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## Mixed Signals: What Can We Expect from the Supreme Court in This Post-ADA Amendments Act Era?

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## MIXED SIGNALS: WHAT CAN WE EXPECT FROM THE SUPREME COURT IN THIS POST-ADA AMENDMENTS ACT ERA?

*Nicole Buonocore Porter\**

### I. INTRODUCTION

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was intended to breathe new life into the ADA after the courts, especially the Supreme Court, drastically narrowed the ADA's protected class. But since the ADA was amended in 2008, the Supreme Court has not decided any ADA cases. Thus, there are many ADA issues, especially in the employment context, that remain unresolved. This paper will attempt to determine whether we can expect a disability-friendly Supreme Court or whether the Court will once again narrowly construe individuals with disabilities' rights under the ADA.

In doing so, I have uncovered some mixed signals. On the one hand, the body of Tenth Circuit ADA cases decided by our newest<sup>1</sup> jurist, Justice Gorsuch, suggests an anti-disability bent. On the other hand, one possible source of good news for individuals with disabilities are two disability law cases decided by the Supreme Court in 2017: *Fry v. Napoleon Community Schools* and *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*. Both of these cases were very plaintiff-friendly and both were unanimous judgments (the *Fry* case had a two-justice concurring opinion). But are these plaintiff-friendly cases signaling a pro-disability Supreme Court? Or is the plaintiff-friendly outcome of these cases because they involve educating children? And if the latter is true, what can we expect from

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<sup>1</sup> Since the time this paper was drafted, Brett Kavanaugh was appointed to the Supreme Court. However, this paper does not analyze his disability law jurisprudence.

the Supreme Court if and when it decides the unresolved ADA employment issues? This paper will attempt to answer these questions.

Part II will discuss the tumultuous history of the ADA including: a brief description of the ADA, the courts' narrow interpretation of the definition of "disability" under the ADA, Congress's expanded definition of disability under the ADA Amendments Act, and the unresolved ADA issues that might find their way to the Supreme Court in the near future. Part III will discuss the mixed signals regarding how the Supreme Court might decide these unresolved ADA issues, starting with the negative signal—Justice Gorsuch's disability law cases while he was sitting on the Tenth Circuit, before turning to the positive signal—the Supreme Court's plaintiff-friendly disability cases in 2017. Part IV will then hypothesize about what, if anything, these mixed signals mean for the future of ADA employment cases that could reach the Supreme Court in the near future.

## II. TUMULTUOUS HISTORY OF THE ADA

### A. The Early Days

The ADA was enacted in 1990, with overwhelming bipartisan support.<sup>2</sup> The ADA has several titles. Title I covers discrimination in employment by all employers who have 15 or more employees.<sup>3</sup> Title II covers governmental services and benefits, including accessibility of government-funded buildings.<sup>4</sup> Title III addresses access to places of public accommodation—private businesses that are open to the public, regardless of size.<sup>5</sup> Most of the litigation occurs under Title I, the employment discrimination title.

Title I prohibits employers from discriminating against qualified individuals with disabilities.<sup>6</sup> There are two features of Title I that set it apart from other employment discrimination statutes (specifically, Title VII of the Civil Rights Act of 1964, which prohibits

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<sup>2</sup> Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008).

<sup>3</sup> 42 U.S.C. § 12111(5)(A) (2018) (defining employer to include entities that have 15 or more employees).

<sup>4</sup> *Id.* § 12131.

<sup>5</sup> *Id.* §§ 12181-12182.

<sup>6</sup> *Id.* § 12112.

discrimination based on race, color, sex, religion, and national origin<sup>7</sup>). First, only individuals with disabilities are protected.<sup>8</sup> Unlike Title VII, which protects employees regardless of their protected class, there is no “reverse” discrimination under the ADA.<sup>9</sup> Thus, plaintiffs have to prove they fall into the protected class, i.e., that they have a disability as defined in the statute. The second major difference<sup>10</sup> is that the ADA reaches beyond simply prohibiting discrimination based on a disability. It imposes an affirmative obligation on employers to reasonably accommodate individuals with disabilities unless doing so would cause an undue hardship.<sup>11</sup>

It was the first difference—that only those individuals who can meet the definition of disability can bring a claim under the ADA—that dominated the case law after the ADA was passed. Specifically, in a series of four decisions, the Supreme Court decimated the scope of the Act’s coverage, drastically limiting the number of individuals who could qualify as disabled. Disability is defined in the ADA as a “physical or mental impairment that substantially limits one or more major life activities.”<sup>12</sup> In what is known as the *Sutton* trilogy, the Supreme Court held that, in determining whether an individual has a disability, courts should view that person considering any mitigating measures that ameliorate the effects of the disability.<sup>13</sup> Under the facts

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<sup>7</sup> *Id.* §§ 2000e to 2000e-17.

<sup>8</sup> 42 U.S.C. § 12102(1) (defining disability).

<sup>9</sup> Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 219 (2016).

<sup>10</sup> *Id.* at 219. There is a narrow accommodation obligation for religious practices, but the burden on employers is pretty minor. Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 89 (2016) (citing to the statutory provision, 42 U.S.C. § 2000-e(j), that requires accommodations for religious beliefs, as well as the standard announced by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), which only requires employers to provide accommodations for religious beliefs or practices if those accommodations do not result in an undue hardship, which the Court defined as anything more than a de minimis expense).

<sup>11</sup> 42 U.S.C. § 12112(5)(A) (defining discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation can impose an undue hardship”).

<sup>12</sup> *Id.* § 12102(1).

