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Stephen F. Befort

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Abstract

Congress enacted the ADA Amendments Act (ADAAA) in order to override four Supreme Court decisions that had narrowly restricted the scope of those protected by the Americans with Disabilities Act (ADA) and to provide "a national mandate for the elimination of discrimination." This Article undertakes an empirical examination of the impact of the ADAA on case outcomes. The recent reported cases provide a unique opportunity for such an examination because, with the ADAAA not retroactively applicable to cases pending prior to its effective date, courts have been simultaneously deciding cases under both the pre-amendment and post-amendment standards. This study examines all reported federal court summary judgment decisions arising under Title I of the ADA for a forty-month period extending from January 1, 2010, to April 30, 2013. The study coded the pre-ADAAA and post-ADAAA decisions for both disability standing determinations and for rulings on whether the plaintiff was qualified for the job in question. These preliminary data show that the federal courts are granting employers a significantly smaller proportion of summary judgment rulings under the ADAAA on the basis of a lack of disability status. In addition, the ADAAA decisions exhibit a greater prevalence of rulings on the issue of whether the plaintiff is a qualified individual. On the other hand, the post-amendment decisions show an increased tendency for the courts to find that the plaintiff is not qualified. While the rate of increase in plaintiff victories on

* Gray, Plant, Mooty, Mooty, & Bennett Professor of Law, University of Minnesota Law School. The author thanks Jillian Pearson for her assistance in the preparation of this Article.

the disability issue is outpacing the rate of increase in plaintiff losses on the qualified issue, the latter phenomenon suggests a continuing judicial unease with disability discrimination claims generally and with reasonable accommodation requests more specifically.

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I. Introduction

Both houses of Congress unanimously approved the ADA Amendments Act of 2008 (ADAAA),[1] and President George W. Bush signed the ADAAA into law on September 25, 2008.[2] The ADAAA, which went into effect on January 1, 2009,[3] explicitly disavows the reasoning of four earlier Supreme Court decisions that had narrowed the scope of the Americans with Disabilities Act's (ADA) disability definition.[4] A principal objective of Congress in enacting the ADAAA was to refocus the ADA on issues of discrimination rather than on issues of standing.[5]

Both legislators and commentators have lauded the ADAAA as landmark legislation that will broadly empower employees asserting disability discrimination claims.[6] This contention is premised upon a number of frequently asserted assumptions. The first assumption is that the ADAAA will result in fewer summary judgment rulings finding that claimants lack standing as covered individuals with a disability.[7] The second assumption is that the amendments will result in a greater proportion of cases being determined on the basis of whether the claimant is a qualified individual with or without a reasonable accommodation.[8] The third

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1. 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008); 154 CONG. REC. H8286 (daily ed. Sept. 17, 2008).

2. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

3. *Id*. § 8.

4. *See* 42 U.S.C. § 12101(b)(3)–(4) (2012) (noting that the purpose of the chapter is to "invoke the sweep of congressional authority" and "address the major areas of discrimination faced day-to-day by people with disabilities").

5. *See* 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008) (stating that the ADAAA would refocus emphasis on whether discrimination occurred rather than whether an impairment qualifies as a disability).

6. *See, e.g.*, 42 U.S.C. § 12101(b) (2012) (describing the purpose of the ADAAA as to provide a "national mandate for the elimination of discrimination"); Jason Lewis, *A Change for the Better?: The ADA Amendments Act Of 2008*, 14 PUB. INT. L. REP. 203, 206 (2009) (noting that numerous disability rights groups were pleased with the legislation).

7. *See* Evan Sauer, *The ADA Amendments Act of 2008: The Mitigating Measures Issues, No Longer a Catch-22*, 36 OHIO N.U. L. REV. 215, 236 (2010) (predicting that due to the ADAAA's broad definition of disability, "it is less likely that employers will be able to succeed on a motion for summary judgment").

8. *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act*

and final assumption is that the combination of these factors will result in higher overall win rates for ADA plaintiffs.[9]

Most commentators have applauded the apparent expansion of ADA coverage, with Professor Kevin Barry, for example, asserting that "the ADAAA is a radical step in the right direction."[10] Some commentators even think that the ADAAA increases the class of disabled individuals too expansively so as unwisely to benefit individuals who are not truly disabled or in need of protection.[11] But some commentators, including myself, have expressed skepticism about whether the ADAAA will actually affect such a dramatic change in outcomes.[12] One reason for such skepticism is that the ADAAA retained the same basic definition of who is a covered individual with a disability, and courts once again may interpret this language narrowly in order to avoid overloaded dockets.[13] In addition,

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of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability, 2010 UTAH L. REV. 993, 1022 (stating that "the new focus likely will center more on whether an individual is qualified to perform the job in question"); Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 74 (2011) (stating that "the issue of whether the individual's requested accommodation is reasonable will emerge more frequently").

9. *See* Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 670 (2010) (predicting that the ADAAA "will increase the win rate of plaintiffs in ADA Title I cases").

10. Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 208 (2010); *see also* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 229 (2008) (describing the ADAAA as "long overdue").

11. *See, e.g.*, Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 336 (2010) (stating that the ADAAA "will inevitably generate a flood of litigation by individuals who should not be protected"); Jones, *supra* note 9, at 669 (arguing that the ADAAA has responded to a former problem of underinclusiveness with a new problem of overinclusiveness).

12. *See, e.g.*, Befort, *supra* note 8, at 1024–25 ("The original version of the ADA used the same 'substantially limits' language and the EEOC followed by issuing relatively broad interpretative guidelines. But the courts ignored or disapproved of many of the most significant guidelines and interpreted the term 'substantially limits' narrowly."); Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 421 (2011) ("The ADAAA was intended to reverse the effects of several Supreme Court decisions that limited the coverage of the ADA and to broaden the coverage of the ADA . . . . Yet the ADAAA may not resolve all of the issues that Congress or disability advocates wanted to address.").

13. *See* Paul R. Klein, *The ADA Amendments Act of 2008: The Pendulum*

many courts have not been receptive to the ADA's reasonable accommodation requirement, finding it to go beyond a simple ban on discrimination to encompass an uncomfortable preferential-treatment mandate.[14] In short, the judiciary that previously undercut the promise of the initial version of the ADA may find similar incentives with respect to the attempted ADAAA expansion.

This Article undertakes an empirical examination of how the ADAAA has impacted actual case outcomes. The recent reported cases provide a unique opportunity for such an examination because, with the ADAAA not retroactively applicable to cases pending prior to its effective date,[15] courts have been simultaneously deciding cases under both the pre-amendment and post-amendment standards. This study examines all reported federal court summary judgment decisions arising under Title I of the ADA for a forty-month period extending from January 1, 2010, to April 30, 2013. The study coded these pre-ADAAA and post-ADAAA decisions for both disability standing determinations and for rulings on whether the plaintiff is qualified for the job in question. The study also identified the types of impairments at issue in the two comparator sets of data.

These preliminary data show that the federal courts are granting employers a significantly smaller proportion of summary judgment

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Swings Back, 60 CASE W. RES. L. REV. 467, 488 (2010) (stating that "[m]aintaining the substantially limits language [in the ADAAA] could increase the likelihood that the courts will relapse into their previous textualist approach to the statute and interpret the language restrictively").

14. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 50 (2000) (stating that many courts view the notion of reasonable accommodation as "requests for special benefits"); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009) (suggesting that "the ADAAA actually may reinvigorate the backlash as the accommodation mandate becomes more visible and more contested"); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1819–20 (2005) (stating that courts think of accommodations as "an unwelcome species of affirmative action").

15. *See, e.g.*, Carraras v. Sajo, Garcia & Partners, 596 F.3d 25, 33 (1st Cir. 2010) (rejecting application of the ADAAA where the underlying activity occurred prior to the passage of the amendments); EEOC v. Argo Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009) (noting that though Congress passed the ADAAA, the changes did not apply retroactively); Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562, 565–67 (6th Cir. 2009) (rejecting application of the ADAAA because it does not apply retroactively to govern conduct occurring before the Act became effective).

rulings under the ADAAA on the basis of a lack of disability status. In addition, the ADAAA decisions exhibit a greater prevalence of rulings on the issue of whether the plaintiff is a qualified individual. On the other hand, the post-amendment decisions show an increased tendency for the courts to find that the plaintiff is not qualified. While the rate of increase in plaintiff victories on the disability issue is outpacing the rate of increase in plaintiff losses on the qualified issue, the latter phenomenon suggests the potential for lower overall win outcomes for ADAAA plaintiffs than might have been expected.

This Article proceeds in five parts. Part II briefly chronicles the Supreme Court's contraction of the disability definition under the original version of the ADA. Part III discusses the ADAAA override generally. Part IV then describes the methodology of this empirical study, while Part V describes the study's findings. The Article concludes in Part VI, which takes a closer look at the post-amendment decisions to determine if the ADAAA is functioning as anticipated.

II. The Supreme Court's Contraction of the ADA's Definition of Disability

The Americans with Disabilities Act (ADA)[16] was originally enacted in 1990 with considerable fanfare and support. President George H.W. Bush, in signing the ADA into law, described the new statute as "an historic opportunity" representing "the full flowering of our democratic principles."[17] Disability rights activists were optimistic[18] that the new legislation would accomplish its stated purpose of providing a "national mandate for the elimination of discrimination against individuals with disabilities."[19]

The ADA's ban on disability-based discrimination, however, was not simply an extension of the antidiscrimination principles embodied

16. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2006)).

17. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070, 1070 (July 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 601, 601–02.

18. *See, e.g.*, Diller, *supra* note 14, at 19 (noting that the ADA was "enacted amid hopes that it would have a sweeping impact").

19. 42 U.S.C. § 12101(b)(1) (2006).

in the previously enacted Title VII, which bans discrimination "because of" certain listed characteristics.[20] Paraphrasing three different portions of the statute,[21] the ADA's original antidiscrimination formula can be stated as follows: No employer shall discriminate against a *qualified individual with a disability* because of the disability of such individual when the individual, with or without *reasonable accommodation*, can perform the essential functions of the employment position, unless the accommodation would impose an *undue hardship* on the operation of the business of that employer.[22] The ADA's antidiscrimination formula, accordingly, is more complicated than Title VII's in two significant respects. First, while Title VII protects everyone against discrimination on the basis of race or gender, only individuals who have a qualifying disability have standing to assert a claim under the ADA.[23] Second, in ascertaining whether an employer is discriminating in violation of the ADA, the statute asks whether the employee is qualified for the job "with or without reasonable accommodation,"[24] unless such accommodation would impose an "undue hardship."[25]

In defining a covered disability, the ADA borrowed the Rehabilitation Act's three-pronged definition of a "handicapped individual," except with the term "disability" substituted for the term

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20. *Id.* § 2000e-2(a).

