S. 3406: The ADA Amendments Act of 2008

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A. Overview

President George H. W. Bush signed the Americans with Disabilities Act of 1990[1] (ADA) on July 26, 1990. The signature ended years of discussions, debates, and negotiations over the formulation of a law that would do for disabled Americans what the Civil Rights Acts of 1964 and 1968 did for Americans of different races, religions, sex, or ethnicity. Although the ADA is in many ways very similar to these other civil rights statutes, it diverges in many substantial ways because of the difficulty in determining for whom the ADA should act as a protection.

The ADA reflected a change in the historical thinking of Americans about disability and derived from a long and tortured history of public policy developed with the intent to assist those who were physically and mentally disabled.[2] "For decades, people with disabilities were viewed as objects of pity or revulsion, and later, as medical technology increased as objects of rehabilitation and cure. The government's relationship to people with disabilities reflected these common, public attitudes regarding disability."[3] As the governmental approach moved to a more rehabilitative model---which in large part grew out of the government's treatment and support of disabled war veterans---a

[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).
[2] *See, e.g.*, 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, 94-134 (2000); *see also* Andrea Kloehn Naef, Note, Toyota Motor Manufacturing v. Williams: *A Case of Carpal Tunnel Syndrome Weakens the Grip of the Americans with Disabilities Act*, 31 Pepp. L. Rev. 575, 577-78 (2004).
[3] Feldblum, *supra* note 2, at 94.

trend to change society's reaction to those with disabilities also emerged.[4] In Section 501 and 503 of the Rehabilitation Act of 1973, Congress included requirements that executive branch departments institute "affirmative action" programs for disabled individuals.[5] More importantly, however, Section 504 of the Rehabilitation Act provided that "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[6] This statutory language obviously created a new "civil right" for disabled Americans to be free from federally funded programs discriminating against them based on their disability so long as they were qualified.

In the years after the enactment of Section 504, various governmental agencies began writing and developing regulations to enforce the Section 504 mandate and in 1974 the Rehabilitation Act was amended to provide the following definition of "handicapped individual":

> . . . [T]he term "handicapped individual" means any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[7]

The Department of Health and Human Service enacted regulations that defined a "physical or mental impairment" to mean:

> (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine;
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> (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[8]

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[4] *Id.* at 95-97.
[5] Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 501, 503, 87 Stat. 355, 391, 393 (codified as amended at 29 U.S.C. §§ 791, 793).
[6] *Id.* § 504, 87 Stat. at 394 (codified as amended at 29 U.S.C § 794(a)).
[7] H.R. 17503, 93rd Cong. 2nd Sess. (1974).
[8] 45 C.F.R. § 84(3)(j)(2)(i) (now codified as amended at 45 C.F.R. § 84.3(j)(2)(i).

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The case law that developed out of these cases tended to focus on whether actions were taken on the basis of handicap or whether the disabled person was actually qualified or eligible for the benefit at issue.[9] The cases rarely dealt with the question of whether a person was disabled and, in fact, many defendants presumed or conceded that a person was disabled without any analysis at all.[10] Despite the paucity of these cases, the United States Supreme Court did hear one such case in *School Board v. Arline*.[11]

In *Arline*, the question was whether a teacher who had been fired because of her recurrent "tuberculosis, a contagious disease, may be considered a 'handicapped individual' within the meaning of § 504 of the [Rehabilitation Act of 1973]."[12] With what can be described as a fairly cursory analysis, the Court ruled that a person with tuberculosis was a disabled person covered under the Act.[13] In doing so, it concluded that she "had a physical impairment" that was "serious enough to require hospitalization, a fact more than sufficient to establish one or more of her major life activities were substantially limited by her impairment."[14] In doing so, it dismissed the argument made by the school district that the teacher was dismissed "not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others,"[15] finding that "the contagious effects of a disease can[not] be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this."[16] In fact, the Court seized on the "'regarded as having' a physical or mental impairment" language of the definition in concluding that, because, even if the tuberculosis itself did not limit her life activities, the "negative reactions of others to the impairment" certainly would, the teacher was a "handicapped individual" under the statute.[17]

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[9] *See* Feldblum, *supra* note 2, at 106-07 & fns. 83-87.
[10] *Id.*
[11] 480 U.S. 273.
[12] *Id.* at 275.
[13] *Id.* at 280-81.
[14] *Id.*
[15] *Id.* at 281.
[16] *Id.* at 282.
[17] *Id.* at 282-83.

