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The Americans with Disabilities Act Amendments Act: What About Reasonable Accommodation? Where Are We Now?

Teressa Elliott

Kathleen A. Carnes

THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT: WHAT ABOUT REASONABLE ACCOMMODATION? WHERE ARE WE NOW?

Teressa L. Elliott, J.D.[*] *& Kathleen A. Carnes, J.D.*[**]

ABSTRACT

The Americans with Disabilities Act Amendments Act ("ADAAA") was passed in 2008 and became effective on January 1, 2009. There are issues regarding reasonable accommodation that have arisen in connection with this Act. This article first explains what changes were made to the ADA's employment-related provisions with the ADAAA and also explains the relevant U.S. Supreme Court cases that led to passage of the ADAAA. Reasonable accommodation under the Act and reasonable accommodation cases are then discussed as well as the *U.S. Airways v. Barnett* case. We then end with ways to interpret these cases for guidance and the conclusion that as successful as passage of the ADAAA may have been in resolving problems with the original Americans with Disabilities Act, there are still issues to be resolved.

[*] Professor, Business Law and Business Ethics, Northern Kentucky University.
[**] Lecturer II, Business Law, Director, Alternative Dispute Resolution Center, Northern Kentucky University.

I. INTRODUCTION

In 1990, the Americans with Disabilities Act (hereinafter "ADA" or "the Act")[1] was passed to protect individuals in the workplace, on public transportation, within public accommodations and commercial facilities, and in telecommunications from discrimination on the basis of disability.[2] In response to U.S. Supreme Court decisions interpreting the employment-related provisions of the Act, which narrowed coverage of the ADA, Congress amended the ADA effective January 1, 2009, with the Americans with Disabilities Act Amendments Act of 2008 (hereinafter "ADAAA").[3] The ADAAA defines a significantly broader range of individuals who qualify as "individuals with disabilities"[4] and, therefore, are entitled to protection against discrimination.[5] Thus, individuals previously excluded from coverage may now be protected.[6]

This Article will examine what led to the ADAAA, changes in the ADA as a result of the ADAAA, and reasonable accommodation issues with the ADAAA. Specifically, Section II will examine what led to the enactment of the ADAAA, the ADA itself, as well as the *Sutton v. United Air Lines, Inc*.,[7] and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*[8] cases. Section III will then discuss the ADAAA, its passage in reaction to *Sutton* and *Toyota*, and specific changes. Section IV will discuss reasonable accommodation issues as a result of the ADAAA, while Section V

[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)).
[2] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)).
[3] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1990)); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 (2008)).
[4] 42 U.S.C. § 12101(a)(1) (2008).
[5] 42 U.S.C. § 12101(a)(1) (2008).
[6] 42 U.S.C. § 12101(a)(1) (2008).
[7] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
[8] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

will highlight recent reasonable accommodation cases with ways to interpret them, tying to the conclusion of this article and the opinion that while the ADAAA is an important and successful piece of legislation, reasonable accommodation issues remain.

II. PASSAGE OF THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

A. The Americans with Disabilities Act

While not completely successful as proven by the need for the amendments, the ADA was a landmark piece of legislation aimed at eradicating discrimination against the disabled in the workplace, and in other areas of society.[9] Congress planned that the ADA would combat discrimination against the disabled in the workplace.[10] This is apparent in the language of the ADA itself:

> The Congress finds that . . . 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 . . . It is the purpose of this Act . . . (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . .[11]

These protections, however, were restricted by the Court's rulings in *Sutton*[12] and *Toyota*[13] as discussed below.

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[9] The ADA is divided into four main sections: Title I covers employment; Title II covers public entities and public transportation; Title III covers public accommodations and commercial facilities; and Title IV covers telecommunications. *See* 42 U.S.C. §§ 12101-12213 (1990).

[10] Teressa L. Elliott, *The Path to the Americans with Disabilities Act Amendments Act: U.S. Supreme Court Cases, Congressional Intent, and Substantial Change*, 48 GONZ. L. REV. 395, 399 (2013).

[11] 42 U.S.C. § 12101(a)(2)-(b)(2) (1990).

[12] *Sutton*, 527 U.S. at 491-94.

[13] *Toyota*, 534 U.S. at 199-203.

B. U.S. Supreme Court Decisions: Sutton v. United Air Lines, Inc. and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams

Sutton v. United Air Lines, Inc. and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* are cases which were brought under the ADA.[14] The ADA Amendments Act of 2008 was enacted in response to these cases, in which Congress found that:

> [T]he holdings of the Supreme Court in [*Sutton*] 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 . . . [A]s 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 . . . in particular, the Supreme Court, in the case of [*Toyota*], interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress . . . .[15]

And Congress also rejected the holdings of *Sutton* and *Toyota* when explaining the purpose of the ADAAA, which is:

> (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*] 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*] with regard to coverage under the third prong of the definition of disability . . . ; (4) to reject the standards enunciated by the Supreme Court in [*Toyota*], that the terms

[14] *Sutton*, 527 U.S. at 476; *Toyota*, 534 U.S. at 190.
[15] 42 U.S.C. § 12101(a)(7) (2008).

