Proving A Pregnancy Discrimination Case After *Young v. UPS*

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The *McDonnell Douglas* Test as Applied to Pregnancy Discrimination: *Young v. UPS*

- The PDA's first clause simply includes pregnancy and pregnancy-related conditions within the scope of sex discrimination.

- Young v. UPS concerned the PDA's second clause which provides that **employers shall treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."** 42 U.S.C. 2000e(k).

Peggy Young v. United Parcel Service

- 575 U.S. ___, 135 S. Ct. 1338 (2015), *vacating and remanding* 707 F.3d 437 (4th Cir. 2013), *aff'g* 2011 WL 665321 (D. Md. Feb. 14, 2011), is the first pregnancy accommodations case decided by the Supreme Court.

- **Summary of Facts:**
- UPS required Peggy Young to take nearly seven months of unpaid leave when she brought in a doctor's note recommending that she not lift more than 20 pounds for the duration her pregnancy, even though UPS provided alternate work to a wide range of non-pregnant employees with physical limitations.

The two most significant holdings:

(1) The prima facie case of pregnancy discrimination, and

(2) The PDA plaintiff's proof that an employer's "nondiscriminatory reasons" for disparate treatment are actually a pretext for discrimination.

I. The *Prima Facie* Case of Pregnancy Discrimination

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- Peggy Young, like most other plaintiffs in accommodations cases under the PDA, lost her case at the *prima facie* stage.

- Lower courts found:

  *no similarly situated comparator whom UPS had treated better,

  * no "other circumstantial evidence [which] suggests discrimination."

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- Compare to prior Supreme Court holdings:

*making a *prima facie* case of discrimination is not an onerous burden, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

*a plaintiff can make out a *prima facie* case of sex discrimination even in the absence of comparators, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989).

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- Comparators that Young had attempted to use:

  *employees with high blood pressure, diabetes, vision problems,

  *employees injured on the job

  *employees accommodated under the ADA

  *employees with drunk driving convictions

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- District Court holding: "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees"

- It is important here to recall the objective of this element of the *prima facie* case: to discern whether a reasonable inference can be drawn that the employer has animus directed specifically at pregnant women. When an employer grants pregnant employees and some class of non-pregnant employees equally harsh terms, it undermines such an inference. In such circumstances, an employer might have some form of animus that is not to be applauded, but the animus is not directed towards a protected trait and, consequently, is not actionable.

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- **Fourth Circuit's affirmance:**

[T]he dispute here centers on the final element of the *prima facie* case: whether similarly-situated employees outside the protected class received more favorable treatment than Young ....

...Young seeks to compare herself to employees accommodated under the ADA, drivers who have lost their DOT certification for medical reasons, and the employees injured on the job.... [T]hese accommodations were created by a neutral, pregnancy-blind policy--a policy she can attack indirectly no more successfully than she could directly.

Moreover, we conclude that a pregnant worker subject to a temporary lifting restriction is not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." [707 F.3d at450.]

A. The Lower Courts' Holding as to the *Prima Facie* Case:

- Prior to the Supreme Court's decision in Young v. UPS, the pregnant employee could compare herself only to the hypothetical, unidentified other non-pregnant employees whom the employer does not accommodate.

B. The Supreme Court's Holding as to the *Prima Facie* Case:

- *Young v. UPS has most often been cited for its restatement of this holding:*

- The *prima facie* case of discrimination required by *McDonnell Douglas* "is 'not intended to be an inflexible rule'" (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978)); that a "plaintiff may establish a *prima facie* case by 'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion.' *Id.*, at 576. . . . The burden of making this showing is 'not onerous.' *Burdine*, 450 U.S. at 253." 135 S. Ct. at 1353-1354.

B. The Supreme Court's Holding as to the *Prima Facie* Case:

- The *prima facie* case of discrimination under the second clause of the Pregnancy Discrimination Act:

- that [the plaintiff] belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" [135 S. Ct. at 1342.]

B. The Supreme Court's Holding as to the *Prima Facie* Case:

- The Supreme Court held that "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis." *Id.* at 1355.

- Relevance: The PDA means what it says. The pregnancy discrimination plaintiff can compare herself not only those employees whose limitations derive from similar causes or similar conditions, but rather those employees who simply are similar in ability or inability to work.

- EEOC Guidance has been updated to note that, in the PDA case, proper comparators include not only employees similarly situated in all but the protected ways, but rather, employees similar in ability to work.

II. Legitimate Non-Discriminatory Reasons

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- Under *McDonnell Douglas*, once the plaintiff establishes her *prima facie* case, the burden falls to the employer to come forward with its legitimate nondiscriminatory reasons (LNDRs) for disparate treatment.

- UPS's proposed LNDRs:

*accommodating workers injured on the job resulted in a cost savings to the employer, plus it kept employees in the habit of coming to work and reduced the need to hire new employees;

*accommodating workers with medical conditions that resulted in loss of DOT certification was required by the CBA; and

*accommodating workers disabled under the ADA was required by statute.

- The lower courts did not address the LNDRs.

II. Legitimate Non-Discriminatory Reasons

- **The Supreme Court on the question of LNDRs:**

*Rejected the lower courts' conclusion that a collection of "pregnancy blind", "facially neutral" policies is sufficient to protect an employer from liability for pregnancy discrimination, 135 S. Ct. at 1349.

*Expressly held that the employer's "legitimate non-discriminatory reason" for accommodating some employees but not pregnant employees "normally cannot consist simply of a claim that it is more expensive or less convenient" to accommodate pregnant workers. 135 S. Ct. at 1354.

*The majority opinion did not otherwise discuss the LNDRs, but Justice Alito's concurring opinion observed that "it is not at all clear that [UPS] had any neutral business ground for treating pregnant drivers less favorably", 135 S. Ct. at 1361.

III. Pretext

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- Pretext: the evidence by which a PDA plaintiff could demonstrate that any LNDR is actually a pretext for pregnancy discrimination. The Supreme Court remanded the question of pretext to the Fourth Circuit.

- Some of Young's evidence of pretext:

  *the Building Manager's statement that Young must go home until she was no longer pregnant because she was too much of a liability.

  *the testimony of a shop steward that the only time UPS had a problem accommodating lifting restrictions was in the case of pregnant employees.

- The lower courts ruled both of these statements irrelevant, but the Supreme Court cited both statements in its holding.

III. Pretext

- Two holdings of the Supreme Court helpful to PDA plaintiffs on the issue of pretext:

  (1)[T]he plaintiff may reach a jury on this issue [of pretext] by evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather--when considered along with the burden imposed--give rise to an inference of intentional discrimination. [135 S. Ct. at 1354.]

  (2)The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. [135 S. Ct. at 1354.]

- There is no need to show a decisionmaker with animus.

- Discriminatory intent can be inferred where an employer accommodates a large number of non-pregnant employees while refusing to accommodate a large number of pregnant employees.

III. Pretext

- The Supreme Court's summary of its holding:

- "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"

III. Pretext

- A remaining question:
- Must the PDA plaintiff meet a qualitative standard or a quantitative standard?
- Compare "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's" *Id.* at 1355, [-- a qualitative standard]

with

- a plaintiff can satisfy her burden with evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers" [-- a quantitative standard]

Impact of *Young*: 10 Litigation Pro Tips

. . .

Consider whether to bring a claim under Clause 1, Clause 2, or Both

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions*; and* women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…

Still Must Prove Intentional Discrimination, But:

Animus is NOT required

"Pregnancy blind" is no longer enough!

Hold Defendant to the New Prima Facie Case

- P. must show "[1] that she belongs to the protected class, [2] that she sought accommodation, [3] that the employer did not accommodate her, and [4] that he employer did accommodate others 'similar in their ability or inability to work.'"

- "The burden of making this showing is **not onerous**."

- No "qualified for the job" requirement.
  - See Martin v. Winn, 2015 WL 5611646 (M.D. La.)

Prima Facie Case - 4th Prong: Properly Define Your Comparator

- "similar in ability or inability to work" = similar restriction/ accommodation needs (nothing more!)
- Don't allow ER to conflate who is proper comparator with justification for non-accommodation

Gather and present compelling statistical evidence, when available

"The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." - *Young*

* *See Legg. v. Ulster Cnty.*, 2016 WL 1637993 (2d. Cir.) (examining statistical evidence)

Statistical Evidence is Not Required.

EVEN when you have good statistical evidence, show **unjustified burden** also through non-statistical evidence:

- Burden = individual and group hardship
- Use accommodation policies (ADA, light duty, temporary disability)
- Everything boils down to cost or convenience
- Gather evidence of ease of accommodating

See *Legg. v. Ulster Cnty.*, 2016 WL 1637993 (2d. Cir.), *Allen-Brown v. D.C.*, 2016 WL 1273176 (D.D.C.); *McQuistion v. City of Clinton*, 872 N.W.2d 817 (Iowa Sup. Ct.).

Be Aware of Stereotypes

Use the PDA for lactation accommodation claims!

- PDA covers women "affected by pregnancy, childbirth, or related medical conditions"

- See *Allen-Brown v. D.C.*, 2016 WL 1273176 (D.D.C.); *Gonzales v. Marriott Int'l*, 2015 WL 6821303 (C.D. Cal.); *Hicks v. City of Tuscaloosa*, 2015 WL 6123209 (N.D. Ala.).

Also utilize these laws:

- Americans with Disabilities Act
- Family and Medical Leave Act
- State and Local Pregnancy Accommodation Laws

ADA Protections

- No discrimination against qualified individuals on the basis of actual disability, record of disability, or regarded as having a disability
- Reasonable accommodations required for qualified individuals with actual or record-of disabilities, if accommodation would not pose an undue hardship
- 'Normal Pregnancy Doctrine': Even under the ADAAA, normal pregnancy is neither an impairment nor a disability, but pregnancy-related conditions may be both

Pregnancy-Related Conditions Under the ADAAA

- Still must prove a physical or mental impairment, beyond pregnancy (e.g., preeclampsia, gestational diabetes, depression)
- Impairment is enough for a regarded-as claim
- But if accommodations are required, you must be able to show a substantial limitation under the ADAAA's analysis

Pregnancy-Related Conditions Under the ADAAA-Accommodations

- Major life activities now include the operation of major bodily functions (e.g., musculoskeletal, digestive, circulatory, endocrine, reproductive)
- Substantial limitation is now broadly construed
- Limitation is assessed without regard to mitigating measures
- Limitation is assessed in its active state
- Short duration is no longer a bar to coverage

EEOC Regulation Interpreting the ADAA

"… **a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. . .**"

-- 29 C.F.R. Pt. 1630 App., § 1630.2(h).

"… some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended …"

-- EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), available online at

https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IIA

FMLA Leave Must be Provided for:

- Prenatal medical appointments
- Morning sickness
- Pregnancy-related conditions
- The final weeks of pregnancy

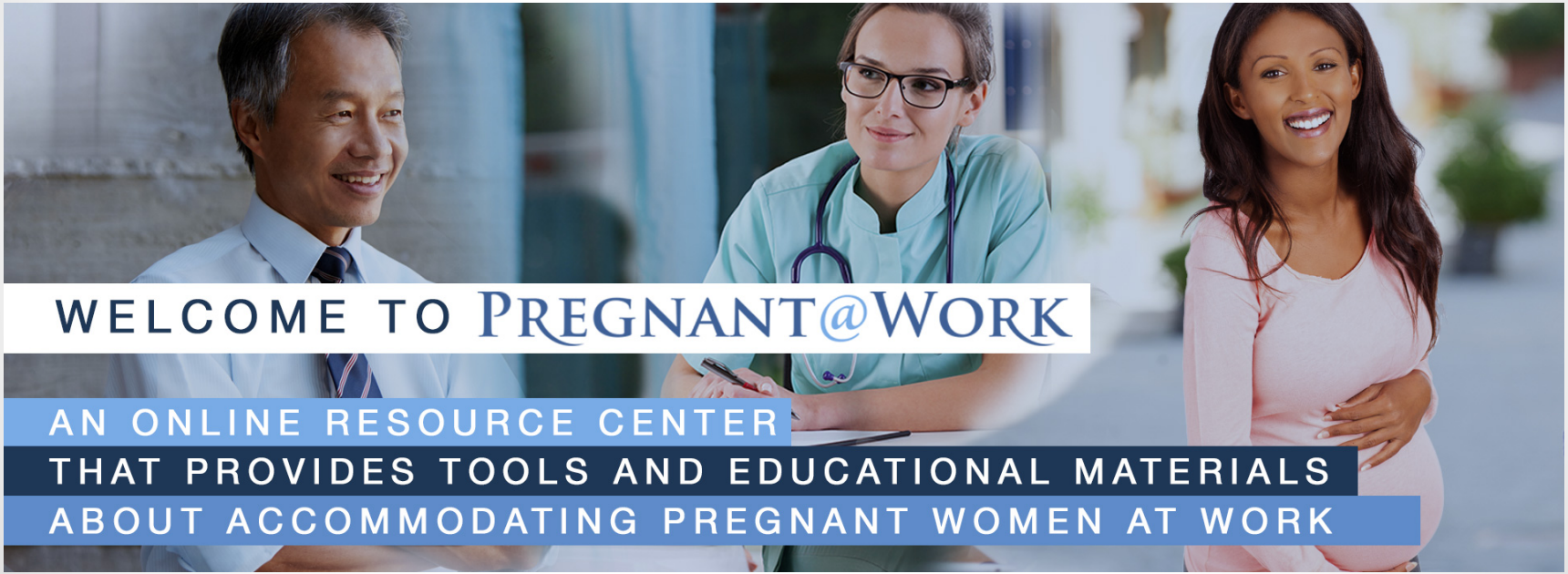
States and Cities with Pregnancy Accommodation Laws

- Alaska
- California
- Colorado (Aug. 2016)
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Louisiana
- Maryland
- Minnesota
- Nebraska
- New Jersey
- New York
- North Dakota
- Rhode Island
- Texas
- Utah
- West Virginia

- New York City
- Philadelphia
- Providence, RI
- Central Falls, RI
- Washington, D.C.

Want more?

Visit www.PregnantAtWork.org



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THE ADA AMENDMENTS ACT OF 2008—
Including Final EEOC Regulations and Guidance, and Current Case Law
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1. Broad interpretation of disability.

a. In general, disability is now to be broadly interpreted.

i. "The ADAAA retained the basic structure and terms of the original definition of disability. However, the Amendments Act altered the interpretation and application of this critical statutory term in fundamental ways." 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011).[1] *See also Garcia-Hicks v. Vocational Rehab. Admin.*, ___ F. Supp. 3d ___, 2015 WL 7720343, at *7 (D.P.R. Nov. 30, 2015) (R.12); *Canfield v. Movie Tavern, Inc.*, 2013 WL 6506320, at *3 (E.D. Pa. Dec. 12, 2013) (R.12); *Willoughby v. Connecticut Container Corp.*, 2013 WL 6198210, at *8 (D. Conn. Nov. 27, 2013) (R.56); *Mercer v. Arbor E & T*, 2012 WL 1425133, at *6 (S.D. Tex. Apr. 21, 2012); *Carbaugh v. Unisoft Intern., Inc.*, 2011 WL 5553724, at *7 (S.D. Tex. Nov. 15, 2011); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011); *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011).

ii. The Rules of Construction require that the definition of disability "shall be construed … in favor of broad coverage of individuals … to the maximum extent permitted by the terms of this Act." 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.1(c)(4).[2] *See also* 29 C.F.R. Part 1630 App., § 1630.2(g), 76

[1] For an explanation of why Congress used the same terminology, see 29 C.F.R. Part 1630 App., § 1630.2(j)(1), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011).

[2] The EEOC's final ADAAA regulations were published on March 25, 2011, at 76 Fed. Reg. 16978, and they (and other guidance documents) are linked online at http://www.eeoc.gov/laws/statutes/adaaa_info.cfm. Congress explicitly authorized the EEOC to issue these regulations, see ¶ 10(a) below, and they are entitled to *Chevron* deference. *See Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 331–332 (4th Cir. 2014); *Canfield v. Movie Tavern, Inc.*, 2013 WL 6506320, at *3 (E.D. Pa. Dec. 12, 2013) (R.12); *Estate of Murray v. UHS of Fairmount, Inc.*, 2011 WL 5449364, at *6 n.15 (E.D. Pa. Nov. 10, 2011). *Compare Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). Other federal

Fed. Reg. 16978, 17006 (Mar. 25, 2011); *id*., at § 1630.2(j)(1)(i), 76 Fed. Reg. at 17008.[3]

iii. Thus, Congress "mandated that the ADA, as amended, be interpreted as broadly as its text permits." *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 (4th Cir. 2014) (R.12). *See also Thomas v. Werthan Packaging, Inc*., 2011 WL 4915776, at *5 (M.D. Tenn. Oct. 17, 2011) (courts requires to apply term "expansively").

iv. *See also Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861 (9th Cir. 2009) ("Beginning in January 2009,

agencies also follow these regulations. The Department of Justice has issued proposed rulemaking with the express intent of conforming its rules enforcing Titles II and III to those of the EEOC. 79 Fed. Reg. 4839 (Jan. 30, 2014). In addition, the U.S. Department of Education, with authority delegated by the U.S. Attorney General, 28 C.F.R. § 35.190(b)(2); http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html, has cited to the EEOC's ADAAA regulations. Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools, Q.6, nn.9–10 (OCR Jan. 19, 2012), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html. See also the Department of Labor's proposed rulemaking at 76 Fed. Reg. 77056, 77058 (Dec. 9, 2011) ("As noted previously, it is OFCCP's intention that these terms [including 'disability'] will have the same meaning as set forth in the ADAAA, and as implemented by the EEOC in its revised regulations."); Administrator's Interpretation No. 2013-1 (DOL Jan. 14, 2013) (adopting EEOC interpretations for FMLA claims based on adult child's disability).

The effective date of the regulations was May 24, 2011, but courts have applied them even in cases that predate them. *See, e.g., Aldini v. Kroger Co. of Michigan*, 2014 WL 7139956, at *7 n.6, *9 n.7 (E.D. Mich. Dec. 12, 2014) (R.56) (pre-ADAAA regulations contradicted the amended statute so the Court refused to rely on them); *Willoughby v. Connecticut Container Corp*., 2013 WL 6198210, at *9 n.4 (D. Conn. Nov. 27, 2013) (R.56); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *2 n.1 (E.D. Pa. June 27, 2013) (R.12) (type 2 diabetes) ("It would be inappropriate to apply the EECOC's previous regulations in light of the EEOC's position that the ADAAA 'change [d] the way that' key 'statutory terms should be interpreted in several ways, therefore necessitating revision of the prior regulations and interpretive guidance.'"); *Gregor v. Polar Semiconductor, Inc*., 2013 WL 588743, at *3 n.5 (D. Minn. Feb. 13, 2013); *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012); *Hoffman v. Carefirst of Fort Wayne, Inc*., 737 F. Supp. 2d 976, 985 n.1 (N.D. Ind. 2010). *See also Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *8 (M.D. Tenn. Aug. 10, 2012) (citing EEOC regulations); *Smith v. Valley Radiologists, Ltd*., 2012 WL 3264504, at *3 (D. Ariz. Aug. 9, 2012) (similar); *Harty v. City of Sanford*, 2012 WL 3243282, at *4–5 (M.D. Fla. Aug. 8, 2012) (similar); *Mayorga v. Alorica, Inc*., 2012 WL 3043021 (S.D. Fla. July 25, 2012) (similar); *Garner v. Chevron Phillips Chemical Co., L.P*., 834 F. Supp. 2d 528, 538–539 (S.D. Tex. 2011) (similar); *Negron v. City of New York*, 2011 WL 4737068, at *11 (E.D.N.Y. Sept. 14, 2011) (court followed new EEOC regulations, noting that circuit precedent deferred to EEOC regulations pre-ADAAA as well). *But cf. Allen v. SouthCrest Hosp*., 2011 WL 6394472, at *6 (10th Cir. Dec. 21, 2011) (unpublished) (questioning their application prior to effective date). Note, too, that courts have deferred to the original, *proposed* regulations as well. *See, e.g., Hutchinson v. Ecolab, Inc*., 2011 WL 4542957, at *8 n.6 (D. Conn. Sept. 28, 2011); *Markham v. Salina Concrete Products, Inc*., 2010 WL 5093769, at *3 n.2 (D. Kan. Dec. 8, 2010). *See also Calvert v. AmeriCold Logistics, LLC*, 2012 WL 4343774, at *4 n.2 (W.D. Tenn. June 26, 2012), partially rejected on other grounds, 2012 WL 4343772 (W.D. Tenn. Sept. 21, 2012) ("The new EEOC regulations, however, were implemented after this lawsuit was filed, and the regulations do not appear to apply retroactively. And neither party argues that the court should apply them retroactively. Even so, the court finds the new regulations persuasive authority for determining whether Calvert's condition substantially limits her ability to perform major life activities.").

[3] "The legislative history of the ADAAA is replete with references emphasizing this principle." 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011), citing some of it. *See also* Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("the scope of protection [is] to be generous and inclusive."); Statement of Rep. Hoyer, 154 Cong. Rec. at H8293 ("By voting for final passage of the ADA Amendment Act, we ensure that the definition of disability will henceforth be construed broadly and fairly."); Statement of Sen. Hatch, 154 Cong. Rec. at S8354 ("the bill directs that the definition of disability be construed in favor of broad coverage. This reflects what courts have held about civil rights statutes in general").

"disability" was to be broadly construed and coverage will apply to the "maximum extent" permitted by the ADA and the ADAAA."); *Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 494 (2008) (unpublished); *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968 (S.D. Tex. 2011) ("Under the ADAAA, the Court is required to construe the term 'disability' broadly and to provide coverage to the maximum extent possible under the ADA."); *Fournier v. Payco Foods Corp*., 611 F. Supp. 2d 120, 129 n.9 (D.P.R. 2009) ("The overarching purpose of the act is to reinstate the 'broad scope of protection' available under the ADA."); *Kingston v. Ford Meter Box Co., Inc*., 2009 WL 981333, at *4 n.4 (N.D. Ind. Apr. 10, 2009) (similar); *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009) ("the ADA amendment is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute").

v. The Act expressly disapproves of *Toyota Motor v. Williams*. Pub. L. 110–325, § 2(a)(5) and (b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101; 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011). *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329–330 (4th Cir. 2014) (R.12) (describing abrogation of *Toyota*); *Nyrop v. Independent Sch. Dist. No. 11*, 616 F.3d 728, 734 n.4 (8th Cir. 2010); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *10 (S.D. Ohio Sept. 5, 2014) (R.56); *E.E.O.C. v. Midwest Reg'l Med. Ctr., LLC*, 2014 WL 4063145, at *2 (W.D. Okla. Aug. 18, 2014) (R.56); *Hutchinson v. Ecolab, Inc*., 2011 WL 4542957, at *7 (D. Conn. Sept. 28, 2011) (ADAAA "substantially broadened" the definition of disability, in response to *Sutton* and *Toyota Motor*); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 238 (D. Mass. 2010) (reasons for ADAAA included courts' "parsimonious" interpretation of "substantially limits;" "Congress took particular umbrage at *Sutton* … and *Toyota Motor* ….").

b. The Act explicitly states that the primary subject in ADA cases "should be whether [covered entities] 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." Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101; 29 C.F.R. § 1630.1(c)(4). *See also* 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011); *id*. at § 1630.2(g), 76 Fed. Reg. 16978, 17006. *See also Mazzeo v. Color Resolutions Intern., LLC*, 746 F.3d 1264, 1268 and n.2 (11th Cir. 2014) (R.56) ("Congress intended 'that the establishment of coverage under the ADA should not be overly complex nor difficult, and expect[ed] that the [ADAAA] will lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA.'") (quoting legislative history); *Hammel v. Soar Corp*., 2015 WL 505410, at *3 (E.D. Pa. Feb. 6, 2015); *Ceska v. City of Chicago*, 2015 WL 468767, at *2 (N.D. Ill. Feb. 3, 2015) (R.56); *Edwards v. Chevron U.S.A., Inc.*, 2013 WL 474770, at *2 (S.D. Tex. Feb. 7, 2013); *Snyder v. Livingston*, 2012 WL 1493863, at *8 (N.D. Ind. Apr. 27, 2012); *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011); *Patton v. eCardio Diagnostics LLC*, 793

F. Supp. 2d 964, 968 (S.D. Tex. 2011); *Hoffman v. Carefirst of Fort Wayne, Inc*., 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010).[4] *Compare Murray v. Warren Pumps, LLC*, 2013 WL 5202693, at *8 (D. Mass. Sept. 12, 2013) (R.56) ("However, Murray's back condition does not *clearly* fall outside the range of disability under the ADAAA, and thus requires some significant analysis of what constitutes a disability. Therefore, because "the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis," I find that Murray has produced sufficient evidence of a collection of limitations to present the issue of disability under the federal standard to a jury.") (citations omitted; emphasis in original); *Estate of Murray v. UHS of Fairmount, Inc*., 2011 WL 5449364, at *5–6 (E.D. Pa. Nov. 10, 2011) (relying on language rejecting extensive analysis to confirm that no medical evidence needed to establish that plaintiff had depression).

c. "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011), citing 2008 House Judiciary Committee Report at 5.

d. Disability should now be much easier to prove. 29 C.F.R. § 1630.1(c)(4) ("The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA."); 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011) (same); id. at 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011) (same); Managers Statement, 154 Cong. Rec. at S8843 ("We intend that … the sum of these changes

[4] *See also* Managers Statement, 154 Cong. Rec. at S8842 (Act does not create "an onerous burden for those" proceeding under actual or record-of prongs); *id.* at S8843 ("The determination of disability is a necessary threshold issue in many cases, but an appropriately generous standard on that issue will allow courts to focus primarily on whether discrimination has occurred or accommodations improperly refused."); Joint Statement of Reps. Hoyer and Sensenbrenner, 154 Cong. Rec. at H8295 ("We expect that courts interpreting the ADA after these amendments are enacted will not demand such an extensive analysis over whether a person's physical or mental impairment constitutes a disability. Our goal throughout this process has been to simplify that analysis."); Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("The bill returns the proper emphasis to whether discrimination occurred rather than on whether an individual's impairment qualifies as a disability."); *id.* at E1842 ("We also agree with the Senate managers … [and] intend that the ADA Amendments will … reduc[e] the depth of analysis related to the severity of the limitation of the impairment and returning the focus to the question of discrimination."); Statement of Senate Majority Leader Reid, 154 Cong. Rec. at S9626 ("Thanks to the newly enacted amendments, the ADA's focus can return to where it should be—the question of whether the discrimination occurred, not whether the person with a disability is eligible in the first place."). *See also id.* (citing with approval the DOJ's proposed Title III guidance that "a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program."); Statement of Sen. Kennedy, 154 Cong. at S8355; Statement of Rep. Nadler, 154 Cong. Rec. at H8289.