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An analysis of the *Arline* decision leads one to fairly conclude that the definition of "handicapped individual" would be construed very broadly by the Supreme Court, and accordingly, Section 504 had a large scope of coverage. Additionally, the history of litigation under the Act suggests that the definition of disability was not a significant issue in most Section 504 cases.

With this background in mind, in the late 1980s, a movement to expand civil rights to disabled Americans picked up momentum. The Civil Rights Restoration Act and the Fair Housing Amendments Act, both of which increased protections to disabled individuals in the private sector, had been passed. In 1988 and 1989 earlier versions of the ADA, which would expand disability protections to almost all private employers, had been introduced in Congress.[18] Political advocates and lobbyists supporting the ADA legislation that eventually passed and was signed in 1990 purposely engaged in a strategy to adopt the Section 504 statutory and regulatory language defining disability in the ADA almost verbatim because

> [I]t seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition. Moreover, although there had been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act. Finally, to the extent those cases were troubling, the Supreme Court's decision in *Arline*, with its expansive interpretation of the third prong of the definition of "handicap," seemed to ensure that *any* person who had been discriminated against because of *any* condition would automatically be covered under that prong of the definition---because the limitation caused by the exclusionary action would itself result in the necessary limitation on a major life activity.[19]

The legislative history of the ADA tends to bear out this historical explanation.[20]

As a result of this conscious choice, the ADA definitions of disability were, in fact, almost identical to the Section 504 definition. The ADA defined the term as follows:

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[18] *See* Feldblum, *supra* note 2, at 127.
[19] Feldblum, *supra* note 2, at 128.
[20] *See id.* at 128-34.

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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.[21]

B. Reasons for Amendment

Despite the political advocates' and lobbyists' desires and high hopes for an expansive interpretation of the definition of disability found in the ADA, as one of those advocates stated in giving an historical explanation of the ADA, "[t]he bottom line is that statutory text matters, sometimes even too much."[22] Because "an active and interested bar of management and plaintiff lawyers who dealt with Title VII employment claims . . . began to stream . . . to . . . seminars devoted to explaining the provisions of the ADA," more attorneys became aware of the ADA definitions of disability and a heightened level of scrutiny was applied to the statutory language adopted by Congress.[23]

As a result of this more intense scrutiny, many attacks to ADA claims were made based upon the definition of a disability. Many attacks were successful and the resulting ADA case law reflected a narrowing of the class of people considered disabled under the ADA.[24] "By 1997, legal commentators had also begun to comment on the judicial trend of concluding that individuals with a wide range of serious impairments—from epilepsy to diabetes to cancer—did not meet the statutory definition of disability."[25]

Ultimately, the United States Supreme Court entered the fray. In a highly-fractured majority decision authored by Justice Kennedy, in *Bragdon v. Abbott*[26] the Court stated that because (a) Congress had incorporated "almost verbatim" the definition of "handicapped individual" from the Rehabilitation Act of 1973 and (b) the ADA had

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[21] Pub. L. No. 101-336, § 3, 104 Stat. 327, 329-30 (codified at 42 U.S.C. § 12102(2)).
[22] Feldblum, *supra* note 2, at 140.
[23] *Id.* at 139.
[24] *Id.* at 138-39.
[25] *Id.* at 139.
[26] 524 U.S. 624 (1998). *Bragdon* did not deal with an employment question but rather a public accommodation question—the plaintiff was refused treatment by a dentist when he discovered her HIV diagnosis. *Id.* at 628-29. The distinction is of little relevance, however, given the definition of disability is the same in either situation.

explicitly provided that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title," it was bound "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[27] It then determined that the plaintiff at issue, an HIV-positive woman, was disabled under the terms of the statute because (1) she was impaired,[28] (2) the major life activity affected was reproduction,[29] and (3) this impairment substantially limited her ability to reproduce because (a) "a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected," and (b) "an infected woman risks infecting her child during gestation and childbirth."[30] When the Court published the decision, "scholars and newspapers alike heralded it as a landmark, pro-plaintiff decision" because it had interpreted the term disability very broadly and quite consistently with the *Arline* decision.[31]