> "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 the congressional intent that the standard created by the Supreme Court in the case of [*Toyota*] for "substantially limits," . . . 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 . . . .[16]

These changes, enacted with the ADAAA, were needed because the *Sutton* and *Toyota* cases limited the number of people who could qualify as disabled under the ADA; thus, the protection afforded by the ADA was restricted.[17] The result was that more employers than employees won ADA cases: "[i]n cases decided on the merits in accord with these 1999 rulings, defendant employers prevailed in more than 93% of reported ADA employment discrimination cases at the trial court level."[18]

In *Sutton*, twin sisters with severe myopia applied to United Air Lines for positions as commercial airline pilots.[19] They each had 20/20 vision while wearing corrective lenses; but, without correction,

[16] 42 U.S.C. § 12101(b)(1)-(5).
[17] 42 U.S.C. § 12101(a)(4)-(6).
[18] Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 51 (2011).
[19] Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).

the petitioners could not perform many activities.[20] While applying, the twin sister petitioners "were rejected because they did not meet respondent's minimum vision requirement."[21] Petitioners then sued United and alleged they were disabled under the ADA due to their severe myopia.[22]

The district court dismissed the complaint and the Court of Appeals for the Tenth Circuit affirmed.[23] Referencing the district court decision, the Supreme Court stated, "[b]ecause petitioners could fully correct their visual impairments, the court [district court] held that they were not actually substantially limited in any major life activity and thus . . . they were [not] disabled within the meaning of the ADA."[24] According to the Supreme Court, the district court also held that "petitioners had not made allegations sufficient to support their claim that they were 'regarded' by the respondent as having an impairment that substantially limits a major life activity."[25]

Petitioners then maintained and the Supreme Court considered their argument "that whether an impairment is substantially limiting should be determined without regard to corrective measures";[26] however, "[r]espondent, in turn, maintains that an impairment does not substantially limit a major life activity if it is corrected."[27] The Supreme Court sided with the respondent and held that:

> Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[28]

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[20] *Id.* The petitioners, without their corrective lenses, "cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores . . . ." *Id*. at 475.
[21] *Id.* at 476.
[22] *Id.*
[23] *Id.* at 476-77.
[24] *Id.* (stating the reasoning behind the district court decision in the case which was affirmed by the Tenth Circuit).
[25] *Id.*
[26] *Id.* at 481.
[27] *Id.*
[28] *Id*. at 482.

The Supreme Court continued by stating that this holding kept the many people with uncorrected conditions outside the scope of the ADA which supported the intention of Congress.[29]

The Court also rejected Petitioners' argument that they were "'regarded as' having a disability" under the ADA.[30] The Court pointed out that petitioners argued, "respondent mistakenly believes their physical impairments substantially limit them . . . ."[31] The Court held, however, "[b]ecause the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards the petitioners as having a *substantially limiting* impairment."[32]

The U.S. Supreme Court thus restricted people from pursuing claims under the ADA because here: the amount of "substantial limitation" must be determined with the use of corrective measures, the employer may decide if any specific impairment makes people unable to do the job, and a disability must preclude a number of jobs, not just one job.[33] The ADAAA, however, rejects these holdings.[34] For example, the ADAAA requires disabilities to be determined in their pre-corrective state with the exception of ordinary eyeglasses or contact lenses.[35]

Congress also rejected the holding reached in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[36] In *Toyota*, the Court defined "major life activities" as activities that are of "central importance to most people's daily lives."[37] The ADAAA responded with a non-exhaustive list of major life activities.[38]

In *Toyota*, the respondent worked at the "petitioner's automobile manufacturing plant"[39] and "was diagnosed with bilateral

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[29] *Id.* at 484.
[30] *Id.* at 489.
[31] *Id.* at 490.
[32] *Id.* at 493.
[33] *See id.*
[34] 42 U.S.C. § 12101(a)(4), (6) (2008).
[35] 42 U.S.C. § 12102(a)(4)(E).
[36] 42 U.S.C. § 12101(a)(1)-(8); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).
[37] *Toyota*, 534 U.S. at 185.
[38] 42 U.S.C. § 12102(2)(A) (2008). Major life activities listed are, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A) (2008).
[39] *Toyota*, 534 U.S. at 187.

carpal tunnel syndrome and bilateral tendinitis."[40] The respondent was later placed on different teams with different job duties and "was diagnosed with . . . an inflammation of the muscles and tendons around both of her shoulder blades; myotendinitis and myositis bilateral forearms with nerve compression causing median nerve irritation; and . . . a condition that causes pain in the nerves that lead to the upper extremities."[41] Respondent asked for an accommodation and was allegedly refused.[42] Petitioner argued that the "respondent simply began missing work on a regular basis."[43] At the time Respondent was terminated for "poor attendance," she was medically restricted from doing any type of work.[44]

In district court, respondent sued petitioner alleging an ADA violation "on the ground that her physical impairments substantially limited her in . . . major life activities under the Act."[45] The district court held that "the impairment did not qualify as a disability because it had not 'substantially limited' any 'major life activity.'"[46] The Court of Appeals for the Sixth Circuit, however, "concluded that respondent had been substantially limited in performing manual tasks" and found her "disabled under the Act."[47]

The U.S. Supreme Court granted certiorari and, according to the Court:

> The relevant question, therefore, is whether the Sixth Circuit correctly analyzed whether these impairments substantially limited respondent in the major life activity of performing manual tasks. Answering this requires us to address an issue about which EEOC regulations are silent: what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks.[48]

[40] *Id.*
[41] *Id.* at 189.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 190.
[45] *Id.*
[46] *Id.* at 191.
[47] *Id.* at 192.
[48] *Id.* at 196.