21. *Id.* §§ 12112(a), 12111(8), 12112(b)(5)(A).

22. *Id.* §§ 12112(a), 12111(8), 12112(b)(5)(A).

23. *See id.* § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability . . . .").

24. *Id.* § 12112(a). Title VII generally does not impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of their jobs, but instead merely invokes a negative prohibition against discrimination. *See* Diller, *supra* note 14, at 40–44 (contrasting how the ADA employs a different-treatment model of discrimination with how most antidiscrimination statutes employ an equal-treatment model of discrimination). Title VII does impose a duty on an employer to accommodate the religious observances and practices of its employees. *See* § 2000e(j) (stating that "religion" includes all aspects of observance and practice unless an employer can demonstrate that they are unable to reasonably accommodate the observance or practice without undue hardship). But the Supreme Court has construed this duty as far more limited than that imposed by the ADA. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (ruling that an employer need not incur more than a *de minimis* hardship in providing an accommodation for religious purposes).

25. 42 U.S.C. § 12112(b)(5)(A) (2006). The term "undue hardship" is defined as "an action requiring significant difficulty or expense." *Id.* § 12111(10)(A).

"handicapped."[26] Under the ADA, "the term 'disability' means, with respect to an individual: (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."[27]

The federal courts generally adopted a broad reading of the disability definition under the Rehabilitation Act. Professor Chai Feldblum, in reviewing pre-ADA-era decisions, summarized her findings as follows:

> Courts deciding cases under [the Rehabilitation Act's] definition had decided that individuals with a wide range of serious medical conditions could invoke the protections of the law. Indeed, courts had rarely even parsed the language of the definition to decide whether a plaintiff was a "handicapped individual" under the law. Rather, the definition was understood to include any medical condition that was non-trivial, and the courts had applied the law's coverage in that manner.[28]

Many activists and observers were optimistic that the ADA was structured to go a long way toward achieving the stated objective of eradicating disability discrimination.[29] But the optimists overlooked one important fact: unlike the all-encompassing nature of race and gender under Title VII, the notion of disability under ADA is a term of limitation.[30] While everyone has a race and gender, not everyone is disabled. If the

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26. 29 U.S.C. § 706(8)(B) (1988) (current version at 29 U.S.C. § 794(a) (2006)); *see also* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (explaining that "[t]he ADA's definition of disability is drawn almost verbatim" from the Rehabilitation Act).

27. 42 U.S.C. § 12102(2).

28. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 91–92 (2000).

29. *See* Diller, *supra* note 14, at 19 ("The bill was signed into law on July 26, 1990 at a White House ceremony attended by 2,000 supporters, including many people with disabilities. The event was an emotional watershed marked by tears and jubilation. Many present referred to it as a second independence day.").

30. *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 69 (1999) (stating that "[t]he ADA is very different" because "[o]nly individuals who meet the statute's definition of 'disability' are protected").

threshold for establishing disability status is raised, the scope of protection afforded by the Act is correspondingly reduced.

The enactment of the ADA contributed to a significant rise in the incidence of employment litigation. In the four years following 1991, the number of employment claims in federal court jumped by 128%.[31] Between the ADA's effective date in 1992 and the end of fiscal year 1998, claimants filed more than 108,000 charges of disability discrimination with the Equal Employment Opportunity Commission (EEOC).[32] This litigation explosion, coupled with the rather imprecise language of the statute, resulted in conflicting judicial interpretations on a host of key ADA issues[33] and led the Supreme Court to decide sixteen cases construing the ADA in a relatively short time span from 1998 to 2004.[34] This increased activity also tested the patience of the

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31. Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22 (1997).

32. Befort & Thomas, *supra* note 30, at 29–30 (citing EQUAL EMP'T OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES, FY 1992–FY 1998 (1998)).

33. *See, e.g.*, *id.* at 31–41 (describing ten contentious ADA issues on which the circuit courts, the EEOC, or both, took conflicting positions and also discussing the reasons for this widespread judicial dissonance).

34. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (determining that because due process protects the right of access to courts, Title II of the ADA constitutes a valid exercise of congressional authority to enforce that substantive guarantee under the Fourteenth Amendment); Raytheon Co. v. Hernandez, 540 U.S. 44, 55 (2003) (distinguishing between disparate-treatment and disparate-impact claims under the ADA); Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 446 n.6 (2003) (noting that the ADA does not helpfully define the term "employee," and using cases construing similar language to fill in the gap); Barnes v. Gorman, 536 U.S. 181, 189–90 (2002) (determining that punitive damages cannot be awarded under section 2 of the ADA); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002) (determining that an EEOC regulation authorizing refusal to hire an individual if job performance would endanger his or her health was permissible under the ADA); US Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002) (noting that an employer's showing that an accommodation would conflict with their seniority system is generally sufficient to show that the accommodation is not reasonable); EEOC v. Waffle House, Inc., 534 U.S. 279, 296–98 (2002) (deciding that an arbitration agreement did not preclude the EEOC from pursuing employee judicial relief); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (determining that a substantial limitation in the activity of performing life tasks must be guided by the ADA disability definition); PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001) (deciding that Title III of the ADA prohibits denial of access to the golf tournament and that use of a golf cart is not a modification that would fundamentally alter the nature of a golf tournament); Bd. of Trs. of the Univ. of

federal judiciary charged with managing the caseload, as illustrated by the following comment:

> The court advised that the ADA as it was being interpreted had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case.[35]

Beginning in 1999, the Supreme Court significantly narrowed the class of protected "disabled" employees through a series of four decisions. The most significant of these decisions was *Sutton v. United Air Lines, Inc.*[36] in which the Court ruled that mitigating measures, such as medication and prosthetic devices, should be taken into account in determining whether a person is disabled for purposes of the ADA.[37] The Court also ruled in that case that a plaintiff is not protected under prong three of the disability definition by virtue of being regarded as disabled unless the employer perceives the plaintiff's impairment as one that would substantially limit a major life activity.[38] Two

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Ala. v. Garrett, 531 U.S. 356, 374 (2001) (determining that the requirements for private individuals to recover monetary damages against the State were not met); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 577–78 (1999) (outlining the ADA's definition of a disability and the extent to which it limits a major life activity); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (determining that the ADA requires that a determination of "substantially limits" be made in reference to the mitigating measures the disabled individual employs); Sutton v. United Air Lines, Inc., 527 U.S. 471, 492–94 (1999) (deciding that the ADA requires that determination of a disability must be made with reference to mitigating measures); Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805–07 (1999) (determining that Social Security Disability Claims and ADA claims do not necessarily conflict, but in order to defeat summary judgment, a reasonable juror must be able to conclude that the plaintiff could perform the essential functions of the job); Bragdon v. Abbott, 524 U.S. 624, 647 (1998) (deciding that respondent's HIV infection did qualify as a disability); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (determining that state prisons fall within the Title II definition of a "public entity," and the ADA is thus extended to state prison inmates).

35. Pedigo v. P.A.M. Transp., 891 F. Supp. 482, 485 (W.D. Ark. 1994), *rev'd*, 60 F.3d 1300 (8th Cir. 1995).

36. 527 U.S. 471 (1999).

37. *See id.* at 482 (rejecting EEOC guidance, found at 29 C.F.R. § 1630.2(j) (1998), suggesting that disability status should be determined without regard to the effect of mitigating measures).

38. *Id.* at 489.

companion decisions issued on the same day as *Sutton* reached similar results.[39] The Court further restricted the disability standing requirement three years later in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[40] when it overturned a Sixth Circuit decision that had found an assembly line worker with carpal tunnel syndrome and tendonitis to be substantially limited in performing manual tasks because of her workplace difficulties in gripping tools and in performing repetitive work.[41] The Supreme Court explained that the proper inquiry was to determine whether an individual has "an impairment that prevents or severely restricts the individual from [engaging in] activities that are of central importance to [daily life]."[42] The Court stated that the terms "substantially limits" and "major life activity" "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[43]

The most obvious impact of these decisions was to narrow the ADA's protected class and to raise the bar for ADA plaintiffs in litigation. This impact is demonstrated by several statistical measures. First, the timing of the *Sutton* decision correlates with a significant decline in the number of charges of alleged discrimination filed under the ADA. The EEOC's charge-filing statistics show a drop in annual ADA charges from the 17,000 to 18,000 range during fiscal years 1997 to 1999, to a range of 15,000 to 16,000 charges filed in each of the four fiscal years following the *Sutton* decision.[44] Federal court filings for

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39. *See* Murphy v. United Parcel Serv., 527 U.S. 516, 518 (1999) (ruling that an employee with hypertension was not disabled when mitigating effects of medication are taken into consideration); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999) (finding that monocular vision was not a disability for an individual whose brain had developed mechanisms to compensate for loss of vision in one eye).

40. 534 U.S. 184 (2002).

41. *See id.* at 192–93 (holding that a substantially limiting impairment is one that prevents or severely restricts an individual from doing activities that are of central importance to most people's daily lives).

42. *Id.* at 198.

43. *Id.* at 196–97.

44. U.S. Equal Emp't Opportunity Comm'n, *Americans with Disabilities Act of 1990 (ADA) Charges (Includes Concurrent Charges with Title VII, ADEA, and EPA) FY 1997–FY 2012*, http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Aug. 23, 2013) (on file with the Washington and Lee Law Review).

employment-based civil rights cases similarly declined from 23,735 in 1998[45] to 20,955 in 2002 and 14,353 in 2006.[46] These numbers suggest that *Sutton* and its progeny served to deter the assertion of discrimination claims under the ADA.