The disability advocates' joy was short-lived, however, because less than one year later the Supreme Court decided another ADA case in such a way that the scope of disabled individuals protected by the ADA was substantially narrowed. In a seven-justice majority in *Sutton v. United Air Lines*[32] and two companion cases, *Murphy v. United Parcel Service*[33] and *Albertson's Inc. v. Kirkingburg*,[34] the Supreme Court was presented with the question of "whether [a person's] disability is to be determined with or without reference to corrective measures"[35] such as eye glasses, medicine, wheel chairs, etc. In interpreting the plain language of the ADA,[36] the Court concluded that to determine whether a person was disabled courts should refer to corrective measures.[37] It

[27] *Id.* at 632 (quoting 42 U.S.C. § 12201(a)).
[28] *Id.* at 637.
[29] *Id.* at 638-39.
[30] *Id.* at 639-40.
[31] Naef, *supra* note 2, at 581.
[32] 527 U.S. 471 (1999).
[33] 527 U.S. 516 (1999).
[34] 527 U.S. 555 (1999).
[35] *Sutton*, 527 U.S. at 481.
[36] *See id.* at 482 ("Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.)
[37] *Id.*

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came to this conclusion for essentially three reasons. First, the Court concluded that because "the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited."[38] Second, the Court concluded that because "disabilities [are to] be evaluated 'with respect to an individual' and [to] be determined based on whether an impairment substantially limits the 'major life activities of such individual,'" such an inquiry "is an individualized inquiry."[39] If a person's disability is considered without mitigation the Court reasoned, "the approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[40] Third, the Court relied on the legislative findings that forty three million Americans had disabilities as evidence that determining whether a person had a disability required considering mitigating efforts was required by the Act. "Had Congress intended to include all persons with corrected physical limitation among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[41] In one of *Sutton's* companion cases, the Court ruled that there "was no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[42] In other words, if a person's body can devise a way to overcome an impairment, the body's mitigating efforts must be assessed in determining whether a person is disabled.

This interpretation of the statute was directly in contravention of the legislative reports that accompanied and explained the ADA as it made its way through Congress to the President's desk.[43] The Senate Report stated that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as

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[38] *Id.*
[39] *Id.* at 483.
[40] *Id.* at 483-84.
[41] *Id.* at 465.
[42] *Albertsons*, 527 U.S. at 565-66.
[43] *Sutton*, 527 U.S. at 499-501 (Stevens, J., dissenting).

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reasonable accommodations or auxiliary aids."[44] The House Labor Report included similar language: "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition disability, even if the effects of the impairment are controlled by medication."[45] Additionally, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice included that understanding in their interpretive guidance.[46] However, as mentioned above, the Court dismissed resort to legislative history because of its plain language interpretation of the statute.

Not only did the *Sutton* court narrowly define disability under the first definitional option, i.e., subsection A of the disability definition found in the ADA, it also narrowed the class of individuals that could be "regarded as" disabled under subsection C of the ADA's disability definition. The Court's analysis began:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[47]

Given that there was no dispute that the plaintiffs in the case were "physically impaired," in furthering its analysis the Court centered only on the second definitional "way" it had described. Accordingly, it turned to the "major life activity" at issue—the activity of work. In assessing whether an employer had impermissibly regarded an employee or applicant as disabled, the Court concluded that "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others,

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[44] S. Rep. No. 116, 101st Cong., 2nd Sess. 22 (1988)
[45] H.R. Rep. No. 485(II) (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 334
[46] *Sutton*, 527 U.S. at 462 (citing 29 C.F.R. pt. 1630, App. § 1630.2(j); 28 CFR pt. 35, App. A, § 35.104 (1998); 28 CFR pt. 36, App. B, § 36.104.
[47] *Id.* at 466.

just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job."[48] In other words, an employer can discriminate if the employer regards the impairments as not being "too bad." Given that the major life activity allegedly affected was "working," the Court continued its analysis by determining that a plaintiff can only show that the impairment was regarded as "too bad" to work if he or she is "unable to work in a broad class of jobs."[49]

Less than three years later, the Supreme Court heard another ADA disability-definition case. Once again, the Court interpreted the definition of disability much more narrowly than the ADA advocates believed it should be. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[50] the Court was confronted with the question of whether carpal tunnel syndrome constituted a disability under the ADA.[51] In engaging in its analysis of the definition of disability, the Court focused on the phrases "substantially limits" and "major life activity."[52] In analyzing these two phrases, the Court stated that, relying on its analysis of the "plain language" of the Act in *Sutton* "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled."[53] Having applied that strict interpretation it ultimately concluded that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to

[48] *Id.* at 467.
[49] *Id.* at 491.
[50] 534 U.S. 184 (2002)
[51] *Id.* at 187.
[52] *Id.* at 196-97.
[53] *Id.* at 197.