<sup>13</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999) (holding that fully correctable myopia is not a disability); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519-21 (1999) (holding that high blood pressure controlled by medication is not a disability); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 558 (1999) (holding that the lower courts should have considered the plaintiff’s brain’s coping mechanisms as a way of compensating for his monocular vision in determining whether monocular vision is a disability); *see also* Nicole

of *Sutton*, this did not seem very controversial because the Sutton plaintiffs had fully-correctable myopia, so their impairment was not at all stigmatizing, and was also very common.<sup>14</sup> But this “mitigating measures” rule led many courts to hold that impairments that many *would* consider disabilities do not fall into the protected class.<sup>15</sup>

The Supreme Court’s final blow to the ADA’s definition of disability was in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>16</sup> In this case, the Court held that, in determining whether an impairment “substantially limits” a major life activity, the impairment must “prevent or severely restrict” the individual from performing a major life activity, and only major life activities that are of “central importance to daily life” are included.<sup>17</sup> The Court also held that the impairment must be permanent or long-term.<sup>18</sup> This case caused many individuals to be excluded from the protected class under the ADA,<sup>19</sup> leading many scholars to claim that the courts were engaging in a “backlash” against the ADA.<sup>20</sup>

## B. The ADA Amendments Act

Congress was unhappy with this dramatically narrowed definition of disability and therefore passed the ADA Amendments Act of 2008.<sup>21</sup> This Act (hereinafter the “Amendments” or the “ADAAA”) did not change the definition of disability but added in several provisions to help courts correctly interpret the definition.<sup>22</sup>

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Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 9-10 (2014) [hereinafter “Porter, *Backlash*”] (discussing these cases).

<sup>14</sup> See Stephen F. Befort, *The Story of Sutton v. United Air Lines, Inc.: Narrowing the Reach of the Americans with Disabilities Act*, in EMPLOYMENT DISCRIMINATION STORIES (Joel Wm. Friedman ed., 2006).

<sup>15</sup> Long, *supra* note 2, at 220 (stating that as a result of the mitigating measures rule, many individuals have been found not disabled under the ADA).

<sup>16</sup> 534 U.S. 184 (2002).

<sup>17</sup> *Id.* at 196-97.

<sup>18</sup> *Id.* at 198.

<sup>19</sup> Porter, *Backlash*, *supra* note 13, at 11.

<sup>20</sup> *Id.* at 13-14. See generally RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT (2005); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in BACKLASH AGAINST THE ADA 62-97 (Linda Hamilton Krieger ed., 2006); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT (2005).

<sup>21</sup> ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-213 (2018); Porter, *Backlash*, *supra* note 13, at 14-15.

<sup>22</sup> Porter, *Backlash*, *supra* note 13, at 15.

First, the ADAAA changed the mitigating measures rule from the *Sutton* trilogy. The statute now states: “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . .”<sup>23</sup> Second, the Court expanded the definition of “major life activities” and placed the definition in the statute itself, rather than leave it to the regulations of the Equal Employment Opportunity Commission (hereinafter “EEOC”) to define major life activity, as had been the case under the original ADA. The major life activity provision (with additions from the EEOC’s prior definition in *italics*) now states:

[M]ajor 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.*<sup>24</sup>

Congress also defined major life activities to include the operation of “major bodily functions,” such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>25</sup>

Third, Congress did not define “substantially limits” but instead left it to the EEOC to define, and stated that the EEOC’s definition should “be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”<sup>26</sup> In 2011, the EEOC issued regulations stating that “substantially limits” should be construed “broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.” Furthermore, it is not meant to be a “demanding standard.”<sup>27</sup>

Fourth, the Amendments state that an impairment that is episodic or in remission should be considered a disability if it would substantially limit a major life activity when active.<sup>28</sup> This provision, in combination with the addition of “major bodily functions,” means

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<sup>23</sup> 42 U.S.C. § 12102(4)(E)(i).

<sup>24</sup> *Id.* § 12102(2)(A) (emphasis added).

<sup>25</sup> *Id.* § 12102(2)(B).

<sup>26</sup> *Id.* § 12102(4)(B).

<sup>27</sup> 29 C.F.R. § 1630.2(j)(1)(i) (2018).

<sup>28</sup> 42 U.S.C. § 12102(4)(D).

that diseases like cancer, multiple sclerosis, or epilepsy will be considered disabilities even if they are in remission or even if the individual is not currently experiencing symptoms from the impairment.<sup>29</sup>

Early research seems to demonstrate that courts are heeding Congress's wish to interpret the definition of disability broadly.<sup>30</sup>

### C. Unresolved Issues

Despite the fact that more cases are proceeding past the coverage inquiry (whether the individual has a disability) and proceeding to the merits of the case, the Supreme Court has not granted certiorari on an ADA Title I case since the Amendments went into effect (on January 1, 2009). Thus, there are several outstanding issues that the Supreme Court will possibly resolve in the future.

First, the correct causation standard under the ADA is undecided. In 1991, Congress amended Title VII to make clear that an individual only has to demonstrate that his protected class status was a "motivating factor" in the employer's decision, even if other factors also motivated the employer.<sup>31</sup> Many courts applied that "motivating factor" standard to ADA cases after the Civil Rights Act of 1991, even though Congress did not specifically amend the ADA with the "motivating factor" standard.<sup>32</sup> But in 2009, the Court held that, under the Age Discrimination in Employment Act (hereinafter "ADEA"), the "motivating factor" standard does not apply.<sup>33</sup> Instead, plaintiffs in an ADEA case have to prove that their age was the "but-for" cause of the adverse employment action.<sup>34</sup> In 2013, the Court also held that retaliation cases brought under Title VII (as compared to status-based

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<sup>29</sup> Porter, *Backlash*, *supra* note 13, at 17.

<sup>30</sup> See Porter, *Backlash*, *supra* note 13, at 46-47; Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050-51 (2013).

<sup>31</sup> 42 U.S.C. § 2000e-2(m).

<sup>32</sup> See, e.g., *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 337 (2d Cir. 2000); *Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Buchanan v. City of San Antonio*, 85 F.3d 196, 200 (5th Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).

<sup>33</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

<sup>34</sup> *Id.* at 176.

discrimination cases) also have to meet the more stringent “but-for” causation standard and not the easier “motivating factor” standard.<sup>35</sup>

After *Gross* and *Nassar*, the lower courts began holding that the proper causation standard under the ADA is the “but-for” causation standard rather than the more lenient “motivating factor” standard.<sup>36</sup> The Supreme Court has not resolved this issue.

