plaintiff failed to argue that his impairment substantially limited his circulatory function.[163]

Finally, there were several cases where the impairment was a mental illness such as depression, anxiety disorder, bipolar disorder, or PTSD. In all of these cases, the plaintiffs failed to allege that their mental impairment substantially limited brain function, which would have been the most straightforward method of proving disability status and surviving a motion to dismiss or a motion for summary judgment.[164]

### *C. Incorrectly Decided Cases by the Courts: Incompetence or Animus?*

There were many cases where the court's legal analysis is plainly wrong, but it is not clear to me whether the errors were unintentional or whether the court was deliberately trying to dismiss the plaintiff's claims because of animus against the ADA or as a method of docket control. These errors can be broadly divided into several categories: 1) Courts that apply a long-term requirement that does not exist post-ADAAA; 2) courts that view the plaintiff in her mitigated state; 3) courts that improperly apply the major bodily functions provision and/or the provision regarding episodic impairments; and 4) courts that improperly apply the new "regarded as" provision.

#### 1. Long-Term Requirement

Recall that in *Toyota Motor Manufacturing v. Williams*[165] the Court held that an impairment's impact must be "permanent or long term" to qualify as a disability.[166] However, in keeping with Congress's intent to broadly construe the definition of disability, the EEOC's regulations interpreting the definition of disability state: "The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."[167] And

161. *See id.* at 391; *see also* Boughton v. Town of Bethlehem, No. 1:13–CV–01583, 2015 WL 3506077, at *5–6 (N.D.N.Y. Sept. 10, 2015) (plaintiff with uncontrolled hypertension argued that the hypertension substantially limited the major life activities of working, breathing, and sleeping, and did not argue that it substantially limited the major bodily function of the circulatory system).

162. No. 15-1106-JT, 2016 WL 3541744 (D. Kan. June 29, 2016).

163. *See id.* at *8.

164. *See, e.g.*, Casanova v. Wyndham Grand Rio Mar Beach Resort & Spa, 205 F. Supp. 3d 220, 231–32 (D. P.R. 2016) (failing to claim depression substantially limited brain function); Russell v. Phillips 66 Co., 184 F. Supp. 3d 1258, 1269 (N.D. Okla. 2016) (plaintiff suffered from anxiety and major depressive disorder but only argued sleeping and thinking as major life activities that were limited); Evola v. City of Franklin, Tenn., 18 F. Supp. 3d 935, 945 (M.D. Tenn. 2014) (plaintiff failed to claim her PTSD substantially limited her brain function).

165. 534 U.S. 184 (2002).

166. *Id.* at 198.

167. 29 C.F.R. § 1630.2(j)(1)(ix) (2018).

yet, there were **eight** cases that held that a plaintiff did not have a disability because the impairment did not last long enough.[168]

For instance, in *Koller v. Riley Riper Hollis & Colagreco*,[169] the plaintiff had ACL surgery and claimed this affected the plaintiff's ability to sleep and concentrate (but strangely, did not rely on walking). Despite citing to the correct post-ADAAA standards, the court held that the time period was too short to qualify as a disability.[170]

Similarly, in *Sampson v. Methacton School District*,[171] the plaintiff had a meniscus tear in his knee. The court cited to the correct post-ADAAA law but then relied on pre-ADAAA cases, holding that the plaintiff's several months of limitation but non-permanent injury was not a disability.[172]

In *Scott v. Kaneland Community School District #302*,[173] the plaintiff had severe attention deficit disorder and major depression. The court did not discuss the ADAAA interpretive standards in detail, but it did correctly list the post-ADAAA major life activities. The court then held that because his impairments were "temporary," they did not constitute disabilities.[174]

In *Mastrio v. Eurest Services, Inc.*,[175] the court discussed the long-term provision in more detail than some of the other courts. The plaintiff in this case had kidney stones, which led to surgery, followed by a two-month leave of absence. Despite initially citing to the correct post-ADAAA provisions, the court then inexplicably relied on a 1998 case that said that an impairment lasting fewer than seven months is too short of a time period to constitute a disability. The court stated:

> I agree . . . that if the ADA was meant to protect any individual who suffers from some impairment substantially limiting an important life activity, regardless of the length of impairment, anyone who became ill and had to miss work for a period of time would suffer from a disability under the ADA. That result is not plausible because disability must mean something more than a mere illness. Here, the plaintiff suffered a limitation on several major life activities while he was recovering from his kidney stone operation. After that, he has not alleged any continued impairments, and, therefore, has not sufficiently alleged a disability under the ADA.[176]

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168. Keep in mind that this number does not include the many cases where courts dismissed plaintiff's claims based on the "long-term" requirement because they were applying pre-ADAAA law, rather than analyzing the case under the Amendments.