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most people's daily lives. The impairment's impact must also be permanent or long term."[54]

Obviously, disability advocates were severely disappointed with the outcome of this case. And, in fact, the statement that the terms needed to be "strictly construed" seemed to be a complete reversal of the Court's previous pronouncements in *Bragdon v. Abbott*[55] that it was bound "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[56] Given these developments in the law, the number of individuals covered by the ADA was now much smaller than many had hoped or imagined.

The ADA Amendments Act of 2008[57] was created in reaction to this line of cases. In fact, the findings and purposes of the act found in Section 2 of the Act make specific mention of *Sutton, Toyota,* and *Arline* and identify that the Congress intends the reasoning of *Sutton* and *Toyota* to be rejected and the liberal reasoning of *Arline* to serve as the basis for all further analysis for the determination of whether a person is disabled as that term is defined in the ADA. The Act explicitly states:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) Findings- Congress finds that--
>
> (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;
>
> (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because

[54] *Id.* at 198.
[55] 524 U.S. 624 (1998).
[56] *Id.* at 632 (quoting 42 U.S.C. § 12201(a)).
[57] Pub. L. No. 110-325, 122 Stat. 3553 (2008). A copy of the Act is reproduced in full in Attachment A. A full copy of the Department of Justice's red-lined copy of the statute is reproduced in full in Attachment B.

of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes- The purposes of this Act are--

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination"' by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a

> major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
>
> (3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;
>
> (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
>
> (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
>
> (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

The Amendments also responded to the "plain language" interpretation the Court used in the *Sutton* case by eliminating reference to (1) the forty-three million number that served as part of the basis for the Court's analysis that the framers of the legislation could

not have meant to have wanted a broad interpretation of disability and (2) the description of individuals with disabilities as discrete and insular minorities.[58] Moreover, the Amendments struck reference to "such individual" as the terms appeared in 42 U.S.C. § 12112 as the reference to individuals presumably to deemphasize the individualized determinations that the Supreme Court had relied on in deciding to strictly interpret the definition of disability. These changes are reproduced in a redlined format:

Sec. 12101. Findings and purpose

(a) Findings

The Congress finds that

(1) ~~some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;~~ physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

[58] *Id.* § 3.

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(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

~~(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;~~

(~~8~~7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(~~9~~8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.[59]

. . . .

Sec. 12112. Discrimination

(a) General rule

[59] 42 U.S.C. § 12101.

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No covered entity shall discriminate against a qualified individual ~~with a disability because of the disability of such individual~~ on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term ~~"discriminate"~~ "discriminate against a qualified individual on the basis of disability" includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuates the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

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> employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
>
> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

The Amendments also refine the definition of disability and incorporate what had been regulatory language that had before defined or provided guidance regarding "substantially limits" and "major life activity" into the main body of the statute. Additionally, a definition of "regarded as" was added to the statute.[60]

> Sec. 12102. ~~Definitions~~ Definition of disability
>
> As used in this chapter:
>
> ~~(1) Auxiliary aids and services~~
> ~~The term "auxiliary aids and services" includes~~
> ~~(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;~~

[60] Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555-56 (2008).

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~~(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;~~
~~(C) acquisition or modification of equipment or devices; and~~
~~(D) other similar services and actions.~~ [61]

(~~2~~1) Disability

The term "disability" means, with respect to an individual

(~~I~~A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(~~ii~~B) a record of such an impairment; or
(~~iii~~C) being regarded as having such an impairment (as described in paragraph (3))**.**

~~(3) State~~
~~The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.~~ [62]

(2) Major Life Activities

(A) In general

For purposes of paragraph (1), major life activities 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.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

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[61] This definition was moved to 42 U.S.C. § 12103.
[62] This definition was moved to 42 U.S.C. § 12103.

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For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

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

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

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

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

(E)

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

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not

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include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The 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.