Second, several empirical studies found that the federal courts saw little merit in those ADA claims that were asserted. Professor Ruth Colker, for example, conducted a detailed analysis of decided ADA federal court decisions and reported that the courts resolved approximately 93% of these cases in favor of employers.[47] Many of these decisions were the result of summary judgment rulings based upon a determination that the plaintiff lacked disability status.[48] Another study undertaken by Professor Colker revealed that the federal courts of appeal are far more likely to overturn trial court rulings favorable to ADA plaintiffs than they are to take similar action with respect to appeals arising under Title VII.[49]

Following the four restrictive Supreme Court decisions, courts generally found many very serious impairments not to be disabling. Most courts, for example, concluded that individuals

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45. ADMIN. OFFICE OF THE U.S. COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, TABLE C-2A. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1998 THROUGH 2002, at 133 (2002), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2002/appendices/c02asep02.pdf.

46. ADMIN. OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, TABLE C-2A. U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2002 THROUGH 2006, at 166 (2006), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/front/completejudicialbusiness.pdf.

47. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (explaining how the author determined that 93% of both appealed and unappealed ADA trial court outcomes were in favor of defendants).

48. *See id.* at 110–16 (arguing that summary judgment rulings on ADA claims routinely include decisions on genuine issues of material fact); Befort & Thomas, *supra* note 30, at 80 ("The most common justification for [employers prevailing in 93% of all court rulings involving ADA claims] is a stringent interpretation of the 'disability' and 'reasonable accommodation' concepts.").

49. *See* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 253–54 (2001) (comparing data on appellate reversals in ADA and Title VII cases).

who could control their diabetes through medication were not disabled.[50]

Similar outcomes typically occurred for other impairments subject to mitigation such as epilepsy and depression.[51] Likewise, most courts prior to the ADAAA found chronic illnesses that are episodic in nature are not disabling. For example, a number of courts ruled that cancer was not a disabling condition because its effects are episodic and subject to periods of remission.[52]

Most of the scholarly response to this restrictive trend was decidedly negative. The loudest detractors, including some long-time disability-rights activists, viewed these decisions as subverting the bold civil rights intent of Congress in enacting the ADA.[53] The clear consensus reaction, even from those

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50. *See, e.g.*, Greenberg v. Bellsouth Telecomms., Inc., 498 F.3d 1258, 1264 (11th Cir. 2007) (finding that Greenberg's obesity and diabetes were not disabilities for the purposes of the ADA in this case because they did not "substantially limit" a "major life activity"); Wilson v. MVM, Inc., 475 F.3d 166, 179 (3d Cir. 2007) (finding that the appellants could not prove that their diabetes, cardiac problems, and use of hearing aids were "not mitigated by corrective measures, thus barring a claim that they have impairments that limit a major life activity"); Scheerer v. Potter, 443 F.3d 916, 919–22 (7th Cir. 2006) (determining that there was not enough evidence in the record to find that Scheerer's medication-controlled diabetes severely restricted any major life activities).

51. *See, e.g.*, Spades v. City of Walnut Ridge, 186 F.3d 897, 900 (8th Cir. 1999) (holding that Spades's depression was corrected by medication and counseling and was not a disability within the meaning of the ADA); Mancini v. Union Pac. R.R. Co., 98 Fed. App'x 589, 591 (9th Cir. 2004) (finding that Mancini was not disabled because his epilepsy was controlled by medication); McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1288–89 (D. Wyo. 2004) (finding that McMullin's clinical depression was mitigated by medication and did not present a "substantial limitation" on the "major life activity of working"); Robb v. Horizon Credit Union, 66 F. Supp. 2d 913, 916 (C.D. Ill. 1999) (finding that Robb's depression was not a disability, because she was "capable of working and [was] not substantially limited in any major life activities" provided that she took her medication).

52. *See, e.g.*, Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 507 F.3d 1306, 1315 (11th Cir. 2007) ("Most notably, the most severe periods of limitation that Garrett suffered during her cancer treatment were short-term, temporary, and contemporaneous with her treatment. A severe limitation that is short term and temporary is not evidence of a disability."); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190–91 (5th Cir. 1996) (finding that Ellison's cancer and treatment did not affect her enough over time to be a "substantial limitation" on the major life activity of working).

53. *See, e.g.*, Diller, *supra* note 14, at 22 (suggesting that *Sutton* and similar rulings demonstrate that the federal courts are engaged in a judicial

commentators outside the disability-advocate community, was that the Supreme Court's decisions cut too deep a swath into the ADA's protected class.[54]

III. The ADAAA

A. The Path to a Congressional Override

Much of the widespread criticism of the four Supreme Court decisions narrowing the scope of the ADA's definition of disability was accompanied by proposals for reform. The most far-reaching proposal would have extended ADA protection to any individual with an actual or perceived impairment regardless of whether the impairment resulted in any functional limitation on that individual's ability to engage in any activity.[55] The proponents of this approach maintained that this change would mirror Title VII in terms of focusing attention on an employer's reasons for its employment action rather than focusing on whether an employee is a member of the "substantially limited" subset.[56]

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backlash that is "systematically nullifying rights that Congress conferred on people with disabilities"); Feldblum, *supra* note 28, at 161 (describing a "large, gaping wound" inflicted by *Sutton* and its companion cases).

54. *See, e.g.*, Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1073 (1999) (arguing that the Supreme Court's ADA cases demonstrate a decision to exclude from ADA coverage "some individuals whom Congress surely intended to cover"); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000) (arguing that the Supreme Court disregarded the "rich legislative history" and a "voluminous set of administrative materials" to conclude that "individuals with impairments that have been mitigated do not have disabilities").

55. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1473–74 (1999) (arguing that the ADA definition of disability "should be replaced with a definition based simply upon mental or physical impairment" and should include "a plaintiff's record of such an impairment, or a perceived impairment"); Feldblum, *supra* note 28, at 162–64 (discussing two ways that Congress could address the court decisions that implement an overrestrictive definition of disability under the ADA).

56. *See, e.g.*, Eichhorn, *supra* note 54, at 1473–74 (arguing that a disability definition based "simply upon mental or physical impairment . . . coincides with the reasons behind prohibiting disability discrimination in the first place," namely its "reliance on irrational, unsubstantiated judgments about mental and

On July 26, 2007, companion ADA Restoration bills were introduced in the House[57] and in the Senate.[58] The bills reflected language that the disability community had crafted.[59] Most significantly, H.R. 3195 proposed amending the ADA's definition of disability to mean: "(i) a physical or mental impairment; (ii) a record of a physical or mental impairment; or (iii) being regarded as having a physical or mental impairment."[60] This proposed definition of disability did not require that such an impairment pose any functional limitation on life activities.[61]

A number of business groups expressed opposition to the companion bills.[62] In testimony before a Senate Committee in November 2007, for example, a management attorney expressed the concern that S. 1881 would confer standing on any individual with an impairment, no matter how trivial, and that individuals with minor impairments would be entitled to reasonable accommodations.[63] This blanket entitlement to accommodations,

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physical impairments"); Feldblum, *supra* note 28, at 162–64 (proposing two ways that Congress could correct an overrestrictive definition of disability under the ADA and place "people with physical or mental impairments who experience discrimination because of such impairments on a par with individuals who experience discrimination because of their race, religion, or sex").

57. H.R. 3195, 110th Cong. (2007).

58. S. 1881, 110th Cong. (2007).

59. *See* Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R., 187, 197–98 (2008) (discussing the introduction of H.R. 3195 and S. 1881 that "closely reflected the draft bill that had been developed by the disability community lawyers").

60. H.R. 3195 § 4.

61. *See id.* (lacking a requirement that a physical or mental impairment impose a functional limitation on life activities).

62. *See* Chai R. Feldblum, *Roundtable On: The Americans with Disabilities Act and the ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 232, 234–35 (2008) (explaining that "a number of major business associations opposed S. 1881 and H.R. 3195" because the groups believed that the amendments included too many people with impairments as people with disabilities).

63. *See Restoring Congressional Intent and Protections under the Americans with Disabilities Act: Hearing on S. 1881 of the Comm. on Health, Educ., Labor, and Pensions United States Senate*, 110th Cong. 23–24 (2007) (statement of Camille A. Olson, Partner, Seyfarth Shaw LLP) ("Employers will find themselves addressing accommodation requests from individuals with the flu, with poison ivy, ankle sprains . . . and a myriad of other minor medical conditions that go far beyond any reasonable concept of disability. There is no limitation on the definition of disability under S. 1881 . . . .").

the attorney opined, would cause considerable difficulty and expense for employers.[64]

Representatives Steny Hoyer and Jim Sensenbrenner, sponsors of the proposed legislation, urged disability and business leaders to work out their differences.[65] From February to May of 2008, representatives of these two groups held numerous meetings and exchanged several drafts of proposed language.[66] They finally achieved a compromise on May 15, 2008,[67] retaining the ADA's current definition of disability but including several measures designed to lower the bar for establishing disability status.[68] With only slight revisions, this compromise was enacted as the ADAAA.

B. A Summary of the ADAAA

The ADAAA explicitly disavows the reasoning of the four Supreme Court decisions that narrowed the scope of the ADA's disability definition.[69] Although the ADA's basic definition of disability remains intact, the ADAAA emphasizes that the

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64. *See id.* at 32–33 (explaining that by broadening the definition of "disability" employers may be forced to implement extensive workplace accommodations).

65. *See* Chai R. Feldblum, *Hearing On: Restoring Congressional Intent and Protections Under the Americans with Disabilities Act*, 13 TEX. J. C.L. & C.R. 200, 229 (2008) (explaining that "Majority Leader Steny Hoyer and Congressman Jim Sensenbrenner urged both the business community and the disability community to meet and see if they could work out their differences").

66. *Id.* at 229–30. As the Statement of the Managers accompanying the bill enacted as the ADAAA described: "S. 3406 is the product of an extensive bipartisan effort that included many hours of meetings and negotiation by legislative staff as well as by stakeholders including the disability, business, and education communities." 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008).

67. *See* Feldblum, *Hearing*, *supra* note 65, at 230 (discussing the work between the business community and the disability community: "[A] final compromise was reached on May 15, 2008").

68. *See* Feldblum, *Roundtable*, *supra* note 62, at 236 (describing the compromise made between the business and disability communities regarding changes to the ADA).

69. *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553, 3554 (detailing the purposes of the ADA Amendments Act and specifically rejecting the Supreme Court's reasoning).

definition of disability should be broadly construed[70] and clarifies and expands the definition's meaning in several ways.