169. 850 F.Supp.2d 502 (E.D. Pa. 2012).

170. *Id.*

171. 88 F. Supp. 3d 422 (E.D. Pa. 2015).

172. *See id.* at 437.

173. Scott v. Kaneland Cmty. Sch. Dist. #302, 898 F. Supp. 2d 1001, 1003 (N.D. Ill. 2012).

174. *See id.* at 1006.

175. Mastrio v. Eurest Servs., Inc., No. 3:13-cv-00564(VLB), 2014 WL 840229 (D. Conn. March 4, 2014).

176. *Id.* at *1, 3–5.

Perhaps most egregiously, in *Boutillier v. Hartford Public Schools*,[177] the plaintiff had a pulmonary embolism that led to an eleven-month leave of absence. Relying on some pre-ADAAA caselaw, the court held that this impairment was too short-term and therefore did not constitute a disability. The court also did not discuss the major bodily functions provision or the episodic provision, both of which would have improved the plaintiff's chances of proving she had a disability.[178]

### 2. Mitigating Measures

Recall that, pre-ADAAA, a court was to view a plaintiff in her mitigated state when determining whether she was disabled.[179] Congress rejected this requirement, stating explicitly that a court should determine whether an impairment substantially limits a major life activity without regard to the ameliorative effects of mitigating measures.[180] And yet, there were **eight** cases I found where the court erroneously considered the plaintiff's mitigating measures when determining whether he was disabled.

For instance, in *DeBacker v. City of Moline*,[181] the plaintiff had depression, anxiety, and hypothyroidism. With regard to his depression, the court erroneously used the rule in *Sutton* that required courts to look at the individual in their mitigated state, and held that, because the plaintiff's medication allegedly ameliorated the effects of his depression, he was not disabled.[182]

Similarly, in *Smart v. Dekalb County, Georgia*,[183] the plaintiff had glaucoma and hypertension, and alleged substantial limitations on seeing and his circulatory function. The court stated that with respect to his hypertension, despite the fact that there were some very high readings that fluctuated greatly, since he had been taking medication to control his hypertension, he was not limited in any major life activity.[184]

There were two cases addressing monocular vision. In *Wilson v. Dollar General Corp.*,[185] despite citing to correct post-ADAAA law, the court cited to one of the *Sutton*-trilogy of cases, *Albertson's, Inc. v. Kirkingburg*,[186] for the proposition that monocular vision is not always a disability because of the brain's ability to develop coping mechanisms to ameliorate the effects of monocular vision. The court then held that the ability of the plaintiff to compensate for monocular vision must be considered.[187] Similarly, in *Cooney v. Barry School of Law*,[188] the plaintiff had monocular vision because of an eye implant that became

177. Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255 (D. Conn. 2016).
178. *See id.* at 273–74.
179. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 472 (1999).
180. *See* 42 U.S.C. § 12102(4)(E)(i) (2012).
181. DeBacker v. City of Moline, 78 F. Supp. 3d 916, 924 (C.D. Ill. 2015).
182. *See id.*
183. Smart v. DeKalb Cty., Ga., No. 1:16-cv-826-WSD, 2018 WL 1089677 (N.D. Ga. Feb. 26, 2018).
184. *See id.* at *7–8.
185. Wilson v. Dollar Gen. Corp., 122 F. Supp. 3d 460, 465 (W.D. Va. 2015).
186. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 555–56 (1999).
187. *See Wilson*, 122 F. Supp.3d at 465.
188. Cooney v. Barry Sch. of L., No. 6:14-cv-106-Orl-22krs, 2016 WL 7130941, at *4–5 (M.D. Fla. March 9, 2016).

disengaged. The court made several errors, including citing to pre-ADAAA law, and not considering whether the plaintiff was substantially limited in the major life activity of seeing (the court only considered reading as the major life activity). Most relevant here, the court also cited to the pre-ADAAA mitigating measures rule in holding that the plaintiff was not disabled. The court stated: "The death knell to Plaintiff's claim of having a disability is the extent that his impairment can be corrected."[189]

