

ADA AMENDMENTS ACT OF 2008: THE EFFECT ON EMPLOYERS AND EDUCATORS

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*Everything went from bad to worse, money never changed a
thing.*

Death kept followin', trackin' us down.

At least I heard your bluebird sing.

Now somebody's got to show their hand.

*Time is an enemy, I know you're long gone, I guess it must be up
to me.*

—BOB DYLAN, *Up to Me*, on BIOGRAPH (Columbia Records
1985).

In response to several Supreme Court decisions and U.S. Equal Employment Opportunity Commission (EEOC) regulations concerning the Americans with Disabilities Act (ADA), the President of the United States signed into law the ADA Amendments Act of 2008 (ADAAA).¹ Congress passed the ADAAA, which will take effect January 1, 2009, in order to correct a trend by the EEOC and Courts of decreasing the breadth of the ADA. Previously, some individuals were unable to fully participate in society because Courts refused to define their condition as a disability. The ADAAA specifically mandates broader coverage of individuals than that previously supported by the Courts and EEOC.² The basic definition

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1. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as amended in scattered sections of 42 U.S.C.).

2. Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008, 74 Fed. Reg. 48,431 (Sept. 23, 2009), available at http://www.eeoc.gov/ada/amendments_notice.html.

of a “disability” remains the same under the ADAAA.³ A disability is a physical or mental “impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.”⁴ The ADAAA alters the interpretation of these terms. While the particular changes affect postsecondary universities in the area of employment, the broadening definition of disabilities affects postsecondary universities in their accommodations of students as well. This Article will first examine the historical provisions and origins of the ADA. Thereafter, it will consider ADA-related issues that have caused disagreement among circuit courts. Following a discussion of various ADA-related issues that still remain unresolved, the Article will specifically address ways for post-secondary educators to address an increasing population of students who qualify under the ADA and ADAAA.

I. HISTORICAL PROVISIONS OF THE ADA

In 1990, President George H. W. Bush signed the ADA⁵ into law, calling the legislation “powerful in its simplicity.”⁶ Former Attorney General Dick Thornburgh called the ADA “a great leap forward in the civil rights movement.”⁷ Congress, in invoking its power to enforce the Fourteenth Amendment as well as to regulate interstate commerce, intended the Act to be “a clear and comprehensive national mandate for the elimination of discrimination for individuals with disabilities.”⁸

The Americans with Disabilities Act of 1990 contains four titles: Title I provides the handicapped with protection from discrimination on the basis of disability of private sector employment. Title II addresses discrimination in the provision of public service by state and local governments. Title III prohibits discrimination in the

3. *Id.*

4. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A)–(C) (2006).

5. 42 U.S.C. §§ 12101–12213, 47 U.S.C. §§ 225, 611 (1990) (amended 2008).

6. Mollie E. Nolan, *A Difference of Opinion: Reconciling the Court's Decision in Tennessee v. Lane*, 30 S. ILL. U. L.J. 357, 367 (2006) (citing Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 179 (1994) (quoting George Bush, Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1068 (July 26, 1990))).

7. *Id.* at 367 (citing Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMP. L. REV. 375, 375 (1991)); See also *id.* at 367 n.82 (“Mr. Thornburgh was the Attorney General when the ADA was enacted and submitted an Amicus Brief in support of the *Lane* Respondents.”).

8. 42 U.S.C. § 12101(b)(1) (2006).

provision of public services and accommodations operated by private entities. Title IV requires that telephone services be made available to persons with hearing or speech impairments.⁹

Title I, which focuses on employment matters, took effect for employers with 25 or more employees on July 26, 1992, and for employers with 15 or more employees on July 26, 1994.¹⁰ Like Title VII of the Civil Rights Act of 1964, Title I mandates that the EEOC handle claims of discrimination based upon disability initially through administrative proceedings.¹¹ Congress charged the EEOC with providing guiding regulations regarding Title I.¹² Further, under Title I, employers are required to provide notice in an “accessible format” to applicants or employees or members of the organization describing the applicable provisions of the ADA.¹³

A. ADA Terms: “Covered Entity,” “Person,” & “Industry Affecting Commerce”

Title I of the ADA states that “[n]o covered entity shall discriminate against a qualified individual on the basis of such disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”¹⁴ Congress has defined “covered entity” as an “employer,” including state employers, under the act.¹⁵ In turn, “employer” includes a “person engaged in an industry affecting commerce who has 15 or more employees.”¹⁶ Completing the picture of who is covered, the statute defines “person” and “industry affecting commerce” to include a *governmental* “industry, business or activity.”¹⁷ “The terms ‘person’ . . . and ‘industry affecting commerce’, shall have the same meaning given such terms in section 2000(e) of this title.”¹⁸ “‘Person’ includes one or more individuals,

9. Jeffrey Ivan Pasek, Stephen V. Yarnell, & Mignon D. Klein, *Compliance by the Private Sector with the Americans with Disabilities Act*, 62 PA. B. ASS’N Q. 139, 139 (1991).

10. 42 U.S.C. § 12111(5)(A) (2006).

11. *Id.* § 12117(a)–(b).

12. *Id.*

13. *Id.* § 12115.

14. *Id.* § 12112(a).

15. *Id.* § 12111(2).

16. *Id.* § 12111(5)(A).

17. *Id.* § 12111(7).

18. *Id.*

governments, governmental agencies, political subdivisions.”¹⁹ “‘Industry affecting commerce’ means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any governmental industry, business, or activity.”²⁰ Although Congress generally included governmental employers in Title I, it exempted the federal government from Title I.²¹ Thus, by including governmental employers in Title I but excluding *federal* governmental employers, Congress was referring *only* to state and local governmental employers. It should also be noted that while Title I requires an employee first to file a charge with the EEOC in a timely manner,²² Title II contains no such requirement.

Title II is the “Public Services” title of the ADA. Congress required the Attorney General of the United States to promulgate regulations implementing Title II.²³ Pursuant to that grant of authority, the Attorney General has determined that Title II applies to employment: “No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.”²⁴

Title II’s operative section provides: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”²⁵ “Public entity” has been defined as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”²⁶ As is evident, that section contains two clauses. First, § 12132 states that “no qualified individual with a disability shall, by reason of such

19. *Id.* § 2000e(a).

20. *Id.* § 2000e(h).

21. *See Id.* § 12111(5)(B) (“‘[E]mployer’ does not include . . . the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . .”).

22. *See id.* § 12117(a) (incorporating the charge requirement from Title VII of the Civil Rights Act of 1964, as amended).

23. *See id.* § 12134(a).

24. 28 C.F.R. § 35.140(a) (1998).

25. 42 U.S.C. § 12132 (2006).

26. *Id.* § 12131(1)(A)–(B).

disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.”²⁷

However, Congress did not define any of the terms in that clause except “public entity” and “qualified individual with a disability.”²⁸ Courts have taken the position that when a statute does not define a term, courts generally interpret the term by “employing the ordinary, contemporary, and common meaning of the words that Congress used.”²⁹

A common understanding of the first clause shows that it applies only to the “outputs” of a public agency, not to “inputs,” such as employment.³⁰ First, employment by a public entity is not commonly considered a “service, program, or activity of a public entity.”³¹ Second, the “action” words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output.³²

This is illustrated in *Zimmerman v. Oregon Department of Justice*, where the Ninth Circuit Court of Appeals considered the hypothetical example of how a Parks Department would answer the question, “What are the services, programs, and activities of the Parks Department?”³³ The court noted that the department might answer, “We operate a swimming pool; we lead nature walks; we maintain playgrounds,” but not, “We buy lawnmowers and hire people to operate them.”³⁴ The court stated, “The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.”³⁵ Similarly, the court considered how a member of the public would answer the question, “What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?”³⁶ The court said that the individual might answer, “I want to participate in the

27. *Id.* § 12132.

28. *See id.* § 12131 (defining terms of Title II).

29. *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

30. *Decker v. University of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997).

31. *Id.*

32. *Id.*

33. *Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999).

34. *Id.*

35. *Id.*

36. *Id.*

Wednesday night basketball league, or find out about the free children's programs for the summer months."³⁷ The court stated that the individual would not logically answer, "I want to go to work for the Parks Department."³⁸

Title III, pertaining to public accommodations and services operated by private entities, discusses the many barriers impeding recovery for employees.³⁹ Title III took effect on January 26, 1992 (18 months from the date of passage of Title I).⁴⁰ Under Title III, the United States Attorney General may seek monetary damages and civil penalties for noncompliance, although the Court must consider any good faith effort to comply by the entity being charged with discrimination.⁴¹

II. ORIGINS OF THE ADA

While the ADA was the most comprehensive legislation of its kind at the time of enactment, Congress had previously passed other legislation attempting to provide greater rights for people with physical and mental disabilities.⁴² Following World War II, Congress prohibited employment discrimination against persons with physical disabilities as part of the Act of June 10, 1948, to assist disabled veterans.⁴³ Subsequently, Congress required all federally financed or constructed buildings to be accessible to people with disabilities through the Architectural Barriers Act of 1968.⁴⁴

The true predecessor of the ADA, however, was the Rehabilitation Act of 1973, which required federal executives and government contractors to develop affirmative action plans for the advancement and promotion in employment of the disabled by the federal government (Section 501) and by federal contractors (Section

37. *Id.*

38. *Id.*

39. Americans with Disabilities Act of 1990, 42 U.S.C. § 12188(b) (2006).

40. *Id.*

41. *Id.*

42. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 387 (1991) (Mr. Weicker was the original sponsor of the ADA in the Senate).

43. Act of June 10, 1948, ch. 434, Pub. L. No. 677, 62 Stat. 351.

44. Act of Aug. 12, 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157 (1988)).

503).⁴⁵ The Rehabilitation Act provides that recipients of federal financial assistance, executive agencies, or the U.S. Postal Service may not discriminate against otherwise qualified individuals on the basis of disability.⁴⁶ Until the passage of the ADA in 1990, Section 504 of the Rehabilitation Act of 1973 was the only other significant federal legislation prohibiting disability discrimination in employment.⁴⁷ The employment provisions found in Title I of the ADA are derived in large part from the Rehabilitation Act of 1973 and its implementing regulations, which were promulgated by the Department of Health, Education, and Welfare in 1977.⁴⁸ Pursuant to specific provisions of the ADA, the U.S. Supreme Court is required to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.⁴⁹ While the ADA and Rehabilitation Act are generally to be interpreted and applied consistently with one another, standards used under the Rehabilitation Act to determine whether a federal employer has violated the section of the Rehabilitation Act that prohibits discrimination in employment will not always be identical to those standards employed in suits brought under the section of the Rehabilitation Act prohibiting discrimination under federal grants and programs or under the ADA generally.⁵⁰ An informative discussion of the outgrowth of the ADA from the Rehabilitation Act can be found in *Helen v. DiDaino*.⁵¹

Congress passed additional legislation in the 1970s and 1980s that improved access to education for handicapped children,⁵² expanded rights and programs for people with developmental

45. See *id.*; see also Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of 29 U.S.C.).

46. See 29 U.S.C. § 794 (2006).

47. *Id.*

48. Rehabilitation Act of 1973, Title V, Pub. L. No. 93-112, 87 Stat. 355, 390 (codified as amended at 29 U.S.C. §§ 791, 793, 794 (2006)); Final Rule, 42 Fed. Reg. 22,676, 22,702 (1977) (codified at 45 C.F.R. §§ 84.1–84.60 (1990)).

49. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

50. *Smith v. Midland Brake, Inc.*, 138 F.3d 1304 (10th Cir. 1998), *reh'g granted*, 158 F.3d 1060 (10th Cir. 1999), *rev'd*, 180 F.3d 1154 (10th Cir. 1999).

51. 46 F.3d 325, 330–335 (3d Cir. 1993).