The Court stated, "'[m]ajor life activities' thus refers to those activities that are of central importance to daily life."[49] And the Court ended with, "[w]e therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[50]

The Court stated that its holding in *Toyota* was appropriate, "[o]therwise, *Sutton*'s restriction on claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a 'class' of tasks associated with that specific job."[51] Congress' reaction to these holdings would have a lasting effect on American society.

III. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

A. Introduction

In response to the *Sutton* and *Toyota* cases, Congress enacted the ADAAA.[52] The ADAAA now shifts the focus to whether or not discrimination occurred and not as much as on whether or not an individual is disabled.[53] In fact, it has been repeatedly stated that employers would be served well to otherwise understand the ADAAA to represent the principle: "Assume Disability, Always Attempt Accommodation" when working with employees asking for an accommodation.[54] According to Nicole Buonocore Porter, we are, however, "[n]ot as far along as Congress and disability rights

[49] *Id*. at 197.
[50] *Id*. at 198.
[51] *Id*. at 201.
[52] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 (2008)).
[53] *See generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213 (2008)).
[54] Lynn Kappelman & Erin Dougherty Foley, *Five Key Labor and Employment Issues Hospitality Employers Need to Be Aware of This Quarter*, SEYFARTH (June 9, 2011), https://www.seyfarth.com/news-insights/five-key-labor-and-employment-issues-hospitality-employers-need-to-be-aware-of-this-quarter-3.html.

advocates probably hoped we would be."[55] Porter argues that there are, "many cases where the court's legal analysis is plainly wrong, but it is not clear to me whether the errors were unintentional or whether the court was deliberately trying to dismiss the plaintiff's claims because of animus against the ADA or as a method of docket control."[56] She divides these cases into various categories: "1) Courts that apply a long-term requirement that does not exist post-ADAAA; 2) courts that view the plaintiff in her mitigated state; 3) courts that improperly apply the major bodily functions provision and/or the provision regarding episodic impairments; and 4) courts that improperly apply the new 'regarded as' provision."[57] If employers focus on accommodating, however, these issues arguably would not exist.

Even with the issues that remain after passage of the ADAAA, one issue that has been definitively decided is that the ADAAA is not to be applied retroactively.[58] While this might be a potential gap the ADAAA left open, appellate courts have held that the ADAAA is not retroactive and thus, this issue is resolved as will be mentioned below.

B. Changes Enacted with the Americans with Disabilities Act Amendments Act

Before discussing gaps and problems in the Act, we need to briefly examine the changes in the Act. As already discussed, most of these changes are a direct result of the *Sutton* and *Toyota* cases. As Stephen F. Befort noted in his article in the Disability Discrimination After the ADA Amendments Act of 2008 symposium, "[t]he most obvious impact of the ADAAA is that it broadly expands the class of individuals considered to have a disability.[59] It also

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[55] Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 414 (2019).
[56] *Id.* at 402.
[57] *Id.*
[58] *See* Carreras v. Sajo Garcia & Partners, 596 F.3d 25 (1st Cir. 2010); EEOC v. Argo Distrib., LLC, 555 F.3d 462 (5th Cir. 2009); Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562 (6th Cir. 2009).
[59] Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1020 (2010).

readjusts the focus of the ADA away from the troublesome issue of standing to that of determining the substance of disability discrimination claims."[60] This underlying principle was firmly followed thereafter when the Equal Employment Opportunity Commission published the implementing regulations:

> Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.[61]

Befort continues, "[t]he ADAAA undoes much of the damage inflicted by the Supreme Court's four narrowing decisions [including *Sutton* and *Toyota*, discussed above]. By systematically overriding the egregious rulings announced in these decisions, the ADAAA will inevitably extend the protections of the ADA to a much larger class of disabled individuals."[62]

The ADAAA adds a new eight-point list of Findings and a six-point list of Purposes.[63] Most of these Findings and Purposes have already been discussed above in connection with the *Sutton* and *Toyota* cases.[64] As discussed earlier, these changes mean that, unlike the holdings of *Sutton* and *Toyota*, "whether an impairment substantially limits a major life activity"[65] is not "to be determined with reference"[66] to "mitigating measures" and that "substantially

[60] *Id.*; Elliott, *supra* note 10, at 412.
[61] 29 C.F.R. § 1630.1(c)(4) (2011).
[62] Befort, *supra* note 59, at 1020.
[63] 42 U.S.C. § 12101 (2008).
[64] *See* 42 U.S.C. § 12101 (2008).
[65] 42 U.S.C. § 12102(4)(E)(i) (2008).
[66] 42 U.S.C. § 12102(4)(E)(i) (2008).