Of course, "plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." Managers Statement, 154 Cong. Rec. at S8842. *See also* Statement of Sen. Kennedy, 154 Cong. Rec. at S8355 ("[C]ourts normally should not require an extensive examination of an individual's disability in cases under the ADA . . . [but] courts should not interpret this statement to constrain plaintiffs from offering evidence needed to establish that their impairment is substantially limiting. . . . [A plaintiff] is free to introduce all the evidence of disability that he or she believes is appropriate, consistent with evidentiary and procedural rules. As the Equal Employment Opportunity Commission has stated in a related context, the plaintiff's evidentiary burden is minimal.").

will make the threshold definition of disability in the ADA—under which individuals qualify for protection from discrimination—more generous, and will result in the coverage of some individuals who were previously excluded from those protections."); Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("Both the House and the Senate clearly expect the courts and the agencies to apply a less demanding standard when interpreting 'substantially limits.'"); EEOC Q&A, *supra*, Question 2. *See also Berkowitz v. Oppenheimer Precision Products, Inc*., 2014 WL 5461515, at *3–4 (E.D. Pa. Oct. 28, 2014) (R.56); *Johnson v. Baltimore City Police Dept*., 2014 WL 1281602, at *14 (D. Md. Mar. 27, 2014) (R.12); *Todd v. Prince George's County, Md*, 2014 WL 1276573, at *5 (D. Md. Mar. 26, 2014) (R.12) ("In passing the ADAAA, Congress explicitly sought to broaden the definition of disability under the Act. With respect to the Supreme Court's prior narrow standard, Congress counseled, '[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.'") (quoting legislative history); *Bielich v. Johnson & Johnson, Inc*., 6 F. Supp. 3d 589, 602 (W.D. Pa. 2014) (R.56) ("broadens the ADA's scope by expanding the definition of disability … and by requiring a 'less searching analysis'"); *Bob-Manuel v. Chipotle Mexican Grill, Inc*., 10 F.Supp.3d 854, 880–81 (N.D. Ill. 2014) (R.56) (hernia) (ADAAA "more inclusive"); *Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958, 965 (N.D. Cal. 2013) ("ADAAA seeks to broaden the scope of disabilities covered"); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *3 (E.D. Pa. Dec. 12, 2013) (R.12); *Moates v. Hamilton County*, 976 F. Supp. 2d 984, 992 (E.D. Tenn. 2013) (R.56) ("The ADAAA mandates a broad interpretation of the meaning of the word 'disability,' and imposes a 'non-onerous' burden on a plaintiff at the *prima facie* stage."); *Bouard v. Ramtron Int'l Corp*., 2013 WL 5445846, at *7–8 (D. Colo. Sept. 27, 2013) (R.56); *Coker v. Enhanced Senior Living, Inc*., 897 F. Supp. 2d 1366, 1374 (N.D. Ga. 2012); *Howard v. Steris Corp*., 886 F. Supp. 2d 1279, 1291 (M.D. Ala. 2012) (ADA provisions, "for better or worse, makes a person afflicted with a common, minor condition 'just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.'"); *Harty v. City of Sanford*, 2012 WL 3243282, at *4 n.5 (M.D. Fla. Aug. 8, 2012); *Beatty v. Hudco Industrial Products, Inc*., 881 F.Supp.2d 1344, 1351 (N.D. Ala. 2012) ("The ADAAA amended the ADA to, among other things, promulgate a more liberal standard of the term 'disabled,' making it significantly easier for a plaintiff to show disability."); *Davis v. Vermont, Dept. of Corr*., 868 F. Supp. 2d 313, 325 (D. Vt. 2012 (R.12) (ADAAA "made it easier for plaintiffs to prove they are 'disabled'"); *Lohf v. Great Plains Mfg., Inc*., 2012 WL 2568170, at *5 (D. Kan. July 2, 2012); *Grosso v. UPMC*, 2012 WL 787481, at *10 (W.D. Pa. Mar. 9, 2012) ("The Congressional intent behind the 2008 Amendments to the ADA, the ADAAA, was to broaden the range of individuals protected by the statute, by retooling the definition of disabled."); *Cooke v. Berkshire Farm Center and Services for Youth*, 2012 WL 668612, at *5 n.3 (E.D.N.Y. Feb. 29, 2012) (similar); *Markham v. Boeing Co*., 2011 WL 6217117, at *3 (D. Kan. Dec. 14, 2011) ("The ADAAA has 'lowered the bar' on the disability inquiry."); *Brodsky v. New England School of Law*, 617 F. Supp. 2d 1, 4 (D. Mass. 2009) ("the ADA amendment is undoubtedly intended to ease the burden of plaintiffs bringing claims pursuant to that statute").

e. The interpretive principles set forth in 29 C.F.R. § 1630.2(j)(1)(i) through (ix) "are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended." 29 C.F.R. § 1630.2(j)(3)(i); *Jones v. Nationwide Life Ins. Co.*, 847 F.Supp.2d 218, 223 (D. Mass. 2012).

f. "This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose." 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011). The legislative history is fully consistent. *See, e.g.*, Managers Statement, 154 Cong. Rec. at S8841; id. at S8842 (recognizing "the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose."); Statement of Rep. Hoyer, 154 Cong. Rec. at H8292 ("Civil rights bills are intended to be interpreted broadly."); Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 (Sep. 17, 2008) ("The Court's treatment of the ADA is at odds with judicial treatment of other civil rights statutes, which usually are interpreted broadly to achieve their remedial purposes."); Statement of Sen. Hatch, 154 Cong. Rec. at S8354 ("the bill directs that the definition of disability be construed in favor of broad coverage. This reflects what courts have held about civil rights statutes in general").

g. Pre-ADAAA cases on the issue of disability are now suspect. *See* 29 C.F.R. Part 1630 App., § 1630.2(j)(1), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011) ("It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed 'substantially limits'…); *Sowell v. Kelly Servs., Inc*., ___ F. Supp. 3d ___, 2015 WL 5964989, at *10 (E.D. Pa. Oct. 14, 2015) (R.56); *Allen v. Baltimore Cty., Md*., 91 F. Supp. 3d 722, 730 n.11 (D. Md. 2015) (R.56); *Russell v. City of Tampa*, 2015 WL 5871189, at *2 (M.D. Fla. Oct. 5, 2015) (R.56); *Martsolf v. United Airlines, Inc*., 2015 WL 4255636, at *10 n.8 (W.D. Pa. July 14, 2015) (R.56); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *11 (E.D.N.C. Apr. 6, 2015) (R.12); *Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *10 (S.D. Ohio Mar. 9, 2015) (R.56); *Ceska v. City of Chicago*, 2015 WL 468767, at *2 (N.D. Ill. Feb. 3, 2015) (R.56); *Martinez v. Univ. Med. Ctr.*, 2015 WL 315708, at *6 (D. Nev. Jan. 26, 2015) (R.56) (by relying on pre-ADAAA case law, summary-judgment movant failed to meet its burden); *Harrison-Khatana v. Washington Metro. Area Transit Auth*., 2015 WL 302820, at *7 (D. Md. Jan. 22, 2015) (R.56); *Aldini v. Kroger Co. of Michigan*, 2014 WL 7139956, at *7–8 (E.D. Mich. Dec. 12, 2014) (R.56); *Freyre v. Hillsborough Cnty. Sheriff's Office*, 2014 WL 6885913, at *7 (M.D. Fla. Dec. 5, 2014) R.12); *Newell v. Alden Vill. Health Facility for Children & Young Adults*, 2014 WL 6757928, at *4 (N.D. Ill. Dec. 1, 2014) (R.56); *O'Toole v. Ulster County*, 2014 WL 4900776, at *6 n.6 (N.D.N.Y. Sept. 30, 2014); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *10 and 11 and n.20 (S.D. Ohio Sept. 5, 2014) (R.56); *E.E.O.C. v. Midwest Reg'l Med. Ctr., LLC*, 2014 WL 4063145, at *2–3 (W.D. Okla. Aug. 18, 2014) (R.56); *Thomas v. Hill*, 2014 WL 3955656, at *4 n.1 (W.D. La. Aug. 13, 2014) (R.56) ("Thus, Hill's reliance on *Sutton* and pre-ADAAA case law, to the extent at odds with the amendments, is *clearly* misplaced.") (emphasis in original);

Maxwell v. County of Cook, 2014 WL 3859981, at *3 n.5 (N.D. Ill. Aug. 4, 2014) (R.12) ("fair" criticism that defendant failed to cite ADAAA case law in its brief); *Palmerini v. Fidelity Brokerage Services LLC*, 2014 WL 3401826, at *5 (D.N.H. July 9, 2014) (R.56); *Poole v. Centennial Imports, Inc*., 2014 WL 2090810, at *4 (D. Nev. May 19, 2014) (R.56); *Johnson v. Baltimore City Police Dept*., 2014 WL 1281602, at *15 (D. Md. Mar. 27, 2014) (R.12); *Todd v. Prince George's County, Md*, 2014 WL 1276573, at *6 (D. Md. Mar. 26, 2014) (R.12); *Butler v. BTC Foods, Inc*., 2014 WL 336649, at *4 (E.D. Pa. Jan. 30, 2014) (R.56); *Rubano v. Farrell Area School Dist*., 991 F. Supp. 2d 678, 690, 693 (W.D. Pa. 2014) (R.56) (defendant incorrectly applied pre–ADAAA standard; court predicted that appeals court would find inapposite those cases relying on pre-ADAAA precedent); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *4 (E.D. Pa. Dec. 12, 2013) (R.12); *Ali v. Hogan*, 2013 WL 5466302, at *7 n.5 (N.D.N.Y. Sept. 30, 2013) (R.12) (pre-ADAAA asthma cases not useful); *Bonzani v. Shinseki*, 2013 WL 5486808, at *7 (E.D. Cal. Sept. 30, 2013) (R.56) (knee injury); *Hodges v. District of Columbia*, 959 F. Supp. 2d 148, 154 (D.D.C. 2013) (R.56) (back condition); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *3 n.2 (E.D. Pa. June 27, 2013) (R.12) (type 2 diabetes); *Hawkins v. Schwan's Home Service, Inc*., 2013 WL 2368813, at *4 (W.D. Okla. May 28, 2013) (R.56) (heart condition); *Mengel v. Reading Eagle Co.*, 2013 WL 1285477, at *3 n.4 (E.D. Pa. Mar. 29, 2013); *Gulley-Falzgraf v. Cherry Creek School Dist. No. 5*, 2013 WL 1313791, at *2 (D. Colo. Mar. 29, 2013); *Tate v. Sam's East, Inc*., 2013 WL 1320634, at *10–11 (E.D. Tenn. Mar. 29, 2013); *Newman v. Gagan LLC*, 939 F. Supp. 2d 883, 896–897 (N.D. Ind. 2013); *Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958, 965 (N.D. 2013) ("Much of the parties' discussion … fails to take into account the ADA Amendments Act of 2008 … This omission is significant…"); *Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *12 (S.D. Ohio Jan. 28, 2013) (defendant's arguments on regarded-as prong "unconvincing because of its basis on overruled authority."); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (distinguishing pre-ADAAA case); *Orne v. Christie*, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013); *Wirey v. Richland Community College*, 913 F. Supp. 2d 633, 642 (C.D. Ill. 2012) (similar); *Kobler v. Illinois Dept. Human Services*, 2012 WL 5995836, at *2 (N.D. Ill. Nov. 30, 2012) ("as plaintiff persuasively points out in her response brief, defendants' cases were decided before the ADA Amendments Act of 2008 expanded the definition"); *Hughes v. Southern New Hampshire Services, Inc.*, 2012 WL 5904949, at *4 n.1 (D.N.H. Nov. 26, 2012); *Nichols v. City of Mitchell*, 914 F. Supp. 2d 1052, 1057 (D.S.D. 2012); *Thomas v. Bala Nursing & Retirement Center*, 2012 WL 2581057, at *6 (E.D. Pa. July 3, 2012) (distinguishing pre-ADAAA law cited by defendant); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 996 (W.D. Tex. 2012); *Becker v. Elmwood Local School Dist*., 2012 WL 13569, at *9–10 (N.D. Ohio Jan. 4, 2012); *Carbaugh v. Unisoft Intern., Inc*., 2011 WL 5553724, at *8 (S.D. Tex. Nov. 15, 2011); *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968 (S.D. Tex. 2011); *Meinelt v. P.F. Chang's China Bistro, Inc*., 787 F. Supp. 2d 643, 651 (S.D. Tex. 2011) (P.F. Chang's relies on pre-ADAAA cases to argue that Meinelt's brain tumor is not a disability … [but] does not, however, explain the relationship between that case law and the statutory amendments."); *Dube v. Texas Health and Human Services Com'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011)

("Defendant relies upon cases applying the much narrower, pre-ADAAA definition of 'regarded as' disabled, which are not relevant."); *Feldman v. Law Enforcement Associates Corp*., 2011 WL 891447, at *7 n.3 (E.D.N.C. Mar. 10, 2011) ("[A]ll of the cases cited by LEA, even those cases decided after the effective date of the ADAAA, involved alleged discrimination that took place before the ADAAA went into effect. … As a result, the cases cited by LEA carry little, if any, precedential weight with respect to the issue of whether the plaintiffs in this case were disabled under the ADAAA."); *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 229 (Mont. 2012).

h. *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330, 331 (4th Cir. 2014) (R.12) (holding that district court erred in relying on pre-ADAAA cases, and noting that defendant likewise relied on pre-ADAAA cases that the ADAAA abrogated); *Sacks v. Gandhi Eng'g, Inc*., 2014 WL 774965, at *18 (S.D.N.Y. Feb. 27, 2014); *Amsel v. Texas Water Development Bd*., 2012 WL 913676, at *3 n.2 (5th Cir. Mar. 19, 2012) (unpublished) (observing that "[m]any of the cases cited in this discussion will be superseded in whole or in part as applied to cases arising under the new law, but they are applicable here [because the law is not retroactive]."); *Ruggles v. Virginia Linen Service, Inc*., 2013 WL 4678408, at *5 n.9 (W.D. Va. Aug. 30, 2013) (R.56) (back injury resulting in lifting restrictions); *Mann v. Donahoe*, 2012 WL 569189, at *2 n.1 (D. Conn. Feb. 21, 2012) (court relied on pre-ADAAA case law regarding burden of proof but not regarding disability because the ADAAA broadened the interpretation of "substantially limited" and "major life activity"); *Geoghan v. Long Island R.R.*, 2009 WL 982451, at *17 (E.D.N.Y. Apr. 9, 2009) ("…[T]he recent amendments to the ADA also cast doubt on the future viability of *Davidson*'s reading of the original ADA and narrow application of *Toyota*."); *Loperena v. Scott*, 2009 WL 1066253, at *12 n.10 (M.D. Fla. April 21, 2009) ("To be clear, the Court recognizes that these cases have been superseded by the ADA Amendments Act of 2008 and are applicable here only because the acts giving rise to the plaintiff's claims occurred before the effective date of the Amendments.").

2. Mitigating measures are not considered in assessing disability

a. "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi).

i. The findings affirmatively disapprove of the *Sutton* trilogy, Pub. L. 110–325, § 2(a)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101, and the new law also eliminates the two findings in the original ADA that the Supreme Court relied on[5] for its mitigating-measures analysis. Pub. L. 110–325, § 3(1) and (2), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.

[5] *Compare Sutton v. United Air Lines, Inc*., 527 U.S. 471, 484 (1999) ("findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."); *id*. at 494 (J. Ginsburg, concurring).

ii. One expressed purpose is to reject *Sutton*'s mitigating-measures analysis, Pub. L. 110–325, § 2(b)(2), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.

iii. This change "is intended to eliminate the catch-22 that exist[ed]." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17009–17010 (Mar. 25, 2011).

iv. The legislative history is consistent.[6]

v. *See also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015) (R.56) ("to the extent that Jacobs's Facebook activity constitutes a 'mitigating measure' (that is, a form of exposure therapy by which Jacobs attempted to overcome her anxiety through social interaction that was not face-to-face and not in real time) we are not permitted to consider it"); *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 n.3 (4th Cir. 2014) (R.12); *Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861–862 (9th Cir. 2009) ("Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet."); *Conn v. Am. Nat'l Red Cross*, ___ F. Supp. 3d ___, 2016 WL 755606, at *8 (D.D.C. Feb. 25, 2016) (R.56) (if plaintiff with depression and anxiety could sleep only because of medication, she may have been substantially limited even if the amount of sleep she actually got did not vary dramatically from that of most people); *Radick v. Union Pac. Corp*., 2016 WL 639126, at *6 (S.D. Tex. Jan. 25, 2016), *report and recommendation adopted*, 2016 WL 632039 (S.D. Tex. Feb. 17, 2016) (R.56) (plaintiff with alcoholism substantially limited in working; "The evidence also suggests that, without rehabilitative measures, Radick might lack the capacity to continue as a member of Union Pacific's workforce."); *Aptaker v. Bucks Cty. Intermediate*, 2015 WL 5179183, at *9 and n.16 (E.D. Pa. Sept. 3, 2015) (R.56) (prior to medication for depression, plaintiff lost concentration for several minutes at a time several times a week, and could only sleep 4–5 hours a night); *Cole v. Weatherford Int'l*, 2015 WL 3896835, at *5 (D. Colo. June 23, 2015) (R.56) ("Thus, the question is the effect of Cole's heart condition if he stopped taking his medication, exercising, and eating healthily. Cole nowhere explicitly states, 'But for these measures, I would have another heart attack.' But that is a reasonable inference from the evidence he has presented, and the Court must draw all reasonable inferences in his favor.") (citations omitted); *Hubbard v. Day & Zimmermann Hawthorne Corp*., 2015 WL 1281629, at

[6] See, *e.g.*, Managers Statement at S8842; Statement of Sen. Harkin, 154 Cong. Rec. at S8349 (Sep. 11, 2008) ("Sutton trilogy . . . is in complete contradiction to congressional intent as we expressed in our committee reports."); Statement of Rep. Miller, 154 Cong. Rec. at E1841 (Sep. 17, 2008) (the law "ensures that individuals who reduce the impact of their impairments through means such as hearing aids, medications, or learned behavioral modifications will be considered in their unmitigated state."); *id.* (Act protects people "who have successfully managed a disability, ending the 'catch-22'"); Statement of House Majority Leader Hoyer, 154 Cong. Rec. at H8293 (Sep. 17, 2008).

*5 n.7 (D. Nev. Mar. 20, 2015) (R.56) (hormone supplements after hysterectomy); *Ceska v. City of Chicago*, 2015 WL 468767, at *3 (N.D. Ill. Feb. 3, 2015) (R.56) (sleeping limited to three to four hours per night with medication must be assumed to be even worse without it); *Bellofatto v. Red Robin Int'l, Inc*., 2014 WL 7365788, at *10 (W.D. Va. Dec. 24, 2014) (R.56) (plaintiff with Type 1 diabetes had to take insulin multiple times a day or run the risk of impaired ability to think coherently, loss of cognitive ability, or unconsciousness); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *11 (S.D. Ohio Sept. 5, 2014) (R.56) (court refused to consider medication alleviating limitations on sleeping and eating); *Wheat v. Rush Health Systems, Inc.*, 2014 WL 3529798, at *5 (S.D. Miss. July 15, 2014) (R.56) (assessment of hearing impairment must be made without hearing aids); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July 3, 2014) (R.56) (without blood-thinner and cholesterol medication, and implanted stents, plaintiff's carotid artery disease substantially limited circulatory function by causing plaque build-up in artery walls, leading to blood clots and possible stroke); *Crosby v. F.W. Webb, Co*., 2014 WL 1268691, at *6–7 (D. Me. Mar. 26, 2014) (R.56) (… "sufficient evidence that his alcoholism and depression were comorbid and that when not adequately treated these impairments substantially limited his ability to work."); *Willoughby v. Connecticut Container Corp*., 2013 WL 6198210, at *9 n.3 (D. Conn. Nov. 27, 2013) (R.56) (rejecting pre-ADAAA case law regarding diabetes that was controlled by medication); *Orne v. Christie*, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013) (under ADAAA, argument that CPAP machine "cured" or "relieved" sleep apnea was wrong; motion to dismiss denied); *Hughes v. Southern New Hampshire Services, Inc.*, 2012 WL 5904949, at *3–4 (D.N.H. Nov. 26, 2012) (diabetes); *Nichols v. City of Mitchell*, 914 F. Supp. 2d 1052, 1058 (D.S.D. 2012) (same); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012) (back pain assessed without regard to over-the-counter pain medication); *Rhodes v. Principal Financial Group, Inc.*, 2011 WL 6888684, at *5 n.9 (M.D. Pa. Dec. 30, 2011) ("This amendment [regarding mitigating measures] clearly impacts plaintiffs suffering from diabetes."); *Verhoff v. Time Warner Cable, Inc*., 299 Fed. Appx. 488, 494 (2008) (unpublished) (sleep problems will have to assessed without regard for use of sleep medication); *Medvic v. Compass Sign Co., LLC*, 2011 WL 3513499, at *7 and n.12 (E.D. Pa. Aug. 10, 2011) (finding stuttering substantially limiting, without considering alleviating medication); *Munoz v. Echosphere, L.L.C.*, 2010 WL 2838356, at *12 (W.D. Tex. July 15, 2010) (under ADAAA diabetes presumably considered as if plaintiff not taking insulin); *Godfrey v. New York City Transit Authority*, 2009 WL 3075207, at *6 n.4 (E.D.N.Y. Sep. 23, 2009) (hearing aids not considered); *Handley v. General Security Services Corp.*, 2009 WL 2132626, at *4 n.5 (S.D. Ohio July 10, 2009) (similar); *E.E.O.C. v. Burlington Northern & Santa Fe Ry. Co*., 621 F. Supp. 2d 587, 593 n.3 (W.D. Tenn. June 3, 2009) (prosthetics no longer considered); *Geoghan v. Long Island R.R*., 2009 WL 982451, at *17 n.28 (E.D.N.Y. Apr. 9, 2009) (ADHD must be considered without Adderall medication).

vi. "To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). Various examples of that now-overruled case law are described in the guidance. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).[7]

b. "Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that consistent with the Amendments Act's command (and the related rules of construction in the regulations) that the definition of disability 'should not demand extensive analysis,' covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). *Compare Cole v. Weatherford Int'l*, 2015 WL 3896835, at *5 (D. Colo. June 23, 2015) (R.56) ("Thus, the question is the effect of Cole's heart condition if he stopped taking his medication, exercising, and eating healthily. Cole nowhere explicitly states, 'But for these measures, I would have another heart attack.' But that is a reasonable inference from the evidence he has presented, and the Court must draw all reasonable inferences in his favor.") (citations omitted); *Bresser v. Total Quality Logistics*, 2014 WL 1872113, at *1, 6, 7 (S.D. Ohio May 8, 2014) (R.56) (although plaintiff stated that it would be hard to know effects of his social anxiety disorder in the absence of anti-anxiety medication, he also indicated he would be unable to work outside the home, would be "like a turtle without its shell," and would get shaky hands, would stutter, and would have a hard time making eye contact).

c. "An individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). *See also Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1173 (7th Cir. 2013) (R.12) (hypertension—in its active state and without mitigating measures—substantially limited functions of cardiovascular or circulatory system); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July

[7] Those examples include, e.g., "*Orr v. Wal-Mart Stores, Inc*., 297 F.3d 720 (8th Cir. 2002) (court held that *Sutton* … required consideration of the ameliorative effects of plaintiff's careful regimen of medicine, exercise and diet, and declined to consider impact of uncontrolled diabetes on plaintiff's ability to see, speak, read, and walk) …." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

3, 2014) (R.56) (without blood-thinner and cholesterol medication, and implanted stents, plaintiff's carotid artery disease substantially limited circulatory function by causing plaque build-up in artery walls, leading to blood clots and possible stroke); *Harty v. City of Sanford*, 2012 WL 3243282, at *4 (M.D. Fla. Aug. 8, 2012) ("In effect, these provisions [regarding mitigating measures] require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated."); *Lloyd v. Housing Authority of the City of Montgomery, Ala.*, 857 F.Supp.2d 1252, 1263 (M.D. Ala. 2012) ("At bottom, the expanded definitions of "disability" and "major life activities" mean that treatable yet chronic conditions like hypertension and asthma render an affected person just as disabled as a wheelchair-bound paraplegic—if only for the purposes of disability law.").

d. "The new statute and regulations require courts to evaluate a plaintiff's impairment as it would manifest without treatments such as medication, mobility devices, and physical therapy." *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 330 n.3 (4th Cir. 2014) (R.12). "In effect, these provisions require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated." *Harty v. City of Sanford*, 2012 WL 3243282, at *4 (M.D. Fla. Aug. 8, 2012), *citing Lloyd v. Housing Authority of the City of Montgomery, Ala.*, 857 F. Supp. 2d 1252, 1263 (M.D. Ala. 2012).

e. The plaintiff bears the burden of producing evidence about how his condition would affect him if left untreated. *Ratcliff v. Mountain Brook Bd. of Educ.*, 2012 WL 1884898, at *3 (N.D. Ala. May 22, 2012); *Lloyd v. Housing Authority of the City of Montgomery, Ala.*, 857 F.Supp.2d 1252, 1263 (M.D. Ala. 2012).

f. Definition of mitigating measures

i. Mitigating measures are defined very broadly in 42 U.S.C. § 12102(4)(E)(i) by way of a non-exhaustive list:[8]

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

2) use of assistive technology;

3) reasonable accommodations or auxiliary aids or services;[9] or

[8] The list of mitigating measures in the Act uses the words "such as," indicating that the list is illustrative only, not exhaustive. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("the [ADA's] use of the term 'such as' confirms [that] the list is illustrative, not exhaustive."). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011) ("The absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA."); Managers Statement, 154 Cong. Rec. at S884.