Second, there is a current circuit split regarding whether an employer must offer reassignment as a reasonable accommodation to an employee with a disability if there are other, more qualified employees who also applied for the job. This is a different issue from the one that arose in *U.S. Airways, Inc. v. Barnett*,<sup>37</sup> where the Court had to decide whether reassignment to a vacant position should be granted as an accommodation for an individual with a disability when a more senior employee had also applied for the vacant position under a formal seniority system.<sup>38</sup> The Court in *Barnett* held that, ordinarily, the seniority system should trump, in part based on the legitimate expectations of non-disabled employees to be treated fairly and consistently pursuant to the seniority system.<sup>39</sup>

Courts diverge on the issue of whether *Barnett* mandates that an employer reassign a disabled employee over another, more qualified employee. The Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*<sup>40</sup> held that giving the accommodation to the employee with a disability instead of the more qualified non-disabled employee would amount to “affirmative action with a vengeance” and therefore does not have to be granted. In other words, the employer is only required to allow the disabled employee to compete for the position along with everyone else.<sup>41</sup> The Supreme Court granted certiorari in this case, but the parties settled before the case was heard, so the case was dismissed.

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<sup>35</sup> Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

<sup>36</sup> See, e.g., Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 233-36 (4th Cir. 2016) (holding, in reliance on *Gross*, ADA discrimination claims require a showing of but-for causation); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (applying but-for causation standard to ADA claim); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (same).

<sup>37</sup> 535 U.S. 391 (2002).

<sup>38</sup> *Id.* at 403-04.

<sup>39</sup> *Id.* at 405-06.

<sup>40</sup> 486 F.3d 480 (8th Cir. 2007).

<sup>41</sup> *Id.* at 483-84; see also United States EEOC v. St. Joseph’s Hosp., Inc., 842 F.3d 1333, 1345-47 (11th Cir. 2016) (holding that the ADA does not require reassignment over a more qualified coworker).



On the other side are courts which hold that only allowing the employee with a disability to compete for a vacant position is not an accommodation at all, because the ADA's non-discrimination provision already requires that employers allow individuals with disabilities to compete on an even playing field with non-disabled coworkers.<sup>42</sup> Most recently, the Seventh Circuit distinguished *Barnett* by noting that, with a seniority system, coworkers have the expectation of receiving fair and uniform treatment under the seniority system. But under a most-qualified policy, employees do not have an expectation of being placed in the position, because those decisions are discretionary unlike the mostly mechanical seniority system decisions.<sup>43</sup> Because the Supreme Court granted certiorari on this issue once, I expect they will again if the right case comes before them.

There is also a circuit split regarding whether Title II of the ADA applies to employment discrimination cases brought against governmental entities. For instance, in *Elwell v. Oklahoma ex rel. Board of Regents of the University of Oklahoma*,<sup>44</sup> the Tenth Circuit (in an opinion authored by then-Judge Gorsuch) held that plaintiffs cannot bring employment discrimination claims under Title II of the ADA; Title I is their only avenue of relief.<sup>45</sup> The Seventh Circuit is in agreement.<sup>46</sup>

Much earlier, in *Bledsoe v. Palm Beach County Soil and Water Conservation District*, the Eleventh Circuit held otherwise, relying on the legislative history surrounding Title II and the Department of Justice's regulations, which specifically state that Title II covers discrimination in employment and that courts should use the same rules and standards as Title I of the ADA.<sup>47</sup>

One of the most commonly litigated issues under the ADA is whether the employer has to grant a leave of absence as a reasonable accommodation, and if so, under what circumstances.<sup>48</sup> The Court

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<sup>42</sup> See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

<sup>43</sup> *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764-65 (7th Cir. 2012).

<sup>44</sup> 693 F.3d 1303 (10th Cir. 2012).

<sup>45</sup> *Id.* at 1305; see also *infra* notes 69-72 and accompanying text (discussing this opinion).

<sup>46</sup> See *Brumfield v. City of Chicago*, 735 F.3d 619, 622 (7th Cir. 2013). So is the Ninth Circuit. See *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1171 (9th Cir. 1999).

<sup>47</sup> 133 F.3d 816, 821-25 (11th Cir. 1998). See also *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264 (4th Cir. 1995) (implicitly assuming plaintiff could sue for employment discrimination under Title II).

<sup>48</sup> See Lawrence P. Postol, *ADA Open Issues: Transfers to Vacant Positions, Leaves of Absence, Telecommuting, and Other Accommodation Issues*, 8 ELON L. REV. 61, 62-63 (2016)

recently denied certiorari on this issue,<sup>49</sup> but I don't think that can necessarily be read as suggesting that they would never grant certiorari to resolve this debate.

There is also a circuit split on the issue of whether courts should grant compensatory and punitive damages under ADA *retaliation* cases (as compared to ADA *discrimination* cases).<sup>50</sup>

Finally, although not a formal circuit split, there is a debate about how courts should address intra-class discrimination issues. For instance, if an employee with bipolar disorder is passed up for a promotion in favor of an employee who uses a wheelchair, can the employee with bipolar disorder sue for disability discrimination? And more broadly, how should courts decide these issues of intra-class discrimination.<sup>51</sup>

This is not necessarily an exhaustive list but merely an attempt to highlight some of the most obvious issues that I believe the Court could and perhaps will address in the near to mid-term future. A completely separate question, to which I turn next, is how the current Court will decide these issues. To answer this, we need to explore some mixed signals.

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(stating that the issue of when and under what circumstances an employer has to provide a leave of absence as a reasonable accommodation is an open issue under the ADA). *See generally* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439 (2002).

<sup>49</sup> *See* Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 481-82 (7th Cir. 2017) (holding that a long-term leave of absence is not a reasonable accommodation under the ADA), *cert. denied*, 138 S. Ct. 1441 (2018).

<sup>50</sup> *Compare* Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1269-70 (9th Cir. 2009) (holding that compensatory and punitive damages are not available for ADA retaliation cases), *Bowles v. Carolina Cargo, Inc.*, 100 F. App'x 889, 890 (4th Cir. 2004) (same), *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 963 (7th Cir. 2004), *cert. denied*, 542 U.S. 932 (2004) (same), *and* *Collazo-Rosado v. Univ. of P.R.*, 775 F. Supp. 2d 376, 388 (D.P.R. 2011) (same), *with* *Foster v. Time Warner Entertm't Co.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001) (affirming award of compensatory damages in an ADA retaliation case without a thorough discussion), *Muller v. Costello*, 187 F.3d 298, 315 (2d Cir. 1999) (same), *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (same), *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 235 (E.D.N.Y. 2005) (holding that compensatory and punitive damages are available for ADA retaliation cases).