First, the ADAAA rejects the rule enunciated by the Supreme Court in the *Sutton* trilogy "that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."[71] The ADAAA, however, recognizes an exception in that "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."[72]

Second, the ADAAA addresses the challenges that some individuals have faced when trying to establish a substantially limiting impairment when that impairment is episodic in nature. According to a rule of construction incorporated in the ADAAA, "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[73]

Under the original version of the ADA, the determination of whether an activity constitutes a major life activity was left to the EEOC and the courts.[74] The ADAAA works a third type of change by including in the statute an illustrative list of major life activities. The activities listed "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[75] In addition, the ADAAA explicitly includes major bodily functions in the statutory definition of major life activities.[76] As a result, some individuals

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70. *See* 42 U.S.C. § 12102(4)(A) (2012) ("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.").

71. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. at 3554 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999)).

72. 42 U.S.C. § 12102(4)(E)(ii).

73. *Id*. § 12102(4)(D).

74. *See* Befort & Thomas, *supra* note 30, at 34 (explaining that the ADA "does not define key terms used in the definition of disability" nor what must be done in the absence of an explicit Congressional definition).

75. 42 U.S.C. § 12102(2)(A).

76. *See id*. § 12102(2)(B) ("[A] major life activity also includes the operation

will be able to establish coverage under the Act without describing the activities in which they are limited so long as they have a serious medical condition that results in a substantial limitation on a major bodily function.

Fourth, the ADAAA expands the coverage of the Act's "regarded as" prong. Under the amended version of the statute, an individual is disabled under prong three of the disability definition "if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[77] Accordingly, unlike the first and second prongs of the disability definition, courts will not have to determine whether an impairment functionally limits a major life activity when an individual is alleging discrimination under the "regarded as" prong.[78] As a compromise for this broad coverage, Congress inserted two important statutory limitations. The first limitation is that the "regarded as" prong does "not apply to impairments that are transitory and minor."[79] The second limitation is that an employer need not provide a reasonable accommodation "to an individual who meets the definition of disability . . . solely under" the "regarded as" prong.[80] As a result, employers will have to provide reasonable accommodations only to individuals who actually have an impairment that substantially limits a major life activity and not to individuals who are simply regarded as disabled.

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of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

77. *Id.* § 12102(3)(A).

78. *See* 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) ("Under this bill, the third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity.").

79. 42 U.S.C. § 12102(3)(B) (2012). The ADAAA states that a "transitory impairment" is "an impairment with an actual or expected duration of 6 months of less." *Id.*

80. *Id.* § 12201(h); *see also* 154 CONG. REC. S8354 (daily ed. Sept. 11, 2008) (statement by Sen. Orrin Hatch) ("[S. 3406] balances [the expanded coverage of the 'regarded as' prong] by limiting the remedies available under this provision.").

As a final measure, the congressional findings included in the ADAAA state that the current EEOC regulations defining the term "substantially limits" set "too high a standard,"[81] and the Act expresses the expectation that the "[EEOC] will revise that portion" of its regulations.[82] The EEOC has since issued regulations implementing the ADAAA which, among other changes, lists eighteen impairments that, in the agency's view, "will, in virtually all cases, result in a determination of coverage under [the ADA]."[83]

IV. Empirical Methodology

Two key factual issues that must be determined in any disability discrimination case are whether the plaintiff employee is "disabled" and "qualified." Under the ADA, an individual has standing to assert a claim of disability discrimination only if she has been treated adversely on the basis of "disability."[84] In addition, Title I, the employment chapter of the ADA,[85] protects only those "qualified"[86] individuals "who, with or without a reasonable accommodation, can perform the essential functions of the employment position."[87] An employment discrimination plaintiff, accordingly, may succeed on a claim of discrimination under the ADA only if she is "disabled," yet "qualified."

Following the *Sutton* decision, courts frequently rejected discrimination claims through summary judgment rulings finding that the plaintiff was not "disabled" within the meaning of the

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81. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(8), 122 Stat. 3553, 3554.

82. *Id*. § 2(b)(6), 122 Stat. at 3554.

83. 29 C.F.R. § 1630.2(j)(3) (2012).

84. 42 U.S.C. § 12112(a); *see also* Perrywatson v. United Airlines, Inc., 916 F. Supp. 2d 866, 877 (N.D. Ill. 2013) (stating that "[a]n ADA plaintiff gets nowhere unless she is able to show that she qualifies as a disabled individual under the statute").

85. The ADA is codified under five separate titles. While Title I addresses disability discrimination in employment, 42 U.S.C. §§ 12111–12117 (2012), the other titles address such non-employment issues as access to governmental services (Title II), 42 U.S.C. §§ 12131–12150 (2012), and public accommodations (Title III), 42 U.S.C. §§ 12181–12189 (2012).

86. *Id*. § 12112(a).

87. *Id*. § 12111(8).

ADA.[88] The ADAAA attempts to reduce the prevalence of such outcomes by commanding a broader construction of the disability definition[89] and by refocusing the ADA on issues of discrimination and qualification as opposed to standing.[90]

The purpose of this empirical study is to determine whether the ADAAA is indeed altering outcomes and fulfilling its stated purpose of providing a "national mandate for the elimination of discrimination."[91] This study attempts such a determination by comparing all reported federal court summary judgment decisions made under pre-amendment and post-amendment standards issued between January 1, 2010, and April 30, 2013.

A. Identifying the Cases

The cases that form the basis for this study were identified through the WestlawNext search engine from the online Westlaw legal database. The search process involved the following steps:

(1) Within WestlawNext, the following two databases were targeted: Federal District Courts and Federal Courts of Appeal.
(2) The Advanced Search option of WestlawNext was then used to narrow the search to those decisions issued between the dates of 1/1/2010 and 4/30/2013.
(3) Under the "Find Documents That Have" tab, the search terms "Americans with Disabilities Act" and "ADA" were entered. The required frequency within each decision was set at "1" for the former term and "2" for the latter term.
(4) At this point, clicking on the "Search" button yielded a total of 7,903 decisions.

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88. *See supra* notes 47–48 and accompanying text.

89. *See* 42 U.S.C. § 12102(4)(A) (2012) ("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.").

90. *See* 154 CONG. REC. S8344 (daily ed. Sept. 11, 2008) (statement of the Managers) (stating that the ADAAA was designed to remedy lower court cases that "too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims").

91. 42 U.S.C. § 12101(b).

(5) The number of decisions was then further narrowed by checking on the "Reported" box in WestlawNext and again clicking on the Search button. This step resulted in a data set of 1,289 decisions.

This study analyzed only decisions chosen for reporting in either the Federal Supplement or the Federal Reporter series for two reasons. First, this requirement resulted in a more manageable number of decisions. Second, the reported cases generally reflect the judiciary's assessment that these decisions are of greater significance.[92] It is likely that courts take a greater degree of care in crafting reported decisions as compared to nonreported decisions.[93]

Because the WestlawNext search cast a very broad net, the resulting set of reported decisions contained many cases that did not fit the target criteria. The goal was to identify a subset of reported federal court decisions that addressed summary judgment motions relating to either "disability" status or "qualified" status arising under Title I of the Americans with Disabilities Act (or the Federal Rehabilitation Act).[94] Toward that end, each of the 1,289 reported decisions identified through WestlawNext was examined to determine inclusion within this relevant subset. This process eliminated more than 80% of the reported decisions. Some of the more frequent reasons for disqualification included (1) cases that did not arise under the ADA, (2) cases that arose in a non-employment context under

92. *See* James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 323 (2007) (stating that "depending on the circuit," unreported judgments are "either considered to have little or no value as a precedent").

93. *See* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1471 (2004) (stating that unpublished opinions are "produced with less care and labor than published opinions").

94. The Federal Rehabilitation Act prohibits disability discrimination by federal employers, contractors, and grant recipients. 29 U.S.C. §§ 791–796 (2012). Non-affirmative action employment discrimination claims arising under the Rehabilitation Act are included in this study because Congress has commanded that courts apply the same standards to those cases as apply under Title I of the ADA. 29 U.S.C. § 791(g).

parts of the ADA other than Title I, and (3) decisions that addressed non-summary judgment issues.

This process identified a relevant data set of 237 decisions. Of this total, federal district courts issued 182 of those decisions, while the federal courts of appeal issued the remaining fifty-five decisions.

B. Coding the Outcomes

Having identified an appropriate set of decisions, each case was then coded to extract relevant comparative information. This coding took place in three steps.

The first step was to code these decisions as subject to either pre-amendment or post-amendment standards. Pre-amendment cases are those that arose out of factual circumstances that occurred prior to the ADAAA's effective date of January 1, 2009.[95] Post-amendment cases are those that arose after that date.

The second step was to code information on those decisions that ruled on summary judgment motions relating to a plaintiff's "disability" status. For district court decisions, information was coded with respect to three characteristics. First, each decision was examined to determine whether the plaintiff's claim of disability status was premised on prong one of the ADA's disability definition (i.e., a current disability), prong three (regarded as disabled), or both. Second, the impairment or impairments alleged by each plaintiff was recorded and coded as being either predominantly physical or mental in nature. Third, each decision was coded as to outcome, with the possibilities being summary judgment granted to the plaintiff, summary judgment granted to the defendant, or summary judgment for the defendant denied. The last outcome usually reflected a determination by the court that the existence of a factual issue concerning disability status precluded an award of summary judgment as a matter of law. The same basic information was coded for the courts of appeals decisions, except the outcome categories were adjusted to reflect the range of potential appellate rulings—namely, affirm summary judgment for

95. *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 8, 122 Stat. 3553, 3559 (stating the effective date).

plaintiff, affirm summary judgment for defendant, or reverse or remand summary judgment for defendant.

Step three involved coding the summary judgment decisions that ruled on a plaintiff's "qualified" status. Here again, information was coded as to the nature of the plaintiff's alleged impairment or impairments and the outcome of the court's ruling. For district court decisions, the coded outcome options were two-fold: summary judgment granted to defendant finding plaintiff is not qualified, or summary judgment denied to defendant alleging plaintiff is not qualified. Here again, the latter outcome generally was based on a court finding the existence of a genuine factual dispute concerning whether the plaintiff was qualified for the job with or without a reasonable accommodation.[96] At the appellate level, outcomes were coded as either affirm district court finding of not qualified, or reverse or remand district court finding of not qualified.

While the resulting data set of reported decisions, as noted above, consists of 237 decisions, the data set contains a total of 289 coded outcomes. This higher number of outcomes reflects the fact that some decisions generated outcomes in multiple categories. So, for example, some plaintiffs alleged disability status under both prong one and prong three, and the court responded by ruling on both allegations. Similarly, some decisions contained rulings on both the disability and the qualified issues. The district court findings set out below generally reflect this larger universe of claim and issue outcomes.