Finally, and remarkably, in *Weaving v. City of Hillsboro*,[190] the plaintiff had attention deficit and hyperactivity disorder (ADHD). The court overturned a jury verdict in the plaintiff's favor on the issue of disability. The court stated that the plaintiff had developed compensatory mechanisms to overcome his ADHD, so therefore, he was not disabled.[191]

### 3. Improper Application of Major Bodily Functions Provision and/or Episodic Provision

Above I discussed cases where the plaintiff failed to rely on the "major bodily functions" provision even when it would have been the most straightforward way of establishing that she had a disability.[192] But sometimes, the plaintiff does correctly rely on this provision, and the court incorrectly concludes that it does not apply or that the plaintiff still cannot establish a substantial limitation on the major bodily function. Another provision that is sometimes misinterpreted or ignored by courts is the provision regarding "episodic" or "in remission" impairments. As discussed earlier, the Amendments state that if an impairment is substantially limiting when it is active, it is still considered substantially limiting even when in remission.[193] Some of the cases below improperly apply this provision.

In total in this category, there were **six** cases. Note, however, that this category does not include cases where the plaintiff failed to explicitly plead that the impairment substantially limited a major bodily function or was episodic in nature. Presumably, in some of those cases, the court would have been aware that the plaintiff was bypassing a simpler way of establishing that she had a disability. Given that some of those plaintiffs were proceeding pro se, the failure of the court to apply the correct law is troubling.

In *Rader v. Upper Cumberland Human Resource Agency*,[194] the plaintiff had colitis and diverticulitis. Despite the fact that the plaintiff correctly cited to the "major bodily function" provision (digestive and bowel systems) and the episodic provision, and argued that flare-ups of his impairments periodically prevented him from working because of the effect on his digestive and bowel functions, the court dismissed his claim. The court relied on the plaintiff's doctor's colonoscopy and said that it only revealed "mild diverticulosis" and that the doctor stated that the plaintiff's condition did not render him unable to perform the functions of his job. The plaintiff argued that it was unfair to allow the doctor to make legal conclusions

189. *Id.* at *5.
190. Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014).
191. *Id.* at 1112.
192. *See supra* Section III.B.2.
193. *See* 42 U.S.C. § 12102(4)(D) (2012); Long, *supra* note 35, at 221.
194. 171 F. Supp. 3d 751, 758–59 (M.D. Tenn. 2016).

(and the legal conclusion about his ability to perform his job is completely irrelevant to the limitation of any major bodily functions) but the court disagreed, stating that apart from incapacitating pain, the plaintiff offered no evidence that he was substantially limited in any major life activities, including major bodily functions.[195]

In another troubling case, *Marquez v. Glendale Union High School District*,[196] the plaintiff had brain cancer. The court acknowledged the major bodily functions provision and the regulations that state that cancer will virtually always be limit normal cell growth.[197] But the court nevertheless held that the plaintiff's complaint failed to identify what "substantial" life activities her brain tumor limited. The court stated: "Plaintiff has not indicated whether she experiences any symptoms from her brain tumor, or alleged that such symptoms impact her ability to work."[198] In short, despite citing to the "major bodily functions" provision, the court appears to have completely ignored it in its analysis.

By far, the most troubling case in this category was *Scavetta v. Dillon Companies, Inc*.[199] In this case, the plaintiff had rheumatoid arthritis (RA), and when the case went to trial, the trial court refused the plaintiff's request to instruct the jury on the major bodily functions provision (the plaintiff was arguing that her RA substantially limited her immune and musculoskeletal functions) and only instructed the jury on manual tasks, walking, standing, or working as major life activities. The court correctly noted that RA is listed in the appendix to the regulations as affecting musculoskeletal functions.[200] At trial, the testimony by plaintiff's doctor described RA as an auto-immune disorder and explained how the disease attacks the joints, causing pain, stiffness, swelling and fatigue. But the court stated that doctor's testimony was more about the general progression of the disease and not specific to the plaintiff (although there is no indication that the doctor testified that the plaintiff's RA did not comport with the usual progression of the disease). Affirming the lower court's jury instruction, the Tenth Circuit noted that the plaintiff's testimony was more individualized, but she only focused on her daily activities and not on how her RA affected her major bodily functions (immune system and musculoskeletal system).[201] What the court seemed to miss, however, is that she obviously could not testify to what was happening inside her body (she's not a doctor); she could only testify as to how her RA limited her daily activities. But the entire point of the addition of the major bodily functions provision (along with the episodic provision) was to allow plaintiffs to prove disability even when they cannot point to a visible or tangible manifestation of their impairments.