limited"[67] does not mean "an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives . . . ."[68] Further, Befort explains that,

> [A] central purpose of the ADAAA expansion in disability coverage is to ensure "that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'"[69]

Befort then states that "the new focus likely will center more on whether an individual is qualified to perform the job in question."[70]

In response to *Sutton*, the ADAAA also adds an extensive, non-exhaustive list of major life activities and major bodily functions that includes working as a major life activity.[71] The ADAAA states that, "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals . . ."[72] and "clarifies what has always been implicit: an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."[73] In this list, all bodily functions are included, such as reproductive functions and "functions of the

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[67] 42 U.S.C. § 12102(4)(E)(i) (2008).
[68] Elliott, *supra* note 10, at 410; *see also* 42 U.S.C. § 12101(b)(2)-(4) (2008).
[69] Befort, *supra* note 59, at 1022.
[70] *Id.*
[71] 42 U.S.C. § 12102(1)(A)-(C), (2)(A)-(B) (2008). The Act reads, "[t]he term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." *Id.* The Act also states, "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." *Id.*
[72] 42 U.S.C. § 12102(4)(A) (2008); *see also* Miller, *supra* note 18, at 55-56 (citations omitted); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 222 (2008) (citations omitted).
[73] *See* Miller, *supra* note 18, at 55-56 (citations omitted); Long, *supra* note 72.

immune system."[74] The ADAAA also adds a section, "Regarded as Having Such an Impairment."[75] This change should make it easier for employees to sue on the basis of being "regarded as" having an impairment and thus, employees can be discriminated against even if the impairment does not limit "a major life activity."[76] The ADAAA, however, states that this section "shall not apply to impairments that are transitory and minor" and defines transitory as an impairment "with an actual or expected duration of 6 months or less."[77] Befort explains that this limits "the otherwise considerable expansion of the 'regarded as' coverage.'"[78] Thus, in response to *Sutton* and *Toyota*, even though Congress expanded the reach of the ADA with the ADAAA, Congress did include limits within the Act.[79] The ADAAA adds though that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[80]

In reaction to *Sutton*, the ADAAA states, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[81] Thus, the ADAAA specifically rejects the *Sutton*

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[74] 42 U.S.C. § 12102(2)(B) (2008). The Act lists the following major bodily functions: "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. § 12102(2)(B) (2008).

[75] 42 U.S.C. § 12102(3)(A). The Act states:

> 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 Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C.§ 12102(3)(A).

[76] *Id.*

[77] 42 U.S.C. § 12102(3)(B) (2008).

[78] *See* Befort, *supra* note 59, at 1027.

[79] 42 U.S.C. § 12102(3)(B) (2008); 42 U.S.C. § 12102(4)(E)(ii) (2008). Impairments that are transitory and minor are not covered and the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses are considered. 42 U.S.C. § 12102(3)(B) (2008); 42 U.S.C. § 12102(4)(E)(ii) (2008).

[80] 42 U.S.C. § 12102(4)(D) (2008).

[81] 42 U.S.C. § 12102(4)(E)(i)(I)-(IV) (2008). The Act 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 such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary

holding.[82] Eyeglasses and contact lenses, however, are still considered mitigating measures.[83] However, the ADAAA states, "a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision 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 consistent with business necessity."[84]

The ADAAA includes sections that protect employers from the law overreaching its intended purpose:

> Nothing in the chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability," and, "A covered entity . . . need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in section 12102 (1) of this title solely under subparagraph (C) of such section," so employers do not have to provide reasonable accommodations to an individual who is disabled by "being regarded as having such an impairment."[85]

When ADA protection was weakened by the *Sutton* and *Toyota* cases, Congress reacted by passing the more-expansive amendments. The reasonable accommodation mandate, however, was left unchanged within the Act. Due to the intended broad definition of disability solidified with the ADAAA, more employees are expected to be covered by the law. However, issues regarding reasonable accommodation, as will be discussed below, now exist in all likelihood at a higher rate than prior to the amendments. The need for employers to "assume disability" and "always attempt accommodation" has left a void regarding how to handle and determine what is reasonable.

> 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; use of assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.

Id.

[82] 42 U.S.C. § 12102(4)(E)(i)(I)–(IV) (2008); *Sutton*, 527 U.S. at 482, 484, 493.

[83] *See* 42 U.S.C. § 12101(4)(E)(i)(I) (2008); *Sutton*, 527 U.S. at 482.

[84] 42 U.S.C. § 12113(c) (2008).

[85] 42 U.S.C. §§ 1220(g)(h), 12102(1)(c) (2008).