V. The Findings

A. The Delayed Effect of the ADAAA

As a preliminary finding, Table 1 shows data concerning the delayed effect of the ADAAA. Because courts uniformly have

96. In cases utilizing the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this category would include a ruling that addresses whether an employer acted upon a legitimate, nondiscriminatory assessment of the employee's ability to perform the essential functions of the job, but would not include a ruling that addresses whether an employer's actions constituted a causal response to the employee's disability in other respects. *See id.* at 798–807 (describing the correct analysis for use in discrimination cases).

ruled that the ADAAA is not retroactive, those cases in the pipeline at the time of the ADAAA's adoption and most of those filed shortly thereafter were subject to pre-amendment standards.[97] Table 1 shows that it was not until 2012, more than three years after the ADAAA's effective date, that post-amendment district court decisions became more prevalent than pre-amendment decisions.[98] This prolonged delay in the emergence of post-amendment decisions demonstrates the glacial nature of nonretroactive legislative reform. It also has contributed to uncertainty with respect to the actual impact of the 2008 amendments. Not surprisingly, this delay is even more pronounced among the court of appeals decisions with only six post-amendment rulings out of a total of fifty-five decisions.

Table 1. Reported District Court Decisions by Year

Year	Pre-Amendment	Post-Amendment
2010	45	3
2011	48	9
2012	28	32
2013 (4 months)	6	11
Total	127	55

B. Disability Status

Not surprisingly, the most frequently asserted basis for summary judgment in the data set was a motion by an employer arguing that the plaintiff was not a covered individual with a disability. Such a motion was at stake in 191 outcomes, representing 66.1% of the data set. Of the district court outcomes, approximately 76% arose prior to the amendments, with the remaining 24% occurring after the amendments' effective date.

Table 2 shows the outcomes of the district court cases. The table shows that courts decided 74.4% of the pre-amendment disability status outcomes by granting summary judgment to the employer. The employer win rate in the post-amendment cases, in

97. *See supra* note 15 and accompanying text (indicating that the ADAAA is not retroactive because Congress expressed no clear intent to make the statute retroactive).

98. *Infra* Table 1.

contrast, is only 45.9%. This represents a 28.5 percentage point drop in pro-employer summary judgment rulings.

Table 2. Disability Status—Cumulative Totals Comparison

	Pre-Amendment		Post-Amendment	
	Number of Claims	Percentage	Number of Claims	Percentage
S/J for Ee	1	0.9	3	8.1
S/J for Er	87	74.4	17	45.9
S/J for Er Denied	29	24.8	17	45.9
Total	117	100	37	100

Although the sample size of the post-amendment decisions is admittedly small (thirty-seven case outcomes), these data provide considerable support for the proposition that the ADAAA is having the intended effect of fostering a broad construction of the revised disability definition.[99] Indeed, there are at least two reasons to believe that the data understate the actual expansion in coverage. First, the data do not include the apparently growing number of cases in which employers simply do not contest disability status.[100] Second, it is likely that the plaintiffs' bar is pushing the envelope by asserting more marginal claims of disability status, thereby dampening the decline in employer win rates.

Another area of inquiry concerns the prevalence of prong three disability status claims asserted in the post-amendment decisions. With the substantially lowered threshold for establishing prong three coverage now providing "nearly universal nondiscrimination protection" on the basis of

99. *See supra* note 69 and accompanying text (discussing the intent of Congress to broaden the definition of disability and reject certain Supreme Court precedent that narrowed the definition of disability).

100. *See, e.g.*, Keith v. Cnty. of Oakland, 703 F.3d 918, 923 (6th Cir. 2013) (noting that the employer did not challenge the disability status of the plaintiff); Anderson v. Georgia-Pac. Wood Prods., LLC, No. 2:11-cv-110-MEF, 2013 WL 1788521, at *6 (M.D. Ala. Apr. 26, 2013) (same); Wynes v. Kaiser Permanente Hosps., No. 2:-10-cv-00702-MCE-GGH, 2013 WL 1284320, at *9 (E.D. Cal. Mar. 28, 2013) (same); Andrews v. Mass. Bay Transit Auth., 872 F. Supp. 2d 108, 114 (D. Mass. 2012) (same); Bonnette v. Shinseki, 907 F. Supp. 2d 54, 69, 77 (D.D.C. 2012) (same).

impairment,[101] one might expect two developments: (1) that a greater proportion of post-amendment claims would be premised on prong three grounds, and (2) that such claims would be more likely to survive summary judgment as compared to prong one claims.[102]

Table 3 depicts outcomes in terms of the prong asserted for disability status in both pre-amendment and post-amendment cases. The data do not support the expectation of a greater prevalence of prong three claims following the effective date of the ADAAA. Among the 117 pre-amendment outcomes, thirty-three, or 28.2%, relied upon a prong three disability allegation. The prevalence of prong three claims in the post-amendment data set, meanwhile, actually dropped to eight out of a total of thirty-seven outcomes, for a rate of 21.6%.

Table 3. Disability Status—Cumulative Totals by Prong Asserted

Prong 1

	Pre-Amendment		Post-Amendment	
	Number of Claims	Percentage	Number of Claims	Percentage
S/J for Ee	1	1.2	2	6.0
S/J for Er	65	77.4	12	41.4
S/J for Er Denied	18	21.4	15	51.7
Total	84	100	29	100

Prong 3

	Pre-Amendment		Post-Amendment	
	Number of Cases	Percentage	Number of Cases	Percentage
S/J for Ee	0	0	1	12.5
S/J for Er	22	66.7	5	62.5
S/J for Er Denied	11	33.3	2	25.0
Total	33	100	8	100

101. Barry, *supra* note 10, at 208.

102. *See id.* at 274–75 (noting that the legislative history of the ADAAA makes clear that persons requiring an accommodation will no longer have a difficult time "demonstrating the limitation that needs accommodating under the first (or second) prong").

The data also do not support the expectation that prong three claimants would be more likely to survive summary judgment. Table 3 shows a higher rate of employer wins among the post-amendment prong three claims (62.5%) than among the post-amendment prong one claims (41.4%), although the prong three numbers are too small to provide a truly meaningful comparison.

A third area of inquiry concerning disability status relates to the type of impairment alleged by the plaintiff. The conventional wisdom is that plaintiffs with mental impairments fare substantially worse in litigation under the ADA than do plaintiffs with physical impairments.[103] On the whole, mental impairments tend to be more subjective in nature and severity, and engender more reactions tainted by bias and stigma.[104]

Table 4 shows outcomes for disability status claims based on the type of impairment asserted. The findings expressed in this table do not support the conventional wisdom, but instead show that plaintiffs asserting mental impairments in the data set more frequently survived summary judgment than those asserting physical impairments. Employers, for example, obtained favorable summary judgment rulings in 78.3% of pre-amendment cases in which plaintiffs claimed disability status on the basis of a physical impairment, while obtaining a similarly favorable ruling in only 60% of those cases involving a mental impairment. The post-amendment rulings run in the opposite direction, but in a substantially smaller set of decisions.

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103. *See, e.g.*, Michelle Parikh, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 745 (2004) (describing the added challenges faced by plaintiffs with mental illnesses that plaintiffs with physical illnesses do not face).

104. *See id.* at 742–45 (suggesting that the lack of outward manifestations of illness for some mental illnesses is "inherently more suspect, as many believe" those mental illnesses are easy to fake); *see also* Stephen F. Befort, *Mental Illness and Long-Term Disability Plans Under the Americans with Disabilities Act*, 2 U. PA. J. LAB. & EMP. L. 287, 290 (1999) (stating that there is a "general widespread suspicion of mental illness and of mental health treatments in particular").

Table 4. Disability Status—Cumulative Impairment Totals Comparison

	Pre-Amendment				Post-Amendment			
	Physical #	Physical %	Mental #	Mental %	Physical #	Physical %	Mental #	Mental %
S/J Ee	1	1.1	0	0	3	9.7	0	0
S/J Er	72	78.3	15	60	13	41.9	4	66.7
S/J D	19	20.7	10	40	15	48.4	2	33.3
Totals	92	100	25	100	31	100	6	100

The court of appeals data also show a very high win rate for employers in pre-amendment decisions. As depicted in Table 5, the appellate courts affirmed summary judgment rulings finding a lack of disability status in 75% of the cases. The relative paucity of post-amendment decisions at the appellate level, however, precludes any meaningful comparison of outcomes arising before and after the ADAAA's effective date.

Table 5. Disability Status–Court of Appeals Decisions

	Pre-Amendment		Post-Amendment	
	Number of Cases	Percentage	Number of Cases	Percentage
Affirm S/J for Ee	2	5.6	0	0
Affirm S/J for Er	27	75.0	1	0
Rev S/J for Er	7	19.4	0	100
Total	36	100	1	100

C. Qualified Status

As noted above, a principal goal of Congress in enacting the ADAAA was to refocus the ADA on issues of discrimination rather than on issues of standing.[105] A common assumption among many commentators was that the ADAAA would result in more cases being decided on the basis of whether the plaintiff is qualified for the job with or without a reasonable accommodation.[106] Table 6 presents data relevant to that assumption. The table shows the number and proportion of

105. *Supra* note 5 and accompanying text.

106. *Supra* note 8 and accompanying text.

district court summary judgment rulings based on qualified status as compared to all district court summary judgment rulings. These data show that the percentage of rulings relative to qualified status jumped from 28.2% in the pre-amendment outcomes to 47.1% in the post-amendment outcomes, providing substantial support for the assumed increased focus on qualified status.

Table 6. Issue for Summary Judgment (District Court Decisions)

	Pre-Amendment		Post-Amendment	
	Number of Claims	Percentages	Number of Claims	Percentages
Disability Status	117	71.8	37	52.9
Qualified Status	46	28.2	33	47.1
Total	163	100	70	100

Table 7 shows outcomes with respect to the qualified issue. In the pre-amendment cases, courts granted summary judgment to the employer, finding that the plaintiff was not qualified, in 47.9% of those outcomes ruling on the qualified issue. The employer win rate among the post-amendment cases rose to 69.7%. Although the post-amendment outcomes are relatively few in number (thirty-three), the data show a hefty 21.8 percentage point increase in employer victories. This increase provides at least some support for those commentators who harbored doubts about whether the ADAAA would radically transform overall ADA case outcomes in a pro-plaintiff fashion.[107]

Table 7. Qualified Status Cumulative Totals Comparison

	Pre-Amendment		Post-Amendment	
	Number of Claims	Percentages	Number of Claims	Percentages
S/J for Er	22	47.9	23	69.7
S/J for Er Denied	24	52.2	10	30.3
Total	46	100	33	100

107. *See supra* notes 11–14 and accompanying text (providing examples of commentators who have described issues created by the reasonable accommodation mandate in the ADA and commentators who have expressed doubt about the positive transformative effect of the ADAAA).