[9] The term "auxiliary aids or services" is defined by 42 U.S.C. § 12103(1), and there is further guidance on what it includes in ADA Titles II and III. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25,

4) learned behavioral or adaptive neurological modifications.[10]

ii. The EEOC regulations repeat this list, but also add psychotherapy, behavioral therapy, and physical therapy. 29 C.F.R. § 1630.2(j)(5)(v). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011) (referring to "therapies").

iii. The regulations also further define "low-vision devices" as those "devices that magnify, enhance, or otherwise augment a visual image" (but excluding ordinary eyeglasses or contact lenses). 29 C.F.R. § 1630.2(j)(5)(i).

iv. The EEOC guidance also includes "assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011).

v. The EEOC guidance also indicates that mitigating measures include a regimen of medicine, exercise and diet. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011) (discussing *Orr v. Wal-Mart Stores, Inc.*); 76 Fed. Reg. at 16982 (for person with diabetes, insulin may be the most obvious mitigating measures, but they also include measures needed "to keep the condition under control (such as frequent blood sugar and insulin monitoring and rigid adherence to dietary restrictions)."). *See also Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012) (ADA Title II case) (planning meals).

vi. Likewise, dialysis is a mitigating measure for someone with kidney disease who requires it. 76 Fed. Reg. at 16982.

vii. The EEOC deemed it unnecessary to list the various kinds of mitigating measures covered by the term "reasonable accommodations," a term used in Title I of the ADA, but noted that the term "certainly" includes "the use of a service animal, job coach, or personal assistant on the job." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

2011).

[10] Regarding "adaptive neurological modifications," the ADAAA's legislative history cites *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (subconscious adjustments to manner of sensing depth and perceived peripheral objects to compensate for monocular vision); and *Bartlett v. NYS Board of Law Examiners*, 226 F.3d 69 (2d Cir. 2000). The *Bartlett* case involved self-accommodations, including "coping strategies that assist her with reading ... using her fingers or a card to move from line to line, using an index card with a hole cut out when reading more difficult text, re-reading text multiple times, subvocalizing (i.e., sounding out words), and highlighting important words in the text."). *Bartlett v. New York State Bd. of Law Examiners*, 2001 WL 930792, at *35 (S.D.N.Y. Aug. 15, 2001).

viii. "Similarly, adaptive strategies that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, are mitigating measures." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). *See also Harty v. City of Sanford*, 2012 WL 3243282, at *5 (M.D. Fla. Aug. 8, 2012) ("While he is able to ameliorate the effects of his disability by doing these things 'in a different way,' the ADAAA does not permit such measures to be considered.").

ix. Similarly, the legislative history lists other mitigating measures, including "use of a job coach, personal assistant, service animal, surgical intervention, or compensatory strategy that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities." H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 15 (June 23, 2008).

x. *See also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015) (R.56) (Facebook activity as a form of exposure therapy, to overcome anxiety through social interaction that was not face-to-face and not in real time); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July 3, 2014) (R.56) (stents permanently inserted in arteries); *Girard v. Lincoln Coll. of New England*, 27 F. Supp. 3d 289, 295–96 (D. Conn. 2014) (R.56) ("Because Plaintiff's study strategies are 'learned behavior' modifications, I cannot consider them in determining whether Plaintiff's [auditory processing disorder] substantially limits a major life activity."); *Lema v. Comfort Inn*, 2013 WL 1345510, at *9 (E.D. Cal. Apr. 3, 2013) ("mobility devices"); *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, Ex. 16 (bed rest).[11]

xi. Surgery

1) The EEOC regulations do not list surgery as a mitigating measure, finding that issue "better assessed on a case-by-case basis," 76 Fed. Reg. 16978, 16983 (Mar. 25, 2011).

2) But nearly all pre-ADAAA cases held that mitigating measures include surgical intervention. *See, e.g., Cutrera v. Board of Sup'rs of Louisiana State University*, 429 F.3d 108, 111–112 (5th Cir. 2005) (discussing *Sutton* and describing surgery as a mitigating measure); *Stephenson v. United Airlines, Inc*., 9 Fed. Appx. 760, 763–764 (9th Cir. 2001) (unpublished) (similar); *Brown v. Hartt Transp. Systems, Inc*., 725 F. Supp. 2d 210, 235 (D. Me. 2010) (quintuple bypass surgery and angioplasty); *Thomas v. Trane*, 2007 WL 2874776, at *5 (M.D. Ga. Sept. 27, 2007) (treating cancer surgery as mitigating measure); *Freitag v. Sonic Automotives, Inc*., 2006 WL 2456920, at *10 (N.D. Okla. Aug. 22, 2006) (treating hip-replacement surgery as a mitigating measure); *Darwin v. Principi*, 2006 WL 5079473, at *7 (M.D. Fla. June 15, 2006) (surgery to

[11] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

improve hearing a mitigating measure); *Brown v. Holy Name Church*, 80 F. Supp. 2d 1261, 1267–1269 (D. Wyo. 2000) (treating hip-replacement surgery as a mitigating measure). *See also Torres-Alman v. Verizon Wireless Puerto Rico, Inc*., 522 F. Supp. 2d 367, 384 (D.P.R. 2007); *Stephenson v. United Air Lines, Inc*., 2002 WL 654093, at *6 (N.D. Cal. Apr. 17, 2002) (suggesting surgery could be viewed as a mitigating measure). *Compare Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 n.3 (4th Cir. 2014) (R.12) (not deciding the issue).

3) Note, too, that whether or not it is a mitigating measure, a disability may continue even after surgery. *See, e.g., Moore v. Chilton County Bd. of Educ*., 1 F. Supp. 3d 1281, 1293–94 (M.D. Ala. 2014) (R.56) (even post-surgery, individual with history of Blount's Disease had some deformity and walked with a limp); *Butler v. BTC Foods, Inc*., 2014 WL 336649, at *4 (E.D. Pa. Jan. 30, 2014) (R.56) (sharp pain when walking or bending seven months after hernia surgery); *Mengel v. Reading Eagle Co*., 2013 WL 1285477, at *3–4 (E.D. Pa. Mar. 29, 2013) (balance problems related to brain-tumor surgery); *George v. Roush & Yates Racing Engines, LLC*, 2012 WL 3542633, at *5 (W.D.N.C. Aug. 16, 2012) (given severity and duration of mobility restrictions following car accident and resulting surgeries, there was sufficient evidence of a substantial limitation in sleeping, walking, lifting, and bending).

4) Note, too, that complications from surgery are "nonameliorative effects" that must be considered when assessing substantial limitation. 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011); *Young v. McCarthy-Bush Corp*., 2014 WL 1224459, at *5 (N.D. Ga. Mar. 24, 2014) (R.56) (knee replacement and complications).

g. But mitigating measures do *not* include "ordinary eyeglasses or contact lenses." 42 U.S.C. § 12102(4)(E)(ii) and (iii); 29 C.F.R. § 1630.2(j)(5)(i).

i. In other words, whether or not a person's vision is substantially limited may be assessed in light of his or her use of ordinary eyeglasses or contact lenses. 29 C.F.R. § 1630.2(j)(1)(vi).

ii. "Ordinary eyeglasses or contact lenses" are lenses that are intended to fully correct visual acuity or eliminate refractive error. 42 U.S.C. § 12102(4)(E)(iii)(I); 29 C.F.R. § 1630.2(j)(6). The term includes eyeglasses or contact lenses intended to fully correct severe myopia, or "ordinary reading glasses . . . intended to completely correct for" visual loss affecting only reading. "Additionally, eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be 'ordinary' eyeglasses or contact lenses, if a proper prescription would fully correct

visual acuity or eliminate refractive error." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

iii. "Whether lenses fully correct visual acuity or eliminate refractive error is best determined on a case-by-case basis, in light of current and objective medical evidence." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

iv. "Moreover, someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside the ADA's protection. Such an individual may demonstrate that, even with the use of ordinary eyeglasses or contact lenses, his vision is still substantially limited when compared to most people." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010–17011 (Mar. 25, 2011).

v. "Ordinary eyeglasses or contact lenses" do not include "low-vision devices," 42 U.S.C. § 12102(4)(E)(i)(I); 29 C.F.R. § 1630.2(j)(5)(i), which are devices that magnify, enhance, or otherwise augment a visual image, 42 U.S.C. § 12102(4)(E)(iii)(II); 29 C.F.R. § 1630.2(j)(5)(i). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). Low-vision devices include magnifiers, closed circuit television, larger-print items, and instruments that provide voice instructions. H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 15 (June 23, 2008). *See also Eldredge v. City of St. Paul*, 2011 WL 3609399, at *15 (D. Minn. Aug. 15, 2011) (magnifiers are mitigating measures); *Edwards v. Marquis Companies I, Inc*., 2009 WL 2424670, at *6 n.6 (D. Or. Aug. 6, 2009) (ordinary glasses do not include a magnifying glass).

vi. *Uncorrected-vision policies*—An employer cannot use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless it is job-related and consistent with business necessity. 42 U.S.C. § 12113(c); 29 C.F.R. § 1630.10(b); 29 C.F.R. Part 1630 App., § 1630.10(b), 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011). Thus, "if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the plaintiffs in the *Sutton* case were), an employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).[12] "For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other,

[12] *See also* Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("Our clarification regarding the provision of modifications [in regarded-as cases] does not shield qualification standards, tests, or other selection criteria from challenge by an individual who is disqualified based on such standard, test, or criteria. As is currently required under the ADA, any standard, test, or other selection criteria that results in disqualification of an individual because of an impairment can be challenged by that individual and must be shown to be job-related and consistent with business necessity or necessary for the program or service in question.").

and visual acuity of 20/20 in both eyes with correction. The department would then have to establish that the standard is job related and consistent with business necessity." 29 C.F.R. Part 1630 App., § 1630.10(b), 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011).

vii. An individual challenging such an uncorrected-vision policy "need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion." 29 C.F.R. § 1630.10(b); 29 C.F.R. Part 1630 App., § 1630.10(b), 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011).

viii. "The Commission also believes that such individuals will usually be covered under the 'regarded as' prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See § 1630.2(l); Appendix to § 1630.2(l).)." 29 C.F.R. Part 1630 App., § 1630.10(b), 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011). Although there is case law indicating that a vision impairment that can be corrected by ordinary prescription eyeglasses does not qualify as a "disability," e.g., *Low v. McGinness*, 2012 WL 537491, at *3 (E.D. Cal. Feb. 17, 2012), it is more accurate to say that such an impairment is not an *actual* disability.

h. Note, too, that it is only the *ameliorative* effects of mitigating measures that are no longer considered; negative side effects of such measures are still relevant. *See Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010) ("The resulting statutory section only prohibits the consideration of ameliorative mitigatory measures, and does not address potentially negative side effects of medical treatment."); *Wells v. Cincinnati Children's Hosp. Medical Center*, 2012 WL 510913, at *9 (S.D. Ohio Feb. 15, 2012).[13] For more on this, see ¶ 3(e)(x) below.

i. "The determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including for example medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures used determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting." 29 C.F.R.

[13] *See also, e.g., Branham v. Snow*, 392 F.3d 896, 903 (7th Cir. 2004) (under pre-ADAAA law "we must also take into account 'any negative side effects' that Mr. Branham suffers 'from the use of mitigating measures.' . . . For Mr. Branham, these negative side effects are many.").

Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011). *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 17 ("A covered entity cannot require an individual to use a mitigating measure.");[14] EEOC's "Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008," Question 14 (similar).[15]

j. "However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and nonameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vi), 76 Fed. Reg. 16978, 17010 (Mar. 25, 2011).

3. "Substantially limits" is broadly interpreted

a. Past standards rejected.

i. The Act rejects the holding in *Toyota Motor* that the term "substantially" in the definition of disability under the ADA must "be interpreted strictly to create a demanding standard for qualifying as a disability." Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.[16]

ii. The Act rejects the *Toyota Motor* view that "substantial" requires proof of a severe restriction. *Id*.[17] *See also Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861 (9th Cir. 2009).

iii. The Act states that the *Toyota Motor* standard for assessing "substantially limits," both in the Supreme Court and as applied by lower courts in numerous decisions, "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA." Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101. *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329–330 (4th Cir. 2014) (R.12); *Hughes v. William Beaumont Hosp*., 2014 WL 5511507, at *7 (E.D. Mich. Oct. 31, 2014) (R.56) (ADAAA "expressly overturned the Supreme Court's holding in *Williams*—that 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, and that the impairment's impact must also be permanent or long term."); *Brown v. Board of Regents for Oklahoma Agr. and Mechanical Colleges for Langston University*, 2009 WL 467754, at *2 n.2 (W.D. Okla. Feb. 24, 2009) ("Amendments to the

[14] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[15] Available online at http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

[16] *See also* Statement of Rep. Baldwin, 154 Cong. Rec. at H8297 (Sep. 11, 2008).

[17] *See also* Statement of Rep. Baldwin at H8297.

ADA . . . changed the definition of 'substantially limits' that courts should apply in determining whether a person is disabled.").

iv. The findings also disapprove the EEOC Title I regulation defining the term "substantially limits" to mean "significantly restricted," finding that it sets too high a standard. Pub. L. 110–325, § 2(a)(8), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101. One explicit purpose of the new law is to reject that standard. Pub. L. 110–325, § 2(b)(6), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.[18] *See also Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861 (9th Cir. 2009).

b. Broad construction mandated.

i. "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." 29 C.F.R. § 1630.2(j)(1)(i). *See also Makeda-Phillips v. Illinois Sec'y of State*, 2014 WL 518938 at *6 (C.D. Ill. Feb. 10, 2014) (R.12) (stress disorder); *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012). This is consistent with the statutory language about the definition of disability generally. *See* 42 U.S.C. § 12102(4)(A). *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 (4th Cir. 2014) (R.12) (Congress "mandated that the ADA, as amended, be interpreted as broadly as its text permits.").

ii. "'Substantially limits' is not meant to be a demanding standard." 29 C.F.R. § 1630.2(j)(1)(i); *Makeda-Phillips v. Illinois Sec'y of State*, 2014 WL 518938 at *6 (C.D. Ill. Feb. 10, 2014) (R.12) (stress disorder); *Smith v. Valley Radiologists, Ltd*., 2012 WL 3264504, at *3 (D. Ariz. Aug. 9, 2012); *Socoloski v. Sears Holding Corp*., 2012 WL 3155523, at *3 (E.D. Pa. Aug. 3, 2012); *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *6 (W.D. Pa. June 11, 2012) (ADAAA requires "less searching analysis" of whether a plaintiff is substantially limited); *Mills v. Temple University*, 2012 WL 1122888, at *7 (E.D. Pa. Apr. 3, 2012) (similar); *Markham v. Boeing Co*., 2011 WL 6217117, at *3 (D. Kan. Dec. 14, 2011); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011).

iii. "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). *See also Eastman v. Research Pharmaceuticals, Inc*., 2013 WL 3949236, at *10 (E.D. Pa. Aug. 1, 2013) (R.56) (back condition) ("Thus, although plaintiff may have been able to drive and work, plaintiff put forth evidence from which a factfinder could reasonably conclude that

[18] *See also* Managers Statement, 154 Cong. Rec. at S8843 ("We also expect that the [EEOC] will revise the portion of its ADA regulations that defines 'substantially limits' . . . given the clear inconsistency of that portion of the regulation with the intent of this legislation."); Statement of Sen. Harkin, 154 Cong. Rec. at S8350 (similar).

these activities were more difficult for her as compared to most people in the general population because they caused her significant pain."); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10–11 (S.D.N.Y. July 9, 2012) (ADA Title II case) (at summary judgment defendants failed to establish that plaintiff "is or ever will be functioning on substantially the same level as the general population," and jury could conclude that plaintiff still had a disability despite improvements). The comparison "continues to mean a comparison to other people in the general population, not a comparison to those similarly situated." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011). *See also Moore v. Chilton County Bd. of Educ*., 1 F. Supp. 3d 1281, 1296 (M.D. Ala. 2014) (R.56) ("Rather, the Board argues that A.M.'s ability to run or jump is not substantially limited because any physical limitations A.M. had with respect to those activities did not impact her ability to receive a high school education. But the ADA's implementing regulations focus on the effect of the impairment on the individual's life activities, not educational activities, and permit a broad-based comparison between the ability of that individual to perform a major life activity "as compared to most people in the general population," not most people in an educational setting."). But this does not mean that disability cannot be shown if an impairment is diagnosed based on a disparity between an individual's actual versus expected abilities or achievement, taking into account the person's age and other characteristics. *Id*. *See also* 76 Fed. Reg. at 16981 (Comparison to "Most People"). For the application of this guidance to learning disabilities, see ¶ 3(h) below.

iv. "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.2(j)(1)(ii). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ii), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011); *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573–74 and n.14 (4th Cir. 2015) (R.56) ("A person need not live as a hermit in order to be 'substantially limited' in interacting with others. … [M]embers of the public will not experience intense anxiety and panic when asked a question by a stranger …. Just 10% of people who experience a fear of public speaking experience enough impairment or distress to be diagnosed with social anxiety disorder. We therefore conclude that social anxiety disorder limits sufferers 'as compared to most people in the general population.'"); *Garcia-Hicks v. Vocational Rehab. Admin*., ___ F. Supp. 3d ___, 2015 WL 7720343, at *6 (D.P.R. Nov. 30, 2015) (R.12) (revised EEOC guidelines explain that "substantially limits" means limiting in an "important" way, but it need not severely or significantly restrict the activity); *Franklin v. City of Slidell*, 936 F. Supp. 2d 691, 708 (E.D. La. 2013); *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013); *Gregor v. Polar Semiconductor, Inc*., 2013 WL 588743, at *3 (D. Minn. Feb. 13, 2013) (citing EEOC guidance); *Smith v. Valley Radiologists, Ltd*., 2012 WL 3264504, at *3 (D. Ariz. Aug. 9, 2012); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10 (S.D.N.Y. July 9, 2012) (ADA Title II case); *Barlow v. Walgreen Co.*, 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012);

Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012). *Compare Brady v. United Refrigeration, Inc*., 2015 WL 3500125, at *11 n.22 (E.D. Pa. June 3, 2015) (R.56) (although plaintiff with multiple chemical sensitvity was able to pursue activities outside the workplace even in environments that were not fragrance-free, she did not have to do them for eight hours every day in a confined space).

v. "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 an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." 29 C.F.R. § 1630.2(j)(1)(iii). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(iii), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011); *Kravits v. Shinseki*, 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012) ("Viewing the facts relevant to [plaintiff's] medical conditions in the light most favorable to him, and assessing those facts under the new, less searching analysis called for by the ADAAA, there is sufficient evidence to permit a reasonable jury to find that [plaintiff] has a disability under the Rehabilitation Act."; conclusion bolstered by EEOC guidance that primary object of attention should be statutory compliance and discrimination, rather than substantial limitation of a major life activity).

vi. "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA." 29 C.F.R. § 1630.2(j)(1)(iv).

vii. "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis." 29 C.F.R. § 1630.2(j)(1)(v). *See also Radick v. Union Pac. Corp*., 2016 WL 639126, at *6 (S.D. Tex. Jan. 25, 2016), *report and recommendation adopted*, 2016 WL 632039 (S.D. Tex. Feb. 17, 2016) (R.56) (although plaintiff did not specifically describe alcohol consumption, behavior while intoxicated, or records from rehab facility, such was not necessary; comparison to most people "usually will not require scientific, medical, or statistical analysis"); *Hubbard v. Day & Zimmermann Hawthorne Corp*., 2015 WL 1281629, at *5 (D. Nev. Mar. 20, 2015) (R.56) ("Plaintiff has offered evidence through her testimony that she has a physical impairment that affects major life activities, including working and the operation of her endocrine system. At the summary judgment stage, precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity. Rather, a plaintiff's testimony may suffice to establish a genuine issue of material fact.") (internal quotes and ellipses omitted); *Booth v.*

Houston, 58 F. Supp. 3d 1277, 1293 (M.D. Ala. 2014) (R.56) (plaintiff produced medical evidence although not required to do so); *Moore v. Marriott Int'l, Inc*., 2014 WL 5581046, at *6 (D. Ariz. Oct. 31, 2014) (R.56) (comparative or medical evidence not required); *Maxwell v. Verde Valley Ambulance Co. Inc*., 2014 WL 4470512, at *5 (D. Ariz. Sept. 11, 2014) (R.56) (doctor's report did not confirm all of plaintiff's reported symptoms from leg injury but "because medical evidence is not required … any lack of medical evidence is not disposit[ive]"); *Willoughby v. Connecticut Container Corp*., 2013 WL 6198210, at *9 and n.2 (D. Conn. Nov. 27, 2013) (R.56); *Lema v. Comfort Inn*, 2013 WL 1345510, at *9 (E.D. Cal. Apr. 3, 2013) ("comparative or medical evidence is not required"); *Mercer v. Arbor E & T, LLC*, 2013 WL 164107, at *13 (S.D. Tex. Jan. 15, 2013) (plaintiff's testimony that she had decreased concentration sufficient; comparison to most people in the general population usually will not require scientific, medical, or statistical analysis; "substantially limits" is not the primary focus and should not demand extensive analysis); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *10 (S.D.N.Y. July 9, 2012) (ADA Title II case); *Sechler v. Modular Space Corp*., 2012 WL 1355586, at *11 (S.D. Tex. Apr. 18, 2012) (in light of broad construction, court would assume that plaintiff's testimony that because of alcoholism he had difficulty thinking, concentrating, communicating, and interacting suggested unique limitations compared to most people).

viii. Note, however, that nothing prohibits "the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate." 29 C.F.R. § 1630.2(j)(1)(v). *Compare Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573–74 and n.14 (4th Cir. 2015) (R.56) ("A person need not live as a hermit in order to be 'substantially limited' in interacting with others. … [M]embers of the public will not experience intense anxiety and panic when asked a question by a stranger …. Just 10% of people who experience a fear of public speaking experience enough impairment or distress to be diagnosed with social anxiety disorder. We therefore conclude that social anxiety disorder limits sufferers 'as compared to most people in the general population.'").

ix. "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity." 29 C.F.R. § 1630.2(j)(1)(vi).

x. The fact that individuals do not seek accommodations does not mean that they do not have a disability. *See Girard v. Lincoln Coll. of New England*, 27 F. Supp. 3d 289, 296 (D. Conn. 2014) (R.56).

xi. For some of the case law, *see, e.g., Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 591 (5th Cir. 2016) (R.56) (sufficient evidence that

shoulder injury substantially limited such tasks as lifting and reaching; "Cannon and his doctor both stated that he is unable to lift his right arm above shoulder level and that he has considerable difficulty lifting, pushing, or pulling objects with his right arm."); *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573–74 and n.14 (4th Cir. 2015) (R.56) ("A person need not live as a hermit in order to be 'substantially limited' in interacting with others. … [M]embers of the public will not experience intense anxiety and panic when asked a question by a stranger …. Just 10% of people who experience a fear of public speaking experience enough impairment or distress to be diagnosed with social anxiety disorder. We therefore conclude that social anxiety disorder limits sufferers 'as compared to most people in the general population.'"); *Mazzeo v. Color Resolutions Intern., LLC*, 746 F.3d 1264, 1268–69 (11th Cir. 2014) (R.56) (herniated disc, with resulting pain lasting years and eventually requiring surgery, substantially limited ability to walk, bend, sleep, and lift more than ten pounds); *Tadlock v. Marshall Cty. HMA, LLC*, 603 F. App'x 693, 702 (10th Cir. 2015) (R.56) (although employer claimed plaintiff had only a temporary, injury-related condition, medical records supported existence of long-term disability, and also supported plaintiff's claim of difficulty standing, walking, or sitting for extended periods of time); *Varone v. Great Wolf Lodge of the Poconos, LLC*, 2016 WL 1393393, at *3 (M.D. Pa. Apr. 8, 2016) (R.12) (pregnancy-related conditions caused pain and cramping in her legs and throughout her stomach and chest, resulted in anxiety and stress, and limited ability to lift, stop, walk, turn, think, concentrate, bend, care for herself, sit and stand for long periods of time and relate to others); *Mileski v. Gulf Health Hosps., Inc*., 2016 WL 1295026, at *15 (S.D. Ala. Mar. 31, 2016) (R.56) (plaintiff had bouts of depression since she was 12 or 13 and, when active, they substantially limited interacting with others and caring for herself, particularly in light of suicide attempts and hospitalization); *Atwell v. Indianapolis-Marion Cty. Forensic Servs. Agency*, ___ F. Supp. 3d ___, 2016 WL 807850, at *8 (S.D. Ind. Mar. 2, 2016) (R.56) (despite earlier testing that did not reveal neurocognitive difficulty, treating neurologist created fact issue by testifying that plaintiff's post-concussive syndrome substantially limited her short-term memory, speaking, concentrating, and thinking); *Conn v. Am. Nat'l Red Cross*, ___ F. Supp. 3d ___, 2016 WL 755606, at *9 (D.D.C. Feb. 25, 2016) (R.56) ("Undoubtedly many Americans contend with problems sleeping more severe than what Conn has testified to experiencing, but this Court is not in the position to decide, as a matter of law, that a person [with depression and anxiety] who is able to sleep only four hours per night on two nights each week is not substantially limited in her ability to sleep."); *Radick v. Union Pac. Corp*., 2016 WL 639126, at *6 (S.D. Tex. Jan. 25, 2016), *report and recommendation adopted*, 2016 WL 632039 (S.D. Tex. Feb. 17, 2016) (R.56) (plaintiff with alcoholism substantially limited in working; he was unable to complete work obligations, took a 4-month leave for treatment, and attended AA meetings twice a week; "The evidence also suggests that, without rehabilitative measures, Radick might lack the capacity to continue as a member of Union Pacific's workforce."); *Ward v. Concentrix Corp*.,