IV. REASONABLE ACCOMMODATION WAS LEFT UNADDRESSED IN ADAAA

A. ADAAA is Not Retroactive

Initially, there was a question regarding whether or not the ADAAA would be retroactive. The question is now settled, however, because courts have held that the ADAAA is not retroactive. According to Miller, courts "have concluded that Congress mandated purely prospective application of the statutory clarification by delaying the effective date of the ADAAA until January 1, 2009, and by not otherwise specifically addressing the issue of retroactive application."[86] Now, a decade later, it is well established that the ADAAA does not apply retroactively. The First, Fifth, and Sixth Circuit Courts have all determined it should not be applied retroactively and that is the consistent position the EEOC has taken as well.[87] Even though the ADAAA is not retroactive, because the ADAAA retained the original ADA reasonable accommodation language, reasonable accommodation cases under the ADA remain precedent. Thus, some of the reasonable accommodation cases discussed here will be cases decided under the ADA and not the ADAAA.

B. Reasonable Accommodation

One of the issues still left open by the ADAAA is the issue of reasonable accommodation. Stone states that, "[a]lthough the ADAAA has made great strides in the direction of removing unnecessary barriers to employees' coverage under the ADA, it has largely failed to address the ADA's 'reasonable accommodation' mandate and to redress the damage done by courts' ADA jurisprudence."[88] The ADAAA requires that reasonable accommodation must be made:

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[86] Miller, *supra* note 18, at 55-56.

[87] *See* Carreras v. Sajo Garcia & Partners, 596 F.3d 25 (1st Cir. 2010); EEOC v. Argo Distrib., LLC, 555 F.3d 462 (5th Cir. 2009); Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562 (6th Cir. 2009).

[88] Kerri L. Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 FLA. INT'L UNIV. COLL. L. 509, 513 (2011) (citing to 42 U.S.C. § 12112(b)(5)(A)).

> As used in this subchapter: . . . (9) The term "reasonable accommodation" may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[89]

As discussed below, we now have case law that has tried to define what is reasonable and what is not reasonable accommodation although courts have tended to disagree at times.[90] The U.S. Supreme Court examined this issue in *US Airways v. Barnett*.[91] According to Stone,

> [d]espite the guidance furnished by the Supreme Court in *Barnett*, courts continue to struggle with and disagree over the correct way to evaluate whether certain proposed accommodations are reasonable accommodations or whether they confer an undue hardship upon employers. For example, courts continue to disagree on whether mandatory reassignments are reasonable accommodations.[92]

It seems if courts are struggling over the interpretation of what is reasonable, employers have also legitimately struggled with their legal obligations because the workplace is frequently presented with situations not easily determined by a simple reading of the statute.[93] A thorough analysis of all of the factors involved and the applicable

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[89] 42 U.S.C. § 12111 (2008).

[90] Stone, *supra* note 88, at 522. "Despite the guidance furnished by the Supreme Court in Barnett, courts continue to struggle with and disagree over the correct way to evaluate whether certain proposed accommodations are reasonable accommodations or whether they confer an undue hardship upon employers." Stone, *supra* note 88, at 522.

[91] US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[92] Stone, *supra* note 88, at 522.

[93] *Id.* at 513.

legal guidance is necessary to make an informed decision regarding what is a reasonable accommodation.

Thus, the ADAAA has not made changes that will help ease problems with reasonable accommodations.[94] The ADAAA does state that someone who is "regarded as" disabled and not disabled is not entitled to reasonable accommodation.[95] This minor clarification found in the ADAAA, however, does not alleviate all of the remaining questions regarding reasonable accommodation.

With the ADAAA, "[c]ourts will parse out a plaintiff's disabilities to determine whether or not the reasonable accommodation requested specifically furthers a major life activity put at issue by the disability claim."[96] Further difficulties remain when the individual who is seeking a reasonable accommodation is not actually disabled, and is merely regarded as disabled.

> Moreover, it will not be possible for a plaintiff to get reasonable accommodations when they fall through the cracks because they are merely 'regarded as' disabled, despite the fact that they endure disability discrimination based upon a real or perceived disability and are unable to perform their jobs without reasonable accommodation.[97]

Stone argues that the limitation of a major life activity requirement in connection with reasonable accommodation requests are unnecessary; however, "[t]here is simply no reason to retain this arbitrary requirement that the employee point to a limitation of a major life activity that may or may not be implicated or otherwise aided by an accommodation."[98] It is further argued "[t]he true purpose of the reasonable accommodation provision is to help ensure that an otherwise qualified individual deemed worthy of inclusion within the statute's protection is given the assistance that he or she needs to obtain, perform, or retain the job that she holds or desires."[99]

As Stone points out, when reasonable accommodation is involved, three issues must be decided: "[W]hether a disabled plaintiff is an otherwise qualified individual, whether the proposed

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[94] *Id.*
[95] 42 U.S.C. §§ 12101-12213 (2008).
[96] Stone, *supra* note 88, at 538.
[97] *Id.* at 539.
[98] *Id.* at 549-50.
[99] *Id.* at 550.

accommodation is reasonable, and whether or not the proposed accommodation confers an undue hardship on the employer."[100] While the ADAAA specifically resolves many issues, as Stone points out, regarding reasonable accommodation, the ADAAA did not address it.[101] This is especially problematic because "the ADAAA's expansion of coverage will effectively push the question of what is and is not a reasonable accommodation to the forefront in many cases, necessitating a more workable construction and framework."[102]