The case outcomes on the qualified issue also were sorted by type of impairment. Table 8 shows that plaintiffs with mental impairments fared less well than plaintiffs with physical disabilities in the pre-amendment cases. Among the pre-ADAAA cases, employers prevailed on summary judgment motions related to qualified status in 44.4% of the outcomes involving individuals with physical disabilities as compared to 60% of the outcomes involving individuals with mental disabilities. This finding stands in contrast to the pre-amendment disability status rulings in which plaintiffs with mental impairments more often survived summary judgment than did plaintiffs with physical impairments.[108] In a much smaller sample of decisions, the post-amendment case outcomes showed very little difference in outcomes for plaintiffs with physical as compared to mental impairments.

Table 8. Qualified Status—Cumulative Impairment Totals Comparison

	Pre-Amendment				Post-Amendment			
	Physical #	Physical %	Mental #	Mental %	Physical #	Physical %	Mental #	Mental %
S/J Er	16	44.4	6	60	20	69.0	2	66.7
S/J Den.	20	55.6	4	40	9	31.0	1	33.3
Totals	36	100	10	100	29	100	3	100

Plaintiffs fared even less well on the qualified issue at the court of appeals level. Table 9 shows that the appellate courts affirmed 64.7% of the pre-amendment rulings granting summary judgment to the employer on the qualified issue as well as in three out of the four post-amendment decisions that addressed this issue. Here again, the small number of post-amendment rulings precludes the ability to discern any conclusive trend in the post-amendment appellate outcomes.

108. *Supra* Table 3.

Table 9. Qualified Status—Court of Appeals Decisions

	Pre-Amendment		Post-Amendment	
	Number of Cases	Percentages	Number of Cases	Percentages
Affirm S/J for Er	11	64.7	3	75
Rev S/J for Er	6	35.3	1	25
Totals	17	100	4	100

VI. A Closer Look at Three Assumptions

A principal objective of this study is to determine empirically whether the ADAAA is fulfilling three core assumptions widely held at the time of its passage. As noted above,[109] these three assumptions are as follows:

(1) That the ADAAA will result in fewer summary judgment rulings finding that plaintiffs lack standing as covered individuals with a disability,
(2) That the amendments will result in more cases being decided on the basis of whether the plaintiff is a qualified individual with or without a reasonable accommodation, and
(3) That the amendments will result in higher overall win rates for ADA plaintiffs.

While the data described in the previous section provide some preliminary information with respect to the accuracy of these assumptions, a closer look at some of the actual post-amendment decisions provides a richer context for this assessment.

A. Assumption 1—Fewer Summary Judgment Rulings Denying Disability Status

The federal district court data provides strong support for this assumption. While the district courts granted summary judgment to the employer in 74.4% of the pre-amendment outcomes

109. *See supra* notes 7–9 and accompanying text (explaining the assumptions).

addressing disability status, the employer win rate in the post-amendment cases dropped to 45.9%.[110] This data, accordingly, shows a 28.5 percentage point decline in pro-employer summary judgment rulings.

This finding is hardly surprising since the key purpose of the amendments was to overturn the Supreme Court's restrictive interpretation as to standing and to reinstate a broad construction of the ADA's disability definition.[111] The decided cases illustrate that the ADAAA's expansion of the disability definition is working largely as intended.

1. Mitigating Measures

Prior to the ADAAA, courts followed the *Sutton* decision by considering the impact of mitigating measures in determining the issue of disability status.[112] As a result, courts frequently ruled that individuals with impairments that could be alleviated through medication or other mitigating measures, such as epilepsy[113] and depression,[114] did not have a substantially limiting disability. [115]

The ADAAA altered this analysis by providing that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative

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110. *Supra* Table 2.

111. *See supra* notes 69–70 and accompanying text (discussing the Congressional purpose behind the passage of ADAAA as memorialized in the Act).

112. *See, e.g.*, Greenberg v. Bellsouth Telecomms., Inc., 498 F.3d 1258, 1264 (11th Cir. 2007) (noting that the court looked at mitigating factors in determining whether a disability existed); Wilson v. MVM, Inc., 475 F.3d 166, 179 (3d Cir. 2007) (same); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 723–24 (8th Cir. 2002) (same).

113. *See, e.g.*, Popko v. Pa. State Univ., 84 F. Supp. 2d 589, 594 (M.D. Pa. 2000) (explaining that epilepsy is an impairment that is not a substantially limiting disability because anti-epileptic medicine can mitigate epilepsy's effects); Todd v. Acad. Corp., 57 F. Supp. 2d 448, 454 (S.D. Tex. 1999) (same).

114. *See, e.g.*, Spades v. City of Walnut Ridge, 186 F.3d 897, 889–900 (8th Cir. 1999) (explaining that depression is an impairment that is not a substantially limiting disability because medication and other measures can alleviate depression); McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1294–96 (D. Wyo. 2004) (same); Robb v. Horizon Credit Union, 66 F. Supp. 2d 913, 916 (C.D. Ill. 1999) (same).

115. *See, e.g.*, *Greenberg*, 498 F.3d at 1264 (noting impairments that were alleviated or could have been alleviated with medication or through other measures were not substantially limiting disabilities); *Wilson*, 475 F.3d at 179 (same); *Orr*, 297 F.3d at 723–24 (same).

effects of mitigating measures."[116] This straightforward command has not been lost on the courts in post-amendment cases. In *Eldredge v. City of St. Paul*,[117] for example, the U.S. District Court for the District of Minnesota denied an employer's summary judgment motion with respect to a sight-impaired employee who used such mitigating measures as a magnifying glass and a pocket telescope in performing his duties as a firefighter.[118] Citing to the 2008 amendments, the court stated that "the use of such equipment is not part of the determination of whether a condition substantially limits a major life activity."[119] A South Dakota federal district court reached a similar conclusion with respect to two employees with diabetes, finding "genuine issues of material fact as to whether each Plaintiff has an . . . impairment which substantially limits a major life activity, without considering the ameliorative effects of medication."[120]

2. Episodic Impairments

The courts also have embraced the ADAAA's expansion of coverage for episodic impairments. Prior to the amendments, many courts found individuals with episodic impairments, such as cancer in remission, not to have a qualifying disability.[121] Congress in the ADAAA sought to expand coverage in this arena

116. 42 U.S.C. § 12102(4)(E)(i) (2012).

117. 809 F. Supp. 2d 1011 (D. Minn. 2011).

118. *See id.* at 1029, 1040 (explaining that the availability of mitigating measures was not part of assessing whether a condition substantially limits a major life activity and denying the employer's motion for summary judgment).

119. *Id.* at 1029.

120. Nichols v. City of Mitchell, 914 F. Supp. 2d 1052, 1058 (D.S.D. 2012); *see also* Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 861–62 (9th Cir. 2009) (explaining in dicta that "impairments are to be evaluated in their *unmitigated* state, so that . . . diabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavioral adaptations such as a strict diet").

121. *See, e.g.*, Garrett v. Univ. of Ala. at Birmingham Bd. Of Trs., 507 F.3d 1306, 1315 (11th Cir. 2007) (describing plaintiff's "periods of limitation" as "short-term" and "temporary," and thus "not evidence of a disability"); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190–91 (5th Cir. 1996) (recognizing that plaintiff's "ability to work was affected" by her cancer and treatments, but not enough "to trigger coverage under" the ADA).

by providing that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[122]

Several courts have relied on this amendment in denying summary judgment motions relating to plaintiffs with cancer in remission.[123] One of the earliest post-amendment decisions, *Hoffman v. Carefirst of Fort Wayne, Inc.*,[124] illustrates the reasoning of these decisions. In that case, the employer terminated plaintiff Hoffman at a time when his stage-III renal cancer was in remission.[125] The employer argued in support of its summary judgment motion that Hoffman was not an individual with a disability because he did not have an impairment that substantially limited any major life activity at the time of the termination.[126] The U.S. District Court for the Northern District of Indiana rejected that argument with the following explanation:

> This Court is bound by the clear language of the ADAAA. Because it clearly provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," and neither side disputes that Stage III Renal Cancer, when active, constitutes a disability, this Court must find that Hoffman was "disabled" under the ADAAA. In other words, under the ADAAA, because Hoffman had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), Hoffman does not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action.

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122. 42 U.S.C. § 12102(4)(D) (2012).

123. *See, e.g.*, Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1250–51 (D. Colo. 2012) (finding the plaintiff had "adequately alleged" a disability under the ADAAA because of his cancer diagnosis, but granting defendant's summary judgment motion on non-ADAAA grounds); Meinelt v. P.F. Chang's China Bistro, Inc., 787 F. Supp. 2d 643, 651–52 (S.D. Tex. 2011) (recognizing the plaintiff's brain tumor as a disability under the ADAAA); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185–86 (E.D. Tex. 2011) (relying on the ADAAA to find plaintiff's renal cancer "capable of qualifying as a disability"); Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976, 985–86 (N.D. Ind. 2010) (finding the plaintiff "'disabled' under the ADAAA" because of his "Stage III Renal Cancer").

124. 737 F. Supp. 2d 976 (N.D. Ind. 2010).

125. *Id.* at 978.

126. *Id.* at 984–85.