52. See Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C.); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. § 1415 (2006)).

disabilities,⁵³ demanded voting accessibility,⁵⁴ addressed airline service,⁵⁵ and safeguarded the rights of institutionalized mentally ill individuals.⁵⁶ The Civil Rights Restoration Act of 1987 and Fair Housing Act of 1988 also included provisions prohibiting discrimination against individuals with disabilities.⁵⁷

Despite such pre-1990 federal legislation, individuals with disabilities still lacked protection from discrimination in private employment, as well as access to public accommodations, transportation, and state and local services and activities.⁵⁸ In 1978, through Title IV of the Rehabilitation Act, Congress created the National Council on the Handicapped (Council) as part of the Department of Health, Education, and Welfare.⁵⁹ Congress asked the Council to review all federal laws and programs that affected individuals with disabilities and make recommendations for improvement.⁶⁰ After conducting consumer forums throughout the country, the Council suggested that Congress enact a “comprehensive law” with “broad coverage” and “clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.”⁶¹ The Council’s second report contained the first draft of the ADA.⁶²

III. HISTORY AND PROTECTIVE INTENT

Congress found that the disabled persistently “encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to

53. See Developmental Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 (1988) (repealed 2000).

54. See Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973 (2006).

55. See Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2006).

56. See Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 (2006).

57. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 28 U.S.C. §§ 2341, 2342 (2006)); Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, 3602, 3604–3608, 3610, 3614, 3615, 3619, 3631 (2006).

58. Weicker, Jr., *supra* note 43, at 389.

59. *Id.*

60. *Id.* at 389–390.

61. *Id.* at 390.

62. *Id.* at 391.

lesser services, programs, activities, benefits, jobs, or other opportunities.”⁶³ In the face of these and other distressing facts regarding the plight of disabled Americans, Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁶⁴ The ADA guarantees “broad antidiscrimination protection for disabled individuals—defined as those having physical or mental impairments that substantially limit one or more major life activities.”⁶⁵

Aside from its facially broad—and therefore inclusive (per the 2008 amendment)⁶⁶—language regarding “disability,” the ADA’s legislative history reveals Congress’s remedial intent. Examination of the ADA’s legislative history reveals that Congress heard extensive testimony on the pitiable plight of the disabled.⁶⁷ In response to testimony on disabled persons in the workplace and their potential to contribute if given protections and accommodations, the House Report states that, consistent with the ADA as enacted, “the ADA is to . . . bring persons with disabilities into the economic and social mainstream of American life.”⁶⁸ The report repeatedly revisits this theme.⁶⁹ These reports generally constitute particularly strong evidence of Congress’s intent. As the Court in *Garcia v. United States* stated, “In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.’”⁷⁰ Nothing in the report indicates a desire to exclude large groups of people with medically

63. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(5) (2008).

64. *Id.* § 12101(a)(2)–(7), (b)(1).

65. David W. Lannetti, *Extending Coverage Act of the Americans with Disabilities Act to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 35 TORT & INS. L.J. 155, 157 (1999); see also 29 C.F.R. § 1630 app. (2006) (“The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.”).

66. ADA Amendments Act of 2008, 42 U.S.C.A. § 12102 (West 2008).

67. See generally H.R. REP. NO. 101-485, pt. 2 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 304.

68. *Id.* at 22.

69. See generally *id.*

70. 469 U.S. 70, 76 (1984) (citing *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

recognized disabilities from ADA protection.⁷¹ When selecting which physical and mental impairments to recognize under the “disability” definition, Congress expressly left that list open so that the statute could remain comprehensive as new disabilities emerge.⁷²

Congress was similarly inclusive in its list of “major life activities.”⁷³ “Major life activity” has been defined to include caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities.⁷⁴ Most significantly, as set out in the Congressional report, Congress set an inclusive “limitation” threshold for coverage.⁷⁵ For example, Congress went so far as to say that a person may be “substantially limited” in a major life activity “even if the effects of the impairment are controlled by medication.”⁷⁶ Additionally, Congress declared that impairment does not constitute a disability “unless its severity is such that it results in a ‘substantial limitation’”⁷⁷ Rather than using the term “severity” to describe the requisite level of “limitation” to qualify for ADA coverage, Congress can be understood to have used “severity” to represent a continuum on which the Courts are to place a given impairment. In other words, courts are required to consider whether “this person’s impairment reach[es] the level of ‘substantial’ on the severity continuum[.]”⁷⁸

Perceiving that employers were basing employment decisions on unfounded stereotypes, Congress enacted the Americans with Disabilities Act to level the playing field for disabled people.⁷⁹ Congress acted not only because it recognized problems caused by inconsistent interpretations of the Rehabilitation Act, but also to broaden coverage.⁸⁰ However, the ADA is not designed to allow individuals to advance to professional positions through a back door; rather, it is aimed at rebuilding the threshold of each profession’s

71. See generally H.R. REP. NO. 101-485, pt. 2.

72. See *id.* at 51.

73. See *id.* at 52.

74. See *id.*

75. See generally H.R. REP. NO. 101-485.

76. *Id.*

77. *Id.*

78. *Id.*

79. Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1995).

80. McDonald v. Pa., Dep’t of Pub. Welfare, Polk Center, 62 F.3d 92 (3d Cir. 1995).

front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering through the front door.⁸¹

Courts have stated that the purpose of both the Rehabilitation Act and the ADA is to:

1. Prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all U.S. citizens.⁸²

2. Extend prohibitions against discrimination against the handicapped beyond federal government entities that receive federal funding.⁸³

3. Bar discrimination to ensure handicapped individuals the opportunity to take part in activities enjoyed by others who are not disabled.⁸⁴

4. Ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.⁸⁵

Unfortunately, as explained further below, an alarming trend precipitated the enactment of the ADA Amendments Act of 2008. This trend occurred as a result of the Court's use of its discretion to narrowly define and interpret the Act's terms to exclude—rather than include—individuals from receiving the intended protections.

IV. CONSTITUTIONALITY OF THE AMERICANS WITH DISABILITIES ACT

Pursuant to the “Necessary and Proper Clause” of Article I, Section 8 of the U.S. Constitution, Congress “[s]hall have power to . . . make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by [the] Constitution in the government of the United States, or in any department or officer

81. Price v. Nat'l Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W. Va. 1997).

82. Galloway v. Super. Ct. of D.C., 816 F. Supp. 12 (D.D.C. 1993).

83. Little v. Lycoming County, 912 F. Supp. 809 (M.D. Pa.), *aff'd*, 101 F.3d 691 (3d Cir. 1996).

84. Alexander v. Pathfinder, Inc., 906 F. Supp. 502 (E.D. Ark.), *aff'd in part, rev'd in part*, 91 F.3d 59 (8th Cir. 1995).

85. E.E.O.C. v. Kinney Shoe Corp., 917 F.Supp. 419 (W.D. Va. 1996), *aff'd*, 104 F.3d 683 (4th Cir. 1996).

thereof.”⁸⁶ Once enacted, the law becomes (along with the provisions of the Constitution) the “supreme law of the land.”⁸⁷

In passing the ADA, Congress concluded that, in light of Congressional findings, regulation of employment discrimination was necessary to regulate the national employment market.⁸⁸ The ADA’s regulation of employment discrimination, as applied to the states, was therefore a permissible exercise of Congress’s power under the Commerce Clause.⁸⁹ However, as explained below, Congress was then faced with the ever-impending “Iron Curtain,” the Eleventh Amendment, which had to be overcome in order for the Act to be applicable to the states. To date, the success of this application has not been collectively achieved.

A. *The Iron Curtain of the Constitution*

Historically, individuals are barred from bringing suit against a sovereign without the sovereign’s consent.⁹⁰ Article III of the Constitution gives the federal courts jurisdiction over suits “between states and citizens of another state” and “between a State . . . and foreign . . . Citizens.”⁹¹ In the 1794 case of *Chilsholm v. Georgia*, a South Carolina man loaned money to the State of Georgia during the Revolutionary War, and the man’s executor brought suit to recover the money owed.⁹² The State of Georgia, believing that the man was barred from bringing suit absent Georgia’s consent, failed to appear and defend itself.⁹³ The Court, however, ruled against the State of Georgia, holding that the language of Article III allowed the relief sought by Mr. Chilsholm’s estate.⁹⁴ Within three weeks of the *Chilsholm* decision, both houses of Congress approved what became the Eleventh Amendment. Within one year, enough states had ratified the amendment for it to take effect. The Eleventh Amendment states,

The judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the

86. U.S. CONST. art. I, § 8.

87. *Id.* art. VI, cl. 2.

88. *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 500–501 (5th Cir. 2003).

89. *Id.*

90. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890).

91. U.S. CONST. art. III, §2, cl.1.

92. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1793).

93. *Id.*

94. *Id.* at 479.

United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.⁹⁵

Later, the Court construed the Eleventh Amendment to immunize states from suits brought by their own citizens—despite the amendment’s plain language and readily accessible legislative history.⁹⁶ The Court in *Ex Parte Young*, however, construed the Eleventh Amendment to permit suit against State officials in their official capacity, but only for prospective and injunctive relief.⁹⁷

B. The Fourteenth Amendment and Abrogation of Sovereign Immunity

To a limited degree, the Supreme Court has enabled Congress to abrogate the States’ sovereign immunity via legislation. In *Fitzpatrick v. Bitzer*, the Court held that state sovereignty may be validly abrogated by the enforcement provisions of Section Five of the Fourteenth Amendment.⁹⁸ The Court reasoned that, without Section Five, Section One would be nothing more than “declaratory of the moral duty of the State[s].”⁹⁹ Section Five grants Congress the “power to enforce, by appropriate legislation, the provisions of this article.”¹⁰⁰ Section One of the Fourteenth Amendment bars States from making or enforcing laws that violate due process, equal protection, or privileges and immunities afforded all U.S. citizens by the federal Constitution.¹⁰¹ Section Five of the Fourteenth Amendment gives Congress all power that is necessary and proper to implement the other provisions of the Amendment.¹⁰²

To analyze the validity of a Congressional abrogation, a two-part test has evolved. The Court established the first half of the analysis in *Seminole Tribe of Florida v. Florida*, asking whether Congress has “unequivocally expressed its intent to abrogate the [States] immunity.”¹⁰³ If yes, then has Congress acted pursuant to a valid grant of constitutional authority?¹⁰⁴ The Court announced the second half

95. U.S. CONST. amend. XI.

96. *Hans v. Louisiana*, 134 U.S. 1, 18 (1890).

97. *Ex parte Young*, 209 U.S. 123, 156 (1908).

98. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

99. *Id.* at 455.

100. U.S. CONST. amend. XVI, § 5.

101. *Id.* amend. XIV, § 1.

102. *Id.* amend. XIV, § 5.

103. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

104. *Id.* at 59.

of the test, known as the “congruence and proportionality test,” in *City of Boerne v. Flores*, reasoning that “[w]hile preventative rules are sometimes appropriate remedial measures, congruence and proportionality must exist between the means used and the ends used to be achieved.”¹⁰⁵

Title II of the ADA prohibits a qualified individual with a disability from being excluded from participation in or being denied the benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity because of the individual’s disability.¹⁰⁶ In *Bowers v. National Collegiate Athletic Association*, the Third Circuit Court of Appeals held that Title II of the ADA was a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found to exist both in education and in other areas of governmental services (many of which implicated fundamental rights).¹⁰⁷ Thus, Congress acted within its Fourteenth Amendment authority in abrogating sovereign immunity under Title II of the ADA.¹⁰⁸

This demonstrates that Title II of the ADA is a valid exercise of Congress’s powers under the Fourteenth Amendment, and therefore not an unconstitutional infringement upon powers reserved to states under the Tenth Amendment,¹⁰⁹ which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In *Goonewardena v. New York*, the U.S. District Court for the Southern District of New York upheld Congress’s abrogation of states’ sovereign immunity in the ADA section that prohibited discrimination by governmental entities in their operation of public services, programs, and activities.¹¹⁰ The court reasoned that the abrogation was a valid exercise of Congress’s power under the enforcement section of the Fourteenth Amendment, where it was a congruent and proportional response to the risk of discrimination against disabled individuals in public education.¹¹¹

105. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

106. 28 C.F.R. § 35.140(a) (1998).

107. *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F. 3d 524 (3d Cir. 2007).

108. *Id.*

109. *Bailey v. Anderson*, 79 F. Supp. 2d 1254 (D. Kan. 1999).