Stone suggests a resolution to the problem of reasonable accommodation issues as: "when a non-minor, non-transitory impairment that is the but-for cause of one's need for a reasonable accommodation in order to become or remain employed, an accommodation is warranted where the employee is otherwise qualified . . . ."[103] Stone argues that doing this means "that the 'reasonable accommodation' analysis becomes distinct from others and directly addresses the accommodation itself."[104] Regarding undue hardship, "[t]he undue hardship analysis should focus on the specifics of the employer and anything about it . . . that might render an otherwise reasonable accommodation unreasonable. The otherwise qualified strand, however, should focus entirely on the plaintiff . . . ."[105] Stone believes this solves existing problems, "[t]he shift of the screen from the almost irrelevant or life activity limitation analysis to a (now) more restrictive otherwise qualified analysis ensures that employers' legitimate prerogatives are honored while the essential antidiscrimination mandate of the ADA remains in full force."[106]

Miller argues that reasonable accommodation issues "and defenses will be the new battleground for ADA-qualified employees."[107] One issue that arises is "whether an employer must reassign a qualified disabled employee when it could fill the position with a more qualified employee."[108] While this issue was to some

[100] *Id*. at 552.
[101] *See id*.
[102] *Id*. at 552-53.
[103] *Id*. at 555.
[104] *Id*. at 556.
[105] *Id*.
[106] *Id*. at 561.
[107] Miller, *supra* note 18, at 74.
[108] *Id*. at 76.

extent addressed in *EEOC v. St. Joseph Hospital*,[109] it still leaves unanswered questions. This remains an issue under the ADAAA as does the cost of reasonable accommodation as, "[t]here are no new reporting or recordkeeping costs under the ADAAA, so compliance cost will come primarily from individual accommodation . . . to a broader range of disabled individuals."[110] Thus, while the success of the ADAAA was to increase the number of individuals covered by the statute, that very success increases the problems associated with reasonable accommodation issues because more people will likely now be requesting reasonable accommodation; and yet, the ADAAA does not change the language regarding reasonable accommodation to reflect this and thus, remains an issue under the ADAAA. As Jones points out, "[t]he ADAAA does not change the duty of reasonable accommodation."[111] But, "[b]ecause the ADAAA increases the number and range of physical and mental impairments that qualify as disabilities, however, there will be a corresponding increase in the number of conditions entitled to workplace accommodation."[112] Jones believes that the ADAAA, because of a lack of "clear . . . guidance," will lead to "seemingly unreasonable accommodation for dubious disabilities" and "medical verification of disability is likely to play an enhanced role in reasonable accommodation, especially with respect to major bodily functions."[113] Finally, Jones believes "an employer's best ground for resisting a requested accommodation" will be "arguments based on inability to perform essential job functions."[114] Jones argues that with the ADAAA, "[e]mployer clarity on essential versus non-essential functions" will be even more important for "employers defending against disability discrimination claims . . . ."[115] Thus, reasonable accommodation issues under the ADAAA will not only impact employees, but employers as well. Long agrees that the ADAAA "leave[s] a host of reasonable accommodation issues unresolved, such as whether an employer must . . . reassign an

[109] U.S. Equal Emp. Opportunity Comm'n v. St. Joseph's Hospital, Inc., 842 F.3d 1333 (11th Cir. 2016).
[110] Miller, *supra* note 18, at 77.
[111] Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 696 (2010).
[112] *Id.*
[113] *Id.*
[114] *Id.* at 697.
[115] *Id.* at 698.

individual with a disability to a vacant position when there is another, more qualified applicant" and "[i]nstead of taking the opportunity to resolve the conflicting standards on these points, by relaxing the standard for qualifying as having a disability, Congress may have actually made the job of courts tougher."[116]

V. REASONABLE ACCOMMODATION CASES

A. U.S. Supreme Court

The U.S. Supreme Court examined the issue of reasonable accommodation in *US Airways v. Barnett*.[117] While this case was decided under the ADA, it is still applicable today because the ADAAA kept the language of reasonable accommodation the same.[118] In *US Airways*, the Court asked if an "accommodation demand trump[s] [a] seniority system?"[119]

In *US Airways,* Robert Barnett injured his back and used seniority to work in the mailroom.[120] Later, Barnett's position was open to "employee bidding."[121] Barnett "asked US Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom."[122] After a time, US Airways declined Barnett's request and he lost his job.[123] Barnett sued under the ADA and alleged that the mailroom job was a "reasonable accommodation."[124] US Airways argued that the seniority system gave "other employees the right to the mailroom position."[125] The District Court found for US Airways and granted summary judgment and the Ninth Circuit reversed.[126]

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[116] Long, *supra* note 72, at 229.
[117] 535 U.S. 391 (2002).
[118] Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2008).
[119] *US Airways*, 535 U.S. at 393-94.
[120] *Id.* at 394.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id*. at 394-95.
[125] *Id*. at 395.
[126] *Id*.