2016 WL 336030, at *3 (W.D.N.Y. Jan. 28, 2016) (R.56) (sufficient evidence of disability based on doctor's letter stating that plaintiff was being treated for pelvic-ring fracture, that she was has trouble sitting for more than 30 minutes, and needed an accommodation), *appeal pending*; *Hafermann v. Wisconsin Dep't of Corr*., 2016 WL 206484, at *4 (W.D. Wis. Jan. 15, 2016) (R.56) (undisputed that plaintiff suffered from coronary disease and that plaintiff's sleep apnea can disrupt both his sleeping and breathing as many as 30 times an hour; sufficient evidence of substantial limitation in sleeping, breathing, or function of cardiovascular system); *Khan v. Midwestern Univ*., 2015 WL 7710369, at *4 (N.D. Ill. Nov. 30, 2015) (R.12) (sufficient allegations, supported by doctor's note, that pregnancy-related impairments—including depression, paralyzed anxiety, nausea, and fatigue—substantially limited learning and participating in education; they required that she take time off from medical school and miss exams, and prevented her from completing program requirements); *Lenkiewicz v. Castro*, ___ F. Supp. 3d ___, 2015 WL 7721203, at *4, 5 (D.D.C. Nov. 30, 2015) (R.56) (granting partial summary judgment to plaintiff, finding broken foot substantially limited walking; she had to use crutches and a scooter to get around the office); *Sowell v. Kelly Servs., Inc*., ___ F. Supp. 3d ___, 2015 WL 5964989, at *9–10 (E.D. Pa. Oct. 14, 2015) (R.56) (due to cumulative effects of multiple impairments, at times plaintiff was unable to stand, lift, or engage in sexual intercourse, and had to miss work); *Marsh v. Terra Int'l (Oklahoma), Inc*., 122 F. Supp. 3d 1267, 1280–81 (N.D. Okla. 2015) (R.56) (reviewing interpretive rules and finding sufficient evidence that knee injury substantially limited ability to carry; knee repeatedly buckled and prevented plaintiff from staying employed, he went to ER, and was constantly on guard to prevent future buckling); *Allen v. Baltimore Cty., Md.*, 91 F. Supp. 3d 722, 730–31 (D. Md. 2015) (R.56) (sarcoidosis substantially limited immune functioning and other activities in its active state); *Vale v. Great Neck Water Pollution Control Dist*., 80 F. Supp. 3d 426, 436 (E.D.N.Y. 2015) (R.12) (broken wrist required more time to bathe, dress, and perform household chores, prevented lifting for a time, and necessitated wearing brace for a year); *Gazvoda v. Sec'y of Homeland Sec*., 2015 WL 7450397, at *3–4 (E.D. Mich. Nov. 24, 2015) (motion for injunctive relief) (medical report reflected chronic and severe PTSD that severely impaired "psychological, social, and occupational mental health (or illness) functioning"; although doctor's statements are not necessarily dispositive, here two different doctors supported a single conclusion, establishing at least a triable issue of fact); *Lankford v. Reladyne, LLC*, 2015 WL 7295370, at *9–10 (S.D. Ohio Nov. 19, 2015) (R.56) (sufficient evidence that formally diagnosed alcoholism—which resulted in constant gastrointestinal issues and frequent blackouts—substantially limited at least the ability to concentrate and care for himself); *Coldiron v. Clossman Catering, LLC*, 2015 WL 9583387, at *8–9, 22 (S.D. Ohio Oct. 27, 2015), *report and recommendation adopted*, 2015 WL 9489789 (S.D. Ohio Dec. 30, 2015) (R.56) (sufficient evidence hernia was a disability based on pain, 6-pound lifting restriction, and limits on bending and stretching); *Rogers v. Mediacom, LLC*, 2015 WL 5722795, at *5 (M.D. Ga. Sept. 29, 2015) (R.56)

(plaintiff stated, and doctor supported, that herniated disc required two surgeries and restricted plaintiff at various times from kneeling, crawling, climbing, lifting more than 20–40 pounds at work, going to the store, and doing household chores); *Green v. Teddie Kossof's Salon & Day Spa*, 2015 WL 5675463, at *4 (N.D. Ill. Sept. 24, 2015) (R.56) ("When Green's lumbar radiculopathy flares, pain radiates across her hip and down her legs. The condition also causes numbness and gives Green 'trouble walking, standing for long periods, sitting for long periods, [and] sleeping.' These limitations on Green's major life activities are sufficient for the court to find that her lumbar radiculopathy qualifies as a disability.") (citation omitted); *Berquist v. Lynch*, 2015 WL 4876344, at *5 (E.D. Wash. Aug. 14, 2015) (R.56) (thyroid disorder caused variety of physical and mental symptoms documented by medical records and requiring increasing amount of sick leave); *Kimbro v. Kentucky*, 2015 WL 3687672, at *4–5 (W.D. Ky. June 12, 2015) (R.56) (sufficient evidence that respiratory issues—including asthma and bouts of bronchitis and pneumonia—substantially limited breathing); *Brady v. United Refrigeration, Inc*., 2015 WL 3500125, at *10–11 and n.23 (E.D. Pa. June 3, 2015) (R.56) (evidence that multiple chemical sensitivity was long term, well-documented, and expected to have substantial long-term impact on health, well-being, and productivity); *Sherbyn v. Tyson Fresh Meats, Inc*., 2015 WL 1481453, at *8 (M.D. Tenn. Mar. 30, 2015) (R.56) (plaintiff had disability given the "multiple surgeries on his feet that required accommodations upon his return"); *Powers v. USF Holland Inc*., 2015 WL 1455209, at *6 (N.D. Ind. Mar. 30, 2015), *reconsid. den'd*, 2015 WL 3905261 (N.D. Ind. June 25, 2015) (R.56) ("persistent lumbar radiculitis" substantially limited major life activities of sleeping, walking, lifting, bending, and performing manual tasks, at least when aggravated); *Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *10 (S.D. Ohio Mar. 9, 2015) (R.56) ("In spite of Jones' failure to connect the dots and explain how this evidence demonstrates that her back pain substantially limited her major life activities, the Court believes that a reasonable jury could review these records, find that a substantial limitation existed, and, as a consequence, conclude that Jones was disabled."); *Hammel v. Soar Corp*., 2015 WL 505410, at *3 (E.D. Pa. Feb. 6, 2015) (R.56) (testimony that back issues caused pain, required steroid injection, and impacted ability to walk too far, stand in one position for too long, lift boxes, or sit without adjustment); *Dixon v. City of Birmingham, Ala*., 2015 WL 363162, at *8 (N.D. Ala. Jan. 27, 2015) (R.56) (sufficient evidence that lupus, carpal tunnel, and multiple knee surgeries substantially limited walking, bending, and lifting, as well as working because typing was limited to 90 minutes or less); *Arnold v. Pfizer, Inc*., 2015 WL 268967, at *22 (D. Or. Jan. 21, 2015) (post-verdict) (sufficient evidence that ADD substantially limited concentration); *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297–98 (D.D.C. 2015) (R.56) (sufficient evidence that carpal tunnel syndrome substantially limited various major life activities, including working jobs that required typing, and collecting other carpal tunnel cases); *Kennedy v. Parkview Baptist Sch., Inc*., 2014 WL 7366256, at *14 (M.D. La. Dec. 24, 2014) (R.56) (asthma affecting ability to breathe); *Bellerose v. SAU No. 39*,

2014 WL 7384105, at *4 (D.N.H. Dec. 29, 2014) (R.56) (sufficient evidence of an actual disability because, even though Asperger's diagnosis came after termination, expert treated it as a lifelong condition, plaintiff testified to problems going back to childhood, and there was no evidence that its onset came after termination); *Jacobs v. York Union Rescue Mission, Inc.*, 2014 WL 6982618, at *8–10 (M.D. Pa. Dec. 10, 2014) (R.56) (insufficient evidence that migraines were an actual disability, but sufficient evidence that carpal tunnel syndrome was one, based on need for regular treatment over a period of months during which the plaintiff had a ten-pound lifting restriction in one hand, followed by surgery and an inability to work during the recovery period); *Newell v. Alden Vill. Health Facility for Children & Young Adults*, 2014 WL 6757928, at *4 (N.D. Ill. Dec. 1, 2014) (R.56) ("Based on Newell's limited ability to perform personal care functions and the prolonged documented treatment of her injury, the Court finds that the TCFF tear in Newell's wrist constitutes an ADA covered disability that substantially limits her major life activities."); *Booth v. Houston*, 58 F. Supp. 3d 1277, 1293–94 (M.D. Ala. 2014) (R.56) (although ventilator-caused damage to vocal cords improved over time, employer admitted to plaintiff's voice problems and she remained under a doctor's care after five years); *Hughes v. William Beaumont Hosp.*, 2014 WL 5511507, at *8 (E.D. Mich. Oct. 31, 2014) (R.56) (sufficient evidence that immune thrombocytopenic purpura ["ITP"], an autoimmune disease, was substantially limiting, including it impact on plaintiff's nervous system functions, her recorded hospitalization, and the doctor-ordered time away from work)); *Berkowitz v. Oppenheimer Precision Products, Inc.*, 2014 WL 5461515, at *4–5 (E.D. Pa. Oct. 28, 2014) (R.56) (sufficient evidence that hernia substantially limited sitting, standing, and lifting, and that arthritis substantially limited performing manual tasks); *O'Toole v. Ulster County*, 2014 WL 4900776, at *6 (N.D.N.Y. Sept. 30, 2014) (R.56) (carpal tunnel syndrome); *Stragapede v. City of Evanston*, 69 F. Supp. 3d 856, 863 (N.D. Ill. 2014) (R.56) (sufficient evidence that brain injury substantially limited concentration and neurological function); *Mitchell v. City of Tupelo, Miss.*, 2014 WL 4540924, at *7 (N.D. Miss. Sept. 11, 2014) (R.56) (neck and shoulder injury caused pain, decreased range of motion and grip strength, difficulty getting in and out of a vehicle, and difficulty bathing, dressing, and sleeping); *Maxwell v. Verde Valley Ambulance Co. Inc.*, 2014 WL 4470512, at *5–7 (D. Ariz. Sept. 11, 2014) (R.56) (sufficient evidence that leg injury substantially limited walking); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *10 (S.D. Ohio Sept. 5, 2014) (R.56) (depression, anxiety, and mood disorder impacted many activities, including sleeping, eating, and interacting with others); *Hamm v. Farney*, 2014 WL 4370693, at *4 (N.D.N.Y. Aug. 28, 2014) (R.12) (Title II) (plaintiff sufficiently alleged that his prostate condition—for which he saw a specialist and took medication, which required frequent urination, and which had lasted a year—substantially limited bladder function); *Thomas v. Hill*, 2014 WL 3955656, at *6 (W.D. La. Aug. 13, 2014) (R.56) (at time of adverse plaintiff was still recuperating from heart surgery and was under medical restrictions preventing at least one major life activity); *Stranzl v.*

Delaware County, 2014 WL 3418996, at *7 (E.D. Pa. July 14, 2014) (R.56) (actual disability based on history of ADD, together with need for leave resulting from more recent diagnosis of poor concentration, anxiety and panic attacks, pressured speech, excitability, agitation, insomnia, depression, and distraction); *Camacho v. Colvin*, 2014 WL 2772314, at *8 (D. Md. June 17, 2014) (R.12) (plaintiff sufficiently pled ADAAA disability based on cracked spine since 2009 that makes him unable to sit without pain or carry heavy objects); *Crosby v. F.W. Webb, Co*., 2014 WL 1268691, at *6–7 (D. Me. Mar. 26, 2014) (R.56) (sufficient evidence that alcoholism and depression substantially limited working, in light of need for rehab, ability to work but with mitigating measures, and relapse); *Gorbea v. Verizon New York, Inc*., 2014 WL 917198, at *7 (E.D.N.Y. Mar. 10, 2014) (R.56) (fact issues whether lumbosacral sprain substantially limited ability to bend, twist, push, pull, climb, and lift; insufficient evidence that asthma was substantially limiting); *Powell v. Wetzel*, 2014 WL 2472048, at *11 (M.D. Pa. Feb. 25, 2014) (R.12) (sufficient that plaintiff alleged that he had delusional disorder, a mental illness that causes him to be unusually vulnerable, impressionable, and gullible), *report and recommendation adopted in relevant part*, 2014 WL 2472088, at *4 (M.D. Pa. June 3, 2014); *Bob-Manuel v. Chipotle Mexican Grill, Inc*., 10 F. Supp. 3d 854, 881–82 (N.D. Ill. 2014) (R.56) (eye disease interfered with vision, prevented driving, caused headaches, made it difficult to read lengthy documents, and caused eye to leak fluid, and temporarily prevented vision in one eye); *Lopez-Cruz v. Instituto de Gastroenterologia de P.R.*, 960 F. Supp. 2d 367, 370 (D.P.R. 2013) (R.12) (plaintiff "plausibly pleads a major life activity when she avers that her respiratory problems and cardio-pulmonary symptoms include difficulty breathing and 'extreme coughing.'"); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *4 (E.D. Pa. Dec. 12, 2013) (R.12); *Bloomfield v. Whirlpool Corp*., 984 F. Supp. 2d 771, 777 (N.D. Ohio 2013) (R.56) (plaintiff testified that her depression and anxiety disorder affected her ability to sleep, concentrate, and think, and it resulted in six-month short-term disability leave); *Bouard v. Ramtron International Corporation*, 2013 WL 5445846, at *7–8 (D. Colo. Sept. 27, 2013) (R.56) (sufficient evidence that fragrance sensitivity, triggering rhinitis and sinusitis, was a disability); *Huiner v. Arlington School Dist*., 2013 WL 5424962, at *5 (D.S.D. Sept. 26, 2013) (R.56) (anxiety disorder and associated panic attacks substantially limited ability to maintain nutritional needs, care for children, work, and sleep); *Sigl v. Travel Tags, Inc*., 2013 WL 5223681, at *4 (D. Or. Sept. 16, 2013) (R.56) (sufficient evidence that arthritis in knee, wrist, and hands was "actual" disability); *Moates v. Hamilton County*, 976 F. Supp. 2d 984, 992–93 (E.D. Tenn. 2013) (R.56) (rheumatoid arthritis caused difficulty walking, lifting things, sleeping; plaintiff had weakness due to joint pain, and she described that pain and the effect of her arthritis on her ability to stand; she also showed causal relationship between her arthritis and her rotator cuff injury); *Holmes v. Board of County Com'rs*, 2013 WL 2368394, at *3 (W.D. Okla. May 28, 2013) (R.56) (evidence that back condition caused trouble lifting, walking, bending, and sleeping); *Inman v. Mercy Hosp., Cedar Rapids, Iowa*, 2013

WL 2285387, at *3 (N.D. Iowa May 23, 2013) (R.56) (back injury); *Hardy v. Alabama Dept. of Indus. Relations*, 2013 WL 1336726, at *5–6 (M.D. Ala. Mar. 29, 2013) (sufficient evidence that gastrointestinal condition was an actual disability); *Oxford House, Inc. v. City of Baton Rouge, La*., 2013 WL 1154291, at *4 (M.D. La. Mar. 19, 2013) (sufficient evidence that program residents with alcoholism had an actual disability); *Jones v. Bracco Ltd. Partnership*, 2013 WL 696381, at *8–9 (D.S.D. Feb. 26, 2013) (R.56) (trigeminal neuralgia) (sufficient evidence based on plaintiff's testimony about pain, numbness, faintness, muscle spasms, etc.); *Palacios v. Continental Airlines, Inc.*, 2013 WL 499866, at *4 (S.D. Tex. Feb. 11, 2013) ("self-described severity of Plaintiff's depression and its adverse effects on his desire to work, his sleeping, his eating, and his attention to ordinary care of himself, supported by some medical evidence Plaintiff presents, would appear sufficient under the more lenient standard of the ADAAA"); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013) ("reasonable jury could conclude her fibromyalgia substantially limits her ability to walk, sleep, and perform manual tasks as compared to most people;" affidavits of plaintiff and her husband, supported by medical records, showed difficulty walking when ankles and hips are "flaring," particularly in wet, cool weather; insomnia; and substantial limitations in ability to perform household chores and routine tasks of daily living, such as shopping, driving, or leaving the house to run errands); *Wirey v. Richland Community College*, 913 F. Supp. 2d 633, 641–642 (C.D. Ill. 2012) (sufficient evidence that chronic fatigue syndrome substantially limited thinking and concentrating; plaintiff's mother had to care for her pets, bring in mail, and do her laundry, and plaintiff sometimes got up only to eat; CFS interfered with her ability to remain awake and alert, and "knocked [her] out" so she could not concentrate); *Davis v. Vermont, Dept. of Corr.*, 868 F. Supp. 2d 313, 325 (D. Vt. 2012 (R.12) (medical problem involving testicles limited sex, lifting, and pulling; resulted in 4-week leave, and lasted at least four months until hernia surgery); *Howard v. Steris Corp.*, 886 F. Supp. 2d 1279, 1291–1292 (M.D. Ala. 2012) (doctors testified that obstructive sleep apnea "definitely" interfered with sleep, and Graves' disease can, too); *George v. Roush & Yates Racing Engines, LLC*, 2012 WL 3542633, at *5 (W.D.N.C. Aug. 16, 2012) (given severity and duration of mobility restrictions following car accident and resulting surgeries, there was sufficient evidence of a substantial limitation in sleeping, walking, lifting, and bending); *Smith v. Valley Radiologists, Ltd*., 2012 WL 3264504, at *4 (D. Ariz. Aug. 9, 2012) (sufficient evidence that blind spots leaving only peripheral vision substantially limit reading and driving); *Harty v. City of Sanford*, 2012 WL 3243282, at *5 (M.D. Fla. Aug. 8, 2012) (sufficient evidence that knee injuries substantially limited major life activities of walking, standing, lifting, bending, and performing manual tasks; even if squatting, using stairs, kneeling, running or jumping were not major life activities, they could support a reasonable inference that plaintiff substantially limited in walking, standing, lifting, bending, and performing manual tasks, which are); *Socoloski v. Sears Holding Corp*., 2012 WL 3155523, at *4 (E.D. Pa. Aug. 3, 2012) (sufficient evidence that arthritis,

hernia, and rotator cuff issues prevented working at times and forced plaintiff to request help with lifting and performing manual tasks, and to request accommodations and breaks at work); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012) (ADA Title II case) (cancer-related removal of parts of digestive system left plaintiff with dumping syndrome, explosive diarrhea, cramping, inflammation, hypoglycemia, and other symptoms; "jury could easily find, based on his description of his impairment, that he is substantially limited compared to most people in the general population at least in his ability to eat and the functioning of his digestive and bowel systems"); *Thomas v. Bala Nursing & Retirement Center*, 2012 WL 2581057, at *6 (E.D. Pa. July 3, 2012) (sleeping 12 hours per day substantially limits sleeping, or waking up); *Wright v. Stark Truss Co., Inc*., 2012 WL 3029638, at *6–7 (D.S.C. May 10, 2012) (sufficient evidence that anxiety and depression was actual disability); *Sechler v. Modular Space Corp*., 2012 WL 1355586, at *11 (S.D. Tex. Apr. 18, 2012) ("Notwithstanding the absence of explicit testimony distinguishing Sechler's difficulties from those of the general population, the Court finds the testimony that Sechler had difficulty thinking, concentrating, communicating, and interacting to be sufficient."); *Kravits v. Shinseki*, 2012 WL 604169, at *6 (W.D. Pa. Feb. 24, 2012) (sufficient evidence in plaintiff's testimony that sleep apnea interfered with sleep, causing him to be tired and interfering with his ability to concentrate); *Medvic v. Compass Sign Co., LLC*, 2011 WL 3513499, at *7 (E.D. Pa. Aug. 10, 2011) (employer's claim that plaintiff who stuttered was not substantially limited because he was able to give deposition testimony, despite the presence of an obvious speech impediment, "is contrary to the 2008 ADA Amendments and misses the mark, in any event."); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011) ("in light of evidence plaintiff's condition affected her ability to perform manual tasks[], and keeping in mind that this inquiry is not meant to be 'extensive' or demanding, the court concludes that genuine issues of material fact exist as to whether plaintiff's carpal tunnel syndrome constitutes a disability"); *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968–969 (S.D. Tex. 2011) (two broken femurs substantially limited walking; impairment was severe, plaintiff could not walk unassisted and needed to use a wheelchair for several weeks, after which she needed a walker, and after a year and a half she still has pain and walked with a limp); *Seim v. Three Eagles Communications, Inc*., 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (sufficient evidence that Graves' disease and its medication side effects substantially limited the major life activities of sleeping, standing, speaking, concentrating, thinking, communicating, working, and the functions of his immune, circulatory, and endocrine systems); *Eldredge v. City of St. Paul*, 2011 WL 3609399, at *15–16 (D. Minn. Aug. 15, 2011) (plaintiff with permanent, progressive eye disease causing small blind spot negatively impacting central visual acuity was substantially limited in seeing); *Norton v. Assisted Living Concepts, Inc*., 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) ("the court finds that renal cancer, when active, 'substantially limits' the 'major life activity' of

'normal cell growth.'); *Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258–259 (D.N.H. 2009) (sufficient showing that eating impairment substantially limited plaintiff's eating under the ADAAA's broad construction when, despite spending six weeks in outpatient and inpatient eating disorder clinics, plaintiff still lost nearly five pounds in subsequent 16-day period, dropping her weight to 93% of its ideal; her "alleged condition … required a careful watch over her food intake to protect against potentially dangerous weight loss."); *Pridgen v. Department of Public Works/Bureau of Highways*, 2009 WL 4726619 n.17 (D. Md. Dec. 1, 2009) ("Under the ADA Amendments Act of 2008, a person who has lost sight in one eye but retains full use of his other eye is 'disabled.' Disability is to be construed 'in favor of broad coverage . . . .").[19]

xii. *But cf. Neely v. Benchmark Family Servs*., ___ F. App'x ___, 2016 WL 364774, at *5 (6th Cir. Jan. 26, 2016) (R.56) ("We agree with the district court that, '[w]hile a diagnosis might not be absolutely necessary [to establish a record of impairment], in this situation, some diagnosis must explain the duration or severity of the impairment.' We therefore hold that Neely's self-described symptoms to his physicians, without corroborating medical evidence or any diagnosis are insufficient to establish a substantial limitation on a major life activity."); *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112–14 (9th Cir. 2014) (judgment reversed because of insufficient evidence of a substantial limitation in working or interacting with others); *Allen v. SouthCrest Hosp.*, 2011 WL 6394472 (10th Cir. Dec. 21, 2011) (unpublished) (argument concerning impact of migraine headaches on sleeping was insufficiently developed below and mentioned only in passing on appeal, so court refused to consider it; although evidence showed migraines—when active and treated with medication—did not permit her to perform activities to care for herself in the evenings and compelled her to go to sleep instead, this point was too conclusory and lacked evidence of how much earlier she went to bed than usual, which specific activities of caring for herself she was forced to forego, how long she slept after taking her medication, what time she woke up the next day, whether it was possible for her to complete the activities of caring for herself the next morning that she had neglected the previous evening, how her difficulties in caring for herself on days she had a migraine compared to her usual routine of evening self-care, and how her experience compared to the average person's ability to care for herself in evenings after work; even under the ADAAA a substantial limitation in working requires proof of limitations in a class or broad range of jobs, and plaintiff failed to offer such evidence); *Poper v. SCA Americas, Inc*., 2012 WL 3288111, at *8–9 (E.D. Pa. Aug. 13, 2012) (plaintiff's testimony was vague, and medical records only indicated short-term back pain after car accident); *Ratcliff v. Mountain Brook Bd. of Educ*., 2012 WL 1884898, at *3 (N.D. Ala. May 22, 2012) (three-hour hospital

[19] *See also Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 239–240 and n.2 (D. Mass. 2010) (sufficient pleadings that monocular vision was an ADAAA disability based in part on dicta in *Albertson's* and in part on EEOC statement in proposed regulations that "[s]omeone with monocular vision whose depth perception or field of vision would be substantially limited . . . need not also show that he is unable to perform activities of central importance to daily life.").

visit plus occasional ill and woozy feelings insufficient to show that high blood pressure substantially limited working).

c. Substantial limitations are measured against "most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). *See also* H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 9 (June 23, 2008) (describing the legislative history of the original ADA). The use the term "most people" as the basis of comparison for determining substantial limitation, instead of the former "average person," is not substantive but rather is intended to signal that the comparison "need not be exacting, and usually will not require scientific, medical, or statistical analysis." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011). *See Barlow v. Walgreen Co*., 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012) (plaintiff's back condition "put her at a disadvantage as compared to 'most people in the general population,' and certainly qualify as a significant restriction" in musculoskeletal functioning). Note, however, that this language is not intended to *prohibit* the presentation of scientific, medical, or statistical evidence to make such a comparison. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011).

d. There is no minimum time that an impairment must last to be substantially limiting.

i. "[T]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ix), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011) (internal quotes and brackets omitted). *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329 (4th Cir. 2014) (R.12); *Aptaker v. Bucks Cty. Intermediate*, 2015 WL 5179183, at *10 (E.D. Pa. Sept. 3, 2015) (R.56) ("The Amended ADA expressly rejects the practice of looking at the duration of the impairment as a criterion in determining whether it was substantially limiting. In addition, there is nothing in the ADA that delineates chronic from non-chronic impairments.") (citation omitted); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *9 (E.D.N.C. Apr. 6, 2015) (R.12); *Moore v. Mancuso*, 2015 WL 176644, at *3 (W.D. La. Jan. 13, 2015) (R.56) ("Finally, in reviewing the 2008 amendments to the ADA, the Fifth Circuit has stated that the duration of an impairment is only one of several factors used in determining if an individual was disabled."); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012); *Mercer v. Arbor E & T*, 2012 WL 1425133, at *6 (S.D. Tex. Apr. 21, 2012) (observing that "[f]ederal courts in Texas have applied the ADAAA's broader definition of 'disability' to include impairments that either are not of long duration or are 'episodic or in remission.'"); *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968 (S.D. Tex. 2011) (same).[20]

ii. An impairment that lasts less than six months can still be substantially limiting. 29 C.F.R. § 1630.2(j)(1)(ix) ("impairment lasting or expected to

[20] *See also* the Joint Statement by Reps. Hoyer and Sensenbrenner, 154 Cong. Rec. at H6068 (June 25, 2008).

last fewer than six months can be substantially limiting"). This is because the six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the "actual" or "record of" prongs. *Id*; 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ix), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *Cf. Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329 n.1, 333 (4th Cir. 2014) (R.12); *Gogos v. AMS Mechanical Systems, Inc*., 737 F.3d 1170, 1172 (7th Cir. 2013); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 916 (E.D. Mich. 2015) (R.56); *Khan v. Midwestern Univ*., 2015 WL 7710369, at *4 (N.D. Ill. Nov. 30, 2015) (R.12) (alleged pregnancy-related impairment need not be long-term or permanent to qualify as a disability, and effects lasting or expected to last fewer than six months can be substantially limiting); *Green v. Teddie Kossof's Salon & Day Spa*, 2015 WL 5675463, at *4 (N.D. Ill. Sept. 24, 2015) (R.56) (ovarian cyst resulted in ER visit because of intense cramping, profuse bleeding, lightheadedness, and vomiting, among other symptoms; although it was transitory because it resolved after two weeks with medication, it still substantially limited performance of major life activities as compared to most people); *Martinez v. Univ. Med. Ctr*., 2015 WL 315708, at *6 (D. Nev. Jan. 26, 2015) (R.56); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *10 n.18 (S.D. Ohio Sept. 5, 2014) (R.56); *Maxwell v. County of Cook*, 2014 WL 3859981, at *4 (N.D. Ill. Aug. 4, 2014) (R.12); *Young v. McCarthy-Bush Corp*., 2014 WL 1224459, at *5 (N.D. Ga. Mar. 24, 2014) (R.56) (knee replacement and complications) ("The ADAAA, however, has dispensed with the requirement that courts consider the duration of an impairment when weighing whether it substantially limits a major life activity. … Consequently, the fact that an impairment might only last a few months is not dispositive."); *Walters v. Mayo Clinic Health Sys.-EAU Claire Hosp., Inc.*, 998 F. Supp. 2d 750, 763 (W.D. Wis. 2014) (R.56) (PTSD); *Bob-Manuel v. Chipotle Mexican Grill, Inc*., 10 F. Supp. 3d 854, 881–82 (N.D. Ill. 2014) (R.56) (hernia, eye disease); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *4 (E.D. Pa. Dec. 12, 2013) (R.12); *Moates v. Hamilton County*, 976 F. Supp. 2d 984, 992 (E.D. Tenn. 2013) (R.56); *Heatherly v. Portillo's Hot Dogs, Inc*., 958 F. Supp. 2d 913, 920 (N.D. Ill. 2013) (R.56); *Davis v. Vermont, Dept. of Corr*., 868 F. Supp. 2d 313, 325 (D. Vt. 2012 (R.12) (medical problem involving testicles limited sex, lifting, and pulling; resulted in 4-week leave, and lasted at least four months until hernia surgery); *Feldman v. Law Enforcement Associates Corp*., 2011 WL 891447, at *9 n.6 (E.D.N.C. Mar. 10, 2011) ("transitory and minor" language only applies to "regarded as" claims). *See also EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, Ex. 16.[21]

iii. There is no minimum time period. EEOC, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, Question 10 (no minimum length of time);[22] EEOC, *Questions and Answers for Small*

[21] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.
[22] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

Businesses: The Final Rule Implementing the ADA Amendments Act of 2008, Question 8 (same);[23] *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, § II.A;[24] 76 Fed. Reg. at 16982 ("several" months is enough but there is no specific minimum duration; need not last as long as six months);[25] *Cohen v. CHLN, Inc*., 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("As discussed above, the ADAAA mandates no strict durational requirement for plaintiffs alleging an actual disability."). *See also Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *4 (E.D. Pa. Dec. 12, 2013) (R.12) ("As a result, the purported transient nature of Plaintiff's injuries is not relevant to the analysis. The proper analysis simply asks whether Plaintiff's injuries substantially limit a major life activity.").

iv. There is also legislative history stating that the decision in *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (cancer requiring 8 months leave was considered too "short-term") was wrong. Statement of Rep. Nadler, 154 Cong. Rec. at H6064, H6065, and H6067 (June 25, 2008).

v. The *Toyota Motor* standard is no longer controlling. *See, e.g., Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 (4th Cir. 2014) (R.12); *Eastman v. Research Pharmaceuticals, Inc*., 2013 WL 3949236, at *8 (E.D. Pa. Aug. 1, 2013) (R.56) (back condition) (citing EEOC regulation and questioning continuing validity of "permanent or long term" factor); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July 3, 2014) (R.56) ("Defendant is incorrect, as a matter of law, that Plaintiff's impairment must be sufficiently 'permanent or long-term' to be disabling."); *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013) ("an impairment need not be permanent or long-term"); *Feldman v. Law Enforcement Associates Corp.*, 2011 WL 891447, at *9 (E.D.N.C. Mar. 10, 2011) ("even if Feldman's TIA 'only temporarily limited [his] ability to work, the stringent requirements of *Toyota Motor* may be rejected by the amended statute in favor of a more inclusive standard.'").[26] *See also Welch v. IAC Huron, LLC*, 2013 WL 4817591, at *3 (N.D. Ohio Sept. 10, 2013) (R.56) (shoulder injury; decided under state law but adopting ADAAA analysis); *Shaw-Owens v. The Board of Trustees of California State University*, 2013 WL 4758225, at *2 (N.D. Cal. Sept. 4, 2013) (dismissing complaint under R.12 but with leave to replead, noting that "[c]ontrary to defendant's assertions, it is not necessary for an

[23] Available online at http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

[24] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[25] Note, too, that the ADAAA explicitly states that "regarded as" claims are not actionable if the impairment is transitory. 42 U.S.C. § 12102(3)(B). This means that the term "impairment" must be broad enough to include conditions that *are* transitory; otherwise this restriction would be mere surplusage.