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195. *See id.*

196. No. CV-16-03351-PHX-JAT, 2018 WL 4899603 (D. Ariz. Oct. 9, 2018).

197. *Id.* at *14–15; *see* 29 C.F.R. § 1630.2(j)(3)(iii) (2018).

198. *Marquez*, No. CV-16-03351-PHX-JAT, 2018 WL 4899603, at *14–15.

199. 569 F. App'x 622, 623–26 (10th Cir. 2014).

200. *See* 29 C.F.R. § 1630.2(i) (2018) ("The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, . . . rheumatoid arthritis affects musculoskeletal functions.").

201. *See Scavetta*, 569 F. App'x at 623–26.

### 4. Applied Regarded as Claim Incorrectly

As discussed earlier, the original language of the regarded as prong provided that an individual was only regarded as disabled "if the defendant regarded him as having 'such an impairment,' i.e., an impairment that substantially limits a major life activity."[202] Because of this language, courts concluded that an ADA plaintiff had to do more than show that a defendant based an adverse decision on the plaintiff's impairment. The plaintiff also had to establish that a defendant mistakenly believed that the plaintiff's impairment substantially limited a major life activity of the plaintiff.[203]

The ADAAA changed this significantly by stating that a plaintiff only has to establish that she was subject to an adverse action prohibited by the Act "because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[204] Earlier, I discussed cases where courts were seemingly unaware that this change to the regarded as prong was made. In this section, I am discussing cases where the court cites to the correct post-ADAAA regarded as rule, but then applies it incorrectly. In some of these cases, courts are still looking for the substantiality of the impairments, despite the italicized language in the amended provision quoted above.

But in some of these cases, the court is erroneously applying an exception to regarded as coverage—the transitory and minor exception. The transitory and minor exception states that the "regarded as" provision does not "apply to impairments that are transitory and minor" and a transitory impairment is defined as an "impairment with an actual or expected duration of 6 months or less."[205] The regulations implementing the ADA provide that:

> *Claims based on transitory and minor impairments under the "regarded as" prong.* It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is ***both*** "transitory" and "minor." Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) ***both*** transitory and minor.

202. Long, *supra* note 35, at 223.
203. *See* Long, *supra* note 35, at 223.
204. 42 U.S.C. § 12102(3) (2012) (emphasis added).
205. 42 U.S.C. § 12102(3)(B) (2012).

> For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.[206]

A common mistake when applying the transitory and minor exception is that courts only apply the transitory prong and not the minor prong. Some of the cases below address this mistake.

Addressing the first mistake first, in *Welch v. Level 3 Communications, LLC*,[207] the plaintiff had multiple sclerosis (MS) and suffered from seizures. The court cited to the correct law but then stated that the employer knew about the plaintiff's MS and her seizures, but was not aware about problems these impairments caused with sleeping, headaches, hearing, and exhaustion. This appears to be looking to the severity of the impairments—whether they substantially limited major life activities. Inexplicably, the court also pointed out that the plaintiff did not need other accommodations besides getting to work (because she couldn't drive after her seizure).[208] The court stated that the employer

> certainly knew that she needed to work from home and had a driving restriction because of her MS and seizure disorder. However, Plaintiff cannot show that [her employer regarded her as disabled] . . . merely by pointing to that portion of the record in which [the employer] admitted that [it] was aware of [plaintiff's] medical restrictions and modified [plaintiff's] responsibilities based on them.[209]

The fact that the employer recognized that the employee had MS and a seizure disorder, and then took an adverse employment action because of those impairments is enough to establish liability. The court clearly reached the wrong result in this case.