110. *Goonewardena v. New York*, 475 F. Supp. 2d 310 (S.D.N.Y. 2007).

111. *Id.*

Although Congress has enjoyed success with respect to the ADA's application to the states, the judiciary has systematically eroded the protections enacted since the ADA's inception, finding fewer and fewer grounds upon which to force states to comply with these rules. For example, in *Board of Trustees of University of Alabama v. Garrett*, the Supreme Court held that: (1) States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational; and (2) The legislative record of the ADA fails to show that Congress identified a pattern of irrational state discrimination in employment against the disabled, and thus did not support abrogation of the states' Eleventh Amendment immunity from suits for money damages under Title I of the ADA.¹¹² Furthermore, one U.S. district court has held that the class of individuals protected by the ADA is not entitled to heightened constitutional protection under the equal protection clause of the Fourteenth Amendment, even though Congress stated in its findings relating to the ADA that individuals with disabilities are a "discrete and insular minority."¹¹³ However, the Supreme Court held in January 2006 that, insofar as Title II creates a private cause of action for damages against the state for conduct that violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.¹¹⁴

V. ADMINISTRATIVE

The ADA and the Rehabilitation Act are interrelated congressional mandates designed to remedy discrimination against disabled individuals.¹¹⁵ Congress has granted the U.S. Department of Justice (DOJ) rulemaking authority to enforce certain subsections of Title II of the ADA.¹¹⁶ Courts have also looked to EEOC regulations to interpret the definition of disability in the context of claims under

112. *Bd. of Trusts of Univ. of Ala. v. Garrett*, 531 U.S. 356, (2001).

113. *Brown v. N.C. Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), *aff'd*, 166 F.3d 698 (4th Cir. 1999).

114. *United States v. Georgia*, 546 U.S. 151 (2006); *see also Tennessee v. Lane*, 541 U.S. 509 (2004).

115. *Shepherd v. U.S. Olympic Comm.*, 464 F. Supp. 2d 1072 (D. Colo. 2006), *aff'd sub nom.*, *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191 (10th Cir. 2008).

116. *See Americans with Disabilities Act of 1990*, 42 U.S.C. §§ 12134, 12186 (2006).

Title I of the ADA because the ADA authorizes the EEOC to issue regulations interpreting the ADA.¹¹⁷

Although Congress expressly authorizes the EEOC to issue regulations interpreting the ADA, many Courts have used their judicial discretion to interpret the ADA and disregard the EEOC's guidance. Congress has provided a section-by-section analysis and accompanying lengthy commentary called the Interpretive Guidance on Title I of the ADA.¹¹⁸ Both the Analysis and the Interpretive Guidance provide further interpretation of the ADA and useful illustrations of how it will work in practice.¹¹⁹ It is important to remember that the ADA expressly requires its provisions to be interpreted in a way that prevents imposition of inconsistent or conflicting standards for the same requirements under the ADA and the Rehabilitation Act.¹²⁰ Further, case law permits reliance under the ADA on the Rehabilitation Act's "otherwise qualified" requirement in determining whether an employee would be "qualified" under the ADA.¹²¹

Again, the alarming trend is the clear disregard of Congress's express intent. The Supreme Court's decisions have consistently disregarded Congress's grant of rule-defining authority to several various administrative agencies, including the EEOC, Department of Labor (DOL), Department of Justice (DOJ), and Department of Transportation (DOT). Courts have essentially usurped the power that Congress expressly granted to these agencies. For instance, courts have routinely stated that EEOC's interpretative guidelines "are not controlling upon Courts by reason of their authority; nevertheless, where consistent with the ADA, they do constitute a body of experience and informed judgment to which Courts and litigants may properly resort for guidance."¹²² Another court stated

117. See *e.g.*, *Gonzalez v. Sup. Ct. of Tex.*, No. A-04-CA-750-SS, 2006 U.S. Dist. WL 897745, at *3 (W.D. Tex. Jan. 31, 2006) (citing *Waldrup v. Gen. Elec. Co.*, 325 F.3d 652, 654 (5th Cir. 2003)); 42 U.S.C. § 12116 (2006).

118. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630 app. (2009).

119. *Id.*

120. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §§ 1630.1(c)(1), 1630 app. (2009).

121. *Munoz v. H & M Wholesale, Inc.*, 926 F. Supp. 596 (S.D. Tex. 1996); *Harding v. Winn-Dixie Stores, Inc.*, 907 F. Supp. 386 (M.D. Fla. 1995).

122. *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997); *Porter v. U.S. Alumoweld Co., Inc.*, 125 F.3d 243 (4th Cir. 1997).

that administrative regulations regarding the ADA are not controlling upon courts but merely provide interpretive guidance.¹²³

VI. THE PRIMA FACIE CASE AND EMPLOYER DEFENSES

The following facts and circumstances tend to establish that an unsuccessful job applicant has a valid cause of action for employment discrimination based on disability. These elements of proof are generally required to establish a prima facie case of discriminatory failure to hire or to rebut the defendant employer's articulation of a legitimate nondiscriminatory reason for the employment action.¹²⁴ Some of the elements can also give rise to potential liability under state law or under related federal laws.¹²⁵ Each element is discussed, in turn, below:

1. Plaintiff's disability falls within the meaning of "disability" in the ADA;
2. Record exists of plaintiff's impairment, or plaintiff is generally perceived to have such impairment;
3. Plaintiff's disability is not specifically excluded by the statute;
4. Plaintiff's application for employment followed appropriate application procedures;
5. An open position existed at the time of application;
6. Plaintiff's qualifications for the sought position fall within the meaning of "qualification" in the ADA;
7. Plaintiff's requests for accommodation are reasonable and do not impose an undue burden on employer;
8. Defendant subsequently hired a nondisabled applicant; and
9. Employer gave pretextual reasons for not hiring plaintiff.

A. Plaintiff's Disability Falls Within the Meaning of "Disability" Under the ADA

Certain physical or mental impairments substantially limit major life activity. These physical or mental impairments include: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body (such as

123. *Dey v. Milwaukee Forge*, 957 F. Supp. 1043 (E.D. Wis. 1996).

124. *See* 45A AM. JUR. § 509 (2009) (setting forth elements of prima facie employment discrimination case based on disability).

125. 29 C.F.R. §§ 1630.2(b)–(c) app. (2009).

the nervous and musculoskeletal systems, the respiratory organs, the cardiovascular system, or the glands); and (2) any mental or psychological disorder (such as mental retardation, organic brain syndrome, emotional illnesses, and learning disabilities).¹²⁶

Under the regulations promulgated pursuant to the ADA, an individual is considered “disabled” even if he or she uses medication or some prosthetic device that tends to mitigate the effects of the impairment.¹²⁷ For example, hearing loss corrected through a hearing aid would still be considered an impairment, as would an individual with epilepsy controlled through medication.¹²⁸

With respect to the requirement that an impairment substantially limit a major life activity, the EEOC Regulations follow the Rehabilitation Act’s definition in referring to basic activities a nondisabled person could perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, breathing, learning, working, sitting, standing, and lifting.¹²⁹ While most of these disabilities are open and obvious—and therefore directly related to easily documented physical disabilities—it is important to note that, for postgraduate universities, the critical trait is learning. For such institutions, therefore, the product is a learned student. The fact that a student can’t learn the material is not a disability. The issue is the amount of support the university must give to achieve its mission.¹³⁰

B. Record Exists of Plaintiff’s Impairment, or Plaintiff Is Generally Perceived to Have Such Impairment

With respect to the third alternate definition of a disabled individual as one who is regarded as having a physical or mental

126. 29 C.F.R. §§ 1630.2(h)(1)–(2) (2009). For further discussion of the definition of physical or mental impairment, see 2 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL §§ 7:93–7:96 (2006).

127. See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. §§ 1630.2(g)–(m) app. (2009).

128. 29 C.F.R. § 1630.2(h) app. (hearing loss); 2 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL § 7:96 (epilepsy).

129. 29 C.F.R. § 1630.2(i). For further discussion of the definition of substantial limitation on major life activity, see 2 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL §§ 7:97–7:122 (2006).

130. See, e.g., WESTERN KY. UNIVERSITY, ADA POLICY ADVISORY STATEMENT, <http://www.wku.edu/Dept/Support/Legal/EOO/ADAAdvisoryPolicyCommittee.htm>; *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 145–46 (D. Mass. 1997) (discussing relationship between accommodations and academic standards).

impairment that substantially limits one or more major life activities, the focus is on the “attitudes of others toward such impairment.”¹³¹

Even if an individual’s impairment does not substantially limit a major life activity, that individual is nonetheless impaired under the ADA if the impairment is perceived by an employer to constitute a substantially limiting impairment.¹³² In determining whether an impairment is “substantially” limiting, the factors to be considered include: the nature and severity of the impairment; the length of time the impairment continues or is expected to continue; and the permanent or long-term impact that might result from the impairment.¹³³

C. Plaintiff’s Disability Is Not Specifically Excluded by Statute

The ADA specifically excludes from coverage a number of categories, such as transvestites, homosexuals, and compulsive gamblers.¹³⁴ Also excluded are current drug users, persons with other sexual behavior disorders (such as voyeurism, exhibitionism, and transsexualism), kleptomaniacs, and pyromaniacs.¹³⁵ Importantly, EEOC regulations have similarly recognized certain other conditions that will not be considered covered impairments, including such things as physical characteristics (eye color, hair color, left-handedness), predisposition to certain illnesses or diseases, pregnancy, personality traits such as a quick temper (unless related to a mental or psychological disorder), or environmental or economic disadvantages, such as poverty or lack of education.¹³⁶

D. Plaintiff’s Qualifications for a Position Sought Fall Within the Meaning of “Qualification” in the ADA: Plaintiff Satisfies Requisite Skill, Experience, Education, and Other Job-Related Requirements; Plaintiff Is Able to Perform “Essential Functions” of the Position, with or Without Reasonable Accommodation

As part of a prima facie case, a plaintiff must prove that he or she was “qualified” for the position sought within the meaning of the

131. 29 C.F.R. § 1630.2(l) (2009).

132. 29 C.F.R. § 1630.2(k) app.

133. 29 C.F.R. § 1630.2(j)(2).

134. 29 C.F.R. § 1630.3.

135. See 42 U.S.C.A. §§ 12208, 12211 (West 2009).

136. See 29 C.F.R. § 1630.2(h) app.

ADA.¹³⁷ Under the ADA, a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”¹³⁸ The governing regulations similarly provide that a qualified individual is one “who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”¹³⁹ However, the regulations specifically provide that the employer’s determination of qualification must be based on the individual’s status at the time of the employment action; it cannot be based on some speculation about the applicant’s future ability or inability to perform the job.¹⁴⁰ The employer also may not consider the possibility that the individual will cause an increase in insurance premiums or workers’ compensation premiums.¹⁴¹

A “qualified” applicant is thus one who meets the general knowledge, skill, and education requirements for the job, and who, despite having a disability, can perform the essential job functions of the position, with or without reasonable accommodation. The “essential functions” of a particular job are those that the employer in fact requires to be performed, and those that, if removed, would fundamentally alter the position.¹⁴² The regulations indicate that the determination of whether a function is essential will be made on a case-by-case basis, taking into account all relevant evidence.¹⁴³

137. For further discussion of the definition of a qualified individual with a disability, see 2 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL §§ 7:123–7:134 (2006).

138. 42 U.S.C.A. § 12111(8) (West 2009).

139. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(m) (2009).

140. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(m) app. (2009).

141. *Id.*

142. 29 C.F.R. § 1630.2(n) app. For further discussion of the definition of essential functions, see 2 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL §§ 7:128–7:134 (2006).

143. 29 C.F.R. § 1630.2(n) app.