> This conclusion is further bolstered by the EEOC's interpretive guidance. The EEOC issued a Notice of Proposed Rulemaking to implement the amendments in 29 C.F.R. Part 1630, which specifically provides that "cancer" is an example of "impairments that are episodic or in remission," and is therefore considered to be a disability. 29 C.F.R. 1630.2(g)(4). Additionally, it states that:
>
> > Examples of Impairments that Will Consistently Meet the Definition of Disability— . . . include, but are not limited to—(B) Cancer, which substantially limits major life activities such as normal cell growth . . . .
>
> 29 C.F.R. 1630.2(g)(5). Thus, under the clear language of the ADAAA, the Court finds that Hoffman was indeed "disabled" under the ADA.[127]

The U.S. District Court for the Eastern District of North Carolina also applied a similar analysis with respect to a plaintiff subject to episodic flare ups of multiple sclerosis (MS).[128] In denying the employer's motion to dismiss, the court stated that "[b]ecause none of the parties appear to dispute that MS, when active, constitutes a disability, this court finds that [the plaintiff] has sufficiently stated a claim that he was disabled under the ADAAA."[129] Here again, the court found supporting evidence for its conclusion in the proposed EEOC regulations listing multiple sclerosis as an impairment that will satisfy the disability definition in virtually all cases.[130]

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127. *Id.* at 985–86 (footnote omitted). The regulations as adopted similarly list cancer as a type of impairment that will be covered by prong one of the disability definition in virtually all cases because it "substantially limits normal cell growth." 29 C.F.R. § 1630.2(j)(3)(iii) (2012). *See also* Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185–86 (E.D. Tex. 2011) (interpreting the ADAAA and final regulations to conclude that the plaintiff's "renal cancer qualifies as a disability even if the only 'major life activity' it 'substantially limited' was 'normal cell growth.'").

128. Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472, 481 (E.D.N.C. 2011).

129. *Id.* at 483.

130. *See id.* at 484 ("The proposed regulations then list MS as an impairment that will consistently meet the definition of disability.")

3. The "Regarded as" Prong

The ADAAA's revised treatment of the "regarded as" prong represents the act's most far-reaching expansion in coverage. Following the *Sutton* decision, courts found that an individual had standing under prong three only if the employer perceived that individual as having an impairment that substantially limited a major life activity.[131] The ADAAA drastically changes the prong three coverage formula to protect any individual who is treated adversely because of an actual or perceived impairment without regard to the existence of any functional limitation.[132] As one scholar has commented, the revised "regarded as" formula now provides "nearly universal nondiscrimination protection" on the basis of impairment.[133]

Although two post-amendment decisions appear to have erroneously continued the *Sutton* court's construction of the regarded as prong,[134] the majority of decisions applying the ADAAA correctly broaden coverage by jettisoning the functional limitation requirement.[135] The federal court for the Middle District of Tennessee's decision in *Saley v. Caning Fork, LLC*[136] provides the best articulation of the revised prong three standard.

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131. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) (describing the necessary elements for a pre-ADAAA disability claim), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

132. 42 U.S.C. § 12102(3)(A) (2012).

133. Barry, *supra* note 10, at 208.

134. *See* Rodriguez v. Sistema San Juan Capestrano, No. 11-1128, 2013 WL 1489457, at *4 (D.P.R. Apr. 11, 2013) (adopting a magistrate's finding that the plaintiff's claim "must fail because she was at no time working with any condition that could have been regarded" as a disability); Siring v. Or. State Bd. of Higher Educ., No. 3:11-cv-1407-ST, 2012 WL 5989195, at *33–34 (D. Or. Nov. 29, 2012) (relying on *Sutton*'s "regarded as" prong analysis).

135. *See* Hilton v. Wright, 673 F.3d 120, 129 (2d Cir. 2012) (stating that the plaintiff "was only required to raise a genuine issue of material fact about whether" his employer perceived him as having a disability, not the extent to which the employer perceived it); Chicago Reg'l Council of Carpenters v. Thorne Assocs., Inc., 893 F. Supp. 2d 952, 962–63 (N.D. Ill. 2012) (recognizing plaintiff's claims under the ADA's "regarded as" prong because the defendant "improperly construed [his] limitation as a disabling condition"); Saley v. Canning Fork, LLC, 886 F. Supp. 2d 837, 849–53 (M.D. Tenn. 2012) (analyzing plaintiff's disability claim under only the "regarded as" prong).

136. 886 F. Supp. 2d 837 (M.D. Tenn. 2012).

In that case, a new owner of a restaurant terminated a long-term general manager who was diagnosed with iron overload in his blood, an asymptomatic condition known as hemochromatosis.[137] In denying the employer's motion for summary judgment, the court offered the following explanation:

> Third, Defendant asserts that Plaintiff does not qualify as disabled because "high iron levels in the blood is [*sic*] not disabling for [Plaintiff] as it causes no symptoms. However, Defendant's argument is inconsistent with the logic of the "regarded as" prong of the ADAAA. Congress enacted the ADAAA with the specific intention to overturn the holding of [*Sutton*] . . . Under current law, whether an individual's impairment "substantially limits" a major life activity is "not relevant" to coverage under the "regarded as" prong . . . . Thus, Plaintiff may recover under the "regarded as" prong in the absence of visible symptoms, or any symptoms at all.[138]

This reading of the new "regarded as" prong clearly will expand the class of those who can claim coverage under the ADA.

Given the significantly lowered threshold for establishing prong three coverage, a surprising finding of this study is that the data do not show an increased prevalence of prong three summary judgment determinations following the effective date of the ADAAA.[139] Although the reason for this decline is not clear from looking at the decided cases, two very different explanations are possible. One possibility is that employers simply are not contesting prong three standing claims because of the small likelihood of obtaining a favorable outcome. A second possibility is that post-amendment plaintiffs may be deterred from asserting a prong three claim due to the need for a reasonable accommodation in order to be able to perform the essential functions of the job. As noted above, the ADAAA provides that an employer need not provide a reasonable accommodation to a plaintiff who has standing as disabled only under prong three.[140]

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137. *See id.* at 850 ("Plaintiff has produced a medical record confirming his diagnosis of 'iron overload' contained in the blood, also known as hemochromatosis.").

138. *Id.* at 850–51 (alterations in original) (citations omitted).

139. *Supra* Table 3.

140. *See supra* note 80 and accompanying text (discussing the ADAAA's treatment of prong three to the definition of disability).

More research and analysis will be necessary to determine if either or both of these possibilities bear some causal link with the prevalence of post-amendment prong three claims.

Taken together, the various changes in the disability status calculus have significantly expanded the class of individuals protected by the ADA. The first assumption associated with the ADAAA's passage, accordingly, appears to be accurate.

B. Assumption 2—An Enhanced Focus on Qualified Status

A second commonly held assumption about the likely effect of the ADAAA was that the amendments would refocus ADA litigation on issues of discrimination as opposed to issues of standing, resulting in more cases being decided on the basis of whether the plaintiff is qualified for the job with or without a reasonable accommodation.[141] The data set out in Table 6 above provide significant support for this assumption. The table shows that the percentage of summary judgment rulings on the qualified status issue as compared to all summary judgment rulings jumped from 28.2% in the pre-amendment outcomes to 47.1% in the post-amendment outcomes.[142]

The greater focus on issues of qualified status tends to follow any of three paths in the decided cases. The first path involves the apparently increasing number of post-amendment cases in which the employer does not contest the plaintiff's disability status and files a motion for summary judgment only on the issue of whether the plaintiff is qualified for the job, either with or without a reasonable accommodation.[143]

A second path involves those cases in which employers challenge both disability status and qualified status in summary

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141. *See supra* notes 5, 8, and accompanying text (describing the second of three commonly held assumptions regarding the ADAAA).

142. *Supra* Table 6.

143. *See, e.g.*, Anderson v. Georgia-Pac. Wood Prods., LLC, No. 2:11-cv-110-MEF, 2013 WL 1788521, at *6–7 (M.D. Ala. Apr. 26, 2013) (granting summary judgment to employer on qualified issue); Bonnette v. Shinseki, 907 F. Supp. 2d 54, 77 (D.D.C. 2012) (granting summary judgment to employer on qualified issue); Equal Emp't Opportunity Comm'n v. Creative Networks, LLC, 912 F. Supp. 2d 828, 837 (D. Ariz. 2012) (denying employer's summary judgment motion on qualified issue).

judgment motions. Prior to the ADAAA, it was not uncommon for courts to rule for the employer on the former issue and never reach the question of whether the plaintiff was qualified for the job.[144] With plaintiffs now winning a larger proportion of post-amendment decisions on the disability status issue, however, these courts by necessity must rule on the qualified issue as well.[145]

Finally, even in those post-amendment cases in which employers challenge both disability status and qualified status by means of summary judgment motions, many courts now are jumping over the disability status issue to dispose of the case on qualification grounds. In the converse of pre-ADAAA practices, these courts explain that it is unnecessary to rule on the disability status issue because the plaintiff is not qualified for the job in any event.[146] This approach appears to be gaining in prevalence as exemplified by several 2013 decisions.[147] In a variation on that theme, at least two post-amendment court of appeals decisions have affirmed a grant of summary judgment for the employer based on the plaintiff's lack of ability to perform the essential functions of the job, even though the lower court rulings were based on a finding that the plaintiff was not disabled.[148] The

144. *See supra* notes 47–48 and accompanying text.

145. *See, e.g.*, Wirey v. Richland Cmty. Coll., 913 F. Supp. 2d 633, 647 (C.D. Ill. 2012) (denying employer's summary judgment motion on disability and qualified status issues, but granting summary judgment to employer on basis of plaintiff "not meeting Defendant's legitimate expectations"); Torres v. House of Representatives, 858 F. Supp. 2d 172, 187 (D.P.R. 2012) (denying employer's summary judgment motion on both disability and qualified status issues).

146. *See* McDaniel v. IntegraCare Holdings, Inc., 901 F. Supp. 2d 865, 873 (N.D. Tex. 2012) (granting employer's summary judgment motion after solely addressing the qualified status issue).

147. *See, e.g.*, Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 914 (8th Cir. 2013) ("[T]his court need not decide whether [plaintiff] was disabled under the ADAAA, because assuming, without deciding, that he was disabled, he was not qualified to perform an essential function of his job."); James v. Hyatt Regency Chi., 707 F.3d 775, 783 (7th Cir. 2013) (affirming the granting of summary judgment because plaintiff's disability "restricted him from performing essential functions of his position"); Bennett v. Dallas Indep. Sch. Dist., No. 3:11-CV-0393-D, 2013 WL 1295338, at *4–5 (N.D. Tex. Mar. 29, 2013) (finding that the employer defendant presented evidence that the plaintiff's "physical limitations would have prevented him . . . from performing the essential functions of his job).