(iii) As used in this subparagraph

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.[63]

C. Implications for Future Cases

What these amendments and the proposed regulations that have been promulgated since the amendments were adopted[64] suggest is that the question of whether a person has a disability will be much less of an issue in future ADA cases. This is certainly what the ADA Amendments Act explicitly contemplates: "it is the intent of Congress that the

[63] 42 U.S.C. § 12102.

[64] *See* Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630). A copy of the proposed regulations together with a publication entitled "Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008" are appended hereto as Attachment C.

primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[65] In fact the EEOC's proposed rules have incorporated this presumption[66] and have explicitly identified a number of "impairments [that] will consistently meet the definition of disability:" autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[67]

Those who advocated the adoption of the original ADA contend that this is what was originally contemplated and, therefore, is a return to the "original intent" of the legislation. As discussed above, the history of Section 504 litigation and the passage of the ADA appear to bear this argument out. The 504 case law tended to focus on whether actions were taken on the basis of handicap or whether the disabled person was actually qualified or eligible for the benefit at issue.[68] The cases rarely dealt with the question of whether a person was disabled and, in fact, many defendants presumed or conceded that a person was disabled without any analysis at all.[69] What is to be expected with respect to particular provisions will be dealt with more extensively in other materials written and presented in this seminar.

D. Elimination of Reverse Discrimination Claims

Although not mentioned earlier, one other feature of the ADA Amendments bears noting. Section 6 of the Amendments provides the following: "Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was

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[65] Pub. L. No. 110-325, § 2(5), 122 Stat. 3553, 3554 (2008)
[66] Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,443 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630, § 1630.2(k)) ("Whether an individual has a record of an impairment that substantially limited a major life activity . . . should not demand extensive analysis.")
[67] Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,441 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630, § 1630.2(j)(5)).
[68] *See* Feldblum, *supra* note 2, at 106-07 & fns. 83-87.
[69] *Id.*

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subject to discrimination because of the individual's lack of disability."[70] The effect of this provision is obvious—no person can assert that he or she was discriminated against because the person was without a disability. This eliminates any possibility for any reverse discrimination claims.

[70] Pub. L. No. 110-325, § 6, 122 Stat. 3553, 3557-58 (1998) (codified at 42 U.S.C. § 12201.)

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Disability and Definitions

A. Broadening of the Definition of Disability

As discussed in the general overview section of these materials, despite the ADA's original advocates' desires and high hopes for an expansive interpretation of the definition of disability, many attacks to ADA claims were made against a person's claims to be disabled. Most of these attacks were successful and the resulting ADA case law reflected a narrowing of the class of people considered disabled under the ADA.[1] "By 1997, legal commentators had also begun to comment on the judicial trend of concluding that individuals with a wide range of serious impairments—from epilepsy to diabetes to cancer—did not meet the statutory definition of disability."[2]

Although the United States Supreme Court initially appeared to adopt a broader interpretation of the term "disability" in *Bragdon v. Abbott*,[3] a case decided in 1998, in four subsequent cases the Court substantially narrowed the definition of the term "disability" under the ADA. In a seven-justice majority in *Sutton v. United Air Lines*[4] and two companion cases, *Murphy v. United Parcel Service*[5] and *Albertson's Inc. v. Kirkingburg*,[6] the Supreme Court was presented with the question of "whether [a person's] disability is to be determined with or without reference to corrective measures"[7] such as eye glasses, medicine, wheel chairs, etc. In interpreting the plain language of the

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[1] *See, e.g.*, 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, 138-39 (2000); *see also* Andrea Kloehn Naef, Note, Toyota Motor Manufacturing v. Williams: *A Case of Carpal Tunnel Syndrome Weakens the Grip of the Americans with Disabilities Act*, 31 Pepp. L. Rev. 575, 593-95 (2004).

[2] Feldblum, *supra* note 1, at 139.

[3] 524 U.S. 624 (1998). For a more thorough discussion of the *Bragdon* case, see *supra* discussion in the *Reasons for Amendment* subsection of the *S.3406: The ADA Amendments Act of 2008* section of these materials. *Bragdon* did not deal with an employment question but rather a public accommodation question—the plaintiff was refused treatment by a dentist when he discovered her HIV diagnosis. *Id.* at 628-29. The distinction is of little relevance, however, given the definition of disability is the same in either situation.

[4] 527 U.S. 471 (1999).

[5] 527 U.S. 516 (1999).

[6] 527 U.S. 555 (1999).

[7] *Sutton*, 527 U.S. at 481.