E. Plaintiff's Requests for Accommodation Are Reasonable and Do Not Impose an Undue Burden on Employer

Employers are required to make “reasonable accommodations” for applicants or employees—unless doing so would cause the company undue hardship, which is defined as “significant difficulty or expense.”¹⁴⁴ The following factors will be considered: nature of the accommodation; cost of the accommodation; financial resources of the company (parent and subsidiary); number of employees; impact on earnings and resources; overall size of the business; and type of operation.¹⁴⁵

If a disabled individual poses a direct threat to the health or safety of that individual or to others, the employer may lawfully decline to hire that person.¹⁴⁶ However, the employer must identify the specific risk, and the risk must be significant rather than merely speculative or remote, i.e., the risk cannot be removed through reasonable accommodation.¹⁴⁷ Employers cannot rely on generalized fears about risks to a disabled person in the event of an evacuation or other emergency.¹⁴⁸

F. Defendant Subsequently Hired a Nondisabled Applicant; Employer Gave Pretextual Reasons for Not Hiring Plaintiff

Case law is well-established regarding what a plaintiff must prove in order to establish a prima facie case of unlawful discrimination under various federal employment discrimination statutes.¹⁴⁹ Based on these cases, a claim under the ADA must initially show that: (1) plaintiff has a disability; (2) plaintiff was qualified for the position(s) sought; and (3) plaintiff “suffered an adverse employment action because of that disability.”¹⁵⁰ Note that direct proof of discriminatory intent is not required to establish a

144. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9(a) (2009).

145. 42 U.S.C.A. § 12111(10) (West 2009); 29 C.F.R. § 1630.1(p) (2009).

146. 29 C.F.R. § 1630.15(b)(2).

147. *Id.* § 1630.2(r).

148. *Id.* § 1630.2(r) app.

149. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (Title VII of Civil Rights Act of 1964); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–254 (1981) (same).

150. *Taylor v. Phoenixville Sch. Dist.*, 113 F. Supp. 2d 770, 773 (E.D. Pa. 2000).

prima facie case. In fact, the burden of establishing a prima facie case “is not onerous.”¹⁵¹

If an employee has direct evidence of discrimination in violation of the ADA, the employee then bears the burden of proving: (1) that he or she is disabled, and (2) that he or she is otherwise qualified for the position, despite his or her disability, either (a) without accommodation from the employer, (b) with an alleged essential job requirement eliminated, or (c) with a proposed reasonable accommodation.¹⁵² The employer bears the burden of proving either that (1) a challenged job criterion is essential, and therefore a business necessity, or (2) a proposed accommodation will impose an undue hardship on the employer.¹⁵³ Under the ADA, the plaintiff bears the burden of proving that he or she is a “qualified individual with a disability”—a person who, with or without reasonable accommodation, can perform the essential functions of his or her job.¹⁵⁴

Under the framework articulated by the Supreme Court in *McDonnell Douglas v. Green*, an ADA plaintiff first must establish a prima facie case by proving by a preponderance of the evidence that (1) she applied for an available position for which she was qualified, but (2) she was rejected under circumstances that give rise to an inference of unlawful discrimination.¹⁵⁵ Once the plaintiff has established a prima facie case, the burden then shifts to the defendant employer to “articulate” a legitimate nondiscriminatory reason for the employment action in question (e.g., non-hiring). This is simply a burden of production, as opposed to a burden of proof. In other words, the employer must simply present some evidence of a nondiscriminatory reason for the action taken.¹⁵⁶ The burden then shifts back to the plaintiff to prove to the satisfaction of the jury that the employer’s stated reason for the employment action is “pretextual”—in other words, the employer’s stated reason was not the true reason for what was, in fact, a discriminatory act.¹⁵⁷

151. *Burdine*, 450 U.S. at 253.

152. *See Taylor*, 113 F. Supp. 2d at 776 n.3.

153. *Id.*

154. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2006), *construed in Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

155. *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 30 (1st Cir. 2002).

156. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973).

157. *Id.*

Courts have also implemented this approach in a number of cases where plaintiffs have asserted claims under state handicap discrimination statutes.¹⁵⁸ It is important to keep in mind, however, that “[t]he ultimate burden of proving that the employer engaged in intentional discrimination remains at all times with the complainant.”¹⁵⁹

VII. CASE HISTORY REVIEW

While plaintiffs have urged federal courts to adopt an expansive interpretation of who is a “qualified individual” with a “disability” under Title I of the ADA, the Supreme Court continues to construe this definition narrowly. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court restricted the definition of “disability,” holding that an employee cannot establish that he or she is disabled based solely on evidence of a medical diagnosis.¹⁶⁰ Rather, the employee must present evidence that the limitation resulting from the impairment is substantial “in terms of [the employee’s] own experience.”¹⁶¹ The Court stressed the necessity of performing an individualized assessment of an employee’s impairment, as the effects of particular medical conditions (such as the employee’s carpal tunnel syndrome, for instance) can vary widely from person to person.¹⁶² The Court also noted that the impairment’s impact must be permanent or long-term.¹⁶³

In other instances, courts have challenged administrative agencies in defining the terms of the ADA and struggled among themselves as to who is and who is not covered by the act. In its regulations implementing Title I, the EEOC lists “working” as a major life activity.¹⁶⁴ However, in *Sutton v. United Airlines, Inc.*, the U.S. Supreme Court questioned whether working is, in fact, a major

158. See, e.g., *Shaw v. W.M. Wrigley, Jr. Co.*, 183 Ga. App. 699 (1987); *Deerson v. Metal-Matic, Inc.*, 423 N.W.2d 393 (Minn. 1988); *Clowes v. Terminix Int’l, Inc.*, 109 N.J. 575 (1988); *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428 (Minn. 1983).

159. *Acorn Corrugated Box Co. v. Ill. Human Rights Comm’n*, 181 Ill. App. 3d 122, 137 (1989) (handicap discrimination).

160. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

161. *Id.*

162. *Id.* at 199.

163. *Id.* at 198.

164. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i) (2009).

life activity.¹⁶⁵ After noting some “conceptual difficulty” in defining “major life activity” to include work, the Court did not reach this issue because the parties did not dispute it.¹⁶⁶ The Court again raised this issue and declined to reach it in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.¹⁶⁷

The Court’s curious commentary in *Sutton* has provoked discussion in some circuits regarding whether working is a major life activity. Based on the plain text of the ADA, the Fifth Circuit has held that working is “without a doubt” a major life activity.¹⁶⁸ The Eleventh Circuit continues to follow prior circuit precedent, holding that working is a major life activity because the Supreme Court has not expressly held to the contrary.¹⁶⁹

With respect to working, the EEOC defines “substantially limits” as significantly restricting one’s ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person who possesses comparable training, skills, and abilities.¹⁷⁰ In *Burns v. Coca-Cola Enterprises, Inc.*, plaintiff was substantially limited in the major life activity of working, where his injury precluded him from performing at least 50% of the jobs that he was qualified to perform given his educational background and experience.¹⁷¹ Simple inability to perform a particular job is not sufficient to be classified as disabled under the ADA.¹⁷²

VIII. INCONSISTENCIES BETWEEN THE CIRCUITS

The federal circuit courts have provided anything but clarity and consistency when interpreting and applying the ADA. For example, the Fifth, Sixth, Eighth and Ninth Circuits have held that individuals who are merely regarded as disabled are not entitled to reasonable

165. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 492 (1999).

166. *Id.*

167. 534 U.S. at 200.

168. *See E.E.O.C. v. R.J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999).

169. *See Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000), *reh'g en banc denied*, 251 F.3d 165 (11th Cir. 2001); *see also Peters v. Mauston*, 311 F.3d 835 (7th Cir. 2002) (holding that working is a major life activity).

170. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(3)(i) (2009).

171. *See Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 254 (6th Cir. 2000).

172. 29 C.F.R. § 1630.2(j)(3)(i).

accommodation.¹⁷³ In contrast, the Third, Sixth, and Tenth Circuits have held that an employer must provide reasonable accommodations to employees that the employer regards as disabled.¹⁷⁴ Arguably, the First Circuit implicitly held that individuals who are “regarded as” disabled are entitled to reasonable accommodation. In *Katz v. City Metal Co.*, the First Circuit Court of Appeals held that a directed verdict should not have been entered for the employer because the employee may have been regarded as disabled and may have been able to prove that he could perform his job with reasonable accommodations.¹⁷⁵

A. *Inconsistency I: Essential Job Functions*

Can an employee who becomes totally disabled—and therefore can no longer perform “essential job functions”—bring an ADA claim alleging discrimination as a qualified individual with a disability? Federal circuit courts have failed to agree.¹⁷⁶ In the context of Title I of the ADA, a majority of Courts have determined that a former employee who is currently totally disabled is not a qualified individual with a disability within Title I of the ADA.¹⁷⁷

1. *The Majority Position*

A majority of courts has determined that the meaning of the term “qualified individual” is unambiguous and thus reject the contention that the plain language of Section 12112 is anything other than a clear expression of Congress’s intent “to limit the scope of the Act to only

173. See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231 (9th Cir. 2003); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000).

174. See *D’Angelo v. ConAgra Foods, Inc.*, 398 F.3d 469, 479 (11th Cir. 2005); *Kelly v. Metallics W., Inc.*, 410 F.3d 670 (10th Cir. 2005); *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751 (3d Cir. 2004).

175. *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996).

176. *Hatch v. Pitney Bowes*, 485 F. Supp. 2d 22, 34 (D.R.I. 2007).

177. See *Weyer v. Twentieth Century Fox*, 198 F. 3d 1104, 1110 (9th Cir. 2000); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997), *rev’d on other grounds*, 121 F.3d 1006 (6th Cir. 1997) (en banc); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996); *Gonzales v. Garner Food Serv., Inc.*, 89 F.3d 1523, 1531 (11th Cir. 1996); *Beauford v. Father Flanagan’s Boys’ Home*, 831 F.2d 768 (8th Cir. 1987).

job applicants and current employees capable of performing essential functions of available jobs.”¹⁷⁸

2. *The Minority Position*

In contrast, the Second and Third Circuits have held that a totally disabled person who is no longer employed is nevertheless a “qualified individual” who may bring a discrimination claim under the ADA.¹⁷⁹ These Courts have concluded that the statutory language of Title I is ambiguous. The “ambiguity” is inferred from the “disjunction between the explicit rights created by Title I of the ADA and the ostensible eligibility standards for filing suit under Title I.”¹⁸⁰ Recognizing that the scope of Title I’s prohibition of discrimination extends to the provision of fringe benefits, including post-employment and disability benefits, these courts have refused to assign a plain meaning definition to the qualified individual eligibility requirement because it would effectively “undermine the plain purpose of sections 12112(a) and (b)(2): to provide comprehensive protection from discrimination of fringe benefits.”¹⁸¹

Reasoning that “the definition of ‘employee’ under the ADA parallels that under Title VII and was intended to be given the ‘same meaning,’”¹⁸² the Second and Third Circuits found that the “locus of ambiguity” centered on “whether the ADA contains a temporal qualifier of the term ‘qualified individual with a disability.’”¹⁸³ Discerning no temporal qualifier, these courts determined that the term could reasonably be read to either include or exclude former employees who are totally disabled.¹⁸⁴ To resolve this ambiguity, these courts concluded that a narrow reading would undermine the ADA’s underlying rationale of preventing discrimination regarding, among other things, fringe benefits.¹⁸⁵

178. *Gonzales*, 89 F.3d at 1528; *see also Weyer*, 198 F.3d at 1112 (concluding that to hold otherwise would “essentially render[] the qualified individual requirement under the Act, that an individual with a disability hold or desire a position the essential functions of which he or she can perform, meaningless”) (quoting *Gonzales*, 89 F.3d at 1529); *Weyer*, 198 F.3d at 1112 (announcing agreement with the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits).

179. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of N.Y.*, 142 F.3d 58, 66–70 (2d Cir. 1998).

180. *Ford*, 145 F.3d at 606.

181. *Castellano*, 142 F.3d at 68.

182. *Id.* at 69.

183. *Ford*, 145 F.3d at 606.