The Supreme Court noted, "reasonable accommodation may include…reassignment to a vacant position."[127] The parties viewed this differently and the Court concluded, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[128]

The Court then examined another issue in the case. According to the plaintiff Barnett, "the statutory words 'reasonable accommodation' mean only 'effective accommodation.'"[129] The Court did not agree with this argument because reasonable does not mean effective.[130] The Court found that the accommodation the plaintiff requested, continued assignment to the mailroom, seemed reasonable under the circumstances.[131] But a secondary question remained: because the accommodation would violate the employer's rules of a bona fide seniority system, is the permanent reassignment truly reasonable?[132] The Court concluded Congress did not intend to undermine such established systems, and explicitly recognized the importance of seniority to employee-management relations.[133] Therefore, if an employer can show an accommodation would violate a seniority system, it is "ordinarily sufficient" to overcome the determination that it would be a reasonable accommodation.[134] Employees may still show, however, that based on their particular case, the accommodation remains reasonable, even though a seniority system is violated.[135] The Court reasoned that typically, the ADA does not require an accommodation of reassignment if such would violate a seniority system, but an employee may present evidence that such an accommodation remains reasonable under the circumstances.[136]

[127] *Id.* at 396.
[128] *Id.* at 398.
[129] *Id*. at 399.
[130] *See id*. at 400.
[131] *See id*. at 402-03.
[132] *Id.* at 403.
[133] *Id.*
[134] *Id*. at 403-05.
[135] *Id*. at 405.
[136] *Id*. at 406.

B. Recent Cases

While the *Barnett* decision provided limited guidance for assessing reasonable accommodations in the workplace, it left open what evidence an employee may present that would turn such a request into one that was reasonable. In a more recent case examining *Barnett*, the Eleventh Circuit rejected the stance of the Commission that an employer must place a disabled employee in a vacant position as a reasonable accommodation.[137] In *EEOC v. St. Joseph Hospital*,[138] the court noted that requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable: "[p]assing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance."[139] The court also appropriately stated that "'[t]he ADA was never intended to turn nondiscrimination into discrimination' against the non-disabled."[140]

In *St. Joseph's Hospital*, a nurse using a cane due to spinal stenosis was no longer qualified to perform her duties in the psychiatric ward of the hospital due to concerns that patients could use the cane as a weapon.[141] After she applied for seven vacant positions in the hospital, three of which the nurse was qualified for, the hospital hired better-qualified candidates and the nurse was left without a position.[142] In determining that the nurse was not entitled to a vacant position, the court noted that "[t]he ADA does not say or imply that reassignment is always reasonable. To the contrary, the use of the word 'may' implies just the opposite: that reassignment will be reasonable in some circumstances but not in others."[143] Although *St. Joseph's* did not include a seniority system as in *Barnett*, the case relied upon a best-qualified applicant policy, which the court found applicable in reaching its conclusion:

> Nevertheless, *Barnett*'s framework is instructive in this context. Requiring reassignment in violation of an

[137] U.S. Equal Emp, Opportunity Comm'n v. St. Joseph's Hospital, Inc., 842 F.3d 1333 (11th Cir. 2016).
[138] *Id.*
[139] *Id.* at 1346.
[140] *Id.* (quoting Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998)).
[141] *Id.* at 1338.
[142] *Id.*
[143] *Id.* at 1345.

> employer's best-qualified hiring or transfer policy is not reasonable "in the run of cases." As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.[144]

Employers, through *Barnett*, can now feel somewhat comfortable in hiring the best candidate for a position regardless of the possibility that a disabled employee may request that same position. While this decision is helpful in providing some guidance for employers, it does not create a bright line rule to establish which "circumstances" necessitate accommodation and which do not, and again, encourages a case-by-case analysis based upon business needs.

Another case, *Hostettler v. College of Wooster*,[145] further directed employers on what may constitute a reasonable accommodation in a workplace, but seemed to provide more latitude for employees to fashion an accommodation beneficial to their own needs.[146] In *Hostettler*, the Sixth Circuit found that working full-time is not always an essential job function; therefore, it was unlawful to mandate such a requirement at all times for all disabled employees.[147]

The employee in *Hostettler* was having difficulty returning to work as an HR Generalist after her twelve-week maternity leave due to severe postpartum depression and separation anxiety.[148] Based upon her doctor's advice and direction, she requested to work a part-time schedule of five half-days for the "foreseeable future."[149] After working half-days for a couple months, the employee was terminated when she requested to continue her employment on a part-time

[144] *Id.* at 1346.
[145] 895 F.3d 844, 856-58 (6th Cir. 2018).
[146] *Id.* at 857.
[147] *Id.* at 857.
[148] *Id.* at 849.
[149] *Id*. at 850.

basis.[150] The employer argued that full-time work was an essential function of the position and therefore the employee was not qualified to perform her job duties.[151]

The *Hostettler* court concluded that the ADA requires employers reasonably accommodate employees with disabilities, including allowing part-time or modified work schedules.[152] The court noted "[a]n employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is per se unreasonable will not relieve an employer of its ADA responsibilities."[153]