The court in *Jordan v. City of Union City*,[210] was fairly explicit about its hostility to the new "regarded as" rule: "The puzzling result is that plaintiffs are now entitled to protection under the ADA without evidence that they are 'disabled' or that an employer regarded them as such. It is enough that an employer took some adverse employment action because of some impairment, whether real or imagined, no matter how insubstantial."[211] Despite the decision-maker in this case stating "You've got some anxiety issues that you need to deal with . . . It's not going to be here," the court stated that plaintiff cannot prove that the decision-maker had knowledge of his anxiety.[212]

The rest of the cases discussed below address the misuse of the transitory and minor exception to the regarded as prong. For instance, in *Randall v. United*

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206. 29 C.F.R. § 1630.15(f) (2018) (emphasis added).

207. *See* No. 15-1338, 2017 WL 2306443 (E.D. Mich. May 26, 2017).

208. *See id.* at *5. The inquiry into what accommodations an employee needs has nothing to do with the definition of disability.

209.Welch, 2017 WL 2306443, at *5 (citing to pre-ADAAA cases).

210. *See* No. 1:13-CV-2960-AT-JFK, 2014 WL 12546919, at *7–9 (N.D. Ga. Dec. 17, 2014).

211. *Id.* (citing Jennings v. Dow Corning Corp., 2013 U.S. Dist. LEXIS 66803, at *22–23 (E.D. Mich. May 10, 2013)).

212. *Id.* Fortunately, this case was reversed on appeal, Jordan v. City of Union City, Ga., 94 F. Supp. 3d 1328, 1336–37 (N.D. Ga. 2015).

*Petroleum Transports, Inc*.,[213] the plaintiff had a seizure disorder that prevented him from driving so he requested an accommodation to allow him to work from home. The court did not cite to the new regarded as rule, but then inexplicably cited to the transitory and minor exception.[214] The plaintiff pointed to emails that demonstrated that human resources knew that he had a medical condition that prevented him from driving for six months, but the court held that this was a transitory impairment without every addressing the minor prong of the defense.[215] A seizure disorder is not "minor" under any definition of that word.

Similarly, in *Eshleman v. Patrick Industries, Inc*.,[216] the plaintiff had surgery to remove a nodule on his lung, which resulted in a two-month leave, followed by an additional leave of absence to recover from a severe upper respiratory infection. The court applied the correct rule but stated that the complaint lacked proof that removing a nodule on his lung was not transitory and minor. The court stated:

> Mr. Eshleman provides numerous conclusory statements but clearly lacks factual allegations that his impairment could be long-term or could substantially limit the nature of his condition. Nowhere in his complaint does Mr. Eshleman allege that Patrick Industries thought his impairment was anything other than a one-time surgery and a one-time severe upper respiratory infection . . . .[217]

Again, it is unclear to me how needing surgery to remove a nodule on one's lung is a "minor" impairment.

## IV. IMPLICATIONS AND FUTURE RESEARCH

So what do we make of all of this? If these cases had been decided in the first five years after the Amendments were passed, I would likely attribute the mistakes to a simple unawareness of or confusion about a new law. But these are cases decided in the second five years (2014–2018) after the Amendments went into effect on January 1, 2009. It is both interesting and troubling to compare my research from the first five years after the Amendments with this project. As stated earlier, my conclusion after reviewing the cases from 2009[218]–2013 was that the courts arrived at the right result on the issue of whether the plaintiff had a disability in almost all of the cases, with only a handful or so cases that were incorrectly decided.[219] In this project, the number of incorrectly decided cases tops 200.

I draw two tentative conclusions from all of this. First, more education is needed. And second, if this trend of incorrectly decided cases continues, we might be headed towards another "backlash" against the ADA. I will discuss each of

213. *See* 131 F. Supp. 3d 566 (W.D. La. 2015).

214. *See id.* at 572. This exception did not exist in the pre-ADAAA regarded as definition.

215. *See Randall*, 131 F. Supp. 3d at 572.

216. No. 17-4427, 2018 WL 3219497 (E.D. Pa., July 2, 2018).

217. *Id.* at *4.

218. Keep in mind that the Amendments did not apply retroactively, so even though they went into effect on January 1, 2009, the facts leading to the alleged ADA violation would have to have occurred after January 1, 2009 in order for the Amendments to be applicable. This means that we did not see many cases decided under the Amendments in 2009.

219. Porter, *Backlash*, *supra* note 2, at 41–46.

these tentative conclusions before turning to additional research that might be helpful in exploring this issue.

### *A. More Education Is Needed*

The number of cases[220] where the courts seemed to be unaware that the ADA was amended was both the most shocking, but perhaps also the easiest problem to fix. Judges needed to be educated on this not-so-new law. To the extent that federal judges attend conferences where they learn about substantive updates in the law, an update on the broadened definition of disability under the ADA as amended should be included.