<sup>51</sup> *See generally* Jeannette Cox, *Disability Stigma and Intra-class Discrimination*, 62 FLA. L. REV. 429 (2010) (discussing various issues of intra-class discrimination); Nicole Buonocore Porter, *Cumulative Hardship*, G. MASON L. REV. (forthcoming 2019) (discussing how courts should address intra-class discrimination issues).

### III. MIXED SIGNALS

This Part will first address what I consider to be the negative signal—specifically, the fact that Justice Gorsuch authored several anti-disability rights cases while on the Tenth Circuit. I will then turn to the positive signal, which is that the 2017 Court decided two plaintiff-friendly disability cases, albeit in the education context rather than the employment context.

#### A. Justice Gorsuch's Tenth Circuit Opinions

I will address then-Judge Gorsuch's disability opinions while on the Tenth Circuit in chronological order. The first is *Johnson v. Weld County, Colorado*,<sup>52</sup> where the court addressed the issue of whether the plaintiff's multiple sclerosis was a disability under the pre-Amendments ADA.<sup>53</sup> The plaintiff was an accountant who had multiple sclerosis.<sup>54</sup> She was temporarily placed into the position of Fiscal Officer while the employer was preparing to hire a permanent replacement.<sup>55</sup> When the employer finally began hiring for a permanent fiscal officer, the plaintiff applied, along with other employees.<sup>56</sup> Ultimately, the employer hired a non-disabled man for the job.<sup>57</sup> When the male employee was hired, the plaintiff was tasked with training him.<sup>58</sup> She complained to human resources about this, which subsequently led to her experiencing retaliation.<sup>59</sup> She eventually brought a lawsuit that included several claims, but for purposes of this paper, I will only address the disability claim.

This case applied pre-ADAAA law regarding the definition of disability because the Amendments did not apply retroactively and the facts of this case occurred in 2005,<sup>60</sup> several years before the ADAAA became effective. The plaintiff argued that her multiple sclerosis

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<sup>52</sup> 594 F.3d 1202 (10th Cir. 2010).

<sup>53</sup> *Id.* at 1206-07. The case also dealt with a sex discrimination issue but that will not be discussed here.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1207.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

substantially limited her in the major life activity of working.<sup>61</sup> But because the evidence suggested that she was a “highly competent employee” and had “excellent performance reviews,” the court held that she was not substantially limited in working.<sup>62</sup> The court recognized that it is likely that her multiple sclerosis would progress to the point where it would interfere with her ability to work, but it had not yet.<sup>63</sup> Thus, the court used the evidence the plaintiff had introduced to help buttress her claim that she should have received the promotion instead of the able-bodied man it hired, in order to hold that she was not disabled, and therefore did not fall into the protection of the ADA at all.<sup>64</sup> Even if she had been in possession of convincing evidence that the employer did not want to hire her for the job because it worried about her being too disabled in the future to perform the job well or because it did not want to provide her any accommodations that she might have needed in the future, the court would not have considered that evidence because it held that she did not even fall into the protected class.<sup>65</sup>

The court also dismissed plaintiff’s claim that she was disabled under a “regarded as” argument—that the employer regarded her as being substantially limited in a major life activity.<sup>66</sup> Her evidence was that she was told that the decision maker “didn’t hire her as Fiscal Officer because she was a woman and had multiple sclerosis, and so, in his view, she couldn’t handle the stress of the position.”<sup>67</sup> The court refused to consider this argument because it was “inadmissible hearsay.”<sup>68</sup>

The next case that then-Judge Gorsuch authored was *Elwell v. Oklahoma ex rel. Board of Regents of the University of Oklahoma*.<sup>69</sup> This case addressed the issue of whether state employees can bring employment discrimination claims against their state employers under

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<sup>61</sup> *Id.* at 1218.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> I do not mean to suggest that this move is unique to this case. Several courts in the pre-Amendments era held that plaintiffs were not disabled and therefore did not fall into the protected class without ever reaching the merits of their cases. Porter, *Backlash*, *supra* note 13, at 11-12.

<sup>66</sup> *Johnson*, 594 F.3d at 1219.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 693 F.3d 1303 (10th Cir. 2012).

Title II of the ADA (which applies to government services) or whether their only avenue of relief is under Title I.<sup>70</sup> Taking a methodical approach through the statutory text of Title II, including the catch-all language contained in the main anti-discrimination section of Title II—“or be subjected to discrimination by any such entity”—the court found that Title II was not intended to apply to employment discrimination claims.<sup>71</sup>

This holding might not seem very important given the protection of Title I for employment discrimination claims. However, Title I has administrative exhaustion requirements, and more importantly, the Supreme Court has held that states enjoy Eleventh Amendment immunity from suit under Title I, which represents an obstacle for state employees trying to bring employment discrimination claims.<sup>72</sup> As I mentioned earlier, this is one of those issues for which the circuits are split. It seems likely to me that, if this issue were decided by the Supreme Court, not only can we predict how Justice Gorsuch would rule on it, but the fact that he authored one of the circuit’s opinions leads me to suspect that he might be able to persuade other justices to side with him on this issue.

Perhaps the most troubling of Judge Gorsuch’s Tenth Circuit disability cases is *Hwang v. Kansas State University*,<sup>73</sup> where the court had to deal with the issue of when a leave of absence is a reasonable accommodation.<sup>74</sup> This case was brought under section 504 of the Rehabilitation Act, rather than the ADA, but in most circumstances, courts interpret the statutes consistently.<sup>75</sup> Gorsuch started the opinion appearing sympathetic, noting that “Grace Hwang was a good teacher suffering a wretched year.”<sup>76</sup> She was a college professor who was diagnosed with cancer and needed treatment. She was given a six-month leave of absence, but when that leave ended and her doctor advised that she was not capable of returning, she asked for more time off.<sup>77</sup> The university responded that it had a strict policy of not

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<sup>70</sup> *Id.* at 1305.

<sup>71</sup> *Id.* at 1307-10.

<sup>72</sup> *Id.* at 1310 (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001)).

<sup>73</sup> 753 F.3d 1159 (10th Cir. 2014).

<sup>74</sup> *Id.* at 1161 (“Must an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no.”).

<sup>75</sup> *See, e.g., Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 133 (D. Mass. 1997).

<sup>76</sup> *Hwang*, 753 F.3d at 1161.