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ADA,[8] the Court concluded that to determine whether a person was disabled courts should refer to corrective measures.[9] It came to this conclusion for essentially three reasons. First, the Court concluded that because "the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited."[10] Second, the Court concluded that because "disabilities [are to] be evaluated 'with respect to an individual' and [to] be determined based on whether an impairment substantially limits the 'major life activities of such individual,'" such an inquiry "is an individualized inquiry."[11] If a person's disability is considered without mitigation the Court reasoned, "the approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals."[12] Third, the Court relied on the legislative findings that forty three million Americans had disabilities as evidence that determining whether a person had a disability required considering mitigating efforts was required by the Act. "Had Congress intended to include all persons with corrected physical limitation among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[13] In one of *Sutton's* companion cases, the Court ruled that there "was no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[14] In other words, if a person's body can devise a way to overcome the limitation, the body's mitigating efforts must be assessed in determining whether a person is disabled.

This interpretation of the statute was directly in contravention of the legislative reports that accompanied and explained the ADA as it made its way through Congress to

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[8] *See id.* at 482 ("Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.)
[9] *Id.*
[10] *Id.*
[11] *Id.* at 483.
[12] *Id.* at 483-84.
[13] *Id.* at 465.
[14] *Albertsons*, 527 U.S. at 565-66.

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the President's desk.[15] The Senate Report stated that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[16] The House Labor Report included similar language: "persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition disability, even if the effects of the impairment are controlled by medication."[17] Additionally, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice included that understanding in their interpretive guidance.[18] However, as mentioned above, the Court dismissed resort to legislative history because of its plain language interpretation of the statute.

Not only did the *Sutton* court narrowly define disability under the first definitional option, i.e., subsection A of the disability definition found in the ADA, it also narrowed the class of individuals that could be "regarded as" disabled under subsection C of the ADA's disability definition. The Court's analysis began:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[19]

Given that there was no dispute that the plaintiffs in the case were "physically impaired," in furthering its analysis the Court centered only on the second definitional "way" it had described. Accordingly, it turned to the "major life activity" at issue—the activity of work. In assessing whether an employer had impermissibly regarded an employee or applicant as disabled, the Court concluded that "an employer is free to

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[15] *Sutton*, 527 U.S. at 499-501 (Stevens, J., dissenting).
[16] S. Rep. No. 116, 101st Cong., 2nd Sess. 22 (1988)
[17] H.R. Rep. No. 485(II) (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 334
[18] *Sutton*, 527 U.S. at 462 (citing 29 C.F.R. pt. 1630, App. § 1630.2(j); 28 CFR pt. 35, App. A, § 35.104 (1998); 28 CFR pt. 36, App. B, § 36.104.
[19] *Id.* at 466.

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decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job."[20] In other words, an employer can discriminate if the employer regards the impairments as not being "too bad." Given that the major life activity allegedly affected was "working," the Court continued its analysis by determining that a plaintiff can only show that the impairment was "too bad" to work if they "are unable to work in a broad class of jobs."[21]

Less than three years later, the Supreme Court heard another ADA disability-definition case. Once again, the Court interpreted the definition of disability much more narrowly than the ADA advocates believed it should be. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[22] the Court was confronted with the question of whether carpal tunnel syndrome constituted a disability under the ADA.[23] In engaging in its analysis of the definition of disability, the Court focused on the phrases "substantially limits" and "major life activity."[24] In analyzing these two phrases, the Court stated that, relying on its analysis of the "plain language" of the Act in *Sutton* "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled."[25] Having applied that strict interpretation it ultimately concluded that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or

[20] *Id.* at 467.
[21] *Id.* at 491.
[22] 534 U.S. 184 (2002)
[23] *Id.* at 187.
[24] *Id.* at 196-97.
[25] *Id.* at 197.

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severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[26]

The ADA Amendments Act of 2008[27] was created in reaction to this line of cases.

A. Broadening of the Definition of Disability

1. "Interpreting Terms Strictly to Create a Demanding Standard for Qualifying as Disabled."