184. *Id.*

185. *Id.*

B. Inconsistency 2: Defining the Term “Regarded As”

Must reasonable accommodations be afforded to an employee who falls within any of the ADA’s definitions of disabled, including “regarded as?”¹⁸⁶ The Fifth, Sixth, Eighth, and Ninth Circuits have determined that the ADA’s reasonable accommodation requirement does not apply to the “regarded as” category of disabled individuals.¹⁸⁷ In contrast, the Third Circuit held that, under the plain language of the ADA, employers are obliged to provide reasonable accommodations for individuals falling within any of the ADA’s definitions of disabled, including those “regarded as” being disabled.¹⁸⁸ The Eleventh Circuit adopted the Third Circuit’s reasoning in *D’Angelo v. ConAgra*.¹⁸⁹ The First Circuit has also addressed the issue but has only done so indirectly, assuming—without expressly holding—that the ADA requires reasonable accommodations for employees regarded as disabled.¹⁹⁰

C. Inconsistency 3: Requirements Transfer to Another Position

In light of 42 U.S.C. 12111(9)(B), which outlines the scope of reasonable accommodations required of an employer, there has been uncertainty as to whether an employer is required to reassign a qualified, disabled employee to a vacant equal position when such a decision would be in direct opposition to an existing seniority rule. The Tenth Circuit in *Smith v. Midland Brake, Inc.*¹⁹¹ and the D.C. Circuit in *Aka v. Washington Hospital Center*¹⁹² contend that it violates the ADA by forcing disabled employees to compete with non-disabled employees. The Seventh Circuit in *EEOC v. Humiston-Keeling, Inc.*,¹⁹³ the Eighth Circuit in *Cravens v. Blue Cross and Blue*

186. *D’Angelo v. ConAgra*, 422 F.3d 1220, 1235 (11th Cir. 2005).

187. See *Kaplan v. N. Las Vegas*, 323 F. 3d 1226, 1231 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F. 3d 907, 916–17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F. 3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F. 3d 276, 280 (5th Cir. 1998).

188. *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F. 3d 751, 771–76 (3d Cir. 2004).

189. *D’Angelo*, 422 F.3d at 1235 (“Because a review of the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense, we join the Third Circuit in holding that regarded-as disabled individuals also are entitled to *reasonable accommodations* under the ADA.”).

190. *Katz v. City Metal Co.*, 87 F.3d 26, 32–34 (1st Cir. 1996).

191. 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc).

192. 156 F.3d 1284 (D.C. Cir. 1998).

193. 227 F.3d 1024,1027–28 (7th Cir. 2000).

Shield of Kansas City,¹⁹⁴ and the Fifth Circuit in *Turco v. Hoechst Celanese Corp.*¹⁹⁵ have held that the ADA only requires the employee to apply and be able to compete for the position—nothing more and nothing less.¹⁹⁶ The Supreme Court granted certiorari on this sole issue in *Huber v. WalMart*¹⁹⁷ on September 7, 2007, but the Court dismissed the writ approximately four months later,¹⁹⁸ ensuring continued uncertainty on this issue.

D. Inconsistency 4: Release of Medical Information

Courts are split on the application of Title II of the ADA. In *Board of Trustees of University of Alabama v. Garrett*, the Supreme Court held that the Eleventh Amendment does not categorically bar suits for damages based on confidentiality of medical information.¹⁹⁹ The law is unsettled as to whether Title II of the ADA applies to employment discrimination. Without answering the question itself, the Supreme Court has acknowledged a split of opinion among the circuits.²⁰⁰ The Second Circuit has not offered an answer.²⁰¹ The two circuits that have confronted the question directly have reached opposite results.²⁰² Meanwhile, “[t]he Fourth, Fifth and Tenth Circuits appear to have assumed, without deciding, that Title II applies to [discrimination in] public employment.”²⁰³ But the Sixth

194. 214 F.3d 1011, 1019 (8th Cir. 2000).

195. 101 F.3d 1090, 1094 (5th Cir. 1996).

196. *Id.*

197. 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 742 (2007).

198. 128 S.Ct. 1116 (2008).

199. 531 U.S. 356, 363–64 (2001).

200. *Id.* at 360 n.1 (“[N]o party has briefed the question whether Title II of the ADA . . . is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject. The Courts of Appeals are divided on this issue . . .” (citations omitted)).

201. *See Perry v. State Ins. Fund*, 83 F. App’x 351, 354 n.1 (2d Cir. 2003) (“There remain questions regarding . . . whether Title II ADA violations can be based on employment discrimination . . .”); *Mullen v. Rieckhoff*, No. 98-7019, 1999 WL 568040, at *1, 1999 U.S. App. LEXIS 18150, at *2 (2d Cir. July 22, 1999) (“[P]laintiff rightfully points to a split of authority over whether an employment discrimination plaintiff may avoid the ADA’s requirement of an EEOC charge by filing under Title II of that Act. . . . [W]e need not reach that question.”).

202. *Compare Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820 (11th Cir. 1998) (holding that Title II covered employment discrimination), *with Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169, 1183–84 (9th Cir. 1999) (holding that it did not).

203. *Clifton v. Georgia Merit Sys.*, 478 F. Supp. 2d 1356, 1364 (N.D. Ga. 2007) (citing *Davoll v. Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999); *Holmes v. Texas A & M Univ.*, 145

Circuit has observed—in a case concerning Title III—that the only portion of the ADA to address employment discrimination is Title I.²⁰⁴

In *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit held that the second clause of Title II's antidiscrimination provision applied to discriminatory zoning decisions, and the court described that clause as “a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.”²⁰⁵ Some district courts in the Second Circuit have cited this language in holding that Title II applies to employment discrimination.²⁰⁶ However, as *Perry* and *Mullen* demonstrate, *Innovate Health Systems* does not answer the question of whether Title II covers employment discrimination.²⁰⁷ Even courts answering this question in the affirmative have cautioned against over-reading the Second Circuit's use of the term “catch-all phrase.”²⁰⁸ In general, district courts in the Second Circuit have taken divergent approaches.²⁰⁹

F.3d 681, 684 (5th Cir. 1998); *Doe v. Univ. of Md. Med. Sys.*, 50 F.3d 1261, 1265 (4th Cir. 1995)).

204. *Clifton*, 478 F. Supp. 2d at 1364 (quoting *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997)).

205. 117 F.3d 37, 44–45 (2d Cir. 1997).

206. *See, e.g.*, *Bloom v. New York City Bd. of Educ.*, No. 00 Civ. 2728, 2003 WL 1740528, at *10–11, 2003 U.S. Dist. LEXIS 5290, at *31–33 (S.D.N.Y. Apr. 2, 2003); *Worthington v. City of New Haven*, No. 3:94-CV-00609, 1999 WL 958627, at *7–8, 1999 U.S. Dist. LEXIS 16104, at *18–20 (D. Conn. Oct. 5, 1999).

207. *Perry v. State Ins. Fund*, 83 F. App'x 351, 354 n.1 (2d Cir. 2003); *Mullen v. Rieckhoff*, No. 98-7019, 1999 WL 568040, at *1, 1999 U.S. App. LEXIS 18150, at *2 (2d Cir. July 22, 1999).

208. *See, e.g.*, *Transp. Workers Union of Am., Local 100 v. N.Y. City Transit Auth.*, 342 F. Supp. 2d 160, 171 (S.D.N.Y. 2004) (“The seemingly broad scope of the Court's language notwithstanding, it is important to read these words in context.”).

209. *Compare* *Olson v. New York*, No. 04-CV-0419, 2005 U.S. Dist. LEXIS 44929, at *13 (E.D.N.Y. Mar. 9, 2005) (holding that Title II covered employment discrimination); *Transp. Workers Union*, 342 F. Supp. 2d at 175 (same); *Bloom*, 2003 WL 1740528, at *11 (same); *Winokur v. Office of Ct. Admin.*, 190 F. Supp. 2d 444, 449 (same); *Magee v. Nassau County Med. Ctr.*, 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998) (same), *with* *Ayantola v. Cmty. Technical Colls. of Conn. Bd. of Trs.*, No. 3:05CV957, 2007 WL 963178, at *2 (D.Conn. Mar. 30, 2007) (holding that Title II does not cover employment discrimination); *Cormier v. City of Meriden*, No. 3:03CV1819, 2004 WL 2377079, at *8 (D. Conn. Sept 30, 2004) (same); *Filush v. Town of Weston*, 266 F. Supp. 2d 322, 327 (D.Conn. 2003) (same); *Syken v. N.Y. Executive Dep't, Div. of Hous. & Cmty. Renewal*, No. 02 Civ. 4673, 2003 WL 1787250, at *11 (S.D.N.Y. Apr. 2, 2003) (same); *Sworn v. Western N.Y. Children's Psychiatric Ctr.*, 269 F. Supp. 2d 152, 157–58 (W.D.N.Y. 2003) (same).

E. Inconsistency 5: Retaliation Claims Under the ADA

In *Shannon v. Henderson*, the Fifth Circuit addressed the issue of what standard should apply to retaliation claims brought under the ADA.²¹⁰ While acknowledging a circuit split on the issue, the court held that the “burden-shifting framework” in the U.S. Supreme Court case of *McDonnell Douglas Corp. v. Green* applied to Rehabilitation Act claims as well as ADA claims.²¹¹ At least two circuits have explicitly noted that the same standard is applicable to retaliation claims brought under the Rehabilitation Act and the ADA.²¹² Similarly, other circuits have applied the *McDonnell Douglas* framework to retaliation claims brought under the Rehabilitation Act without explicitly noting that the same standard is used for retaliation claims under both acts.²¹³ However, even circuits that agree that the *McDonnell Douglas* framework is appropriate still cannot agree on what standards are appropriate within its framework.²¹⁴

F. Inconsistency 6: Other Factors to Consider in Determining a Disability

In *McAlindin v. County of San Diego*, the Ninth Circuit carefully analyzed the circuit split on the issue of whether interacting with others (i.e., “the ability to get along with others”) constitutes a major life activity.²¹⁵ A number of courts have found that recreational activities do not constitute major life activities.²¹⁶ At least one court has held that because interacting with others is an essential, regular

210. No. 01-10346, 2001 WL 1223633, at *3 (5th Cir. Sept. 25, 2001).

211. *Id.*

212. *See Gribcheck v. Runyon*, 245 F.3d 547, 550 (6th Cir. 2001), *cert. denied*, 534 U.S. 896 (2001); *Hooven-Lewis v. Caldera*, 249 F.3d 259, 272 (4th Cir. 2001).

213. *See, e.g., Sherman v. Runyon*, 235 F.3d 406, 409 (8th Cir. 2000); *Williams v. Widnall*, 79 F.3d 1003, 1005 n.3 (10th Cir. 1996); *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001).

214. *See, e.g., Sanchez v. Henderson*, 188 F.3d 740, 747 (7th Cir. 1999) (opposing the Fifth, Eighth and Tenth Circuit standards within the *McDonnell Douglas* framework); *Hughes v. Bedsole*, 48 F.3d 1376, 1387–88 (4th Cir. 1995) (same).

215. 192 F.3d 1226, 1234–35 (9th Cir. 1999); *compare, Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (expressing doubt that the “ability to get along with others” constitutes a major life activity) *with McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (“Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of ‘major life activity.’”).

216. *See, e.g., Colwell v. Suffolk County Police Dep’t*, 158 F.3d 635, 642–43 (2d Cir. 1998); *Wellner v. Town of Westport*, 154 F. Supp. 2d 360, 362 (D. Conn. 2001); *Ouzts v. USAir, Inc.*, No. 94-625, 1996 WL 578514, at *14 n.14 (W.D. Pa. July 26, 1996), *aff’d*, 118 F.3d 1577 (3d Cir. 1997).

function, like walking and breathing, it easily falls within the definition of major life activity.²¹⁷ A court in another circuit, however, suggested that the “ability to get along with others” was too vague to be a major life activity—yet assumed that it was a major life activity for the purposes of its decision.²¹⁸ The court acknowledged that “a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity.”²¹⁹ In any event, interacting with others is no more vague than “caring for oneself,” which has been widely recognized as a major life activity.²²⁰

IX. ADA ARGUMENTS

Assuming that most jobs demand proficiency in a variety of tasks, a person must normally possess considerable ability in order to perform a job’s essential functions. Logically, the more ability an individual possesses, the better his or her job performance. Yet herein lies the paradox: If a person has sufficient ability to perform the essential functions of his or her job, he or she will have difficulty simultaneously proving sufficient limitation in a major life activity so as to clear the court’s high “severe limitation” bar.