Education also needs to reach plaintiffs' lawyers and judicial clerks.[221] The latter group (and soon-to-be plaintiffs' lawyers) could be reached by increasing the number of students who learn about disability law while in law school. Students will generally learn about the ADA in an Employment Discrimination course, possibly in a survey-type Employment Law (or Work Law) course, and of course in a stand-alone Disability Law course. In 2013, I surveyed which labor and employment law courses schools across the country were offering.[222] Most schools offer a general Employment Law course;[223] however, these courses are often "survey" courses, covering all of the law regarding the workplace. Therefore, these courses are unlikely to dive deeply into the ADA, if they cover it at all. Most schools also offer an Employment Discrimination course.[224] When I teach Employment Discrimination, I spend three or four ninety-minute classes on the ADA. This is enough time to cover the basics, including the definition of disability, but I am not sure whether this coverage would be enough for my students to become good plaintiffs' lawyers who do not make some of the mistakes mentioned above. Finally, I also surveyed how many schools offered a stand-alone course on Disability Law—that number was seventy-four.[225] Although this is a decent number of schools, it is unclear how often these courses are being offered,[226] and of course, it is unclear how many students take these courses. Improving these numbers would help towards educating future judicial clerks and future plaintiffs' lawyers so they do not make some of the mistakes identified above (especially failing to realize that the ADA was ever amended).

As for educating plaintiffs' lawyers who are not fresh out of law school, we need to do better. We should have more programming on disability law at conferences and CLE events that plaintiffs' attorneys attend. There is also interesting work being done by Professors Marcy Karin, Kevin Barry, and some

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220. In total, between the actual disability prong and the regarded as prong, there were **eighty-eight** total cases where the courts did not mention or cite to the amended ADA at all.

221. Reaching judicial clerks is important because judicial clerks write bench memorandums educating their judges on the issues and the law of a case, and often write the initial draft of the opinion.

222. Nicole Buonocore Porter, *A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 ST. LOUIS U. L. J. 155, 157 (2013).

223. *Id.* at 158 (noting that, of the 195 law schools surveyed, 169 offered an Employment Law course).

224. *Id.* (noting that, of the 195 law schools surveyed, 159 offered an Employment Discrimination Law course).

225. *Id.* at 159 (noting that seventy-four schools offered a stand-alone Disability Law course).

226. For instance, in times of declining law school enrollment and shrinking faculties, electives such as Disability Law might be offered every other year at most.

others to help educate plaintiffs' attorneys. First, in 2013, they wrote an article highlighting some of the pleading problems I have identified here, and providing plaintiffs' attorneys with a roadmap of how to properly plead the disability issue in ADA cases.[227] They are also working on a new initiative, *The ADA Project*, which is an online repository of information to assist plaintiffs' lawyers and people with disabilities bringing ADA claims, to learn about the legislative history of the ADA and ADAAA, and to stay up to date on emerging areas of the law.[228] This is an important step in the right direction.

### *B. Another Backlash?*

Because the cases in the second five years contained more mistakes than the cases in the first five years, it is hard not to see this as a negative trend towards more plaintiffs having their cases kicked on the issue of whether they fall into the ADA's protected class. Even though most of the cases I researched survived on the disability issue (766 out of 976), the results were still troubling and frustrating because the Amendments and implementing regulations specify that this issue should not demand extensive analysis and the focus should be on whether covered entities complied with the statute rather than whether plaintiffs fall into the protected class.[229]

Furthermore, there were some cases where the evidence that the employer had violated the statute was very clear; thus, the holding on the question of coverage is even more troubling because, if the court had correctly decided the disability issue, the plaintiff's claim would have survived.[230] On the other side, if courts determined that the plaintiff's claim failed on the merits, their mistaken conclusions regarding disability coverage serve to needlessly complicate and even corrupt the body of post-ADAAA case law. One of the things I discovered in reading these cases is that courts were reluctant to rely on the statute and regulations alone. In fact, when searching for relevant case law, the courts often relied on pre-ADAAA opinions discussing similar facts, even though those opinions are arguably overruled by

227. Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L. J. 1, 3 (2013).

228. *See* THE ADA PROJECT, http://www.adalawproject.org (last visited Apr. 21, 2019).