[26] Note that on summary judgment, however, the court found insufficient facts to support a disability because the plaintiff spent only one night in the hospital, his medical testing was normal, and he failed to submit any testimony. *Feldman v. Law Enforcement Associates Corp*., 955 F. Supp. 2d 528, 539–540 (E.D.N.C. 2013).

impairment to be 'permanent or long term' to qualify as a disability for purposes of the ADA.").[27]

vi. *See also Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 916–18 (E.D. Mich. Mar. 5, 2015) (R.56) (bout of depression lasting five months); *Khan v. Midwestern Univ*., 2015 WL 7710369, at *4 (N.D. Ill. Nov. 30, 2015) (R.12) (impairment need not be long-term or permanent to qualify as a disability; temporary nature of plaintiff's impairment does not bar her claim); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *11 (E.D.N.C. Apr. 6, 2015) (R.12) (pregnancy-related limitations); *Booth v. Houston*, 58 F. Supp. 3d 1277, 1293–94 (M.D. Ala. 2014) (R.56) (defendant's argument that condition was temporary "loses efficacy in light of the ADAAA"); *Butler v. BTC Foods, Inc*., 2014 WL 336649, at *4 (E.D. Pa. Jan. 30, 2014) (R.56) (sharp pain when walking or bending seven months after hernia surgery); *Bonzani v. Shinseki*, 2013 WL 5486808, at *5 (E.D. Cal. Sept. 30, 2013) (R.56) (sufficient evidence that knee injury was not temporary when considering original injury and not just re-injury); *Duggins v. Appoquinimink School Dist*., 921 F. Supp. 2d 283, 289–290 (D. Del. 2013) (six-month bout of severe depression, which might recur and which prevented work for a month, "inevitably" qualifies as a disability); *Hodges v. District of Columbia*, 959 F. Supp. 2d 148, 154 (D.D.C. 2013) (R.56) (back condition) ("the fact that Hodges's impairment was expected to be temporary is not a bar"); *Lee v. Harrah's New Orleans*, 2013 WL 3899895, at *5 (E.D. La. July 29, 2013) (R.56) (back condition and fibromyalgia resulting in pain on standing lasting a year); *Mercer v. Arbor E & T, LLC*, 2013 WL 164107, at *13 (S.D. Tex. Jan. 15, 2013) (employer argued that plaintiff's return to work after 12-week FMLA leave meant condition was merely temporary, but ability to return did not establish that she no longer had disability); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc*., 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (pleading that pregnancy-related complications lasted eight months sufficient, in light of regulations); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012) (non-employment claim) (temporary impairments can qualify as substantially limiting," and jury could find that plaintiff had disability on day in question; jury could also believe he still had disability despite improvements); *Dentice v. Farmers Ins. Exchange*, 2012 WL 2504046, at *11 (E.D. Wis. June 28, 2012) (sufficient evidence of substantial limitations; plaintiff received continued medical treatment for anxiety, depression, and carpal tunnel during nine months of leave and continuing upon his return to work).

vii. "Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ix), 76 Fed. Reg. 16978, 17011 (Mar. 25,

[27] But note that the Minority Views include a statement that the ADAAA is not intended to change the Toyota Motor standard that to be substantially limiting an impairment must be "permanent or long term." H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at pp. 30–31 (June 28, 2008). See also Statement of Rep. Smith, 154 Cong. Rec. at H6074 (June 25, 2008).

2011) (internal quotes). *See also Summers v. Altarum Institute, Corp*., 740 F.3d 325, 329 (4th Cir. 2014) (R.12) (citing regulations); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *9 (E.D.N.C. Apr. 6, 2015) (R.12); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012); *Cohen v. CHLN, Inc*., 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("Such a severe, ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu.") (prong one claim).

e. Condition, manner, duration.

i. "[I]n determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity." 29 C.F.R. § 1630.2(j)(4)(i).

ii. "Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function." 29 C.F.R. § 1630.2(j)(4)(ii). *See also Bracken v. DASCO Home Medical Equipment, Inc*., 2014 WL 4388261, at *9–10 (S.D. Ohio Sept. 5, 2014) (R.56) (depression, anxiety, and mood disorder impacted many activities); *Doby v. Sisters of St. Mary of Oregon Ministries Corp*., 2014 WL 3943713, at *4 (D. Or. Aug. 11, 2014) (R.56) (OCD made activities difficult, involved, and time-consuming); *Medlin v. Honeywell Analytics, Inc*., 2012 WL 511997, at *5 (M.D. Tenn. Feb. 15, 2012) (injuries from car wreck impacted many activities).

iii. Consistent with the legislative history, an impairment may substantially limit the 'condition' or 'manner' under which a major life activity can be performed in a number of ways. For example, the condition or manner under which a major life activity can be performed may refer to the way an individual performs a major life activity. Thus, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

iv. "Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone

with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also McGee v. CCLA 9 LLC*, 2016 WL 612731, at *4 (E.D. Mich. Feb. 16, 2016) (R.56) (sufficient evidence that lipedema was substantially limiting; plaintiff testified that she experienced severe leg pain and needed assistance in cleaning, changing clothes, and getting in and out of vehicles); *Ward v. Concentrix Corp*., 2016 WL 336030, at *3 (W.D.N.Y. Jan. 28, 2016) (R.56) (sufficient evidence of disability based on doctor's letter stating that plaintiff was being treated for pelvic-ring fracture, that she was has trouble sitting for more than 30 minutes, and needed an accommodation), *appeal pending*; *Garcia-Hicks v. Vocational Rehab. Admin*., ___ F. Supp. 3d ___, 2015 WL 7720343, at *8 (D.P.R. Nov. 30, 2015) (R.12) (sufficient pleading based on plaintiff's strong back pain caused by cervical strain, lumbosacral strain, and bulging disks, which was exacerbated by sitting for long periods); *Araya-Ramirez v. Office of the Courts Admin*., 2015 WL 5098499, at *7–8 (D.P.R. Aug. 31, 2015) (R.12) (allegation that fibromyalgia resulted in chronic pain and fatigue, lack of stamina, and severe headaches that severely impacted concentration, sleep, and stamina, among other things); *Green v. Teddie Kossof's Salon & Day Spa*, 2015 WL 5675463, at *4 (N.D. Ill. Sept. 24, 2015) (R.56) ("When Green's lumbar radiculopathy flares, pain radiates across her hip and down her legs. The condition also causes numbness and gives Green 'trouble walking, standing for long periods, sitting for long periods, [and] sleeping.' These limitations on Green's major life activities are sufficient for the court to find that her lumbar radiculopathy qualifies as a disability.") (citation omitted); *Harris v. Hous. Auth. of Baltimore City*, 2015 WL 5083502, at *6 (D. Md. Aug. 26, 2015) (R.12) (sufficient allegation that knee injury and constant pain substantially limited plaintiff from traveling, taking care of personal needs, cleaning his home, shopping, taking out trash and sleeping); *Luedecke v. Tenet Healthcare Corp*., 2015 WL 3867793, at *4 (N.D. Tex. June 23, 2015) (R.12) (pain caused by impairments); *Brady v. United Refrigeration, Inc*., 2015 WL 3500125, at *11 (E.D. Pa. June 3, 2015) (R.56) (frequent debilitating headaches often left plaintiff unable to concentrate or focus for a number of hours); *Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *10 (S.D. Ohio Mar. 9, 2015) (R.56) (episodic back pain flared on occasion, requiring leave from work when in its active state); *Hammel v. Soar Corp*., 2015 WL 505410, at *3 (E.D. Pa. Feb. 6, 2015) (R.56) (testimony that back issues caused pain, required steroid injection, and impacted ability to walk too far, stand in one position for too long, lift boxes, or sit without adjustment); *Aldini v. Kroger Co. of Michigan*, 2014 WL 7139956, at *8 (E.D. Mich. Dec. 12, 2014) (R.56) (heel spur and chronic plantar fasciitis caused extreme pain); *Berkowitz v. Oppenheimer Precision Products, Inc.*, 2014 WL 5461515, at *4 (E.D. Pa. Oct. 28, 2014) (R.56) (pain from hernia and arthritis); *Lyman v. New York & Presbyterian Hosp.*, 2014 WL 3417394, at *9 (S.D.N.Y. July 14, 2014) (hip pain); *Denobrega*

v. Sport-Elle, Inc., 2014 WL 3396500, at *3 (D.N.J. July 9, 2014) (R.12) (pro se) (sufficient pleading of substantial limitation in heavy lifting because it caused severe pain); *Butler v. BTC Foods, Inc*., 2014 WL 336649, at *4 (E.D. Pa. Jan. 30, 2014) (R.56) (pain and difficulty with bending and lifting following hernia surgery; sharp pain when walking or bending seven months later; pain strong enough that plaintiff anticipated needing additional leave); *Gaylor v. Greenbriar of Dahlonega Shopping Center, Inc*., 975 F. Supp. 2d 1374, 1385 (N.D. Ga. 2013) (R.56) (Title III case) (multiple sclerosis caused pain on walking); *Sigl v. Travel Tags, Inc*., 2013 WL 5223681, at *4 (D. Or. Sept. 16, 2013) (R.56) (arthritis in knee, wrist, and hands caused pain); *Black v. Shinseki*, 2013 WL 4779020, at *8 (S.D. W.Va. Sept. 5, 2013) (R.56) (pain from back condition); *Eastman v. Research Pharmaceuticals, Inc*., 2013 WL 3949236, at *9–10 (E.D. Pa. Aug. 1, 2013) (R.56) (pain from back condition); *Lee v. Harrah's New Orleans*, 2013 WL 3899895, at *5 (E.D. La. July 29, 2013) (R.56) (back condition and fibromyalgia); *Lema v. Comfort Inn*, 2013 WL 1345510, at *9 (E.D. Cal. Apr. 3, 2013) ("referring to increased pain, fatigue, and instability"); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013) (pain during activities bolsters conclusion that fibromyalgia a disability); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 994–995 (W.D. Tex. 2012) (sufficient evidence based on back pain when performing several major life activities); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *18 (W.D. Pa. Sept. 28, 2011) (chronic pain clearly affects one or more body systems).

v. *But cf. Jacobs v. York Union Rescue Mission, Inc*., 2014 WL 6982618, at *8 (M.D. Pa. Dec. 10, 2014) (R.56) ("District courts within the Third Circuit have held that evidence of chronic pain alone does not establish a disability under the ADAAA."); *Krachenfels v. N. Shore Long Island Jewish Health Sys*., 2014 WL 3867560 (E.D.N.Y. July 29, 2014) (R.56) ("While the Court does not mean to minimize the pain plaintiff may feel, the issue is not whether plaintiff felt pain while showering; it is whether that pain, caused by discoid dermatitis, substantially limited her ability to shower in any way. Because plaintiff has shown at most that her skin condition was painful at times, she has failed to create a triable issue of fact as to whether her discoid dermatitis substantially limited her ability to care for herself.") (citations omitted).

vi. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. For example, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment 'causes the operation [of the bodily function] to over-produce or underproduce in some harmful fashion.'" 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also Pilling v. Bay Area Rapid Transit*, 881 F.Supp.2d 1152, 1159 n.8 (N.D. Cal. 2012) (Rule 12 motion denied; even though plaintiff took only a little longer than normal to use the bathroom, he voided through an apparatus because of cancer-related colostomy).

vii. "'Duration' refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

viii. "For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain. However, a person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also Tadlock v. Marshall Cty. HMA, LLC*, 603 F. App'x 693, 702 (10th Cir. 2015) (R.56) (although employer claimed plaintiff had only a temporary, injury-related condition, medical records supported existence of long-term disability, and also supported plaintiff's claim of difficulty standing, walking, or sitting for extended periods of time); *McGee v. CCLA 9 LLC*, 2016 WL 612731, at *4 (E.D. Mich. Feb. 16, 2016) (R.56) (sufficient evidence that lipedema was substantially limiting; plaintiff testified that it affected her ability to "walk more than 100 feet without taking a break" and "stand for an extended period of time"); *Vale v. Great Neck Water Pollution Control Dist*., 80 F. Supp. 3d 426, 436 (E.D.N.Y. 2015) (R.12) (broken wrist required more time to bathe, dress, and perform household chores, prevented lifting for a time, and necessitated wearing brace for a year); *Hammel v. Soar Corp*., 2015 WL 505410, at *3 (E.D. Pa. Feb. 6, 2015) (R.56) (testimony that back issues caused pain, required steroid injection, and impacted ability to walk too far, stand in one position for too long, lift boxes, or sit without adjustment); *Dixon v. City of Birmingham, Ala*., 2015 WL 363162, at *8 (N.D. Ala. Jan. 27, 2015) (R.56) (sufficient evidence that plaintiff with carpal tunnel was substantially limited in working because her typing was limited to 90 minutes or less); *Childers v. Hardeman Cnty. Bd. of Educ*., 2015 WL 225058, at *6 (W.D. Tenn. Jan. 15, 2015) (R.56) (cystitis, diverticulosis, and IBS prevented plaintiff from sitting or standing more than ten minutes at a time); *Moore v.*

Mancuso, 2015 WL 176644, at *3 (W.D. La. Jan. 13, 2015) (R.56) (inability to walk more than five minutes at a time); *Rosa v. City of Chicago*, 2014 WL 1715484, at *5 (N.D. Ill. May 1, 2014) (R.56) (knee pain upon standing more than twenty-five minutes; plaintiff had to stretch out his legs and lift his knees if he sits for more than five minutes; could not climb more than a few steps, could not walk a city block, and could not sit for more than fifteen to twenty minutes); *Barlucea Matos v. Corporacion del Fondo del Seguro del Estado*, 2013 WL 1010558, at *6 (D. Puerto Rico Mar. 14, 2013) (R.56) (inability to sit or stand for extended periods of time); *Barlow v. Walgreen Co*., 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012) (fact that back condition caused great difficulty crouching for more than short periods of time testified to seriousness of musculoskeletal problems).

ix. "Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). "Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." *Id*. *See also Childers v. Hardeman Cnty. Bd. of Educ*., 2015 WL 225058, at *6 (W.D. Tenn. Jan. 15, 2015) (R.56) (cystitis, diverticulosis, and IBS required frequent bathroom breaks and substantially limited bowel, bladder, digestive and genitourinary functions).

x. "In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity." 29 C.F.R. § 1630.2(j)(4)(ii). *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 15;[28] *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010) ("The resulting statutory section only prohibits the consideration of ameliorative mitigatory measures, and does not address potentially negative side effects of medical treatment."); *Luedecke v. Tenet Healthcare Corp*., 2015 WL 3867793, at *4 (N.D. Tex. June 23, 2015) (R.12) (side effects of medications limit walking and driving); *Latham v. Donahue*, 40 F. Supp. 3d 1023, 1027 (N.D. Ill. 2014) (R.56) ("Her bipolar medication also limits her in her ability to work, as it makes her nauseous and groggy, requiring her to take breaks or leaves."); *Wells v. Cincinnati Children's Hosp. Medical Center*, 2012 WL 510913, at *9 and n.5 (S.D. Ohio Feb. 15, 2012) (side

[28] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

effects of medication for gastrointestinal disorder); *Seim v. Three Eagles Communications, Inc.*, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (sufficient evidence that Graves' disease and its medication side effects substantially limited various major life activities). Other "nonameliorative effects" could include "complications that arise from surgery," among other things. 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also Brown v. Bd. of Educ. of City of New Britain*, 107 F. Supp. 3d 232, 237 (D. Conn. 2015) (use of crutches); *DeAngelo v. Yellowbook Inc*., 105 F. Supp. 3d 166, 175 (D. Conn. 2015) (R.56) ("It is common knowledge … that chemotherapy causes severe negative side effects on cancer patients.").

xi. "Given the rules of construction . . . [in 29 C.F.R. § 1630.2(j)(1)(i)–(ix)], it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(4)(iv). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011); 76 Fed. Reg. 16982 ("For example, whether diabetes is substantially limiting will most often be analyzed by considering its effects on endocrine functions in the absence of mitigating measures such as medications or insulin, rather than by considering the measures someone must undertake to keep the condition under control (such as frequent blood sugar and insulin monitoring and rigid adherence to dietary restrictions). Likewise, whether someone with kidney disease has a disability will generally be assessed by considering limitations on kidney and bladder functions that would occur without dialysis rather than by reference to the burdens that dialysis treatment imposes.").

xii. Likewise, "in many instances, it will not be necessary to assess the negative impact of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and it thus is not necessary to consider the burdens that dialysis treatment imposes." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).[29]

xiii. "Accordingly, while the Commission's regulations retain the concept of 'condition, manner, or duration,' they no longer include the additional list of 'substantial limitation' factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or

[29] For some of the legislative history regarding kidney disease, see, *e.g*., Statement of Sen. Harkin, 154 Cong. Rec. at S7957; id. at S8350 (adding major bodily functions to the definition of major life activities "is important for people with . . . kidney disease . . . because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.").

expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).'' 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

xiv. Also, "'condition, manner, or duration' are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. 'Condition, manner, or duration' are not required 'factors' that must be considered as a talismanic test. Rather, in referring to 'condition, manner, or duration,' the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).[30] Thus, for example, "a showing of substantial limitation is not defeated by facts related to 'condition, manner, or duration' that are not pertinent to the substantial limitation the individual has proffered." *Id*. *See also Mazzocchi v. Windsor Owners Corp*., 2013 WL 5295089, at *7 (S.D.N.Y. Sept. 17, 2013) (R.12) (condition, manner, duration not required elements of analysis).

f. Performing manual tasks.

i. The ADAAA rejects the Supreme Court's focus on those manual tasks that are central to daily life. Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.

ii. "Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in *Toyota*) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011). *See also Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *9 (S.D. Ohio Mar. 9, 2015) (R.56) ("[T]he Court considers 'repetitive motion' to be a type of major life activity that falls under the category of 'performing manual tasks.'"); *Smith v. Donahoe*, 2013 WL 5467679, at *7 (E.D. Pa. Oct. 1, 2013) (R.56) (fine motor limitations resulting from shoulder impairment sufficient to show substantial limitation in manual tasks); *Gregor v. Polar Semiconductor, Inc*., 2013 WL 588743, at *3 (D. Minn. Feb. 13, 2013) (citing EEOC guidance); *Garner v. Chevron Phillips Chemical Co., L.P*., 2011 WL 5967244, at *4 (S.D. Tex. Nov. 29, 2011) (citing EEOC

[30] "At the same time, individuals seeking coverage under the first or second prong of the definition of disability should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

guidance); *Negron v. City of New York*, 2011 WL 4737068, at *12 (E.D.N.Y. Sept. 14, 2011) (allegation that when active, pain and inflammation from episodic impairment prevented use of left hand, was sufficient to show she was substantially limited in performing manual tasks compared to most people); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011) ("in light of evidence plaintiff's condition affected her ability to perform manual tasks[], and keeping in mind that this inquiry is not meant to be 'extensive' or demanding, the court concludes that genuine issues of material fact exist as to whether plaintiff's carpal tunnel syndrome constitutes a disability").

g. Lifting.

i. The statute expressly identifies lifting as a major life activity. 42 U.S.C. § 12102(2)(A); *Thomas v. Werthan Packaging, Inc*., 2011 WL 4915776, at *5 (M.D. Tenn. Oct. 17, 2011).

ii. "[L]ifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011); *id.* at § 1630.2(i), 76 Fed. Reg. at 1716978, 17008 (Mar. 25, 2011).

iii. "[S]omeone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also id*., § 1630.2(j)(1)(ix), 76 Fed. Reg. at 17011 (similar); *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 591 (5th Cir. 2016) (R.56) (sufficient evidence that shoulder injury substantially limited such tasks as lifting and reaching; "Cannon and his doctor both stated that he is unable to lift his right arm above shoulder level and that he has considerable difficulty lifting, pushing, or pulling objects with his right arm."); *Clark v. State ex rel. Bd. of Regents of Univ. of Oklahoma*, 2016 WL 407316, at *2 (W.D. Okla. Feb. 2, 2016) (R.12) (plaintiff adequately alleged disability based on broken scapula resulting in 15-pound pushing and pulling restriction, and 10-pound lifting restriction, that lasted at least two months); *Gatlin v. Vill. of Summit*, 2015 WL 8780551, at *3 (N.D. Ill. Dec. 15, 2015) (R.56) (sufficient evidence that after spinal-fusion surgery, plaintiff was restricted from lifting more than 20 pounds or from working except while sedentary; court cited EEOC example regarding 20-pound lifting restriction); *Rogers v. Mediacom, LLC*, 2015 WL 5722795, at *5 (M.D. Ga. Sept. 29, 2015) (R.56) ("In light of changes made to the ADA in 2008 … there is no longer confusion regarding whether lifting is a major life activity. Plaintiff throughout his employment with Defendant after his injury was restricted from lifting substantial weight in addition to other restrictions after his

injury restricted him from bending, etc."); *Barden v. King Soopers*, 2015 WL 4550427, at *5 (D. Colo. July 29, 2015) (R.56) (fact issue whether plaintiff's lifting restrictions of forty pounds maximum and five pounds overhead was a substantial limitation in lifting); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *9 (E.D.N.C. Apr. 6, 2015) (R.12); *Ceska v. City of Chicago*, 2015 WL 468767, at *3 (N.D. Ill. Feb. 3, 2015) (R.56) (restricted to lifting eight pounds frequently and 20 pounds occasionally); *Molina-Parrales v. Shared Hosp. Services Corp*., 992 F. Supp. 2d 841, 852–53 (M.D. Tenn. 2014) (R.56) (collecting cases and finding ten-pound restriction substantially limiting); *Galvin-Stoeff v. St. John's Hosp. of the Hosp. Sisters of the Third Order of St. Francis*, 2014 WL 4056695, at *9 (C.D. Ill. Aug. 15, 2014) (R.56) (30-pound lifting restriction may be substantial limitation, rejecting pre-ADAAA case law); *Resler v. Koyo Bearings USA LLC*, 2014 WL 1272114, at *7 (M.D. Ga. Mar. 27, 2014) (R.56) (collecting cases and finding sufficient evidence of permanent lifting restriction on one arm that was constant source of pain); *Bob-Maunuel v. Chipotle Mexican Grill, Inc*., 10 F. Supp. 3d 854, 881 (N.D. Ill. 2014) (R.56) (hernia made lifting difficult and pain, and doctors imposed ten-pound lifting restriction); *Heatherly v. Portillo's Hot Dogs, Inc*., 958 F. Supp. 2d 913, 921 (N.D. Ill. 2013) (R.56) (sufficient evidence given that high-risk pregnancy restricted employee to "light duty," meaning no heavy lifting); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *5 (E.D. Pa. Dec. 12, 2013) (R.12); *Lohf v. Great Plains Mfg., Inc.*, 2012 WL 2568170, at *5–6 (D. Kan. July 2, 2012) (25- to 30-pound restriction sufficient); *Mills v. Temple University*, 2012 WL 1122888, at *8 (E.D. Pa. Apr. 3, 2012) (sufficient evidence that substantially limited in lifting); *Williams v. United Parcel Service, Inc.*, 2012 WL 601867 at * 3 (D.S.C. Feb.23, 2012) (adopting and approving magistrate's ruling denying summary judgment,[31] which was based in part on 20-pound lifting restriction); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012) (20-pound lifting restriction). *See also Farina v. Branford Bd. of Educ.*, 2010 WL 3829160, at *10–11 (D. Conn. Sept. 23, 2010) (15- to 20-pound restriction may suffice under ADAAA).