<sup>77</sup> *Id.*

allowing more than six months of sick leave, and therefore, it refused to give her more leave, effectively resulting in her termination.<sup>78</sup>

The court was quick to dismiss the idea that an additional leave of absence might be a reasonable accommodation. In fact, the court stated: “*It perhaps goes without saying* that an employee who isn’t capable of working for so long isn’t an employee capable of performing a job’s essential functions—and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation.”<sup>79</sup> Judge Gorsuch did recognize that sometimes an employee who needs a “brief” absence can “still discharge the essential functions of her job” or that “allowing such a brief absence may sometimes amount to a (legally required) reasonable accommodation so that the employee can proceed to discharge her essential job duties.”<sup>80</sup> But then the court stated that “it’s difficult to conceive how an employee’s absence for six months—an absence in which she could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today.”<sup>81</sup>

The court refused to rely on the EEOC enforcement guidance, which states that employers should provide employees with additional unpaid leave unless doing so would cause an undue hardship.<sup>82</sup> The court misinterpreted the EEOC Guidance<sup>83</sup> and then stated that there is no evidence that the employer’s inflexible policy in this case was discriminatory.<sup>84</sup>

The next ADA employment case then-Judge Gorsuch authored was *Myers v. Knight Protective Service, Inc.*<sup>85</sup> In this case, the plaintiff, at a place of prior employment, had suffered a workplace injury and obtained social security disability benefits as a result.<sup>86</sup> Around the same time, the plaintiff applied for a job as an armed

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1161 (emphasis added).

<sup>80</sup> *Id.* at 1162.

<sup>81</sup> *Id.* (stating “[e]ven if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a *reasonable* accommodation.” (emphasis in original)).

<sup>82</sup> *Id.* at 1162-63.

<sup>83</sup> *Id.* at 1163 (stating that the EEOC Guidance does not answer the question of when a leave of absence would be reasonable and only applies after a court determines that additional leave would be reasonable).

<sup>84</sup> *Id.* at 1164.

<sup>85</sup> 774 F.3d 1246 (10th Cir. 2014).

<sup>86</sup> *Id.* at 1248.

security guard with Knight Protective Service.<sup>87</sup> As part of that application, he was asked several questions about his physical condition and he alleged that he suffered no relevant disabilities.<sup>88</sup> Soon after, one of his supervisors noticed that plaintiff seemed to be in pain, and upon questioning, plaintiff admitted that he had a number of neck and back surgeries and that he experienced recurring pain. As a result, plaintiff was told that he could not work without passing a physical examination. Plaintiff waited for the employer to schedule the exam, and when that did not occur, he believed he was terminated and he filed suit.<sup>89</sup> The district court dismissed all of his claims.<sup>90</sup>

The Tenth Circuit affirmed the dismissal stating that the plaintiff was not qualified for his position.<sup>91</sup> The court gave deference to the employer's written employment application, which indicated that the essential functions of the job as a security guard were to engage in "frequent and prolonged walking, standing, and sitting; to react quickly to dangerous situations; to subdue violent individuals; and to lift heavy weights."<sup>92</sup> The court found that the plaintiff was not qualified to perform these functions in large part because in his representations to the Social Security Administration, the plaintiff conceded that he was "in pain all the time, could stand for only twenty minutes, and could walk for just ten or fifteen minutes."<sup>93</sup> The Tenth Circuit recognized that the Supreme Court had previously held in *Cleveland v. Policy Management System Corp.*<sup>94</sup> that when a plaintiff makes seemingly inconsistent statements in proceedings before the Social Security Administration and in the ADA lawsuit, that the plaintiff should be given an opportunity to provide a sufficient explanation for the apparent contradiction.<sup>95</sup> In one sentence, without elaboration (despite the fact that this is a published opinion), the court stated: "That [(providing the explanation)] Mr. Myers has failed to do."<sup>96</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1248-49.

<sup>93</sup> *Id.* at 1249.

<sup>94</sup> 526 U.S. 795 (1999).

<sup>95</sup> *Myers*, 774 F.3d at 1249 (citing *Cleveland*, 526 U.S. at 805).

<sup>96</sup> *Id.* at 1249.

Without knowing more about the job or what the plaintiff alleged in his briefs to the court, it is unclear to me whether the plaintiff attempted to offer an explanation for the apparent inconsistency. Most often, the explanation turns on whether there are reasonable accommodations that would allow the plaintiff to perform the job. I, of course, do not know much about the duties of a security guard, but one relevant question would be whether the plaintiff could successfully perform the job if accommodated. Possible questions for determining if he could have been reasonably accommodated might include: whether the plaintiff worked with another security guard; if so, whether that other security guard could assist if the plaintiff needed to apprehend someone; whether it would be possible for the plaintiff to sit on a stool for part of his shift; and whether it would be possible to structure the “rounds” a security guard makes so as to minimize the amount of walking he would have to do. I have no idea whether any of these would be feasible, but in my limited experience with security guards, their main function is often meant to be one of deterrence and observation, rather than actually chasing or apprehending anyone. Some of the accommodations I have suggested might have allowed him to perform his job successfully. Certainly, it is possible that both the district court and the Tenth Circuit considered these possible accommodations. If so, it would have been helpful to include this discussion so that the wisdom and precedential value of the case could be analyzed. Without it, I find problematic the court’s failure to explore whether accommodations would have allowed him to perform his job successfully.

The final disability employment case authored by then-Judge Gorsuch was *Lancaster v. Sprint/United Management Co.*, which is an unpublished opinion.<sup>97</sup> Without any details being provided about the facts of the case, the court noted that the district court had initially entered a default judgment on the plaintiff’s behalf because the employer did not respond to her complaint in a timely manner.<sup>98</sup> However, this default judgment was vacated because the plaintiff failed to meet her burden of showing that she had served process on Sprint’s authorized agent.<sup>99</sup> In addressing her ADA failure-to-accommodate claim on the merits, the Tenth Circuit stated that she was not entitled to a reasonable accommodation because the only

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<sup>97</sup> 670 F. App’x 984 (10th Cir. 2016).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*



accommodation that she sought was “an extended, indeterminate leave of absence,” which the court held was not a reasonable accommodation as a matter of law.<sup>100</sup>

Even though I have only covered the opinions that were employment cases, I was unable to find *any* disability-related opinions that then-Judge Gorsuch authored that were decided in the plaintiff’s favor.<sup>101</sup> This alone does not bode well for plaintiffs in disability cases. But more importantly, Justice Gorsuch has issued opinions against plaintiffs in two of the circuit splits I identified above; whether plaintiffs can bring employment discrimination claims under Title II and whether leaves of absence are reasonable accommodations under the ADA.