229. *See* 29 C.F.R. § 1630.2(j)(1)(iii) (2018) ("The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis.")

230. *See, e.g.*, Fritz v. United Parcel Serv., Inc., No. 15-9178-JWL 2016 WL 4565692, at *7–8 (D. Kan. Sept. 1, 2016) (holding that the plaintiff was not disabled or regarded as disabled even though the facts are clear that he was not hired because his vision, even corrected, did not meet the employer's requirements; the court does not cite to any post-ADAAA law and never requires employer to justify its vision requirement as being job related and consistent with business necessity); Hammonds v. Dolgencorp, LLC, No. 4:14-CV-0067-HLM-WEJ, 2015 WL 12591769, at *7–8 (N.D. Ga. Oct. 19, 2015) (holding that plaintiff was not regarded as disabled when she was terminated while on leave to have the batteries of her pacemaker replaced; despite fact that managers knew she had been hospitalized when they terminated her, the court relied on pre-ADAAA law to hold that the employer had no knowledge of her "disability status" and did not perceive her to be limited in working a broad class of jobs or otherwise disabled).

virtue of the Amendments.[231] Thus, if courts mistakenly hold that a plaintiff is not disabled even when there is another grounds upon which to dismiss the plaintiff's claim, such a mistaken holding will likely steer future courts in the wrong direction if they are not paying close enough attention to notice the mistaken holding.

Finally, as mentioned above, especially for the regarded as claim, several courts used language indicating some displeasure with the broad coverage.[232] Even in cases where the courts allowed the plaintiff to survive summary judgment on the issue of disability, they often still expressed disbelief about a particular impairment qualifying as a disability.[233]

The bottom line is that it is too early to know whether we are headed towards another backlash. With almost eighty percent of the cases coming to the correct conclusion on the issue of disability, I certainly do not want to be an alarmist by prematurely concluding that we are heading towards another backlash against the ADA. Only time will tell.

### *C. Further Exploration*

In addition to what has been revealed above, I plan to explore further some other trends in these cases that I did not have the time or space to address in this piece. First, courts frequently dismissed plaintiffs' claims because they did not present medical evidence to support their allegations that they have a disability.[234] Especially when the disability is obvious (someone walks with a cane or walker) or when the disability is based on the plaintiff's subjective impressions of pain (back impairments, for instance), it is not clear to me why the plaintiff's testimony

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231. Although not part of this Article (because of space limitations), I uncovered forty-one cases where courts, despite citing to the correct post-ADAAA law, also cited to pre-ADAAA cases in applying the law. Professor Deborah Widiss has written about this phenomenon, referring to these pre-ADAAA cases as "shadow precedents." *See generally* Deborah A. Widiss, *Still Kickin' after All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 920–22 (2015).

232. *See, e.g.*, Jordan v. City of Union City, Ga., No. 1:13-CV-2960-AT-JFK, 2014 WL 12546919, at *7–9 (N.D. Ga. Dec. 17, 2014) ("The puzzling result is that plaintiffs are now entitled to protection under the ADA without evidence that they are 'disabled' or that an employer regarded them as such. It is enough that an employer took some adverse employment action because of some impairment, whether real or imagined, no matter how insubstantial.") (citing Jennings v. Dow Corning Corp., No. 12-12227, 2013 U.S. Dist. LEXIS 66803, at *22–23 (E.D. Mich. May 10, 2013)); *see also* Mastrio v. Eurest Servs., Inc., No. 3:13-cv-00564, 2014 WL 840229, at *1, 3–5 (D. Conn. March 4, 2014) (stating that plaintiff who had kidney stones, resulting in surgery and a leave of absence, and despite clear evidence that the termination was because of the leave, the court held that the plaintiff was not disabled because the impairment did not last long enough, and stating: "if the ADA was meant to protect any individual who suffers from some impairment substantially limiting an important life activity, regardless of the length of impairment, anyone who became ill and had to miss work for a period of time would suffer from a disability under the ADA.").

233. *See, e.g.*, Lloyd v. Hous. Auth. of the City of Montgomery, 857 F. Supp. 2d 1252, 1264 (M.D. Ala. 2012) ("At bottom, the expanded definitions of 'disability' and 'major life activities' mean that treatable yet chronic conditions like hypertension and asthma render an affected person just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.").