The case of *Rohan v. Networks Presentations LLC*, in which the court determined that an actress suffering from post-traumatic stress disorder was both too competent to be disabled and too disabled to be competent, epitomizes this problem.²²¹ The plaintiff in *Rohan* sued for wrongful termination under the ADA.²²² The district court ruled that the plaintiff was not a “qualified individual” under the ADA because her disabilities prevented her from interacting with others,

217. See *Criado v. IBM Corp.*, 145 F.3d 437, 442 (1st Cir. 1998) (plaintiff’s mental impairment “substantially limited her ability to work, sleep, and relate to others”); *Sherback v. Wright Automotive Group*, 987 F. Supp. 433, 438 (W.D. Pa. 1997); Equal Employment Opportunity Comm’n, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities 3, EEOC Notice No. 915.002 (March 25, 1997), available at <http://www.eeoc.gov/policy/docs/psych.html>.

218. *Soileau*, 105 F.3d at 15.

219. *Id.*

220. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 638–39 (1998) (citing 45 C.F.R. § 84.3(j)(2)(ii)); *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining “caring for oneself” as including everything from driving and grooming to feeding oneself and cleaning one’s home).

221. 375 F.3d 266 (4th Cir. 2004).

222. *Id.* at 272.

which was an essential job function.²²³ In an ironic twist, the Court of Appeals disagreed: Not only could plaintiff perform the essential function of interacting so as to make her a qualified individual, but her disabilities were not sufficiently severe to even *trigger* ADA protection.²²⁴ In one appeal, plaintiff went from being so disabled that she did not qualify for the job to being so capable that she no longer qualified as disabled under the ADA.

The plaintiff in *McClure V. General Motors* was held not to fall within the protection of the ADA.²²⁵ In his oral testimony before the House Education and Labor Committee, plaintiff pleaded, “Well, you can’t have it both ways—am I disabled or not? If I am, then the ADA should have been there to protect me. If I’m not, then I should be working . . . at GM right now. . . . Because I’m adapted so well to living with muscular dystrophy, the Court said I wasn’t protected by the ADA. That doesn’t make any sense to me.”²²⁶

X. PROBLEMS UNDER THE ADA

In order to qualify for ADA protection, an employee “must show that [he is] highly debilitated by [a] disorder, yet still capable of doing [the] job . . . [with] reasonable ‘accommodations.’”²²⁷ Irrespective of the impairment, it is always a difficult task for an employee to prove that he or she is “substantially impaired [] but not so impaired that [he or she does] not qualify for [the] job in the first place.”²²⁸ Understandably, “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at a trial court level.”²²⁹ Additionally, in cases in which

223. *Id.*

224. *Id.* at 279–80.

225. *McClure v. General Motors Corp.*, 75 F. App’x 983, 983 (5th Cir. 2003).

226. *The ADA Restoration Act of 2007: Hearing on H.R. 3195, Before the H. Comm. on Education and Labor*, 110th Cong. (January 29, 2008) (statement of Carey L. McClure, plaintiff in ADA lawsuit against General Motors), available at <http://edlabor.house.gov/testimony/2008-01-29-CareyMcClure.pdf>.

227. See generally Lisa Belkin, *Office Messes*, N.Y. TIMES, July 18, 2004, § 6 (Magazine), at 29 (discussing attention deficit disorder within a work environment).

228. *Id.* at 29 (quoting Patricia Latham, author of a series of books on disabilities and the law).

229. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999). See generally Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133 (1990) (discussing the bias inherent in reported decisions).

employees appealed the court's decision, the court of appeals affirmed the judgment eighty-four percent of the time.²³⁰ According to the National Disability Law Reporter Survey of ADA Cases, a judge found the plaintiff able to meet the requisite statutory definitions in only six of the 110 cases in which the issue was raised.²³¹ Such results are far worse than those in other areas of law.²³²

Because courts fail to examine the discrepancy between an individual's own ability and that individual's achievement, those disabled individuals with statistically average to superior intelligence face many problems.²³³ For example, the ability to learn at an average level exempts a learning disabled individual from recovery—despite the fact that the individual's success might be largely due to the accommodations he or she has received.²³⁴ While evidence of past academic success is relevant to the ultimate factual determination of whether an employee is disabled, it should by no means entitle the employer to judgment as a matter of law. Otherwise, doctors and lawyers could never be considered to have a learning disability because admittance into medical school or law school alone would automatically negate their claim.²³⁵ Such a rule places the ADA plaintiff in an untenable situation where “[s]uccess negates the existence of the disability, whereas failure justifies dismissal for incompetency.”²³⁶ That is neither the theory nor the purpose of the ADA. The idea of the ADA is to afford equal opportunity to qualified individuals with disabilities; it is not to deny opportunity to the

230. Colker, *supra* note 233, at 100.

231. Thomas D'Agostino, *Defining "Disability" Under the ADA: 1997 Update*, NAT'L DISABILITY L. REP. 1997, at ii.

232. Colker, *supra* note 229, at 100 n.10 (noting that only prisoner rights cases tend to be as difficult to win).

233. See Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229 (2007).

234. See generally Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 34 (1997) (discussing general characteristics of learning disabilities).

235. *Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097, 1113 (Cal. 2004) (Thomas, J., dissenting) (noting that a history of academic success alone cannot justify the conclusion, as a matter of law, that a plaintiff is not disabled).

236. *Id.* at 1111 (citing Andrew Weiss, *Jumping to Conclusions in "Jumping the Queue,"* 51 STAN. L. REV. 183, 205 (1998)).

disabled solely because meeting the prerequisites of qualification demonstrates their abilities.²³⁷

For a potential employee, revealing a disability could be a no-win situation if employers are unwilling to provide accommodations and an individual is terminated and forced to sue.²³⁸ Because of this, most employees with learning disabilities believe “[i]mpairment is safer not mentioned at all” and choose to keep their disability to themselves.²³⁹ One employee reasoned that “work isn’t like school, where they have to give you more time to take tests In the real world, if you tell during the interview, they won’t hire you. And if you tell after you’re hired, they can fire you.”²⁴⁰

For all the good intentions behind enactment of the ADA and the positive effects it has produced since its 1990 enactment, the current environment in the judiciary has led to questions as to whether the ADA still accomplishes its intended purpose. As noted above, there has been a trend by courts of narrowing the broad coverage of the ADA, which, in many cases, disregards Congress’s stated intent. Unfortunately, “[t]he first lesson [law] students learn is that statutory language passed by Congress to mean one thing can be interpreted by judges to mean an entirely different thing.”²⁴¹

In the legislative history of the ADA, Congress stated that it intended the ADA’s definition of “disability” to be interpreted consistently with *School Board of Nassau County v. Arline*,²⁴² where the Supreme Court broadly interpreted the definition of “disability” under the Rehabilitation Act.²⁴³ Congress also noted that “the use of medication and other devices should not be taken into account when determining whether an individual has a disability.”²⁴⁴ Nonetheless, the Supreme Court has “ignored this legislative history when

237. *Id.* at 1111–1112.

238. *See* Belkin, *supra* note 227, at 29.

239. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illness as Disabilities*, 16 HYPATIA 17, 22 (2001) (quoting disability activist Liz Crow, *Including All of Our Lives: Renewing the Social Model of Disability*, in ENCOUNTERS WITH STRANGERS: FEMINISM AND DISABILITY 209–210 (1996)).

240. Belkin, *supra* note 227, at 24.

241. *The ADA Restoration Act of 2007: Why Is it Necessary*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 159, 160 (2008) (quoting Kevin Barry’s comments regarding his work with Georgetown University Law Center’s Federal Legislation Clinic and views as to why the ADA Restoration Act of 2007 was needed).

242. *Id.*

243. *Id.*

244. *Id.*

interpreting the ADA.”²⁴⁵ Although the judiciary has systematically narrowed the protected class and reduced those that are protected by the ADA,²⁴⁶ the ADA has still provided protection for the disabled. As Senator Tom Harkin (D-Iowa) expressed in regards to the ADA enactment, “[T]he ADA was one of the landmark civil rights laws of the 20th century—a long overdue emancipation proclamation for millions of Americans with disabilities. As chief sponsor of the ADA in the Senate, I take pride in the progress we have made as a nation since 1990.”²⁴⁷

XI. THE 2008 AMENDMENT

The ADA Amendments Act of 2008 passed the U.S. House of Representatives in June by a 402–17 vote.²⁴⁸ The U.S. Senate approved its version of the ADAAA—a slightly different version than the House bill—by unanimous consent on September 11, 2008.²⁴⁹ On September 17, 2008, the House of Representatives approved the Senate’s version, accepting the manner in which the Senate updated the definition of “disability.”²⁵⁰ Thereafter, the bill was signed into law by President Bush, who applauded the significantly expanded protections now secured for qualified disabled individuals as memorialized in the ADAAA.²⁵¹

The new legislation, which took effect January 1, 2009, expressly repeals the United States Supreme Court rulings of *Sutton v. United Airlines Inc.*²⁵² and *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*.²⁵³ The purpose of the repeal was to undo the narrowed definitions of the ADA and broaden its coverage through

245. *Id.*

246. *Id.*

247. *Id.* at 159 (quoting the opinion of U.S. Senator Tom Harkin as to why the Act is needed). *See also* The 17th Anniversary of the Signing of the Americans with Disabilities Act, July 26, 2007, <http://harkin.senate.gov/blog/?i=d0f78425-4c60-4c8d-a7bf-4c09ea9a7cf7> (statement released by Senator Tom Harkin).

248. Arthur D. Rutkowski & Barbara L. Rutkowski, *New ADA Amendments Act of 2008 Would Expand ADA Coverage*, 22 No. 7 Emp. L. Update (WL) 1 (2008) (discussing the changes made by H.R. 3195).

249. Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 653 (2009).

250. Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 240 (2008).

251. *Id.* at 240 n.191.

252. 527 U.S. 471 (1999).

253. 534 U.S. 184 (2002).

liberal expansion of the applicable definitions, particularly the definition of a disability.²⁵⁴

Thus, the purpose of the ADA Amendments Act of 2008 was summarized as follows:

1. Providing a “clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” through broadening the scope of ADA protection;²⁵⁵

2. Rejecting the Supreme Court decision in *Sutton*, which interpreted “substantially limits a major life activity” as being tied to the “ameliorating effects of mitigation measures”;²⁵⁶

3. Overcoming the Supreme Court’s holding in *Sutton* by replacing the current ADA definition of disability with the definition of handicap spelled out under the Rehabilitation Act of 1973;²⁵⁷

4. Rejecting the standards set out in the Supreme Court’s decision in *Toyota Motor*, where the Court held that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that “substantially limited” requires an individual to “have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”;²⁵⁸

5. Expressing “congressional intent” that the standard regarding “substantially limits” set forth by the Court in *Toyota Motors* has “created an inappropriately high level of limitation necessary to obtain coverage under the ADA”; establishing that “it is the intent of Congress that the primary object of attention in cases brought before the ADA should be whether entities covered under the ADA have complied with their obligations”; and explaining that the “question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis”;²⁵⁹

6. Conveying Congress’s expectation that the EEOC “will revise that portion of its current regulations that defines the term

254. See Rutkowski, *supra* note 248, at 1.

255. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (2008).

256. *Id.* at § 2(b)(2) (citing *Sutton*, 527 U.S. 471).

257. *Id.* at § 2(b)(3) (citing *Sutton*, 527 U.S. 471).

258. *Id.* at § 2(b)(4) (quoting *Toyota Motor*, 534 U.S. 184).

259. *Id.* at § 2(b)(5).

‘substantially limits’ as ‘significantly restricted’ to be consistent” with the ADAAA, “including amendment made” by the ADAAA.²⁶⁰

A. *New Definitions*

While the ADAAA has created numerous changes to the ADA, the most significant for employers and educators are the following:

1. Although the ADAAA does not define “substantially limits,” Congress mandates that the term “shall be interpreted consistently with the findings and purposes” of the ADAAA.²⁶¹

2. An individual will not be “regarded as” having an impairment if the impairment is “transitory and minor,” which is defined as “an impairment with an actual or expected duration of 6 months or less.”²⁶²

Under “Rules of Construction Regarding the Definition of Disability,” Congress also mandates that

the definition of ‘disability’ . . . shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term ‘substantially limits’ shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

260. *Id.* at § 2(b)(6).