iv. Prior case law on whether lifting restrictions were substantially limiting should no longer control. *See Tate v. Sam's East, Inc*., 2013 WL 1320634, at *11 (E.D. Tenn. Mar. 29, 2013) (collecting cases); *Thomas v. Werthan Packaging, Inc*., 2011 WL 4915776, at *5 (M.D. Tenn. Oct. 17, 2011) (rejecting prior analysis and finding fact question whether person with back condition—who testified that he might be able to lift 20 pounds but was not sure for how long—was substantially limited in lifting). *See also Bob-Manuel v. Chipotle Mexican Grill, Inc*., 10 F. Supp. 3d 854, 881 (N.D. Ill. 2014) (R.56) (hernia); *Farina v. Branford Bd. of Educ.*, 2010 WL 3829160, at *11 (D. Conn. Sept. 23, 2010) (15- to 20-pound restriction may suffice under ADAAA). *But cf. Majors v. General Elec. Co*., 2012 WL 2912726, at *6 (S.D. Ind. July 16, 2012) (relying on pre-ADAAA law without

[31] *See Williams v. U.S. Services, Inc*., 2012 WL 590049 (D.S.C. Jan. 31, 2012) (Magistrate's recommendation).

explanation and finding no actual disability, but finding enough evidence of "regarded as" disability).

v. Note, too, that a lifting restriction may reflect a substantial limitation in the major life activity of the operation of the musculoskeletal system. *Gough v. Lincoln Cty. Bd. of Cty. Commissioners*, 2016 WL 164632, at *3 (W.D. Okla. Jan. 13, 2016) (R.56) ("In the present case, Plaintiff suffered a back injury and, after prolonged treatment, was released from medical care with a permanent restriction. The spine and other bones in his back are, of course, part of Plaintiff's musculoskeletal system. The permanent restriction of lifting no weight greater than seventy-five pounds falls into the category of "major life activity."); *Barlow v. Walgreen Co*., 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012) (evidence that back impairments caused great difficulty lifting even relatively light objects such as a gallon of milk). *See also McNamee v. Freeman Decorating Services, Inc*., 2012 WL 1142710, at *4 (D. Nev. Apr. 04, 2012) (sufficient evidence that injured employee with comp history and lifting restrictions had disability under all three prongs).

h. Learning disabilities.

i. "In determining whether an individual has a disability under the 'actual disability' or 'record of' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. § 1630.2(j)(4)(iii). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

ii. "The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. . . .[But this] does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement, taking into account the person's chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act." 29 C.F.R. Part 1630 App., §

1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011). *See also Girard v. Lincoln Coll. of New England*, 27 F. Supp. 3d 289, 295–96 (D. Conn. 2014) (R.56). *But cf. Healy v. National Bd. of Osteopathic Medical Examiners, Inc.*, 870 F.Supp.2d 607 (S.D. Ind. 2012) (ADA Title III case) (insufficient evidence that plaintiff was substantially limited in reading; evidence suggested that plaintiff's "coping mechanisms" were just good study habits, not something "undertaken to account for a substantially-limiting disorder").[32]

iii. As the EEOC states, "[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012–17013 (Mar. 25, 2011). *See also* Statements of Reps. Miller and Stark, 154 Cong. Rec. at H8290–H8291 (rejecting the notion that academic success is inconsistent with a finding of substantial limitation); Statement of Rep. Courtney, 154 Cong. Rec. at H8296; *Girard v. Lincoln Coll. of New England*, 27 F. Supp. 3d 289, 296 (D. Conn. 2014) (R.56).

iv. Both the EEOC guidance and the legislative history it cites reject the contrary holdings in several named cases decided pre-ADAAA. 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012–17013 (Mar. 25, 2011).[33]

v. "For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life." 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

vi. For more case law, *see, e.g., Karlik v. Colvin*, 15 F. Supp. 3d 700, 708 (E.D. Mich. 2014) (R.56) (collecting case on dyslexia and ADHD).

i. Monocular vision—"someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory

[32] For some of the legislative history on dyslexia, *see, e.g.*, Statement of Rep. Stark, 154 Cong. Rec. at H8291; Statement of Rep. Courtney, 154 Cong. Rec. at H8296. For some of the history on learning disabilities generally, *see, e.g*., Statement of Rep. Stark, 154 Cong. Rec. at H8291; Statement of Rep. Courtney, 154 Cong. Rec. at H8296; Managers Statement, 154 Cong. Rec. at S8842. *See also Geoghan v. Long Island R.R.*, 2009 WL 982451, at *17 (E.D.N.Y. Apr. 9, 2009) (ADAAA is intended to cover those with ADHD).

[33] Those rejected cases include *Price v. National Bd. of Medical Examiners*, 966 F. Supp. 419 (S.D. W.Va. 1997); *Gonzalez v. National Bd. of Medical Examiners*, 60 F. Supp. 2d 703 (E.D. Mich. 1999); and *Wong v. Regents of University of California*, 410 F.3d 1052 (9th Cir. 2005).

strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also Fahey v. Twin City Fan Companies, Ltd*., 2014 WL 131196, at *3 (D.S.D. Jan. 13, 2014) (bench trial) (holding monocular vision was substantially limiting). For additional guidance on monocular vision, see ¶ 9(h) below.

j. Substantial limitation in working.

i. "The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations. 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

ii. "In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act." 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).[34]

iii. "In addition, many cases previously analyzed in terms of whether the plaintiff was 'substantially limited in working' will now be analyzed under the 'regarded as' prong of the definition of disability as revised by the Amendments Act." 29 C.F.R. Part 1630 App., Substantially Limited in Working, at n.2, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).[35]

iv. "In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities." 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978,

[34] As examples of this change the EEOC cited three pre-ADAAA cases in which the court found no substantial limitation in working: *Corley v. Dep't of Veterans Affairs ex rel Principi*, 218 F. App'x. 727, 738 (10th Cir. 2007) (involving seizure disorder, which the EEOC points out would now be found to substantially limit neurological function); *Olds v. United Parcel Serv., Inc*., 127 F. App'x. 779, 782 (6th Cir. 2005) (regarding bone-marrow cancer, which the EEOC notes substantially limits normal cell growth); and *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 763–764 (3d Cir. 2004) (police officer's major depression would now substantially limit brain function). 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

[35] As examples the EEOC cites *Cannon v. Levi Strauss & Co*., 29 F. App'x. 331 (6th Cir. 2002) (noting that plaintiff "would now be protected under the third prong because she was fired because of her impairment, carpal tunnel syndrome"); and *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (applicant not hired because of hemophilia). 29 C.F.R. Part 1630 App., Substantially Limited in Working, at n.2, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

17013 (Mar. 25, 2011). *See also Allen v. SouthCrest Hosp*., 2011 WL 6394472, at 6–7 (10th Cir. Dec. 21, 2011) (unpublished) (ADAAA retains test requiring impact in broad range or class of jobs); W*iseman v. Convention Ctr. Auth. of the Metro. Gov't of Nashville & Davidson Cty.*, 2016 WL 54922, at *11 (M.D. Tenn. Jan. 5, 2016) (R.56) ("broad range or class" is still the test even after ADAAA); *Hill v. Southeastern Freight Lines, Inc*., 877 F.Supp.2d 375, 359 (M.D.N.C. 2012); *Culotta v. Sodexo Remote Sites Partnership*, 2012 WL 1069179, at *7 (E.D. La. Mar. 29, 2012); *Azzam v. Baptist Healthcare Affiliates, Inc*., 2012 WL 28117, at *6 (W.D. Ky. Jan. 5, 2012) (similar). *But cf. Harrison-Khatana v. Washington Metro. Area Transit Auth*., 2015 WL 302820, at *8–9 (D. Md. Jan. 22, 2015) (R.56) (refusing to rely on pre-ADAAA regulations referring to significant restriction in a broad range or class of jobs).

v. The determination of a substantial limitation in working must apply a lower standard than the courts typically did pre-ADAAA. "The Commission believes that the courts . . . have reached conclusions with regard to what is necessary to demonstrate a substantial limitation in the major life activity of working that would be inconsistent with the changes now made by the Amendments Act. Accordingly, as used in this section the terms 'class of jobs' and 'broad range of jobs in various classes' will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act." 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).[36]

vi. A substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish a substantial limitation in working, but a class of jobs "may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels). . . . For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or

[36] As examples of cases using too high a standards, the EEOC cited *Duncan v. WMATA*, 240 F.3d 1110, 1115 (D.C. Cir. 2001) (manual laborer whose back injury prevented him from lifting more than 20 pounds was not substantially limited in working because he did not present evidence of the number and types of jobs available to him in the Washington area; testimony concerning his inquiries and applications for truck driving jobs that all required heavy lifting was insufficient); and *Taylor v. Federal Express Corp*., 429 F.3d 461, 463–64 (4th Cir. 2005) (employee's impairment did not substantially limit him in working because, even though evidence showed that employee's injury disqualified him from working in numerous jobs in his geographic region, it also showed that he remained qualified for many other jobs). 29 C.F.R. Part 1630 App., Substantially Limited in Working, at n.3, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

she is substantially limited in performing the class of jobs that require heavy lifting." 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013–17014 (Mar. 25, 2011).

vii. *See also DeBacker v. City of Moline*, 78 F. Supp. 3d 916, 927 (C.D. Ill. 2015) (R.56) ("Additionally, the fact that the City terminated him rather than allow him to continue in the booking officer position could promote the reasonable inference that the City regarded him to be substantially limited from a class of jobs as a police officer."); *Hernandez-Echevarria v. Walgreens de Puerto Rico, Inc*., 2015 WL 4389519, at *6 (D.P.R. July 15, 2015) (R.56) (sufficient evidence of substantial limitation in working based on hospitalizations for depression, inability to work for one month after hospitalization, and history of taking antidepressants); *O'Reilly v. Gov't of the Virgin Islands*, 2015 WL 4038477, at *6–7 (D.V.I. June 30, 2015) (R.12) (sufficient allegation that recurring headaches and sinus problems, caused by mold allergy, were a physiological condition affecting respiratory and immune systems, and substantially limited working); *Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *10 (S.D. Ohio Mar. 9, 2015) (R.56) (episodic back pain flared on occasion, requiring leave from work when in its active state); *Dixon v. City of Birmingham, Ala*., 2015 WL 363162, at *8 (N.D. Ala. Jan. 27, 2015) (R.56) (sufficient evidence that plaintiff with carpal tunnel was substantially limited in working because her typing was limited to 90 minutes or less); *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297–98 (D.D.C. 2015) (R.56) (sufficient evidence that plaintiff was substantially limited in working jobs that required typing); *Pick v. City of Remsen*, 2014 WL 4258738, at *24 (N.D. Iowa Aug. 27, 2014) (R.56) (over six-month span plaintiff was repeatedly treated for stress, anxiety, and depression, and repeatedly prescribed that he take time off from work); *Maxwell v. County of Cook*, 2014 WL 3859981, at *3 (N.D. Ill. Aug. 4, 2014) (R.12) (sufficient pleading of substantial limitation in ability to work "in the class of jobs related to law enforcement and more specifically, to being a police officer."); *Broadwater v. Minnesota Dept. of Human Services*, 22 F. Supp. 3d 989, 994–95 (D. Minn. 2014) (R.56) (as result of domestic assault, plaintiff had concussion, occipital neuralgia, and post-concussion syndrome; her inability to work more than 20 hours a week could qualify as a substantial limitation in working); *Crosby v. F.W. Webb, Co*., 2014 WL 1268691, at *6–7 (D. Me. Mar. 26, 2014) (R.56) (sufficient evidence that alcoholism and depression substantially limited working, in light of need for rehab, ability to work but with mitigating measures, and relapse); *Akerson v. Pritzker*, 980 F. Supp. 2d 18, 29 (D. Mass. 2013) (R.56) (when bladder disease was exacerbated, plaintiff testified that she had to use restroom as often as every twenty minutes, with each visit lasting between five and ten minutes, and such disruption would last throughout her workday); *E.E.O.C. v. Old Dominion Freight Line, Inc*., 2013 WL 3230670, at *3 (W.D. Ark. June 26, 2013) (R.56) ("… Old Dominion treated alcoholism as something that required treatment before Grams could even work as a dock hand, from which reasonable jurors might conclude that being regarded as an alcoholic would substantially limit Grams' ability to

work in a broad range of jobs in many classes."); *Chicago Regional Council of Carpenters v. Thorne Associates, Inc.*, 893 F. Supp. 2d 952, 962 (N.D. Ill. 2012) ("If Rosas were unable to perform lifting tasks that really are required for journeyman carpentry work—or even for drywall installation work alone—he is limited in a broad range of jobs."); *Lloyd v. Housing Authority of the City of Montgomery, Ala.*, 857 F.Supp.2d 1252, 1264 (M.D. Ala. 2012) (doctor's statement that plaintiff's asthma and hypertension limited his ability to work in the sun and around cleaning chemicals provides reasonable jury with enough evidence to conclude that his physical impairments substantially limit ability to work); *Hutchinson v. Ecolab, Inc*., 2011 WL 4542957, at *8–9 (D. Conn. Sept. 28, 2011) (rejecting pre-ADAAA case law and finding person prevented from driving was substantially limited in working); *Negron v. City of New York*, 2011 WL 4737068, at *12 (E.D.N.Y. Sept. 14, 2011) (allegation that when active, pain and inflammation from episodic hand impairment required leave from work was sufficient to show she was substantially limited in working a broad range of jobs).

viii. Note, too, that the fact that a condition does not interfere with a person's job duties or prevent working does not mean that it is not a disability. *See, e.g., Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 591 n.3 (5th Cir. 2016) (R.56) (district court relied on plaintiff's statements that he was able to climb a ladder and needed no accommodation at work, "[b]ut these statements do not undermine the evidence indicating that his injury substantially limits his ability to lift, which is all that is required"); *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 331 (4th Cir. 2014) (R.12) ("If the fact that a person could work with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated."); *Hafermann v. Wisconsin Dep't of Corr*., 2016 WL 206484, at *5 (W.D. Wis. Jan. 15, 2016) (R.56); *Magnotti v. Crossroads Healthcare Mgmt., LLC*, 126 F. Supp. 3d 301, 312 (E.D.N.Y. 2015) (R.12); *Luedecke v. Tenet Healthcare Corp*., 2015 WL 3867793, at *4 (N.D. Tex. June 23, 2015) (R.12); *E.E.O.C. v. Old Dominion Freight Line, Inc*., 2015 WL 3895095, at *9 (W.D. Ark. June 24, 2015) (post-trial) (rejecting employer's argument that alcohol addiction was not substantially limiting simply because employee was capable of performing his job and refraining from drinking during the workday); *Powers v. USF Holland Inc*., 2015 WL 1455209, at *6 (N.D. Ind. Mar. 30, 2015), *reconsid. den'd*, 2015 WL 3905261 (N.D. Ind. June 25, 2015) (R.56) ("And that he works in other jobs is not dispositive of the question of whether his impairments render him disabled, especially under the substantially more liberal standards of the ADAAA."); *Aldini v. Kroger Co. of Michigan*, 2014 WL 7139956, at *8 (E.D. Mich. Dec. 12, 2014) (R.56) (although plaintiff could do job, his heel spur and chronic plantar fasciitis caused him pain); *Moore v. Marriott Int'l, Inc*., 2014 WL 5581046, at *6 (D. Ariz. Oct. 31, 2014) (R.56) ("major life activities include more than work"); *Hoey v. County of Nassau*, 2014 WL 4656223, at *4 (E.D.N.Y. Sept. 12, 2014) (R.56); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *11 (S.D. Ohio Sept. 5,

2014) (R.56); *E.E.O.C. v. Midwest Reg'l Med. Ctr., LLC*, 2014 WL 4063145, at *3 (W.D. Okla. Aug. 18, 2014) (R.56); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July 3, 2014) (R.56); *Baron v. Advanced Asset & Prop. Mgmt. Solutions, LLC*, 15 F. Supp. 3d 274, 282 (E.D.N.Y. 2014) (R.56); *Bonzani v. Shinseki*, 2013 WL 5486808, at *8 n.8 (E.D. Cal. Sept. 30, 2013) (R.56) (knee injury); *Eastman v. Research Pharmaceuticals, Inc*., 2013 WL 3949236, at *9–10 (E.D. Pa. Aug. 1, 2013) (R.56) (back condition) (does not matter that plaintiff could work full day; focus is on limitations, not what she can overcome).[37]

ix. *See also Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 591 n.3 (5th Cir. 2016) (R.56) (even if ability to do his job was relevant to disability [which it wasn't], plaintiff's statement that he needed no accommodation was explained by the fact that he compensated for his right arm's limitations through greater use of his left); *Hafermann v. Wisconsin Dep't of Corr*., 2016 WL 206484, at *5 (W.D. Wis. Jan. 15, 2016) (R.56) (even if ability to do the job was relevant to disability here [which it wasn't], fact the plaintiff could work third shift on occasion did not mean he could do it on a regular basis); *Coldiron v. Clossman Catering, LLC*, 2015 WL 9583387, at *9, 22 (S.D. Ohio Oct. 27, 2015), *report and recommendation adopted*, 2015 WL 9489789 (S.D. Ohio Dec. 30, 2015) (R.56) (sufficient evidence hernia was a disability, even though it did not restrict most job tasks); *Girard v. Lincoln Coll. of New England*, 27 F. Supp. 3d 289, 296 (D. Conn. 2014) (R.56) (rejecting argument based on fact that plaintiff maintained above-average GPA and sought accommodations in only five of twenty-three courses she took); *Arthur v. Am. Showa, Inc*., 2014 WL 5609842, at *6 (S.D. Ohio Nov. 4, 2014) (R.56) (fact that plaintiff was able to work did not refute evidence that his lifting restriction was chronic and permanent; he was given lifting assistance at work); *Moore v. Marriott Int'l, Inc*., 2014 WL 5581046, at *5 (D. Ariz. Oct. 31, 2014) (R.56) (not necessary for plaintiff to show that impairment is caused or exacerbated by her job).

x. *But cf. Carothers v. Cty. of Cook*, 808 F.3d 1140, 1148 (7th Cir. 2015) (R.56) (interacting with juvenile detainees is a unique aspect of single specific job; no evidence that anxiety disorder would restrict plaintiff from performing either a class of jobs or a broad range of jobs); *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014) (judgment reversed because "record does not contain substantial evidence showing that Weaving was limited in his ability to work compared to "most people in the general population.").

k. "In determining whether an individual has a disability under the 'actual disability' or 'record of' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve." 29 C.F.R. § 1630.2(j)(4)(iii). *See also Jacobs v. N.C. Admin. Office of the*

[37] This is consistent with pre-ADAAA law. *See, e.g*., *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 199 (2002); *Brion v. Adrian Steel Co*., 2006 WL 2123756, at *9 (E.D. Mich. July 27, 2006).

Courts, 780 F.3d 562, 573–74 and n.14 (4th Cir. 2015) (R.56) ("A person need not live as a hermit in order to be 'substantially limited' in interacting with others. … [M]embers of the public will not experience intense anxiety and panic when asked a question by a stranger …. Just 10% of people who experience a fear of public speaking experience enough impairment or distress to be diagnosed with social anxiety disorder. We therefore conclude that social anxiety disorder limits sufferers 'as compared to most people in the general population.'"); *Molina v. DSI Renal, Inc.*, 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012). "For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. § 1630.2(j)(4)(iii).

l. The fact that a person disavows that she "is disabled" and maintains that she is fully capable of doing her work does not mean that she does not have a legally recognized disability. *McGee v. CCLA 9 LLC*, 2016 WL 612731, at *4 n.2 (E.D. Mich. Feb. 16, 2016) (R.56) ("Defendant notes that Plaintiff … testified 'I don't have a disability. I know I have a health issue....this is...who I am.' This testimony does not persuade the Court that Plaintiff does not suffer from a physical impairment that substantially limits major life activities.") (citation omitted); *Lankford v. Reladyne, LLC*, 2015 WL 7295370, at *9 n.16 (S.D. Ohio Nov. 19, 2015) (R.56) (rejecting employer's attempt to rely on plaintiff's deposition statements because they were contradicted by medical records, and at least in part referred to his condition at the time of deposition, not his condition at the time he sought treatment); *Barden v. King Soopers*, 2015 WL 4550427, at *5 (D. Colo. July 29, 2015) (R.56) (plaintiff's statements denying disability were made later on, after she had recovered); *Barlow v. Walgreen Co.*, 2012 WL 868807, at *5 (M.D. Fla. Mar. 14, 2012) ("While Plaintiff has declined to label herself as disabled, she has stated that she suffers from the various musculoskeletal disorders described herein, and has repeatedly detailed her consequent physical limitations resulting therefrom."). *See also Cole v. Weatherford Int'l*, 2015 WL 3896835, at *9 (D. Colo. June 23, 2015) (R.56) (rejecting defense claim that because plaintiff felt that his back and heart problems did not limit him, they were "transitory and minor"; the plaintiff's own subjective belief [like focusing on the employer's subjective belief] is inconsistent with required objective analysis).

m. "Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ii), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011). *See also Sowell v. Kelly Servs., Inc.*, ___ F. Supp. 3d ___, 2015 WL 5964989, at *9–10 (E.D. Pa. Oct. 14, 2015) (R.56) ("Ms. Sowell suffers from anemia, polycystic ovarian disease, hypertension, and dysfunctional uterine bleeding. Ms. Sowell does not claim that she is disabled on account of any one disease in particular; instead, she seems to claim that cumulatively these are physical impairments that substantially limit one or more of her major life activities. Due to these conditions, Ms. Sowell is at times unable to stand, unable to or limited in her ability to lift objects, and at times was required to avoid sexual intercourse. Ms. Sowell's conditions also required her to miss time at work.") (citations omitted); *Harrison-Khatana v.*

Washington Metro. Area Transit Auth., 2015 WL 302820, at *10 (D. Md. Jan. 22, 2015) (R.56) (ongoing impairment to one knee relevant to claim based in part on recent injury to other knee); *Klaes v. Jamestown Bd. of Public Utilities*, 2013 WL 1337188, at *7 (W.D.N.Y. Mar. 29, 2013) (R.12) (nerve and musculoskeletal damage, sleep apnea, and depression caused limitations in sleeping); *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013) (R.56) ("evidence that plaintiff suffered multiple physiological disorders and conditions that affected her reproductive system"); *Kravits v. Shinseki*, 2012 WL 604169, at *6 (W.D. Pa. Feb. 24, 2012) ("[Plaintiff] further argues that the combination of his sleep apnea, fibromyalgia, and depression substantially limit the major life activity of learning. It would be reasonable to conclude that an individual with [plaintiff's] conditions would be substantially limited in the major life activities of learning . . . 'as compared to most people in the general population.'"). *Compare Pagan v. Morrisania Neighborhood Family Health Ctr*., 2014 WL 464787, at *5 (S.D.N.Y. Jan. 22, 2014) (R.12) (although plaintiff did not specify which of his medical conditions [including heart disease, diabetes, and a wrist injury] was the basis of the "regarded as" disability, the court found his pleadings sufficient; "Pagan cannot be expected to know the specifics of how he was perceived, and it would make little sense to dismiss a disability discrimination suit because the plaintiff suffers from too many conditions to know which of them caused the discrimination.").

n. Evidence that the individual has qualified for a disability-benefits program, while not dispositive, is some evidence of an ADA disability. *See, e.g., K.R.S. v. Bedford Cmty. Sch. Dist.*, 109 F. Supp. 3d 1060, 1075 (S.D. Iowa 2015) (R.56) (student with ADHD had a disability under the IDEA and therefore also had a disability under § 504); *Binger v. Anderson Enterprises*, 2015 WL 461753, at *6 (N.D. Miss. Feb. 4, 2015) (R.56) (although plaintiff offered no expert testimony or medical evidence regarding his kidney cancer, and denied in deposition that he "was disabled," there was sufficient evidence based on receipt of Social Security disability benefits); *Smith v. Donahoe*, 2013 WL 5467679, at *7 n.15 (E.D. Pa. Oct. 1, 2013) (R.56) (finding of disability for purposes of Postal Service rehabilitation program is relevant evidence); *Bonzani v. Shinseki*, 2013 WL 5486808, at *6 (E.D. Cal. Sept. 30, 2013) (R.56) (knee injuries resulted in 10% VA disability rating); *Access for the Disabled, Inc. v. First Resort, Inc.*, 2012 WL 2917915, at *4 n.5 (M.D. Fla. July 17, 2012) (R.56) (Title III) (Social Security disability for visual and physical impairments, although not dispositive, "is certainly persuasive").[38] *See also Eiler v. City of Pana*, 606 F. App'x 305, 306 (7th Cir. 2015) (R.12) (attaching to complaint plaintiff's record of disability discharge from military); *Thompson v. Donahoe*, 2013 WL 3286196, at *9 (N.D. Cal. June 27, 2013) (evidence that plaintiff got his job through state rehabilitation agency based on a learning disability). *But cf. Phillips v. Mabus*, 2013 WL 4662960, at *10 and n.5 (D. Haw.

[38] This is also consistent with pre-ADAAA case law. *See Lawson v. CSX Transp., Inc*., 245 F.3d 916, 927 (7th Cir. 2001); *Moore v. Wal-Mart Stores East, L.P*., 2009 WL 3109823, at *8 (M.D. Ga. Sept. 23, 2009); *Lester v. M&M Knopf Auto Parts*, 2006 WL 2806465, at *10 (W.D.N.Y. Sept. 28, 2006); *Gonzales v. Columbia Hosp*., 2002 WL 31245379, at *3 (N.D. Tex. Oct. 1, 2002); *Jackson v. Service Engineering, Inc*., 96 F. Supp. 2d 873, 881 (S.D. Ind. 2000). See also Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans, Question 5 (EEOC), http://www.eeoc.gov/eeoc/publications/ada.veterans.cfm (person with military or VA disability rating is probably covered by ADA).