Moreover, in his apparent desire to be brief and pithy, his opinions leave the reader wanting more explanation regarding the facts and the court’s reasoning. It is almost impossible to ascertain any of the relevant facts from reading his opinions alone. The reader would have to turn to the district court opinions. Thus, it would be difficult to determine whether an opinion would be a relevant precedent for an individual case without delving more deeply into the lower court opinions. This will be frustrating to lawyers and researchers.

## B. The Supreme Court’s 2017 Disability Opinions

The Supreme Court decided two disability-related opinions in 2017 that are friendly to disability plaintiffs and their interests: *Fry v. Napoleon Community Schools* and *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*.

### I. *Fry v. Napoleon Community Schools*<sup>102</sup>

In *Fry*, the Court addressed a relatively narrow issue of exhaustion of remedies. Under the Individuals with Disabilities Education Act (hereinafter “IDEA”),<sup>103</sup> public schools have to provide a “free appropriate public education” (hereinafter “FAPE”)—which consists of special education and related services—to all children with

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<sup>100</sup> *Id.*

<sup>101</sup> *See, e.g.,* Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917 (10th Cir. 2012) (affirming dismissal of claim by a residential treatment facility that denial of a variance to allow it to operate in a public motel was not discriminatory).

<sup>102</sup> 137 S. Ct. 743 (2017).

<sup>103</sup> 20 U.S.C. §§ 1400-1482 (2018).

disabilities.<sup>104</sup> Because parents and schools sometimes do not agree on whether an appropriate education is being provided to a particular child, the IDEA establishes formal procedures (a multi-step process) for resolving disputes—this process is referred to as “exhausting remedies.”<sup>105</sup> But the IDEA is not the only federal statute that applies to children with disabilities and the schools they attend—plaintiffs can also file suit under Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, which both broadly prohibit discrimination against individuals with disabilities (children and adults) in all kinds of settings, as long as those settings are public entities (for purposes of Title II) or a program or activity that receives federal financial assistance (for purposes of Section 504).<sup>106</sup> These statutes require covered entities to provide reasonable modifications to existing practices to allow the individual with a disability to participate in those programs or activities.<sup>107</sup>

The plaintiff in this case, E.F., was a child with a severe form of cerebral palsy, affecting her motor skills and mobility.<sup>108</sup> Her parents, upon the recommendation of her pediatrician, obtained a trained service dog for her, a goldendoodle named Wonder, who assisted E.F. by helping her with various life activities, including “retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet.”<sup>109</sup> When the Frys sought permission for Wonder to attend kindergarten with E.F., the school refused, arguing that because E.F.’s Individualized Education Program (hereinafter “IEP”) provided for a human aide and one-on-one support, Wonder was superfluous.<sup>110</sup> Later that year, the school briefly allowed Wonder to attend school with E.F., but the dog was required to stay in the back of the classroom and could not assist E.F. with many of the tasks he had been specifically trained to do.<sup>111</sup> The school administrators subsequently

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<sup>104</sup> *Fry*, 137 S. Ct. at 748.

<sup>105</sup> *Id.* at 749.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 750.

<sup>109</sup> *Id.* at 751 (alteration in original).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

barred Wonder completely from the classroom, and the Frys removed E.F. from the school and began home-schooling her.<sup>112</sup>

The Frys filed a complaint with the U.S. Department of Education's Office for Civil Rights (hereinafter "OCR"), arguing that the school's exclusion of Wonder violated E.F.'s rights under Title II of the ADA and Section 504 of the Rehabilitation Act.<sup>113</sup> The OCR agreed, explaining that a school's obligation goes beyond providing educational services, and includes not discriminating against a child.<sup>114</sup> In response to OCR's decision, the school agreed to allow Wonder to attend school with E.F., but the Frys were worried that the school would resent E.F. and decided to find her another school.<sup>115</sup> The Frys also filed suit in federal court, alleging that the school failed to reasonably accommodate E.F.'s use of a service animal.<sup>116</sup> The district court granted the school district's motion to dismiss, stating that the Frys were required to first exhaust their administrative remedies under the IDEA.<sup>117</sup> The Sixth Circuit affirmed, stating that because the injuries alleged by E.F. are "educational" in nature, the Frys first had to exhaust their remedies under the IDEA.<sup>118</sup> The Supreme Court granted certiorari.<sup>119</sup>

The Court first noted that the Sixth Circuit erred in holding that the Frys must exhaust remedies under the IDEA if the injury is educational in nature.<sup>120</sup> Instead, the Court held that the IDEA's exhaustion requirement is only applicable to relief that is available under the IDEA and the only relief that can be sought under the IDEA is the denial of a FAPE.<sup>121</sup> Thus, the exhaustion rule "hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education."<sup>122</sup>

The Court then turned to the next step in the analysis—determining whether the plaintiff is seeking relief for the denial of a

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 751.

<sup>116</sup> *Id.* at 751-52.

<sup>117</sup> *Id.* at 752.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 753.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 754.

FAPE.<sup>123</sup> The Court stated that, in answering this question, the court should look at the substance (or “gravamen”) of the complaint.<sup>124</sup> The exhaustion requirement will apply if the plaintiff’s complaint seeks relief for the denial of a FAPE, and in making this determination, courts should not simply consider specific terms or labels used by the plaintiff; but rather, should look to the substance of the complaint.<sup>125</sup>

One clue, according to the Court, for determining whether the gravamen of the complaint concerns the denial of a FAPE or instead addresses disability-based discrimination is to ask two hypothetical questions.<sup>126</sup> First, could the plaintiff have brought the same claim if the conduct had occurred at a public facility that was not a school, such as a public library?<sup>127</sup> Second, could an adult at the school (an employee or a visitor) have brought the same claim that the child did?<sup>128</sup> If the answer to both of these questions is “yes,” then the complaint is not alleging a denial of a FAPE.<sup>129</sup> Ultimately, the Court remanded to the court below to address the proper question—(what is the gravamen of E.F.’s suit) which is a different question from the one the Sixth Circuit had asked (whether the claim was “educational” in nature).<sup>130</sup> Despite the remand, the Court strongly suggested that the gravamen of the suit was not the denial of a FAPE because the Frys have all along admitted that the school district satisfied E.F.’s educational needs.<sup>131</sup> The Court also noted that the Frys could have brought this same suit against another type of governmental entity which had refused to admit E.F.’s service dog.<sup>132</sup>

Justice Alito wrote a concurring opinion, which Justice Thomas joined.<sup>133</sup> Although the concurring justices agreed with most of the opinion, they disagreed with the “clues” offered in the majority opinion to help courts decide these cases—specifically whether the student could have brought the same suit against another public institution and whether an adult could have brought the same claim

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<sup>123</sup> *Id.* at 755.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 756.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 756.