261. *Id.* at § 3(4)(b) (codified at 42 U.S.C.A. § 12102(4)(B)).

262. *Id.* at § 3(3)(b).

- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.
- (ii) The ameliorative effects of mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
- (iii) As used in this subparagraph
 - (I) The term ‘ordinary eyeglasses or contact lenses’ means lenses that are intended to fully correct visual acuity or eliminate refractory error; and
 - (II) The term ‘low-vision devices’ means devices that magnify, enhance, or otherwise augment a visual image.²⁶³

XII. POST-GRADUATE UNIVERSITIES AND THE ADA

While employers face the prospect of providing a proper environment so that the employee can be an effective producer for the business, post-secondary schools are in a unique position regarding the ADA. The ultimate product of post-secondary schools is not a widget or a service but the production of a learned individual. As these institutions fulfill their mission, a duty still exists for these universities to provide appropriate accommodations. Public institutions are covered by Title II of the ADA, which addresses discrimination in the provision of public service by state and local governments.²⁶⁴ Title III, which prohibits discrimination in the provision of public services and accommodations operated by private entities,²⁶⁵ applies to private institutions.²⁶⁶ Additionally, institutions that receive federal funds have been prohibited from discriminating based on a disability under section 504 of the Rehabilitation Act.²⁶⁷ The Civil Rights Restoration Act of 1987 confirmed that the section 504 prohibition of discrimination against disabled individuals applies to the entire institution—even if only one aspect of the institution receives federal funds.²⁶⁸

263. *Id.* at § 3(4)(A)–(E) (codified at 42 U.S.C.A. § 12102(4)(A)–(E)).

264. Americans with Disabilities Act of 1990, 42 U.S.C. § 12131–12132 (2006).

265. *Id.* § 12182(a).

266. *See generally* *Gluckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997).

267. *Id.* at 144–145.

268. Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 366 (2008).

As such, both private and public post-graduate institutions must provide accommodations for those with both physical, emotional, and learning disabilities.²⁶⁹ The ADA specifically states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”²⁷⁰ As such, each post-graduate program must provide reasonable accommodations to all disabled students in a fair and equitable manner while still maintaining its duty as a gatekeeper to the professions they are training. While in many cases this should not be a problem, the ADA obligates each post-graduate university to determine the true requirements for its product. For example, it is easy to conclude that a blind individual should probably not be a surgeon. However, the possibility exists that a blind individual could become an excellent psychiatrist. Thus, if requested, the ADAAA could require and accommodate the blind student in his clinical education.

A. Types of Disabilities Faced in Post-Graduate Schools

At the same time, the nature of competition between students in post-graduate schools is of paramount importance in developing an overall institutional plan. Students should feel that the policies, rankings, and opportunities are fair for the entire student body, while at the same time accommodations should be tailored specifically to each student. The EEOC has broadly defined the types of disabilities to include those that impair the ability to care for oneself, perform manual tasks, walk, see, breathe, learn, work, sit, and stand.²⁷¹ The ADAAA includes such tasks in a nonexhaustive list of major life activities, stating that “major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning,

269. *Singh v. Geo. Wash. Univ. Sch. of Med. & Health Sci.*, 597 F. Supp. 2d 89, 98 (D.D.C. 2009). Under instructions from the D.C. Circuit Court on remand, 508 F.3d 1097, 1104 (D.C. Cir. 2007), the court—while finding that the plaintiff did not have a learning disability—acknowledged that correctly diagnosed learning disabilities are covered under the ADA. However, the standard used by the D.C. Circuit of requiring disruption of a major life activity is no longer a valid standard under the ADAAA. *See, e.g., Singh*, 597 F. Supp. 2d at 95 n.4.

270. 42 U.S.C. § 12182(a).

271. 29 CFR § 1630.2(i) (1991).

reading, concentrating, thinking, communicating, and working.”²⁷² As stated above, a “qualified individual” with a disability is identified as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²⁷³ In turn, a “disability” is defined as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”²⁷⁴ Physical disabilities can include sensory impairments, such as visual disorders and hearing loss or deafness, and most other physical impairments.²⁷⁵

Mental disabilities can be divided further into cognitive disorders and, more broadly, personality disorders. Cognitive disorders generally involve deficits or deficiencies in thinking, memory retention, and reasoning ability, including conditions that are the result of brain injury, amnesia, dementia and delirium.²⁷⁶ More relevant to post-graduate educators are so-called Axis I diagnoses by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). These disorders include Attention Deficit Disorder (ADD), the more common diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), and anxiety disorders.²⁷⁷ Mood disorders are also part of Axis I. They entail the persistent feeling of sadness or periods of feeling overly happy, or fluctuations from extreme happiness to extreme sadness.²⁷⁸ The most common mood disorders are depression, mania, and bipolar disorder.²⁷⁹

The other major classification of mental disorders that post-graduate educators may face is personality disorders and mental retardation.²⁸⁰ These disorders, classified by DSM-IV-TR as Axis II, include but are not limited to Paranoid Personality Disorder, Schizoid

272. 42 U.S.C.A. § 12102(2)(A) (West 2009).

273. *Id.* § 12111(8).

274. *Id.* § 12102(2).

275. *Id.* § 12102(4)(A).

276. Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 890 (2009).

277. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 78, 85–93 (4th ed. 1994) [hereinafter DSM-IV-TR].

278. TABER’S CYCLOPEDIA MEDICAL DICTIONARY 1230–1231 (18th ed. 1997).

279. *Id.*

280. DSM-IV-TR, *supra* note 277, at 29.

Personality Disorder, mental retardation, and other personality disorders.²⁸¹

These differences are important as classmates—and possibly faculty—anecdotally appear to support a student’s accommodation for a diagnosis of physical disorders, but remain more reticent to provide accommodations for some of the cognitive disorders, including those with ADHD. Whether or not this is the case deserves further study. However, the issue of providing accommodation for Axis I students will not decrease but only increase with time as the diagnosis of these conditions increases their prevalence in the population.

While often associated, learning disabilities and ADHD are not the same.²⁸² Learning disabilities include disabilities related to “listening, speaking, basic reading skills, reading comprehension, written expression, mathematical calculation, or mathematical reasoning.”²⁸³ ADHD is a neurological behavior disorder that is “characterized by pervasive inattention and hyperactivity-impulsivity that often results in substantial functional impairment.”²⁸⁴

The percentage of children diagnosed with ADHD has steadily increased from 1997 through 2006.²⁸⁵ In 2006, 4.5 million United States school children were diagnosed with ADHD.²⁸⁶ Also, as of 2006, 4.6 million school children had been diagnosed at some time with a learning disability.²⁸⁷ Learning disabilities, while not a reflection of IQ, can manifest themselves in various ways—including

281. *Id.*

282. ADHD and learning disabilities require different therapeutic approaches, with ADHD generally benefiting from pharmacological treatment and learning disabilities benefiting from a specialized educational curriculum. See Alysa E. Doyle et al., *Separating Attention Deficit Hyperactivity Disorder and Learning Disabilities in Girls: A Familial Risk Analysis*, 158 AM. J. PSYCHIATRY 1666, 1666 (2001), available at <http://ajp.psychiatryonline.org/cgi/reprint/158/10/1666>.

283. PATRICIA N. PASTOR & CYNTHIA A. REUBEN, U.S. DEP’T OF HEALTH & HUMAN SERVS., VITAL HEALTH STATISTICS, SERIES 10, NO. 237, DIAGNOSED ATTENTION DEFICIT HYPERACTIVITY DISORDER AND LEARNING DISABILITY: UNITED STATES, 2004–2006 8 (2008), available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_237.pdf.

284. *Mental Health in the United States: Prevalence of the Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder—United States, 2003*, 54 MORBIDITY AND MORTALITY WEEKLY REPORT 842 (Sept. 2, 2005) (Centers for Disease Control and Prevention), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5434.pdf>.

285. See PASTOR & REUBEN, *supra* note 283, at 3–6.

286. *Id.* at 5.

287. *Id.*

dyslexia, for example.²⁸⁸ Individuals with such disabilities are also often diagnosed with mental retardation, blindness, or ADHD, and may have difficulty performing a specific task, as with dyslexia and reading skills or dysgraphia and handwriting skills.²⁸⁹ While most often diagnosed in childhood, these conditions can persist into adulthood.²⁹⁰

Post-graduate schools are the gatekeepers of professions. Their task is not merely to educate the future members of the profession but to eliminate those that do not possess the ability to positively contribute to that profession. While the stated purpose of the ADAAA and the ADA is to bar discrimination and to ensure opportunity for the disabled to take part in activities enjoyed by others who are not disabled,²⁹¹ it does not bar post-graduate institutions from making decisions regarding graduation requirements under each institution's educational mission.²⁹² At some point, a learning disability may prove too severe for success in a particular field. Additionally, a student's failure in school may be related to some reason other than the student's particular disability.

Nonetheless, courts have generally concluded that ADD, ADHD, and learning disabilities fall within the purview of the ADA.²⁹³ And while some courts have found that the ADA requires that the

288. See Nat'l Inst. of Child Health & Human Development, Learning Disabilities, http://www.nichd.nih.gov/health/topics/learning_disabilities.cfm.

289. *Id.*

290. See Robert Eme, *Attention Deficit Hyperactivity Disorder and the Family Court*, 47 *Fam. Ct. Rev.* 650, 659 (2009) (discussing the difficulties of adults with ADHD).

291. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (amended 2008).

292. See *Singh v. Geo. Wash. Univ. Sch. of Med. & Health Sci.*, 597 F. Supp. 2d 89, 98 (D.D.C. 2009) ("As an educational institution [the university] is obligated to provide reasonable accommodations to students who demonstrate that they are entitled to them under the ADA."). *But see* Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 *SAN DIEGO L. REV.* 137, 172 (1999) ("With regard to issues of discrimination against individuals with disabilities in graduate and professional schools, courts give post-secondary schools great latitude in determining what essential functions students must perform and when students unable to satisfy such functions should be dismissed. Courts have consistently held that academic institutions are the best to judge what functions of their programs are necessary and what accommodations are appropriate.").

293. See *generally* *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) (wherein ADD, ADHD, and learning disabled students brought suit against Boston University for discrimination based on their disability); Golden, *supra* note 272, at 369.

disability must hinder a major life activity,²⁹⁴ those same courts have found that a learning disability is a major life activity.²⁹⁵

Regardless, under the ADA as modified by the ADAAA, a learning disability would likely be “regarded as” a disability by the general population and, as such, post-graduate institutions would clearly need to provide an appropriate accommodation.²⁹⁶ The very fact that the student was able to perform well enough to qualify for admission to the university undermines the argument that the disability is too great of a burden and that an accommodation therefore would not aid the student in succeeding. While post-graduate schools may not discriminate against the disabled in admissions, they need not decrease the academic standards in their admissions. Specifically, “[i]t is beyond question that it would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program. An educational institution is not required by the Rehabilitation Act or the ADA to lower its academic standards for a professional degree.”²⁹⁷ Despite this edict, questions still abound. What is the role of academic freedom? At what point does the requested accommodation interfere with the stated mission of the school?

B. When Universities May Deny an Accommodation

Post-graduate schools must ordinarily provide a reasonable accommodation to those with a disability.²⁹⁸ However, if the accommodation will fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations provided by that post-graduate institution, then it is reasonable for the university to deny that modification.²⁹⁹ However, such institutions may not continue, add, or develop qualifications or eligibility criteria

294. *Singh*, 597 F. Supp. 2d at 96.

295. *Id.*

296. *Id.* at 98; *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555 (2008) (enacted as 42 U.S.C.A. §12102(2)(a), (3)(c)) (defining major life activity to include “learning,” and establishing that an “impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”).

297. *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076 (8th Cir. 2006).

298. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(b)(2)(A)(ii) (2006); Golden, *supra* note 272, at 365.

299. 42 U.S.C. § 12182(b)(2)(A)(ii).

that hinder or screen out the disabled as defined by the ADA unless the post-graduate-institution finds that it is necessary for the “provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.”³⁰⁰

Post-graduate programs need not provide an accommodation that would create an undue financial or administrative burden on the program.³⁰¹ The effect of this is that an institute that qualifies as a place of public accommodation may not try to offset the costs of a required accommodation by seeking payment from the disabled individual for the accommodation made.³⁰² Further, the ADA requires that costs become significant or very difficult to perform before one can use costs as a defense to providing an accommodation.³⁰³ Thus, as the percentage of the student population with a disability increases, post-graduate schools will increasingly be forced to project costs of accommodations into their budget for accommodations.

Traditionally, universities have allowed professors the academic freedom to teach in a manner that they see fit in order to provide the student with the information necessary to master a particular subject.³⁰⁴ With the variety of professors, academic freedom serves as an experiment for the university in various pedagogies that can be evaluated as to the best teaching methods for the various students. While this is certainly desirable, it is not enough to use individual academic freedom as a basis for failing to provide an accommodation to a disabled individual. Great deference is traditionally given by courts and the Department of Education’s Office of Civil Rights³⁰⁵ to decisions made by post-graduate institutions regarding the academic requirements to successfully complete an area of study.³⁰⁶ As such, when the accommodation involves an academic decision, courts

300. *Id.* § 12182(b)(2)(A)(i).

301. *See* Golden, *supra* note 272, at 382.

302. Buhai, *supra* note 292, at 153.

303. Golden, *supra* note 272, at 382.

304. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967). (“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).

305. 49 C.F.R. § 1.70(g) (2006) (Director of the Departmental Office of Civil Rights is delegated the authority to review and evaluate the operating administrations’ enforcement of the Americans with Disabilities Act of 1990).

306. *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1028 (8th Cir. 1999).

should give great respect to the faculty for their professional judgment on the matter.³⁰⁷

XIII. PROBLEMS AND RECOMMENDATIONS

Post-graduate institutions and their accrediting body logically remain in the best position to determine the necessary criteria for the institution's specialty. However, this tradition of academic freedom is not, by itself, a valid reason to deny an accommodation. Neither is dislike of the accommodation by the individual professor. As more students with childhood diagnoses grow into adulthood and attend post-graduate schools, this will place greater pressure on institutions to reconsider some of their treasured beliefs. For example, if a law school implements the American Bar Association (ABA) recommendation that law schools should require "regular and punctual class attendance,"³⁰⁸ can that law school refuse to provide accommodation to a student with depression who finds it difficult to get out of bed each morning due to the student's documented condition? Can the law school refuse on the grounds that attendance is a necessary function for future attorneys as recommended by the ABA? Likewise, can a law school refuse accommodation to a student suffering from anxiety disorder or panic attacks and exempt that student from stressful questions using the Socratic method?³⁰⁹ As a physician, I would not be surprised if a student with such a disorder sought an exemption.

For instance, at least one student with such a diagnosis has sought accommodation under the ADA in taking medical school

307. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

308. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 304(d) (2009–2010); *see also id.* Interpretation 304-6.

309. The "traditional" Socratic method is defined as follows:

[A] teaching style in which the professor selects a single student without warning and questions the student about a particular judicial opinion that has been assigned for class. Often the professor begins by asking the student to state the facts of the case and then asks the student to explain how the court reasoned to an answer. The professor might then test the student's understanding of the case by posing a series of hypotheticals and asking the student to apply the reasoning of the case to the new fact patterns. The purpose of this questioning is to explore the strengths and weaknesses of various legal arguments that might be marshaled to support or attack a given rule of decision. To that end, the professor's inquiries are often designed to expose the weaknesses in the student's responses.

Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 n.3 (1999).

multiple-choice examinations after receiving poor grades on exams.³¹⁰ Although the court in that case held that plaintiff did not suffer from a disability under the ADA, the case may no longer constitute good law because the outcome may differ based on the ADAAA. On the other hand, since post-medical school testing is all based upon multiple-choice tests, it is reasonable for medical school faculty to conclude that passing multiple choice exams is a vital part of the medical school curriculum. If such a conclusion is reached and documented, then no accommodation could be granted to waive the taking of multiple choice exams.³¹¹ In general, anxiety disorders may reasonably be “regarded as” a disability under the ADA.³¹²

Still, as mentioned above, courts give deference to post-graduate institutions as being in the best position to determine what qualities are necessary to become an expert in the institution’s field of study.³¹³ Therefore, the institution can set parameters it considers necessary for achievement of that degree. In the scenarios mentioned above, if the institution decides that attendance is required for achievement of a degree, then deference will be given to that decision unless it is designed to screen out or hinder the disabled individual.³¹⁴

However, if attendance is necessary to achievement of a specific degree, then it follows that *all* professors must follow such a recommendation. Otherwise, it would appear that such a standard is not truly necessary for success in the specified course of study and

310. *McGuinness v. Univ. of N.M.*, 170 F.3d 974, 976–979 (10th Cir. 1998).

311. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(b)(2)(A)(i) (2006) (stating that institutions may develop qualifications that have the effect of screening out individuals with disabilities if the institution finds that such qualifications are necessary for the “provision of the goods, services, facilities, privileges, advantages, or accommodations being offered”).

312. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555 (2008) (codified at 42 U.S.C.A. §12102(2)(a), (3)(c)) (defining major life activity to include “learning,” “concentrating,” and “thinking,” and establishing that an “impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”).

313. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).

314. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(b)(2)(A)(i) (2006) (stating that institutions may develop qualifications that have the effect of screening out individuals with disabilities if the institution finds that such qualifications are necessary for the “provision of the goods, services, facilities, privileges, advantages, or accommodations being offered”).

would defeat the institution's discrimination defense. Likewise, if the institution decides that the Socratic method is a vital component of training attorneys, then it is reasonable for the school to deny that student an accommodation.³¹⁵ Again, though, it is vital that all professors use the Socratic method. The argument of academic freedom or tradition in the face of a documented disability will not survive a challenge if the school knows that not every professor follows the Socratic method or keeps attendance.

However, if the academic community reviews its records and makes a decision that is not arbitrary about what is important to the completion of the degree, the Office of Civil Rights (and courts) would normally agree with that decision.³¹⁶ Thereafter, incoming students should be notified prior to matriculation—and again at matriculation—of the university's policies regarding disabilities. Information to this effect should be placed in the student handbook and should include a description of the documentation needed by the institution in order to provide accommodation. It should be noted, however, that despite any documentation requirements articulated by universities, any qualified expert may provide the necessary documentation.³¹⁷ While some deference should be given to the physician's recommendation for an accommodation based on the physician's expertise on the condition, the institution and its faculty are the experts on the best means to educate the students in that field.

XIV. CONCLUSION

In a "simple twist of fate,"³¹⁸ and after 18 years, "senators and congressmen" have finally come to "heed the call"³¹⁹ and have refused to continue "turn[ing] [their] head[s]" and "pretending [they]

315. *See id.*

316. Bonnie Poitras Tucker, *Disability Discrimination in Higher Education: 1996 Case Law in Review*, 24 J.C. & U.L. 243, 251, 251 n.42 (1997).

317. *See Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 140, 154 (D. Mass. 1997) (ordering Boston University to "cease and desist implementing its current policy of requiring that students with learning disorders (not ADD or ADHD) who have current evaluations by trained professionals with masters degrees and sufficient experience be completely retested by professionals who have medical degrees, or doctorate degrees, or licensed clinical psychologists in order to be eligible for reasonable accommodations").

318. BOB DYLAN, *A Simple Twist of Fate*, on BLOOD ON THE TRACKS (Columbia Records 1975).

319. BOB DYLAN, *The Times They Are A-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

just do[]n't see"³²⁰ that the ADA of 1990 had been reduced to a "creature void of form"³²¹ and substance. The ADA of 1990 was designed to serve broadly as a clear and comprehensive national mandate, recognizing the plight of millions of Americans routinely subjected to discrimination and—consequently—at a loss in the social and economic mainstream of American life. The Act sought to allow the disabled some "shelter from the storm"³²² in order to finally "stand inside [the] shoes"³²³ of the non-disabled Americans so they might feel that they are "on the side that's winning."³²⁴

Through conflicting jurisprudence, courts have misinterpreted Congress's intent in the ADA of 1990, and the ADA has thus failed to shatter the glass ceiling erected above all those who, despite physical or mental disability, are promised the prospect of equality and justice under the law. As American society has become more sympathetic to the plight of the disabled, the judiciary has forged another path, one that has created precedents that seem as clear as fog while containing interpretations which "[don't] amount to anything more than what the broken glass reflects."³²⁵ The ADA of 1990, which promised opportunity and the potential for success, quickly became just another "old road [that] is rapidly agin[g],"³²⁶ reducing the ADA to a false hope and leaving little to be lost. As Chief Justice John Roberts recently pronounced, "When you got nothing, you got nothing to lose."³²⁷

The ADA, which essentially serves as a *reenactment of the original intent* of the ADA,³²⁸ legislatively overruled much Supreme

320. BOB DYLAN, *Blowin' in the Wind*, on THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

321. BOB DYLAN, *Shelter from the Storm*, on BLOOD ON THE TRACKS (Columbia Records 1975).

322. *Id.*

323. BOB DYLAN, *Positively 4th Street*, on BIOGRAPH (Columbia Records, 1985).

324. *Id.*

325. BOB DYLAN, *Up to Me*, on BIOGRAPH (Columbia Records 1985).

326. DYLAN, *supra* note 323.

327. *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 128 S. Ct. 2531, 2550 (2008) (Roberts, C.J., dissenting) (quoting BOB DYLAN, *Like A Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965)). This citation has been inserted *exclusively* for the purpose of illustrating that even Chief Justice John Roberts has found Bob Dylan acceptable legal commentary. It does not in any way attempt to analogize or demonstrate contextual accuracy of his statements therein.

328. *See* ADA Amendments Act 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553 (2008) (concluding that courts have failed to carry out the original congressional intent of the ADA).

Court precedent with regard to determining (among other factors): What is a disability, and what constitutes the requisite degree of impairment because of a disability? The ADAAA reemphasized the ADA's original language that prohibits mitigating factors to be considered.³²⁹ The ADAAA will cause both employers and educators to reevaluate their approach to the disabled. Employers will need to expand the accommodations to include other areas of responsibilities within the company.

Because of the increased number of students with disabilities—including a marked increase of students with learning disabilities, ADHD, and anxiety disorders—the faculty at each post-graduate institution should review the institution's policies to prospectively consider what policies are truly necessary to train the post-graduate student. It may be time for the way professors train their students to change. What this could involve is a process whereby each department, post-graduate program, and/or institution could specifically review their policies, rules, regulations, and habits to determine how important those regulations and rules are in educating students. Some of our most cherished traditions need not be abandoned, but they may need to be modified for the disabled under the ADA as modified by the ADAAA. This renouncement by Congress should be embraced optimistically because very seldom does Congress ever truly say what it really meant; at present, with regards to the ADA, Congress has said it twice. "You don't need a weatherman to know which way the wind blows."³³⁰

The question inevitably progresses to a prediction of the future of the "new" ADA. In that regard, the only scintilla of certainty available might be that the "answer my friend is blowing in the wind, the answer is blowing in the wind."³³¹ So, while "only time will tell,"³³² one thing is for certain: For employers and educators and their dealings with the disabled, "the times they are a-changin'."³³³

329. *Id.* at 3555 (codified at 42 U.S.C.A. § 12102(e)(i)–(iii) (West 2009)).

330. *Latino Issues Forum v. U.S. E.P.A.*, 558 F.3d 936, 949 (9th Cir. 2009) (quoting BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1965)).

331. DYLAN, *supra* note 320.

332. BOB DYLAN, *Walking Down the Line*, on BOOTLEG SERIES VOL. 1–3 (Columbia Records 1991).

333. DYLAN, *supra* note 319.