Aug. 29, 2013) (finding status as disabled veteran supported "regarded as" claim, but by itself would be insufficient to prove "actual disability).

o. "Nonetheless, not every impairment will constitute a 'disability' within the meaning of this section." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(ii), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011).[39] *See also Mengel v. Reading Eagle Co*., 2013 WL 1285477, at *3–4 (E.D. Pa. Mar. 29, 2013) (insufficient evidence that plaintiff's hearing substantially limited); *Curley v. City of North Las Vegas*, 2012 WL 1439060 (D. Nev. Apr. 25, 2012) (three percent hearing loss insufficient; even without hearing aids and while wearing two sets of earplugs, plaintiff could hear speech). *But cf. Cohen v. CHLN, Inc*., 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("Such a severe, ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu.").

4. Episodic conditions and those in remission

a. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii).

b. "This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011), *quoted in Kinney v. Century Services Corp. II*, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011).[40] It also rejects the results in cases finding that cancer in remission is not a disability because it was too short-lived. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii).[41] "It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." *Id*.

c. The case law is consistent. *See, e.g., Gogos v. AMS Mechanical Systems, Inc*., 737 F.3d 1170, 1173 (7th Cir. 2013) (R.12) (plaintiff sufficiently alleged that episode of very high blood pressure and intermittent blindness substantially limited his circulatory function and eyesight); *Olsen v. Capital Region Medical Center*, 713 F.3d 1149, 1154 (8th Cir. 2013) ("It is undisputed that Olsen was disabled, because Olsen suffered from seizures which, while occurring, incapacitated her and prevented her from performing her job duties."); *Francis v. Wyckoff Heights Med.*

[39] Note that the EEOC eliminated its list of things that are not disabilities, finding it confusing. 76 Fed. Reg. 16978, 16983 (Mar. 25, 2011).

[40] One epilepsy case specifically rejected is *Todd v. Academy Corp*., 57 F. Supp. 2d 448, 453 (S.D. Tex. 1999), in which the court found the plaintiff's relatively brief seizures were not sufficiently limiting because they occurred episodically.

[41] One such cancer case specifically discredited is *Pimental v. Dartmouth-Hitchock Clinic*, 236 F. Supp. 2d 177, 182–183 (D.N.H. 2002).

Ctr., 2016 WL 1273235, at *9 (E.D.N.Y. Mar. 30, 2016) (R.56) (lymphedema flared up intermittently, restricting sleeping, lifting, concentrating, and performing manual tasks like grasping); *Sowell v. Kelly Servs., Inc*., ___ F. Supp. 3d ___, 2015 WL 5964989, at *10 (E.D. Pa. Oct. 14, 2015) (R.56) (rejecting employer argument that medical problems were temporary, finding them instead episodic); *Allen v. Baltimore Cty., Md*., 91 F. Supp. 3d 722, 731 (D. Md. 2015) (R.56) ("[W]hen active, Allen's sarcoidosis unmistakably constituted a disability."); *Green v. Teddie Kossof's Salon & Day Spa*, 2015 WL 5675463, at *4 (N.D. Ill. Sept. 24, 2015) (R.56) ("When Green's lumbar radiculopathy flares, pain radiates across her hip and down her legs. The condition also causes numbness and gives Green 'trouble walking, standing for long periods, sitting for long periods, [and] sleeping.' These limitations on Green's major life activities are sufficient for the court to find that her lumbar radiculopathy qualifies as a disability.") (citation omitted); *E.E.O.C. v. Aurora Health Care, Inc*., 2015 WL 2344727, at *12 (E.D. Wis. May 14, 2015) (R.56) (MS); *Showers v. Endoscopy Ctr. of Cent. Pennsylvania, LLC*, 58 F. Supp. 3d 446, 461 (M.D. Pa. 2014) (R.56) (although colon cancer was in remission, it could substantially limit major life activities when active); *Jones v. Honda of Am. Mfg., Inc*., 2015 WL 1036382, at *10 (S.D. Ohio Mar. 9, 2015) (R.56) (back pain flared on occasion, requiring leave from work); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 918 (E.D. Mich. 2015) (R.56) (recurrent bouts of depression); *Roggenbach v. Touro College of Osteopathic Medicine*, 7 F. Supp. 3d 338, 344 (S.D.N.Y. 2014) (R.56) ("Although he may not show symptoms because his HIV is 'episodic or in remission,' it may nevertheless 'limit a major life activity when active.'"); *Walters v. Mayo Clinic Health Sys.-EAU Claire Hosp., Inc.*, 998 F. Supp. 2d 750, 763 (W.D. Wis. 2014) (R.56) ("In light of this broad definition, the court has little trouble finding that plaintiff has put forth more than sufficient evidence to demonstrate that her mental health issues substantially limits one or more major life activities, at least during the period of time or times she experienced heightened anxiety or increased depression due to a reoccurrence of PTSD."); *Moore v. Marriott Int'l, Inc*., 2014 WL 5581046, at *6–7 (D. Ariz. Oct. 31, 2014) (R.56) (epilepsy assessed in active state, during seizures); *Ali v. Hogan*, 2013 WL 5466302, at *7 (N.D.N.Y. Sept. 30, 2013) (R.12) (sufficient evidence regarding asthma attacks); *Esparza v. Pierre Foods*, 2013 WL 550671 (S.D. Ohio Feb. 12, 2013) (motion to dismiss denied in case involving kidney stones); *Edwards v. Chevron U.S.A., Inc.*, 2013 WL 474770, at *2 (S.D. Tex. Feb. 7, 2013) (irritable bowel syndrome a disability when viewed in active state); *Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *10–11 (S.D. Ohio Jan. 28, 2013) (plaintiff was "obviously disabled when the cancer was active, as it substantially limited the major life activity of normal cell growth;" it substantially limited working in that she was off for about two months and had to work half days for another month; if it were to recur and become active again, it would again substantially limit working and normal cell growth); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11–12 (E.D. Pa. Jan. 9, 2013) (fibromyalgia caused various problems during flare-ups; defense argument relying on fact that condition may wax and wane is foreclosed by ADAAA); *Knudsen v. Tiger Tots Community Child Care Center*, 2013 WL 85798, at *3 (Iowa App. Jan. 9, 2013) (unpublished) (sum. j.) (under ADAAA's mandate to look at conditions in their active state, food allergy might be disability); *Kobler v. Illinois Dept. Human*

Services, 2012 WL 5995836, at *2 (N.D. Ill. Nov. 30, 2012) (asthma flare-ups state a claim); *Gannett v. Poudre School Dist. R-1*, 2012 WL 5954092, at *2 (D. Colo. Nov. 28, 2012) (sufficient evidence that when plaintiff's heart condition and related problems were active and aggravated by stress, they constituted disability); *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *10–11 (W.D. Pa. June 11, 2012) (when active, vocal cord edema made speaking difficult and painful); *Mercer v. Arbor E & T*, 2012 WL 1425133, at *6 (S.D. Tex. Apr. 21, 2012); *Katz v. Adecco USA, Inc*., 2012 WL 78156, at *5–6 (S.D.N.Y. Jan. 10, 2012) (cancer in remission covered); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984 995 (W.D. Tex. 2012) ("[T]hat Molina's back condition did not, at least initially, cause her pain every day is not determinative, as a disability can be 'episodic' if it 'substantially limits a major life activity when active.'"); *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638, at *7–8 (E.D. Pa. Dec. 12, 2011) (inability to control bowels or work during flare-ups of irritable bowel syndrome); *Carbaugh v. Unisoft Intern., Inc*., 2011 WL 5553724, at *8 (S.D. Tex. Nov. 15, 2011) ("Carbaugh's evidence that his MS, when active, substantially limits one or more of his major life activities is sufficient evidence to raise a genuine issue of material fact as to whether he was disabled under the ADAAA."); *Medvic v. Compass Sign Co., LLC*, 2011 WL 3513499, at *7 (E.D. Pa. Aug. 10, 2011) (finding stuttering substantially limiting when active); *Norton v. Assisted Living Concepts, Inc*., 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (". . . the court finds that renal cancer, when active, 'substantially limits' the 'major life activity' of 'normal cell growth.' Therefore, that Norton may have been in remission when he returned to work at ALC is of no consequence.") (citation omitted); *Hoffman v. Carefirst of Fort Wayne, Inc*., 737 F. Supp. 2d 976, 985 (N.D. Ind. Aug. 31, 2010) (no dispute that cancer in its active state is substantially limiting). *See also E.E.O.C. v. Old Dominion Freight Line, Inc*., 2015 WL 3895095, at *9 (W.D. Ark. June 24, 2015) (post-trial) (sufficient evidence that alcoholism, described in its active state, substantially limited walking, standing, thinking, communicating, and caring for himself).

d. In addition to epilepsy, PTSD, MS, and cancer listed above, "[o]ther examples of impairments that may be episodic include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 11;[42] *Gogos v. AMS Mechanical Systems, Inc*., 737 F.3d 1170, 1173 (7th Cir. 2013) (R.12) (episode of blood-pressure spike); *Wright v. Stark Truss Co., Inc*., 2012 WL 3029638, at *7 (D.S.C. May 10, 2012) (rejecting defendant's argument that anxiety and depression were at most temporary, even if plaintiff was never diagnosed with "major depression"); *Kinney v. Century Services Corp. II*, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011) ("Regardless whether her depression impacted her work when inactive, there is no question that, by its very nature, inpatient treatment substantially impacts (in fact, precludes) work performance and limits major life activities. Given Ms. Kinney's debilitating symptoms when her depression was active, the Court finds

[42] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

that Ms. Kinney's depression at least raises a genuine issue of fact as to whether she is a qualified individual under the ADA.").

e. "The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1173 (7th Cir. 2013) (R.12) (quoting EEOC guidance); Moore v. Marriott Int'l, Inc., 2014 WL 5581046, at *7 (D. Ariz. Oct. 31, 2014) (R.56) (similar). *Compare Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *10–11 (S.D. Ohio Jan. 28, 2013) (cancer substantially limited working in that she was off for about two months and had to work half days for another month; if it were to recur and become active again, it would again substantially limit working and normal cell growth).

f. The EEOC rejects the view that progressive conditions such as Parkinson's Disease are not substantially limiting their early stages, recognizing that they can still substantially limit bodily functions. 76 Fed. Reg. 16978, 16983 (Mar. 25, 2011).

g. This provision makes it much easier to prove coverage for conditions that have flare-ups. *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 855 (5th Cir. 2010) (psoriatic arthritis); *Feldman v. Law Enforcement Associates Corp.*, 955 F. Supp. 2d 528, 542 (E.D.N.C. 2013) (R.56) (evidence that plaintiff Perry had an episodic MS flare-up). *See also E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 642 n.4 (7th Cir. 2010).

h. *But cf. Feldman v. Law Enforcement Associates Corp*., 955 F. Supp. 2d 528, 538 (E.D.N.C. 2013) (R.56) (plaintiff Feldman's possible mini-stroke or transient ischemic attack "is an acute condition that is different from the more chronic conditions—such as cancer, epilepsy, multiple sclerosis, asthma, major depressive disorder, bipolar disorder, schizophrenia, hypertension, diabetes, and post-traumatic stress disorder—that Congress intended to include within the definition of a disability through the enactment of this provision.")

5. The definition of "major life activities" is expanded.

a. One purpose of the new law is to reject the analysis in *Toyota Motor v. Williams*. Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sep. 25, 2008), set out in the Note to 42 U.S.C. § 12101.[43] *See also Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297 (D.D.C. 2015) (R.56).

[43] *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), had held that the term "major" must be interpreted strictly to create a demanding standard for disability, and thus refers only to "activities that are of central importance to most people's daily lives." The ADAAA explicitly rejects these holdings.

b. Major life activities now "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." 42 U.S.C. § 12102(2)(A). The regulations repeat this list, but also add sitting, reaching, and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i). *See also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015) (R.56) ("We therefore defer to the EEOC's determination and hold that interacting with others is a major life activity."); *Verhoff v. Time Warner Cable, Inc*., 299 Fed. Appx. 488, 494 (6th Cir. 2008) (unpublished) ("there is no longer any dispute that 'sleeping' and 'thinking' are major life activities.").

c. "Major life activities" also include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. § 12102(2)(B). The regulations repeat this list, but also add functions of special sense organs and skin, as well as genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions. 29 C.F.R. § 1630.2(i)(1)(ii). *See also Childers v. Hardeman Cnty. Bd. of Educ*., 2015 WL 225058, at *6 (W.D. Tenn. Jan. 15, 2015) (R.56) (recognizing genitourinary functions).

i. The EEOC "added these examples to further illustrate the nonexhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).[44]

ii. Moreover, "[t]he operation of a major bodily function includes the operation of an individual organ within a body system." 29 C.F.R. § 1630.2(i)(1)(ii). *See also EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, § II.A.[45] "This would include, for example, the operation of the kidney, liver, pancreas, or other organs." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011). *See also* EEOC Q&A, Question 8.[46]

iii. The addition of the bodily-function examples "was an important addition to the statute . . . [and] was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or

[44] These additions are also consistent with the body systems listed in the definition of "impairment," and with the DOL's regulations implementing the Workforce Investment Act of 1998, 29 U.S.C. 2801, et seq. 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

[45] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[46] For some of the legislative history regarding kidney disease, see, *e.g*., Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8350 (adding major bodily functions to the definition of major life activities "is important for people with . . . kidney disease . . . because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability."). For some history regarding liver disease, see, *e.g*., Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id.* at S8350 (adding major bodily functions to the definition of major life activities "is important for people with liver disease because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.").

wrongly dismissed as falling outside the definition of 'major life activities' under the ADA." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

iv. "The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011). *See also Gough v. Lincoln Cty. Bd. of Cty. Commissioners*, 2016 WL 164632, at *3 (W.D. Okla. Jan. 13, 2016) (R.56) ("In the present case, Plaintiff suffered a back injury and, after prolonged treatment, was released from medical care with a permanent restriction. The spine and other bones in his back are, of course, part of Plaintiff's musculoskeletal system. The permanent restriction of lifting no weight greater than seventy-five pounds falls into the category of "major life activity."); *Cole v. Weatherford Int'l*, 2015 WL 3896835, at *4 (D. Colo. June 23, 2015) (R.56) (by definition, the plaintiff's heart condition limited circulatory functions); *Bellofatto v. Red Robin Int'l, Inc*., 2014 WL 7365788, at *10 (W.D. Va. Dec. 24, 2014) (R.56) (Type 1 diabetes impacts the functioning of the endocrine system); *Willoughby v. Connecticut Container Corp*., 2013 WL 6198210, at *9 (D. Conn. Nov. 27, 2013) (R.56) (diabetes, which by definition is a disease impacting the functioning of the endocrine system, could easily be found to be an actual disability); *Lema v. Comfort Inn*, 2013 WL 1345510, at *9 (E.D. Cal. Apr. 3, 2013) (Title III case) (osteogenesis imperfecta "unquestionably" an ADA disability, in light of various facts, including its limitation of the major bodily function of cell growth); *Scavetta v. King Soopers, Inc*., 2013 WL 316019, at *2 (D. Colo. Jan. 28, 2013) (sufficient evidence that rheumatoid arthritis an actual disability, finding it prevented recreational activities and giving shots, and citing language in 29 C.F.R. § 1630.2(i)(2) that "rheumatoid arthritis affects musculoskeletal functions"); *Coker v. Enhanced Senior Living, Inc*., 897 F. Supp. 2d 1366, 1375–1376 (N.D. Ga. 2012) (partial summary judgment to plaintiff on disability, based in part on doctor's affidavit that breast disease—which although non-cancerous, required surgery—was "the result of abnormal cell growth and abnormal endocrine and reproductive functioning").

v. The inclusion of major bodily functions would, for example, change the outcome in those cases that analyzed HIV infection solely in terms of a person's ability or desire to procreate; courts can now focus on the major life activity of immune functioning. 29 C.F.R. Part 1630 App., § 1630.2(i),

76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).[47] *See also Croy v. Blue Ridge Bread, Inc*., 2013 WL 3776802, at *3 n.1 (W.D. Va. July 15, 2013) (R.56) (HIV); *Horgan v. Simmons*, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010) ("[I]t is certainly plausible—particularly, under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system. Such a conclusion is consistent with the EEOC's proposed regulations to implement the ADAAA which lists HIV as an impairment that will consistently meet the definition of disability.").[48]

vi. Similarly, the law corrects previous case law finding that cirrhosis of the liver caused by Hepatitis B was not a disability "because liver function—unlike eating, working, or reproducing—'is not integral to one's daily existence.'" 29 C.F.R. Part 1630 App., § 1630.2(i).[49]

vii. Likewise, cancer substantially limits normal cell growth, regardless of its impact on the ability to care for oneself, sleep, or concentrate, in effect overruling contrary case law. 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).[50] *See also Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (renal cancer, when active, substantially limited major life activity of normal cell growth, and qualified as a disability even if that was the only major life activity substantially limited); *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (plaintiff adequately pled actual disability based on leukemia and heart disease; he alleged substantial limitation in normal cell growth and circulatory function).

viii. *See also Gogos v. AMS Mechanical Systems, Inc*., 737 F.3d 1170, 1173 (7th Cir. 2013) (R.12) (hypertension—in its active state and without mitigating measures—can substantially limit functions of cardiovascular or circulatory system); *Hafermann v. Wisconsin Dep't of Corr*., 2016 WL 206484, at *4 (W.D. Wis. Jan. 15, 2016) (R.56) (undisputed that plaintiff suffered from coronary disease; sufficient evidence of substantial limitation in function of cardiovascular system); *Day v. Nat'l Elec. Contractors Association*, 91 F. Supp. 3d 1008, 1018 (S.D. Ohio 2015) (R.56) (bowel and bladder functioning are major life activities); *Allen v. Baltimore Cty., Md*., 91 F. Supp. 3d 722, 731 (D. Md. 2015) (R.56) ("In light of these changes, Allen

[47] Congress and the EEOC both singled out *U.S. v. Happy Time Day Care Ctr*., 6 F. Supp. 2d 1073 (W.D. Wis. 1998), as an example of the kind of unfortunate HIV analysis that will change under the ADAAA. 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

[48] For more about HIV infection, see ¶ 9(d)(x) below.

[49] Congress and the EEOC both singled out *Furnish v. SVI Sys., Inc*., 270 F.3d 445 (7th Cir. 2001), as an example of this kind of case. 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

For some of the legislative history regarding liver disease, see, *e.g*., Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8350 (adding major bodily functions to the definition of major life activities "is important for people with … liver disease because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.").

[50] Congress and the EEOC both singled out *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002), as an example of this kind of case. 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

plainly had a disability within the ADA's meaning. Since at least 2000, Allen has had a serious medical condition—sarcoidosis—that has affected his immune system. When the symptoms caused by his condition flared up, he experienced serious physical impairment to a variety of his bodily functions and organs, including his legs, back, neck, and sinuses."); *Jordan v. Crossroads Util. Serv., LLC*, 2015 WL 4724803, at *4 (W.D. Tex. Aug. 10, 2015) (R.56) ("Accordingly, because Lupus is an autoimmune disease, the court assumes arguendo that Plaintiff is disabled under the ADA."); *Gaube v. Day Kimball Hosp*., 2015 WL 1347000, at *9 (D. Conn. Mar. 24, 2015) (R.12) (depression limited brain function); *Hubbard v. Day & Zimmermann Hawthorne Corp*., 2015 WL 1281629, at *5 (D. Nev. Mar. 20, 2015) (R.56) ("Plaintiff has offered evidence through her testimony that she has a physical impairment [hysterectomy] that affects major life activities, including working and the operation of her endocrine system."); *Buser v. Eckerd Corp*., 2015 WL 418172, at *6 (E.D.N.C. Feb. 2, 2015) (R.56) (sufficient evidence that tremors substantially limited neurological function, even though plaintiff was not limited in day-to-day activities);); *Childers v. Hardeman Cnty. Bd. of Educ*., 2015 WL 225058, at *6 (W.D. Tenn. Jan. 15, 2015) (R.56) (sufficient evidence that interstitial cystitis, diverticulosis, and IBS substantially limited bowel, bladder, digestive and genitourinary functions); *Showers v. Endoscopy Ctr. of Cent. Pennsylvania, LLC*, 58 F. Supp. 3d 446, 461 (M.D. Pa. 2014) (R.56) (colon cancer); *Baron v. Advanced Asset & Prop. Mgmt. Solutions, LLC*, 15 F. Supp. 3d 274, 282 (E.D.N.Y. 2014) (R.56) (even though heart condition—severe aortic regurgitation ("SAR")—did not make plaintiff feel bad or interfere with work, there was sufficient evidence that it substantially limited his circulatory function); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *4 (M.D. La. July 3, 2014) (R.56) (without blood-thinner and cholesterol medication, and implanted stents, plaintiff's carotid artery disease substantially limited circulatory function by causing plaque build-up in artery walls, leading to blood clots and possible stroke); *Serlin v. Alexander Dawson Sch.*, 2014 WL 1573535, at *4 (D. Nev. Apr. 17, 2014) (R.56) (major life activities include bowel and bladder functioning, and plaintiff had to use restroom between 10 and 20 times per day as a result of her breast-cancer surgeries); *Lafata v. Dearborn Heights School Dist. No. 7*, 2013 WL 6500068, at *8 (E.D. Mich. Dec. 11, 2013) (R.56) (effect of muscle wasting—apparently caused by Charcot Marie Tooth syndrome—would seem to substantially limit musculoskeletal functions); *Stafford v. King*, 2013 WL 3835774, at *4 (S.D. Miss. July 24, 2013) (non-employment) (R.12) (slow and uncomfortable writing, resulting from muscular dystrophy, substantially limited communicating); *Pilling v. Bay Area Rapid Transit*, 881 F.Supp.2d 1152, 1159 n.8 (N.D. Cal. 2012) (R.12) (even though plaintiff took only a little longer than normal to use the bathroom, he voided through an apparatus because of cancer-related colostomy); *Kravtsov v. Town of Greenburgh*, 2012 WL 2719663 (S.D.N.Y. July 9, 2012) (non-employment claim) (sufficient evidence that plaintiff was substantially limited in functioning of digestive and bowel systems as a result of losing portions of his gastrointestinal tract to cancer;

he could only eat bland food in several small meals per day, and was prone to nausea, dizziness, and explosive diarrhea); *Barlow v. Walgreen Co.*, 2012 WL 868807, at *4 (M.D. Fla. Mar. 14, 2012) (spinal stenosis, cervical disc disease, neural foraminal stenosis, and cervical radiculopathy substantially limited operation of musculoskeletal system; plaintiff had great difficulty lifting even light objects [e.g., gallon of milk] and great difficulty crouching for more than short periods, "which put her at a disadvantage as compared to 'most people in the general population,' and certainly qualify as a significant restriction."); *Seim v. Three Eagles Communications, Inc*., 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (sufficient evidence that Graves' disease and its medication side effects substantially limited various major life activities, including functions of the immune, circulatory, and endocrine systems).[51]

d. Both the list of major life activities and the list of major bodily functions are illustrative and non-exhaustive, as expressly stated in 42 U.S.C. § 12102(2)(A) and (B). *See also* 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011) (the absence of a particular life activity or bodily function from the list does not create a negative implication); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *9 (E.D.N.C. Apr. 6, 2015) (R.12); *Moore v. Chilton County Bd. of Educ*., 1 F. Supp. 3d 1281, 1295–96 (M.D. Ala. 2014) (R.56) (assuming without deciding that running and jumping are major life activities); *Bonzani v. Shinseki*, 2013 WL 5486808, at *7 (E.D. Cal. Sept. 30, 2013) (R.56) (knee injury) (squatting and running are major life activities under the ADAAA).

e. Courts have identified other major life activities in light of the ADAAA's broad construction. *See,* e.g., *Marsh v. Terra Int'l (Oklahoma), Inc*., 122 F. Supp. 3d 1267, 1280 (N.D. Okla. 2015) (R.56) (because carrying was recognized even pre-ADAAA, it is a major life activity under the more expansive interpretation); *Maxwell v. County of Cook*, 2014 WL 3859981, at *3 (N.D. Ill. Aug. 4, 2014) (R.12) (pushing and pulling); *Rosa v. City of Chicago*, 2014 WL 1715484, at *5 (N.D. Ill. May 1, 2014) (R.56) (climbing); *Doe v. Samuel Merritt University*, 921 F. Supp. 2d 958, 967 (N.D. Cal. 2013) ("Given the state of the caselaw, the recent directives of Congress, and the importance of test-taking in our society, the Court finds that Plaintiff has, at a minimum, raised 'serious questions' as to whether test-taking is a major life activity under the ADA."); *Bonzani v. Shinseki*, 2013 WL 5486808, at *7 (E.D. Cal. Sept. 30, 2013) (R.56) (knee injury) (squatting and running); *Smith v. Valley Radiologists, Ltd*., 2012 WL 3264504, at *4 (D. Ariz. Aug. 9, 2012) (driving).52 *But cf. Thomas v. Astrue*, 2012 WL 6011878 (D. Del.

[51] *Compare Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, Question 1 (DOJ Jan. 2013), http://www.ada.gov/q&a_lesley_university.htm ("Major life activities also include major bodily functions, such as the functions of the gastrointestinal system. Some individuals with food allergies have a disability as defined by the ADA—particularly those with more significant or severe responses to certain foods. This would include individuals with celiac disease and others who have autoimmune responses to certain foods, the symptoms of which may include difficulty swallowing and breathing, asthma, or anaphylactic shock.").

[52] The legislative history also lists other major life activities. *See* H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at p. 10 (June 23, 2008) ("The Committee also seeks to clarify how the bill's concept of 'materially restricts' should be applied for individuals with specific learning disabilities who are frequently substantially limited in the major life

Nov. 30, 2012) (driving not a major life activity even under ADAAA). *See also Buser v. Eckerd Corp*., 2015 WL 418172, at *7 (E.D.N.C. Feb. 2, 2015) (R.56) (osteoarthritis and hip-replacement surgery substantially limited stooping).

f. In determining other examples of major life activities, the term "major" shall *not* be interpreted strictly to create a demanding standard for disability. 29 C.F.R. § 1630.2(i)(2); *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297 (D.D.C. 2015) (R.56); *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL 3205779, at *3 (D. Kan. July 28, 2011).[53]

g. "Whether an activity is a 'major life activity' is not determined by reference to whether it is of "central importance to daily life." 29 C.F.R. § 1630.2(i)(2). *See also* 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007–17008 (Mar. 25, 2011); *id*. at § 1630.2(j)(1)(viii), 76 Fed. Reg. at 17011; *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 590 (5th Cir. 2016) (R.56) ("The district court concluded that Cannon was not disabled because his 'injured shoulder did not substantially impair[] his daily functioning.' Whatever merit that finding of no disability may have had under the original ADA, it is at odds with changes brought about by the ADA Amendments Act of 2008."). "Thus, for example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting. Similarly, someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).[54] *See also* 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011) (giving same lifting example above, and also noting that the major life activity of performing manual tasks has many different manifestations [e.g., performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure], and "[s]uch tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks.").

h. The EEOC also expressed approval for the portion of *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998), holding that a major life activity does not have to have a "public, economic or daily aspect." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

activities of learning, reading, writing, thinking, or speaking."); *id*. at 11 ("Other activities the Committee considers to be examples of major life activities include interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination.").