148. *See, e.g.*, McElwee v. Cnty. of Orange, 700 F.3d 635, 643 (2d Cir. 2012)

issue of disability, the basis for the district court's rulings, was not addressed by these appellate courts on appeal.[149]

In sum, the post-amendment decisions also provide support for the second commonly held ADAAA assumption, namely that the amendments would focus more attention on whether a plaintiff is qualified for the job with or without a reasonable accommodation, and less attention on the issue of whether the plaintiff is an individual with a disability. By placing a greater emphasis on the merits of a claim and less on the question of standing, the ADAAA has recast disability discrimination litigation in a manner more akin to litigation under Title VII.[150]

C. Assumption 3—Higher Win Rates for ADA Plaintiffs

The third and final assumption concerning the ADAAA's likely effect was that it would result in greater overall wins for plaintiffs in ADA lawsuits. The logic was that if a greater proportion of plaintiffs survived summary judgment motions with respect to standing, a subset of this larger cohort also would go on to experience more favorable outcomes by litigation's end.[151]

The database generated in this study does not directly capture overall wins and losses. Instead, it tallies outcomes on summary judgment motions relating to disability status and qualified status. What this study captures, accordingly, is rulings that can be characterized as either plaintiff-loss outcomes or as plaintiff-survives-to-litigate-another-day outcomes. If an employer prevails on either type of summary judgment motion, the lawsuit ends in a loss for the plaintiff unless that ruling is

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(affirming summary judgment for the employer on the basis of qualification, not disability); Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 81 (1st Cir. 2012) (same).

149. *See, e.g.*, *McElwee*, 700 F.3d at 643 (affirming summary judgment for the employer on the basis of qualification, not disability); *Jones*, 696 F.3d at 81 (same).

150. *See supra* notes 55–56 and accompanying text (discussing how proposals would have been more similar to Title VII in that the focus would have been on the employer's reasons for termination rather than whether the plaintiff had standing).

151. *See* Jones, *supra* note 9, at 669–70 ("In practice, this means that employers will face greater and more recurrent pressures to settle cases rather than risk large judgments and expenses at trial.").

overturned on appeal. A plaintiff who does not lose on either type of motion, however, is not necessarily a winner but instead is a survivor with considerable leverage.[152] Most ADA plaintiffs who survive summary judgment negotiate some type of settlement that results in at least a partial victory of sorts.[153] Thus, the loss and survivor data of this study approximate, but do not replicate, win–loss data.

One way of measuring this data is to compare summary judgment outcomes on disability status and qualified status motions. If the post-amendment changes in outcomes for both types of motions trend in the same direction, this necessarily signals a movement in that same direction with respect to overall outcomes.

This comparison does not reveal a clear overall path in this instance because the post-amendment outcomes with respect to these two types of summary judgment issues trend in opposite directions. Summary judgment rulings favorable to employers on the disability status issue, as expected, show a marked downward trend among the post-amendment decisions. While employers prevailed in 74.4% of the pre-amendment determinations, the employer win rate fell by 28.5 percentage points to 45.9% in the post-amendment decisions.[154]

In contrast, employers thus far have achieved more favorable outcomes in the post-amendment rulings on the qualified status issue. In the pre-amendment decisions, courts granted summary judgment to employers in 47.9% of the outcomes, but this figure jumped to 69.7% in the post-amendment outcomes, representing a more than 21 percentage point increase.[155]

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152. *See id.* (stating that an employer that does not receive a favorable summary judgment ruling under the ADAAA "will face greater and more recurrent pressures to settle cases").

153. Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010) ("In the 14 percent of cases that remain active after the disposition of the motion for summary judgment, more than one-half . . . settle before a trial outcome."); Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcome of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005).

154. *Supra* Table 2.

155. *Supra* Table 7.

These data suggest that the more plaintiff-friendly outcomes engineered by the ADAAA with respect to disability status are being partially offset by more employer-friendly outcomes with respect to qualified status. These results also provide some support for those commentators who have expressed concerns that the courts could once again undermine congressional efforts to establish a national mandate against disability discrimination.[156]

This rather rough comparison of proportional changes, however, masks the transformative impact of the ADAAA in two ways. First, it does not take into account the fact that the database contains far more summary judgment rulings as to disability status than it does summary judgment rulings as to qualified status. Indeed, almost two-thirds of the summary judgment rulings in this data set (66.1%) involve disability status issues. As such, looking only at percentage changes does not capture the fact that each percentage point change in disability status outcomes has approximately two times the numeric clout as a percentage point change in qualified status outcomes.

Second, the above comparison analyzes claim outcomes rather than case outcomes. Quantifying claim outcomes has the advantage of generating data with respect to the type of disability status prong asserted and the type of summary judgment motion being decided. But these data, even though rich in detail, do not provide an accurate depiction of case outcomes. Take, for example, a plaintiff who asserts both prong one and prong three disability status claims. A grant of summary judgment for the employer on the prong one claim does not necessarily put the plaintiff's case in the loss column since the plaintiff would remain a survivor if the employer's motion on the prong three claim is denied. Similarly, a plaintiff who prevails on an employer's disability status summary judgment motion will nonetheless lose the case if the court grants the employer's motion on the qualified status issue.

A more meaningful way to compare losers and survivors is to focus on numerical case outcomes. Table 10 depicts such a

156. *See supra* notes 12–14 and accompanying text ("In short, the judiciary that previously undercut the promise of the initial version of the ADA may find similar incentives with respect to the attempted ADAAA expansion.").

comparison. The table shows that plaintiffs survived summary judgment motions in 41 out of 127 pre-amendment cases coded for this study. This translates to a survival rate of 32.3%. In the set of post-amendment decisions, plaintiffs survived in 22 of the reported 55 cases. The survival rate for plaintiffs in these post-amendment cases rose to 40%, which is equivalent to 7.7 percentage points higher than in the pre-amendment decisions.

Table 10. Case Loss and Survivor Outcomes

	Pre-Amendment		Post-Amendment	
	Number of Cases	Percentages	Number of Cases	Percentages
Plaintiff Loss	86	67.7	33	60.0
Plaintiff Survives	41	32.3	22	40.0
Totals	127	100	55	100

The data set out in Table 10 show that the positive gains made by plaintiffs in post-amendment disability status rulings more than made up for the greater frequency of negative outcomes in the post-amendment qualified status rulings. While a 7.7 increase in percentage points does not represent a "radical" change,[157] it does corroborate the assessment of Professor Samuel Bagenstos that the ADAAA "is a worthy effort that is likely to make things somewhat better" for ADA plaintiffs.[158] This data, accordingly, support the assumption that the ADAAA will assist plaintiffs in achieving higher overall win rates in disability discrimination cases.

VII. Conclusions

Congress enacted the ADAAA in order to override four Supreme Court decisions that had narrowly restricted the scope of those protected by the ADA.[159] While retaining the ADA's original

157. Barry, *supra* note 10, at 209.

158. SAMUEL L. BAGENSTOS, LAW AND CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51 (2009).

159. *See* 154 CONG. REC. 17,740, 17,741 (2008) (statement of Sen. Tom Harkin) ("This bill will overturn the basis for the reasoning in the Supreme Court decisions—the Sutton trilogy and the Toyota case—that have been so

definition of an individual with a disability, the amendments included several rules of construction designed to expand the Act's coverage.[160] The ADAAA's self-stated purpose was to provide a "national mandate for the elimination of discrimination."[161]

This anticipated mandate was premised upon three widely held assumptions concerning the ADAAA's likely effect. These assumptions are as follows:

(1) That the ADAAA will result in fewer summary judgment rulings finding that plaintiffs lack standing as covered individuals with a disability;[162]
(2) That the amendments will result in more cases being decided on the basis of whether the plaintiff is a qualified individual with or without a reasonable accommodation;[163] and
(3) That the amendments will result in higher overall win rates for ADA plaintiffs.[164]

This Article summarizes the results of an empirical study designed to determine the validity of these assumptions. The study, which compared all reported pre-amendment and post-amendment summary judgment rulings for a forty-month period, provides empirical support for each of these assumptions. With respect to the first assumption, the data show a significant drop in employer win rates on the disability status issue from 74.4% of the pre-amendment rulings to 45.9% of the post-amendment rulings.[165] The data also support the second assumption with an increase in summary judgment rulings on the qualified status issue as

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problematic for so many people with very real disabilities.").

160. *See id.* ("This bill has a broad construction provision which instructs the courts and the agencies that the definition of disability is to be interpreted broadly, to the maximum extent permitted by the ADA.").

161. 42 U.S.C. § 12101(b) (2012).

162. *See supra* note 7 and accompanying text (discussing the first of three assumptions regarding the ADAAA's impact on disability discrimination litigation).

163. *See supra* note 8 and accompanying text (discussing the second of three assumptions regarding the ADAAA's impact on disability discrimination litigation).

164. *See supra* note 9 and accompanying text (discussing the third of three assumptions regarding the ADAAA's impact on disability discrimination litigation).

165. *Supra* Table 2.

compared to all summary judgment decisions from 28.2% in the pre-amendment claims to 47.1% in the post-amendment claims.[166] Finally, focusing on case outcomes, the proportion of plaintiffs who survived summary judgment motions increased from 32.3% in the pre-amendment decisions to 40% in the post-amendment decisions.[167]

The data reveal some less anticipated results as well. First, despite the substantially lowered threshold for establishing prong three coverage under the ADAAA, the post-amendment decisions show no increase in the proportion of prong three claims asserted by plaintiffs.[168] Second, and more significantly, the data reveal a decline in plaintiff win rates in post-amendment qualified status summary judgment rulings.[169] These data suggest that the greater prevalence of plaintiff wins in post-amendment disability status rulings[170] is being somewhat undercut by an increase in plaintiff losses on qualified-status rulings. This preliminary trend may suggest a continuing judicial unease with disability discrimination claims generally and with reasonable accommodation requests more specifically.

Despite these two cautionary notes, this study shows that the ADAAA, for the most part, is being interpreted by the courts in a manner consistent with congressional intent. While the preliminary uptick in pro-employer post-amendment qualified status rulings bears close scrutiny, the overall findings are that the ADAAA has succeeded in expanding coverage, in refocusing litigation on the issues of qualifications and reasonable accommodation, and in enabling more favorable overall outcomes for disabled plaintiffs.

166. *Supra* Table 6.
167. *Supra* Table 10.
168. *Supra* Table 3.
169. *Supra* Table 7.
170. *Supra* Table 2.