Since the *Hostettler* case, it is clear that an employer must not assume that it will not be required to reasonably accommodate a disabled employee who cannot work on a full-time schedule.[154] Employers are required to engage in the interactive process to determine if a full-time schedule is truly an essential function of the position or if it would be an undue hardship to allow the employee to work part-time. If the court had found otherwise, the court reasoned that

> employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week. That could mean denying leave for doctor's appointments, dialysis, therapy, or anything else that requires time away from work. Aside from being antithetical to the purpose of the ADA, it also would allow employers to negate the regulation that reasonable accommodations include leave or telework.[155]

The court further concluded that even if an employer would *like* an employee in the office on a full-time basis, and it would be more efficient for the individual to work under those circumstances, the ADA is concerned with additional implications. The "benefits of

[150] *Id.* at 851.
[151] *Id.* at 851-52.
[152] *Id.* at 852.
[153] *Id.* at 857.
[154] *Id.* at 856.
[155] *Id.* at 857.

gainful employment for individuals with disabilities…outweigh simple calculations of ease or efficiency."[156]

Hostettler references an important Sixth Circuit case which similarly emphasized that a reasonable accommodation must be reviewed on a case-by-case basis while considering all relevant factors.[157] In *EEOC v. Ford Motor Company*,[158] the court stressed that, and also stated that an employer's review of essential job functions must consider if they are "job-related, uniformly-enforced, and consistent with business necessity."[159] The employee in *Ford*, Jane Harris, was working as a resale steel buyer and diagnosed with irritable bowel syndrome.[160] This caused her "uncontrollable diarrhea and fecal incontinence . . . occasionally couldn't even make the one-hour drive to work without having an accident. The vicious cycle continued, as her symptoms increased her stress, and the increased stress worsened her symptoms—making her less likely to come to work."[161] In addition to her attendance problems, Harris had significant performance concerns and failed to perform core objectives of the job.[162] The company attempted to assist her in meeting certain performance goals and even allowed her to telecommute, but after three failed attempts Harris was denied another opportunity to do so.[163] After several more years of performance and absenteeism problems, Harris was terminated.[164]

The question the court answered was very specific: "[i]s regular and predictable on-site job attendance an essential function (and a prerequisite to perform other essential functions) of Harris's resale-buyer job?" The Tenth Circuit Court of Appeals held that it was.[165] The court went on to explain:

> The Americans with Disabilities Act (ADA) requires employers to reasonably accommodate their disabled employees; it does not endow all disabled persons with a job—or a job schedule—of their choosing . . .

[156] *Id.*
[157] *Id.* at 855-56.
[158] EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015) (en banc).
[159] *Id.* at 766.
[160] *Id.* at 758.
[161] *Id.* at 758-59.
[162] *Id.*
[163] *Id.* at 759.
[164] *Id.* at 760.
[165] *Id.* at 757-62.

> the general rule: common sense . . . [r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.[166]

The court noted its reasoning was consistent with EEOC regulations listing seven factors to determine a job function, the majority of which indicates predictable attendance as an essential function or "fundamental," as opposed to a marginal function.[167]

However, *Ford* did not leave the door wide-open for employers to deny employees telecommuting, work-from-home, or time off as reasonable accommodations, as it found its decision did not "require blind deference to the employer's stated judgment."[168] Instead, *Ford* requires that an employer's policies and practices, considering all relevant factors, must show that regular attendance is an essential job function.[169] This indicates that employers have the burden to show that for one particular position, it has been and will be, an essential function for the employee to have a regular presence at the workplace. This is especially relevant today, in our current COVID pandemic.

VI. CONCLUSION

Throughout the COVID pandemic, many companies have recognized that employees can work from home and successfully accomplish their tasks remotely. For many months, the government and health advocates pushed for such arrangements, and companies transitioned well to these unconventional working arrangements.[170] It will be interesting to see how employers will now handle the question of what is an essential function of a job knowing that it can, and has, continued to successfully operate through telecommuting, job restructuring, part-time and remote work. Will employers be more limited in arguing that regular in-person attendance is essential? *Ford* is undoubtedly reasoned on the premise that the employer must

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[166] *Id.* at 762-63.
[167] *See id. See also* 29 C.F.R. § 1630.2.
[168] *Id*. at 765.
[169] *Id.* at 765-66.
[170] Kathleen A. Carnes, *Is This the Calm Before the Storm? Worsening Legal Needs of Low Income Clients and the Impact of a Remote Workforce*, 34 MIE J. 40, 40 (2020).

demonstrate a need for the employee to remain in attendance in order to find such attendance to be an essential job function. Are employers able to do that as easily now? In the COVID pandemic? Of course, we do not know what the future holds, but both employers and employees are both invested in these issues and their outcomes.

The passage of the ADAAA made significant steps in resolving some of the more problematic legal issues associated with the original Americans with Disabilities Act such as its definition of disability or what constitutes a major life activity. The new law, however, did not alleviate the practical concerns that come with the equally important question of what constitutes reasonable accommodation. The myriad of factors and circumstances that influence that determination will forever present a difficult decision for employers that will require balancing business and employee interests with workplace policies and human resources needs. This balancing act continues to leave many unanswered questions under the law, and at times, gives us an imprecise answer for what a reasonable accommodation is.