234. *See, e.g.*, Randall v. United Petroleum Transps., Inc., 131 F. Supp. 3d 566, 570–71 (W.D. La. 2015) (holding that plaintiff with seizure disorder that prevented him from driving, which necessitated an accommodation request to work from home, was not disabled in part because there were no medical records to support his seizure disorder despite the fact that there was a doctor's excuse slip that said plaintiff was "disabled as he cannot drive for 6 months").

alone is not enough to survive summary judgment. Moreover, the EEOC regulations implementing the ADAAA state:

> The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population *usually will not require* scientific, *medical*, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.[235]

The second trend I plan to explore further is how often courts relied on the plaintiff's own testimony to conclude that the plaintiff was not disabled. Because of the stigma attached to the label "disabled" and the lack of plaintiffs' understanding of what the law requires them to prove to support their claims, it is not surprising that some plaintiffs might testify as to their medical condition but then specifically disclaim that they are "disabled." For instance, in *Randall v. United Petroleum Transports, Inc.*,[236] the plaintiff had a seizure disorder that prevented him from driving so he requested an accommodation to allow him to work from home. In dismissing his claim, the court relied in part on the fact that, during his deposition, when he was asked if he had a "real" disability that prevented him from working, he said no, he just couldn't drive.[237] I cannot assert that courts who rely on plaintiffs' testimony in this way are *wrong* as confidently as I can assert that failing to cite to the Amendments is wrong, but I found this trend both interesting and infuriating, and I plan to explore it further in future work.

A third trend I noticed was how often courts focused on the ability of the plaintiff to do his job, rather than focusing on substantial limitations on other major life activities. The case cited in the paragraph immediately above is a perfect example.[238] In *Randall*, the court discussed the fact that the plaintiff was asked in his deposition whether he had a "real" disability that prevented him from working.[239] It is not at all clear to me why that matters, and yet there were dozens of cases like this—where courts strangely focused on whether the plaintiff could do his job and used the fact that he could to support the courts' holding that he was not disabled. This is especially troubling because plaintiffs also have to prove that they are "qualified" as part of their prima facie case—that they can perform the essential functions of their job with or without an accommodation.[240] When courts focus on the fact that the plaintiff can do his job despite his impairment to hold that the plaintiff is not disabled, they are putting conflicting obligations on the plaintiff—to prove that he is disabled enough that he cannot do his job but that he is not so disabled that he is still qualified. Because the first one (proving that he is

235. 29 C.F.R. § 1630.2(j)(1)(v) (2018) (emphasis added).

236. *See Randall*, 131 F. Supp. 3d at 570–71.

237. *See id.*

238. As somewhat of an aside, the reader might notice that I have cited to this case as evidence of all three trends I have identified. In addition, this case is cited as an example where the court failed to cite to any post-ADAAA law. There are many cases in my dataset where courts made several of the errors identified above, not just one.

239. *See Randall*, 131 F. Supp. 3d at 570–71.

240. 42 U.S.C. § 12111(8) (2012).

disabled enough that he cannot do his job) is not a requirement of the statute, the courts' focus on it was troubling.

Finally, there are a couple of questions I was not focused on when conducting this research but might be interesting to explore further: (1) Whether there is any evidence that some courts are committing more errors than other courts (either district courts versus appellate courts or by jurisdiction); and (2) whether certain impairments fare worse than other impairments.

## V. CONCLUSION

Where are we ten years after the ADAAA was passed? Not as far along as Congress and disability rights advocates probably hoped we would be. There are simply too many errors being made by attorneys, judges, and their clerks. Although we should not expect perfection, over 200 cases decided incorrectly is something to take seriously. As mentioned above, educating lawyers (including soon-to-be lawyers) and judges is key to turning this trend around. And yet, despite my focus on the bad cases, the good news is that the majority of courts are still following Congress's mandate for broad coverage of the ADA. I don't want to diminish that progress by only focusing on the bad cases. Having said that, I am troubled by what seems like an increase in the number of cases where courts are *not* following Congress's mandate, and I am especially troubled by those courts who do not seem to know that Congress has issued a mandate in the form of the ADA Amendments Act of 2008. We can and should do better. For my part, I plan to get this message out as often as I can. I hope others will do the same. If some of these education efforts take root, hopefully, a search in five years (covering 2019–2024) will reveal positive progress.