<sup>130</sup> *Id.* at 758.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 759.

against the school.<sup>134</sup> Justice Alito stated that these clues are not helpful because the statutes involved have overlapping protections.<sup>135</sup>

Although the reach of this opinion is small (because the issue was narrow), it is still seen as a pro-plaintiff suit. E.F. and her parents have the right to sue the school district for denying E.F. the right to bring Wonder, the service dog, to class.

## 2. *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*<sup>136</sup>

In *Andrew F.*, the Court had to revisit an issue left open from 1982, when it had first discussed the applicable standard for determining what constitutes a “free appropriate public education.”<sup>137</sup> In *Rowley*, the issue was whether the IDEA’s FAPE requirement obligated the school district to provide Amy Rowley with a sign language interpreter.<sup>138</sup> The Court in *Rowley* took a middle road in determining the standard governing whether a school district has met its obligations of providing each student with a disability a FAPE. The Court held that the IDEA “guarantees a substantively adequate program of education to all eligible children.”<sup>139</sup> This requirement is satisfied if the child’s IEP sets out an educational plan that is “reasonably calculated to enable the child to receive educational benefits.”<sup>140</sup> When a child is receiving her education in the regular classroom, a FAPE is being provided if the IEP is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>141</sup> Because Amy Rowley was advancing from grade to grade in a regular classroom without the use of the sign language interpreter, the Court determined that the school district’s obligation to provide a FAPE had been met.<sup>142</sup>

The question not answered by the Court in *Rowley*, however, was how courts determine if a FAPE is being provided when the child

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 137 S. Ct. 988 (2017).

<sup>137</sup> *Id.* at 993. *See also* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176 (1982).

<sup>138</sup> *Andrew F.*, 137 S. Ct. at 994.

<sup>139</sup> *Id.* at 995 (citing *Rowley*, 458 U.S. at 200-02).

<sup>140</sup> *Id.* at 996.

<sup>141</sup> *Id.* (quoting *Rowley*, 458 U.S. at 204).

<sup>142</sup> *Id.* (citing *Rowley*, 458 U.S. at 202).

is *not* being educated in the regular classroom. That issue arose in *Endrew F.* Endrew F. had autism, which qualifies as a disability under the IDEA.<sup>143</sup> Endrew attended school in Douglas County School District from pre-school through fourth grade.<sup>144</sup> Each year, an IEP was prepared to address his educational and functional needs.<sup>145</sup> In fourth grade, his parents became dissatisfied with Endrew's progress.<sup>146</sup> They believed his academic and functional progress had stalled.<sup>147</sup> His IEP mostly contained the same goals and objectives from the prior year, indicating to his parents that he was not making meaningful progress towards his goals.<sup>148</sup> When the school district presented another IEP that Endrew's parents thought was substantially similar to the previous year, they objected, removed him from public school, and enrolled him at a private school that specialized in educating children with autism.<sup>149</sup> Endrew did much better at the private school in part because the school developed a behavioral intervention plan that identified strategies for addressing his biggest problem areas.<sup>150</sup> The private school also increased his academic goals, and he soon was making academic progress that he had not achieved in public school.<sup>151</sup>

After six months at the private school, the public school presented another IEP to Endrew's parents but they again rejected it, claiming it was too similar to his old IEP despite the fact that his experience at the private school suggested that he would benefit from a different approach.<sup>152</sup> After exhausting their administrative remedies, Endrew's parents sued the school district for failing to provide Endrew a FAPE.<sup>153</sup>

The Administrative Law Judge who first heard the case denied relief.<sup>154</sup> The district court affirmed the ALJ's decision.<sup>155</sup> The district

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 997.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

court acknowledged that Endrew’s performance “did not reveal immense educational growth,” but it concluded that the changes made to Endrew’s IEP objectives were “sufficient to show a pattern of, at the least, minimal progress” and this was all that was required under the standard announced in *Rowley*.<sup>156</sup>

The Tenth Circuit affirmed.<sup>157</sup> That circuit had long interpreted the language in *Rowley* requiring “*some* educational benefit” as meaning that an IEP will be considered “adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than *de minimis*.’”<sup>158</sup> Under this standard, the Tenth Circuit held that Endrew’s IEP was calculated to enable him to make “*some* progress” and therefore, he had not been denied a FAPE.<sup>159</sup>

Before the Supreme Court, the school district argued that the IEP does not need to provide any particular level of benefits as long as it allows the child to achieve *some* educational benefit.<sup>160</sup> The district relied on the *Rowley* Court’s refusal to set any particular standard as evidence of its position.<sup>161</sup> The Court disagreed, pointing primarily to the fact that the Court in *Rowley* had no need to define the particular standard because the case before it involved a child whose progress of advancing from grade to grade affirmatively established that the IEP was designed to deliver “more than adequate educational benefits.”<sup>162</sup> The Court also noted the inconsistency between the district’s argument that the *Rowley* Court had set a substantive standard that *any* educational benefit was enough when the *Rowley* Court made clear that it was not setting a particular standard for testing the adequacy of the educational benefits received.<sup>163</sup>

The Court then announced not a precise standard but a general approach: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>164</sup> Although the Court made clear that the question should be whether the IEP was *reasonable* rather than whether it is *ideal*, it also stated that

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<sup>156</sup> *Id.* (citation omitted).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (alteration in original) (citation omitted).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 998.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 999.

the “IEP must aim to enable the child to make progress.”<sup>165</sup> The Court stated that this standard reflects the “broad purpose of the IDEA,” which is an “ambitious” piece of legislation.<sup>166</sup> And, a “substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.”<sup>167</sup>

The Court reiterated what it had said in *Rowley*, that when the preference for mainstreaming is met, “the system itself monitors the educational progress of the child” by making sure the child is receiving “passing marks” and advancing “from grade to grade.”<sup>168</sup> But the Court had no need in *Rowley* to opine on what is appropriate progress when a child is not reasonably going to be able to achieve grade-level advancement.<sup>169</sup> For those students, the Court said, the educational program “must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”<sup>170</sup>

The Court recognized that this standard is not a “formula” but also noted that it is “markedly more demanding” than the “merely more than *de minimis*” standard used by the Tenth Circuit.<sup>171</sup> A student offered an educational program only aimed at merely more than *de minimis* “progress from year to year can hardly be said to have been offered an education at all.”<sup>172</sup> The Court came to a unanimous opinion in this plaintiff-friendly case.