As discussed more fully above, in *Toyota Motor Manufacturing,*[28] the Court declared that because the terms "substantially limits" and "major life activity" were found in the definition of disability, "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled."[29] This newly-announced "demanding standard" was based upon the Court's *Sutton* analysis which had relied on "the present indicative verb form" of "the phrase 'substantially limits'",[30] relied on the fact that "disabilities [were to] be evaluated 'with respect to an individual' and [to] be determined based on whether an impairment substantially limits the 'major life activities of such individual,'"[31] and relied on the legislative findings that stated that forty three million Americans had disabilities rather than a "much higher number"[32] to conclude that Congress had not wanted a disability to be determined without reference to mitigating efforts. The Court did this despite its earlier acknowledgment in *Bragdon v. Abbott*[33] that because (a) Congress had incorporated "almost verbatim" the definition of "handicapped individual" from the Rehabilitation Act of 1973 and (b) the ADA had explicitly provided that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations

[26] *Id.* at 198.
[27] Pub. L. No. 110-325, 122 Stat. 3553 (2008). A copy of the Act is reproduced in full in Attachment A. A full copy of the Department of Justice's red-lined copy of the statute is reproduced in full in Attachment B.
[28] 534 U.S. 184 (2002)
[29] *Id.* at 197.
[30] 527 U.S. 471, 482 (1999).
[31] *Id.* at 483.
[32] *Id.* at 465.
[33] 524 U.S. 624 (1998).

issued by Federal agencies pursuant to such title," it was bound "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[34] By ignoring the *Bragdon* language and adopting the stricter interpretation, the Court reinforced "the judicial trend of concluding that individuals with a wide range of serious impairments—from epilepsy to diabetes to cancer—did not meet the statutory definition of disability."[35]

The ADA Amendments specifically addressed these presumptions and declared that the intention of the ADA was to broadly construe the term disability to include within its grasp a much broader group of disabilities. In the Amendments, Findings and Purposes, the Congress declared:

> SEC. 2. FINDINGS AND PURPOSES.
>
> (a) Findings- Congress finds that--
>
> (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;
>
> (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
>
> (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
>
> (4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by

[34] *Id.* at 632 (quoting 42 U.S.C. § 12201(a)).
[35] Feldblum, *supra* note 1, at 139.

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the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes- The purposes of this Act are--

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination"' by reinstating a broad scope of protection to be available under the ADA;

. . . .

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

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> (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and
>
> (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Besides addressing Congress's intentions regarding the interpretation of the ADA, Congress also made extensive changes to the definition of disability. The Amendments provided in relevant part:

> Sec. 12102. ~~Definitions~~ Definition of disability
>
> (~~2~~1) Disability
>
> The term "disability" means, with respect to an individual
>
> > (~~i~~A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> > (~~ii~~B) a record of such an impairment; or
> > . . . .
>
> (2) Major Life Activities
>
> > (A) In general
> >
> > For purposes of paragraph (1), major life activities 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.

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(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

. . . .

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

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

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

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

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

. . . .

The most obvious change to the definition is that substantial language has been added to the definition. Before the Amendments, Congress had not attempted to define either "major life activity" or "substantially limits" in the body of the statute. Apparently, because these phrases had been the stated basis for the narrow interpretation the Supreme Court had mandated in *Sutton* and *Toyota*, the Congress wanted to give definitive guidance regarding those terms. Accordingly, Congress has directed that disability is to

be construed broadly in favor of coverage. It has also specifically rejected a narrow interpretation.

2. "Whether an individual is disabled should be [determined] with reference to measures that mitigate the individual's impairment.

As discussed above, the Supreme Court in *Sutton v. United Air Lines*[36] and two companion cases concluded that to determine whether a person was disabled courts should refer to corrective measures.[37] It came to this conclusion for essentially three reasons.[38] It relied on "the present indicative verb form" of "the phrase 'substantially limits'", [39] relied on the fact that "disabilities [were to] be evaluated 'with respect to an individual' and [to] be determined based on whether an impairment substantially limits the 'major life activities of such individual,'" [40] and relied on the legislative findings that stated that forty three million Americans had disabilities rather than a "much higher number" [41] to conclude that Congress had not wanted a disability to be determined without reference to mitigating efforts.

Congress specifically reacted to this case in its findings:

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings- Congress finds that--

. . . .

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

. . . .

(b) Purposes- The purposes of this Act are--

[36] 527 U.S. 471 (1999).
[37] *Id.*
[38] *Id.* at 197.
[39] 527 U.S. 471, 482 (1999).
[40] *Id.* at 483.
[41] *Id.* at 465.