#### IV. FUTURE OF ADA TITLE I CIRCUIT SPLITS?

After exploring the mixed signals above, the open question is what the combination of Justice Gorsuch’s addition to the bench and the pro-plaintiff 2017 opinions means for the future of some of the

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citation omitted).

<sup>169</sup> *Id.* at 1000.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (emphasis in original).

<sup>172</sup> *Id.* at 1001.



ADA issues that might come before the Supreme Court in the near future.

Unfortunately for disability rights advocates, I do not think that the picture is rosy. Despite the pro-plaintiff 2017 opinions, my reading of those cases is that they are not pro-disability so much as they are pro-education of children. There is some language in the *Fry* and *Andrew F.* opinions that emphasizes the importance of children's education. For instance, at one point in the *Andrew F.* opinion, the Court states that the "focus on the particular child is at the core of the IDEA."<sup>173</sup> And the Court in *Fry* describes the IDEA as "important" for *children* with disabilities.<sup>174</sup>

More importantly, these plaintiff-friendly cases are likely not indicative of a disability-friendly Supreme Court because they both involved questions of statutory interpretation under the IDEA, which is a very different statute from the ADA.

The IDEA provides a substantive mandate for educational benefits, whereas the ADA is primarily an anti-discrimination statute.<sup>175</sup> Even though the ADA requires employers to provide reasonable accommodations to individuals with disabilities, courts have long been skeptical about the ADA's accommodation mandate. For instance, Judge Posner, in *Vande Zande v. Wisconsin Department of Administration*,<sup>176</sup> said this about the ADA's reasonable accommodation obligation:

The more problematic case is that of an individual who has a vocationally relevant disability—an impairment such as blindness or paralysis that limits a major human capability, such as seeing or walking. In the common case in which such an impairment interferes with the individual's ability to perform up to the standards of the workplace, or increases the cost of employing him, hiring and firing decisions based on the impairment are not "discriminatory" in a sense closely analogous to employment discrimination on racial grounds. The draftsmen of the Act knew this. But they

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<sup>173</sup> *Id.* at 999.

<sup>174</sup> *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017).

<sup>175</sup> *Id.* at 756 ("In short, the IDEA guarantees individually tailored educational services, while Title II and § 504 [of the Rehabilitation Act] promise non-discriminatory access to public institutions.").

<sup>176</sup> 44 F.3d 538 (7th Cir. 1995).

were unwilling to confine the concept of disability discrimination to cases in which the disability is irrelevant to the performance of the disabled person's job. Instead, they defined "discrimination" to include an employer's "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 . . . ." <sup>177</sup>

Compared to what some see as hostility towards the reasonable accommodation obligation under the ADA, <sup>178</sup> the IDEA's provision of substantive benefits, as part of Congress's power to legislate under the spending power, <sup>179</sup> stands on firmer footing. Because Congress provides federal funding in exchange for the states' agreement to meet the provisions of the IDEA, <sup>180</sup> the substantive obligation to provide a FAPE is very broad. For instance, in *Cedar Rapids Community School District v. Garret F.*, <sup>181</sup> the Court held that the IDEA does not contain an "undue burden" exemption even though the costs of the medical services needed by a ventilator-dependent student were very high. <sup>182</sup> The Court concluded:

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in School. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools. <sup>183</sup>

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<sup>177</sup> *Id.* at 541-42.

<sup>178</sup> See, e.g., Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").

<sup>179</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 204 n.26 (1982).

<sup>180</sup> *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017) ("An eligible child . . . acquires a 'substantive right' to such an education once a State accepts the IDEA's financial assistance." (citation omitted)).

<sup>181</sup> 526 U.S. 66 (1999).

<sup>182</sup> *Id.* at 77-78.

<sup>183</sup> *Id.* at 79.

In contrast to the broad interpretation the Court has given to the IDEA, it has not interpreted the ADA broadly.<sup>184</sup> I think it is unlikely that two plaintiff-friendly IDEA cases are going to change the Court's interpretation of disability rights under the ADA.

Finally, given that disability plaintiffs in the Tenth Circuit lost in every case penned by then-Judge Gorsuch, his addition to the Court is likely bad news for disability rights advocates. More specifically, he has taken employer-friendly positions on two of the issues for which there are currently circuit splits—whether a plaintiff can sue for employment discrimination under Title II and whether an employer has to provide a long-term leave of absence as a reasonable accommodation.<sup>185</sup>

All of this leads me to believe that if and when any of the circuit splits identified above<sup>186</sup> are heard by the Supreme Court, they are not likely to lead to disability-friendly outcomes.

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<sup>184</sup> See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477-78 (1999) (holding that plaintiffs with fully correctable myopia are not disabled because disability must be determined considering any mitigating measures); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 519-20 (1999) (holding that plaintiff's hypertension is not a disability because medication helps to mitigate it); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (holding that, in determining whether plaintiff's monocular vision is a disability, the court must consider any coping techniques the plaintiff's brain uses to accommodate his vision impairment); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (narrowly interpreting the meaning of "substantially limits" and "major life activities"); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (holding that the employer's seniority system trumps the disabled employee's right to be reassigned to a vacant position as a reasonable accommodation).

<sup>185</sup> See *Elwell v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.*, 693 F.3d 1303 (10th Cir. 2012); *Hwang v. Kan. State Univ.*, 753 F.3d 1159 (10th Cir. 2014).

<sup>186</sup> See *supra* Part III.A.