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> (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination"' by reinstating a broad scope of protection to be available under the ADA;
>
> (2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;
>
> . . . .

The Amendments also responded to the "plain language" interpretation the Court used in the *Sutton* case by eliminating reference to (1) the forty-three million number that served as part of the basis for the Court's analysis that the framers of the legislation could not have meant to have wanted a broad interpretation of disability and (2) the description of individuals with disabilities as discrete and insular minorities.[42] Moreover, the Amendments struck reference to "such individual" as the terms appeared in 42 U.S.C. § 12112 as the reference to individuals presumably to deemphasize the individualized determinations that the Supreme Court had relied on in deciding to strictly interpret the definition of disability. These changes are reproduced in a redlined format:

> Sec. 12101. Findings and purpose
>
> (a) Findings
>
> The Congress finds that
>
> > (1) ~~some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;~~ <u>physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others</u>

[42] *Id.* § 3.

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who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

. . . .

~~(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;~~[43]

. . . .

Sec. 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual ~~with a disability because of the disability of such individual~~ on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term ~~"discriminate"~~ "discriminate against a qualified individual on the basis of disability" includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency,

[43] 42 U.S.C. § 12101.

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labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuates the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of

such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

The Amendments also specifically required that mitigation measures not be considered when assessing whether a person has a disability.[44] In relevant part, the statute provided:

Sec. 12102. ~~Definitions~~ Definition of disability

As used in this chapter:

(~~2~~1) Disability

The term "disability" means, with respect to an individual

(~~I~~A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(~~ii~~B) a record of such an impairment; or
(~~iii~~C) being regarded as having such an impairment (as described in paragraph (3))**.**

. . . .

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

. . . .

(E)

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

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not

[44] Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555-56 (2008).

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include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The 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.

(iii) As used in this subparagraph

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.[45]

B. Which Activities are "Major Life Activities"

As discussed above, although the original ADA did not define "major life activities," the Amendments codifies the definition for purposes of determining what is or is not a disability.

Sec. 12102. ~~Definitions~~ Definition of disability

As used in this chapter:

. . .

[45] 42 U.S.C. § 12102.

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(2) Major Life Activities

(A) In general

For purposes of paragraph (1), major life activities 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.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The most significant part of this newly enacted definition is that "major life activities" now explicitly includes "the operation of a major bodily function." "The purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability. For example, cancer affects the major bodily function of normal cell growth and diabetes affects the major bodily function of the endocrine system."[46]

B. Redefinition of "Substantially Limits"

As discussed above, although the original ADA did not define "substantially limits," the Amendments gives guidance on how to interpret "substantially limits.

Sec. 12102. ~~Definitions~~ Definition of disability

(~~2~~1) Disability

The term "disability" means, with respect to an individual

(~~I~~A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(~~ii~~B) a record of such an impairment; . . .

[46] *Questions and Answers on the Notice of Proposed Rulemaking for the Amendments Act of 2008*, Question 5, at 3. A copy is attached as part of Attachment C.

. . . .

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

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

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

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

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

By requiring the courts to broadly construe "substantially limits," the Congress is entirely overturning the *Toyota* Court's determination that the term requires strict interpretation against finding a disability.

In fact, as now constructed, the statute has led the EEOC to explicitly identify a number of "impairments [that] will consistently meet the definition of disability:" autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[47] Clearly, the change will result in a broader interpretation of what is considered "substantially limiting."

[47] Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,441 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630, § 1630.2(j)(5)). A copy is attached as part of Attachment C

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D. Scott Crook represents both private and public sector employers and employees in most areas of employment law, including creation and negotiation of employment-related documents, including personnel policies, employee handbooks, employment agreements, severance agreements, and non-competition agreements. He has successfully handled employment contract claims, labor disputes, and discrimination claims in administrative agencies and courts at all levels, including the Equal Employment Opportunity Commission, Utah Anti-Discrimination and Labor Division, Merit Systems Protection Board, and the National Labor Relations Board.

Mr. Crook also has an active litigation and appellate practice, recently serving as chair of the Appellate Practice Section of the Utah State Bar. He has represented clients in state courts in Utah and Idaho, the Utah federal District Court, the Utah Court of Appeals, Tenth Circuit Court of Appeals, and Utah Supreme Court. He has lectured or written on employment law, constitutional matters, appellate practice, real property, and jury selection procedures.