[53] Note that EEOC also eliminated its prior regulatory definition referencing "basic activities that most people in the general population 'can perform with little or no difficulty," at the request of a disability-rights group. 76 Fed. Reg. 16978, 16980–16981 (Mar. 25, 2011).

[54] For more on monocular vision, see ¶ 9(h) below.

i. "Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities." 29 C.F.R. Part 1630 App., § 1630.2(i), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011).

j. Prior, more restrictive case law is suspect. *See, e.g., Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297 (D.D.C. 2015) (R.56); *Brtalik v. South Huntington Union Free School Dist.*, 2012 WL 748748, at *3 (E.D.N.Y. Mar. 8, 2012) ("The ADA Amendments . . . broaden the definition of disability and the class of major life activities protected by the ADAAs a result, pre-ADAAA case law rejecting major life activities is suspect."); *Cohen v. CHLN, Inc.*, 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("Defendants also argue that 'climbing stairs' is not a major life activity within the meaning of the ADA. The case Defendants offer in support of this proposition, however, cites to authority using the more restrictive pre-amendment ADA.") (cite omitted). *But cf. Marsh v. Terra Int'l (Oklahoma), Inc.*, 122 F. Supp. 3d 1267, 1279–80 (N.D. Okla. 2015) (R.56) (although recognizing that older cases are now suspect, court still rejected participation in sports as a major life activity).

k. Only one major life activity need be limited.

i. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. 42 U.S.C. § 12102(4)(C); 29 C.F.R. § 1630.2(j)(1)(viii). *See also Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *11 (S.D. Ohio Sept. 5, 2014) (R.56).

ii. "This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).

iii. "For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).

iv. This also confirms that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity. *See Smith v. Donahoe*, 2013 WL 5467679

(E.D. Pa. Oct. 1, 2013) (R.56) (focus is not on what plaintiff with shoulder impairment *can* do). *See also Brady v. United Refrigeration, Inc*., 2015 WL 3500125, at *11 n.22 (E.D. Pa. June 3, 2015) (R.56) (although plaintiff with multiple chemical sensitvity was able to pursue activities outside the workplace even in environments that were not fragrance-free, she did not have to do them for eight hours every day in a confined space).[55]

v. "In determining whether an individual has a disability under the 'actual disability' or 'record of' prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. § 1630.2(j)(4)(iii). *See also Kravits v. Shinseki*, 2012 WL 604169, at *6 (W.D. Pa. Feb. 24, 2012) ("Contrary to this regulation, the Department seeks to undercut Mr. Kravits's evidence of disability by highlighting his physical, social, and academic achievements. Mr. Kravits's ability to engage in the activities identified by the Department do not alter the fact that he has presented evidence that could reasonably establish that his diagnosed conditions substantially limited his ability to sleep and learn, as compared to most people in the general population."); *Feldman v. Law Enforcement Associates Corp.*, 2011 WL 891447, at *8 n.5 (E.D.N.C. Mar. 10, 2011) (citing same language from proposed regulations, that "[i]n determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment.").

vi. Also, the fact that a person disavows that she "is disabled" and maintains that she is fully capable of doing her work does not mean that she does not have a legally recognized disability. *Barlow v. Walgreen Co*., 2012 WL 868807, at *5 (M.D. Fla. Mar. 14, 2012) ("While Plaintiff has declined to label herself as disabled, she has stated that she suffers from the various musculoskeletal disorders described herein, and has repeatedly detailed her consequent physical limitations resulting therefrom.").

vii. "In addition, this rule of construction is intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA. To the extent cases pre-dating the applicability of the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011) (cites and internal quotes omitted).[56]

[55] The ability to do many things is likewise irrelevant in a "regarded as" claim. *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, *18 (W.D. Pa. Sept. 28, 2011).

[56] As an example of such rejected analysis, the EEOC cites *Holt v. Grand Lake Mental Health Ctr., Inc*., 443 F.3d 762

6. Impairment

a. The EEOC regulations state that "[p]hysical or mental impairment means—(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h).

b. Although the ADAAA itself does not include a statutory definition for the term "impairment," some of the legislative history supports the pre-ADAAA regulatory definitions. 29 C.F.R. Part 1630 App., § 1630.2(h), 76 Fed. Reg. 16978, 17006–17007 (Mar. 25, 2011). Thus, the regulatory definition continues to be based on the § 504 regulations, but it "adds additional body systems to those provided in the section 504 regulations and makes clear that the list is nonexhaustive." *Id*., 76 Fed. Reg. at 17007. *See also Young v. McCarthy-Bush Corp*., 2014 WL 1224459, at *5 (N.D. Ga. Mar. 24, 2014) (R.56) (courts may rely on regulations); *Sacks v. Gandhi Eng'g, Inc*., 11 CIV. 5778 DAB DCF, 2014 WL 774965, at *17–18 (S.D.N.Y. Feb. 27, 2014) (giving EEOC regulations "significant deference," and recognizing conditions affecting musculoskeletal system); *Moore v. Chilton County Bd. of Educ*., 1 F. Supp. 3d 1281, 1293 n.9 (M.D. Ala. 2014) (R.56) (following regs in non-employment case).

c. Generally, the ADAAA requires that "impairment" be broadly construed. 42 U.S.C. § 12102(4)(A).[57]

d. Impairment does not require formal diagnosis or complete understanding of a condition's cause. *Punt v. Kelly Services, & GE Controls Solutions*, 2016 WL 67654, at *8 (D. Colo. Jan. 6, 2016) (R.56) (The Court gives no credence to GE's contention that Punt failed to inform anyone at GE that her condition impaired a major life activity. The statute clearly defines the disability in reference to the actual *impairment*.") (emphasis in original; appeal pending on other grounds); *McDaniel v. Milligan*, 2014 WL 3700573, at *4 (E.D. Ark. July 25, 2014) (R.56) (disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment; "while the doctor's note never explicitly stated that Ms. McDaniel had narcolepsy, it stated several effects of her impairments that have similar effects of narcolepsy"); *Martsolf v. United Airlines*,

(10th Cir. 2006) (holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a "broad range" of manual tasks). 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).

[57] Note, too, that the ADAAA explicitly states that "regarded as" claims are not actionable if the impairment is transitory. 42 U.S.C. § 12102(3)(B). This means that the term "impairment" must be broad enough to include conditions that *are* transitory; otherwise this restriction would be mere surplusage.

Inc., 2015 WL 4255636, at *10 (W.D. Pa. July 14, 2015) (R.56) ("United argues that at best, these individuals only had 'knowledge of symptoms that could possibly be related to a speech or hearing disability.' In this case, however, Martsolf's symptoms (trouble hearing and speaking) are indistinguishable from her alleged ADA-covered disability (hearing loss that affects her ability to speak)."); *Hubbard v. Day & Zimmermann Hawthorne Corp*., 2015 WL 1281629, at *5 n.6 (D. Nev. Mar. 20, 2015) (R.56) ("Defendant appears to suggest that just because a physician is not certain as to the reason for the symptoms that a patient experiences, the symptoms themselves cannot be disabling. This is absurd. Science does what it can, but not all of the mysteries of the human body have been solved. Sometimes a doctor cannot determine what causes a disabling symptom, but that does not mean the symptom does not exist."); *Hutchinson v. Ecolab, Inc*., 2011 WL 4542957, at *9 n.10 (D. Conn. Sept. 28, 2011); *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, § II.A and n.144 ("An impairment's cause is not relevant in determining whether the impairment is a disability.").[58] *See also Sacks v. Gandhi Eng'g, Inc*., 2014 WL 774965, at *3–4, 17–18 (S.D.N.Y. Feb. 27, 2014) (R.56) (perceptions that plaintiff lacked agility and was unable to perform job tasks—which involved walking, climbing, and bending—"give rise to an inference that Defendant believed that Plaintiff had a physiological condition, most likely involving the musculoskeletal system.").

e. Impairments can also include temporary injuries, and not just long-term conditions. *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 332–333 (4th Cir. 2014) (R.12); *Young v. McCarthy-Bush Corp*., 2014 WL 1224459, at *5 (N.D. Ga. Mar. 24, 2014) (R.56) ("Even assuming that having a knee replacement is a temporary impairment, as Defendant suggests, she is still considered disabled under the ADAAA because her impairment significantly limited major life activities while she recovered, such as walking, bathing, or lifting more than twenty-five pounds.").

f. Characteristic manifestations of an impairment are considered part of the impairment. *Moates v. Hamilton County*, 976 F. Supp. 2d 984, 992–93 (E.D. Tenn. 2013) (R.56) (because plaintiff showed causal relationship between arthritis and her rotator cuff injury, court did not need to consider whether the rotator cuff injury was independently a qualifying disability).

g. Courts have found that various conditions are impairments. *See, e.g., Cain v. Esthetique*, ___ F. Supp. 3d ___, 2016 WL 1599490, at *9 (S.D.N.Y. Apr. 20, 2016) (R.56) (hallucinations constitutes a "mental impairment"); *Izzo v. Genesco, Inc*., ___ F. Supp. 3d ___, 2016 WL 1122021, at *5 n.2 (D. Mass. Mar. 22, 2016) (R.56) ("no question that alcoholism is an impairment," *quoting Bailey v. Georgia–Pac. Corp*., 306 F.3d 1162, 1167 (1st Cir. 2002)); *U.S. E.E.O.C. v. St. Joseph's Hosp., Inc*., 2015 WL 685766, at *4 (M.D. Fla. Feb. 18, 2015) (R.56) ("gait dysfunction" due to hip replacement); *Childers v. Hardeman Cnty. Bd. of Educ*., 2015 WL 225058, at *5 (W.D. Tenn. Jan. 15, 2015) (R.56) (interstitial cystitis, diverticulosis, and IBS); *Moore v. Marriott Int'l, Inc*., 2014 WL 5581046, at *5 (D. Ariz. Oct. 31, 2014) (R.56) (epilepsy); *Souza v. Silva*, 2014 WL 2452579, at *8 (D. Haw. May

[58] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

30, 2014) (R.56) (stress and depression); *Poole v. Centennial Imports, Inc*., 2014 WL 2090810, at *2 (D. Nev. May 19, 2014) (R.56) (knee pain); *Bouard v. Ramtron Int'l Corp*., 2014 WL 1389959, at *2 (D. Colo. Apr. 9, 2014) (R.56) (chronic rhinitis and chronic or recurrent acute sinusitis triggered by scented substances); *CRC Health Group, Inc. v. Town of Warren*, 2014 WL 2444435, at *10 (D. Me. Apr. 1, 2014) (R.56) (drug addiction); *Sacks v. Gandhi Eng'g, Inc*., 2014 WL 774965, at *3–4, 17–18 (S.D.N.Y. Feb. 27, 2014) (R.56) (perceptions that plaintiff lacked agility and was unable to perform job tasks—which involved walking, climbing, and bending—"give rise to an inference that Defendant believed that Plaintiff had a physiological condition, most likely involving the musculoskeletal system."); *Rubano v. Farrell Area School Dist*., 991 F. Supp. 2d 678, 692 (W.D. Pa. 2014) (R.56) (depression); *Akerson v. Pritzker*, 980 F. Supp. 2d 18, 29 (D. Mass. 2013) (R.56) (inflammatory bladder disease known as interstitial cystitis); *Mengel v. Reading Eagle Co.*, 2013 WL 1285477, at *3–4 (E.D. Pa. Mar. 29, 2013) (balance problems related to brain-tumor surgery); *Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *10 (S.D. Ohio Jan. 28, 2013) (cancer "unquestionably" an impairment based on pre-ADAAA case law, because it was a physiological condition affecting multiple body systems, and because it was treated by mastectomy resulting in anatomical loss); *Scavetta v. King Soopers, Inc.*, 2013 WL 316019, at *2 (D. Colo. Jan. 28, 2013) ("rheumatoid arthritis is a recognized impairment"); *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *9 (M.D. Tenn. Aug. 10, 2012) (alleged impairment was not liver biopsy but rather "iron overload" in the blood, or hemochromatosis, which is a disorder of iron metabolism, is potentially life-threatening, and affects one or more body systems including the hemic system; plaintiff had blood-draining treatments for two years); *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012) (fibromyalgia, thoracolumbar strain, irritable bowel syndrome, degenerative disc disease, sleep apnea, ulnar neuropathy at the left elbow, hypertension, depressive disorder, anxiety disorder, and post-traumatic stress disorder); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *18 (W.D. Pa. Sept. 28, 2011) (chronic pain condition); *Negron v. City of New York*, 2011 WL 4737068, at *10 (E.D.N.Y. Sept. 14, 2011) (lodged bullet fragments causing pain and inflammation). *See also BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012) (finding obesity an impairment under state law, relying in part on the ADAAA). *But cf. Healy v. National Bd. of Osteopathic Medical Examiners, Inc.*, 870 F.Supp.2d 607, 618–619 (S.D. Ind. 2012) (ADA Title III case) (insufficient evidence that "social phobia" or testing anxiety were actually impairments); *Sibilla v. Follett Corp*., 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012) ("The fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment.").

h. *Cf. Neely v. Benchmark Family Servs*., ___ F. App'x ___, 2016 WL 364774, at *4 (6th Cir. Jan. 26, 2016) (R.56) ("Neely's bare assertions of sleep apnea, without any supporting medical evidence, cannot establish a 'physical or mental impairment' within the meaning of the ADA."); *Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) (R.56) ("While the College seems to characterize the bypass surgery itself as the impairment, we agree with the district court that the surgery was the treatment, not the

impairment."); *Cotto v. Rochester City School Dist*., 2013 WL 4520026, at *7 (W.D.N.Y. Aug. 26, 2013) (R.56) (although record of addiction may be disability, plaintiff offered no such evidence; mere use of drugs is not enough).[59]

i. The EEOC continues its position that although pregnancy is not an impairment because it is not the result of a physiological disorder, a pregnancy-related impairment may satisfy any of the three prongs of the disability definition. 29 C.F.R. Part 1630 App., § 1630.2(h), 76 Fed. Reg. 16978, 17007 (Mar. 25, 2011); *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, § II.A and Exs. 16–18;[60] *Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues*, Questions 18–21.[61] *See also Varone v. Great Wolf Lodge of the Poconos, LLC*, 2016 WL 1393393, at *3 (M.D. Pa. Apr. 8, 2016) (R.12); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *9–11 (E.D.N.C. Apr. 6, 2015) (R.12); *Heatherly v. Portillo's Hot Dogs, Inc*., 958 F. Supp. 2d 913, 921 (N.D. Ill. 2013) (R.56) (high-risk pregnancy restricted employee to "light duty," meaning no heavy lifting); *McKellips v. Franciscan Health System*, 2013 WL 1991103, at *3–4 (W.D. Wash. May 13, 2013) (leave to replead) (pregnancy-related complications may be disability); *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, 2013 WL 121838, at *2–3 (S.D. Ind. Jan. 9, 2013) (plaintiff sufficiently pleaded that pregnancy-related complications were disability); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *5–6 (S.D. Fla. July 25, 2012) (sufficient pleadings based on baby in breech presentation with three ER admissions and numerous pregnancy-related symptoms).

j. The EEOC also takes the position that "[t]he definition of 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' rage and are not the result of a physiological disorder." *Sacks v. Gandhi Eng'g, Inc*., 11 CIV. 5778 DAB DCF, 2014 WL 774965, at *17 (S.D.N.Y. Feb. 27, 2014), *citing* 29 C.F.R. Pt. 1630, App. *See also Morriss v. BNSF Ry. Co*., ___ F.3d ___, 2016 WL 1319407, at *7 (8th Cir. Apr. 5, 2016) (R.56) ("In sum, we conclude that for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition. This remains the standard even after enactment of the ADAAA, which did not affect the definition of physical impairment.")

7. "Record Of" Disability

a. The ADAAA does not explicitly change the "record of" prong of the disability definition.[62]

[59] Note that some courts have held that individuals are protected by the ADA if they are erroneously regarded as engaging in drug use, even if there is no evidence that they are perceived as having an addiction. *See Izzo v. Genesco, Inc*., ___ F. Supp. 3d ___, 2016 WL 1122021, at *4–5 (D. Mass. Mar. 22, 2016) (R.56), relying on 42 U.S.C. § 12114(b)(1)–(3).

[60] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[61] Available online at http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm.

[62] Note that an individual may establish coverage under any one or more of the three prongs of the disability definition. 29 C.F.R. § 1630.2(g)(2); 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011).

b. The regulations continue to define an individual with a "record of" disability as an "individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k)(1).

c. "Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis." 29 C.F.R. § 1630.2(k)(2).

d. "An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment." 29 C.F.R. § 1630.2(k)(2). *See also Davis v. Vermont, Dept. of Corr*., 868 F. Supp. 2d 313, 326 (D. Vt. 2012 (R.12) (sufficient facts pled regarding history of surgery).

e. "In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph [29 C.F.R. § 1630.2](j) of this section apply." 29 C.F.R. § 1630.2(k)(2).

f. By way of example, "the 'record of' provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. . . .Similarly, an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder." 29 C.F.R. Part 1630 App., § 1630.2(k), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011). *See also E.E.O.C. v. Midwest Regional Medical Center, LLC.*, 2014 WL 3881418, at *4 (W.D. Okla. Aug. 7, 2014) (R.56) (citing above guidance in finding that history of skin cancer was "record of" disability as a matter of law).

g. "Such evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a 'record of' a substantially limiting impairment—and thus be protected under the 'record of' prong of the statute—even if a covered entity does not specifically know about the relevant record. Of course, for the covered entity to be liable for discrimination under title I of the ADA, the individual with a 'record of' a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability. 29 C.F.R. Part 1630 App., § 1630.2(k), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011).

h. "The terms 'substantially limits' and 'major life activity' under the second prong of the definition of ''disability'' are to be construed in accordance with the same principles applicable under the 'actual disability' prong, as set forth in § 1630.2(j)." 29 C.F.R. Part 1630 App., § 1630.2(k), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011).

i. "Individuals who are covered under the 'record of' prong will often be covered under the first prong of the definition of disability as well. This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. See 42 U.S.C. 12102(4)(D); § 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the 'actual disability' prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the 'record of' prong based on his history of having had an impairment that substantially limited normal cell growth." 29 C.F.R. Part 1630 App., § 1630.2(k), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011).

j. The Congressional purposes make clear that the broad interpretation of disability in *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), is more in line with Congressional intent than the much more restrictive analyses in *Sutton* or *Toyota*. Pub. L. 110–325, § 2(b)(3), 122 Stat. 3553 (Sep. 25, 2008) (relating to prong three), set out in the Note to 42 U.S.C. § 12101. "Congress expected that the definition of disability and related terms, such as 'substantially limits' and 'major life activity,' would be interpreted under the ADA 'consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act'—i.e., expansively and in favor of broad coverage." 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011). *See also* 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011) ("In addition, unless expressly stated otherwise, the standards applied in the ADA are intended to provide at least as much protection as the standards applied under the Rehabilitation Act of 1973."). Thus, the *Arline* "record of" holding—that a history of an impairment requiring hospitalization is sufficient to show a "record of" disability—should control. *Compare, e.g., O'Leary v. Infrasource Transmission Services Co*., 758 F. Supp. 2d 9, 24 (D. Me. 2010) (*Arline* "categorized an impairment that was 'serious enough to require hospitalization' as an impairment that substantially limits one or more major life activities'").

k. "An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or 'monitoring' appointments with a health care provider." 29 C.F.R. § 1630.2(k)(3). *See also* 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(d); 29 C.F.R. Part 1630 App., § 1630.2(k), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011); *id*. at § 1630.2(o), 76 Fed. Reg. at 17015; *id*. at § 1630.9(e), 76 Fed. Reg. at 17016. This is consistent with 42 U.S.C. § 12201(h), which expressly excludes accommodations in "regarded as" claims, but does not do so for "record of" claims.

l. *See also Atwell v. Indianapolis-Marion Cty. Forensic Servs. Agency*, ___ F. Supp. 3d ___, 2016 WL 807850, at *8 (S.D. Ind. Mar. 2, 2016) (R.56) (sufficient evidence of "record of" disability based on doctor's statement, approved STD, and frequent

complaints by plaintiff of post-concussive symptoms, which the employer acknowledged and one supervisor tried to assist with); *Fortkamp v. City of Celina*, ___, F. Supp. 3d ___, 2016 WL 375075, at *7–8 (N.D. Ohio Feb. 1, 2016) (R.56) (records documenting old back injury, physical condition thereafter, and ensuing multi-year absence from work are evidence of a "record of" disability); *E.E.O.C. v. Aurora Health Care, Inc*., 2015 WL 2344727, at *12 (E.D. Wis. May 14, 2015) (R.56) (fact issue whether MS was "record of" disability); *Bocock v. Specialized Youth Services of Virginia, Inc.*, 2014 WL 8515285, at *4 (W.D. Va. Dec. 15. 2014) (R.12) ("Alleging three years of ongoing therapy and medication allows the Court to infer that there is a record of Bocock's impairments, and as discussed above, she adequately alleges that her impairments substantially limit one or more major life activities."), *adopted in relevant part*, 2015 WL 1611387 (W.D. Va. Apr. 10, 2015); *Davis v. Vermont, Dept. of Corr*., 868 F. Supp. 2d 313, 326 (D. Vt. 2012 (R.12) (court could reasonably infer that employment or medical records existed from allegations related to medical absence and hernia surgery); *Wright v. Stark Truss Co., Inc*., 2012 WL 3029638, at *6–7 (D.S.C. May 10, 2012) (sufficient evidence that anxiety and depression was "record of" disability); *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, Ex. 17 (unlawful to reject applicant because of history of gestational diabetes).[63] *But cf. Cotto v. Rochester City School Dist*., 2013 WL 4520026, at *7 (W.D.N.Y. Aug. 26, 2013) (R.56) (although record of addiction may be disability, plaintiff offered no evidence of addiction; mere use not enough).

8. Regarded As—The "regarded as" prong[64] is changed substantially.

a. Regarded-as disability only requires proof of an impairment

i. An individual is "regarded as" having a disability if the individual is subjected to a prohibited act based on 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); 29 C.F.R. §§ 1630.2(g)(1)(iii) and 1630.2(*l*)(1).

ii. In other words, "regarded as" simply requires proof of an actual or perceived impairment; there is no requirement that the impairment be limiting in any way (either actually or perceived). "Whether an individual's impairment 'substantially limits' a major life activity is not relevant to coverage under … (the 'regarded as' prong) of this section." 29 C.F.R. § 1630.2(j)(2). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011) ("In any case involving coverage solely under the 'regarded as' prong of the definition of 'disability' (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is 'substantially limited' in any major life

[63] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[64] Note that as before, an individual may establish coverage under any one or more of the three prongs of the disability definition. 29 C.F.R. § 1630.2(g)(2); 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011).

activity."); *id*. at § 1630.2(l), 76 Fed. Reg. at 17014; *Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016) (R.12); *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 591–92 (5th Cir. 2016) (R.56); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 230 (5th Cir. 2015) (R.56); *Brown v. City of Jacksonville*, 711 F.3d 883, 889 (8th Cir. 2013); *Hilton v. Wright*, 673 F.3d 120, 129 (2d Cir. 2012) (R.56) (citing legislative history and holding that plaintiff is "not required to present evidence of how or to what degree they believed the impairment affected him."); *Milholland v. Sumner County Bd. of Educ*., 569 F.3d 562, 566 (6th Cir. 2009); *Mileski v. Gulf Health Hosps., Inc*., 2016 WL 1295026, at *15 (S.D. Ala. Mar. 31, 2016) (R.56) ("under 'regarded as' prong, an individual is not subject to any functional test"); *Sheets v. Interra Credit Union*, 2016 WL 362366, at *4 (N.D. Ind. Jan. 29, 2016) (R.56), *appeal pending* ("Since Congress amended the ADA in 2008, a mere perception of impairment is sufficient to support a regarded as claim."); *Gorman v. Covidien, LLC*, ___ F. Supp. 3d ___, 2015 WL 7308659, at *13 (S.D.N.Y. Nov. 19, 2015); *Robertson v. Corval Constructors, Inc.*, 2015 WL 1650367, at *5 and n.46 (M.D. La. Apr. 14, 2015) (R.56); *Moore v. Mancuso*, 2015 WL 176644, at *3 n.26 (W.D. La. Jan. 13, 2015) (R.56); *Kennedy v. Parkview Baptist Sch., Inc*., 2014 WL 7366256, at *6 (M.D. La. Dec. 24, 2014) (R.56); *Bernard v. EDS Noland Episcopal Day Sch*., 62 F. Supp. 3d 535, 541 and n.23 (W.D. La. 2014) (R.56); *Bracken v. DASCO Home Medical Equipment, Inc.*, 2014 WL 4388261, at *12 (S.D. Ohio Sept. 5, 2014) (R.56); *Sacks v. Gandhi Engineering, Inc*., 999 F. Supp. 2d 629, 633–35 (S.D.N.Y. 2014) (R.56); *Brown v. Northrop Grumman Corp*., 2014 WL 4175795, at *10 (E.D.N.Y. Aug. 19, 2014) (R.56) (stress exacerbating fibromyalgia); *Thomas v. Hill*, 2014 WL 3955656, at *4 and n.2 (W.D. La. Aug. 13, 2014) (R.56); *Burton v. Freescale Semiconductor, Inc*., 2014 WL 4165382, at *5–6 (W.D. Tex. Aug. 7, 2014) (R.56) (employer knowledge of chest pains and heart palpitations); *Rubano v. Farrell Area School Dist*., 991 F. Supp. 2d 678, 691 (W.D. Pa. 2014) (R.56); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *5 (M.D. La. July 3, 2014) (R.56); *Palish v. K & K RX Services, L.P.*, 2014 WL 2692489, at *9 (E.D. Pa. June 13, 2014) (R.56) (supervisor who was involved in firing decision admitted he was aware of plaintiff's back pain and spinal-fusion surgery); *Riley v. St. Mary Medical Center*, 2014 WL 2207347, at *2 (E.D. Pa. May 28, 2014) (R.12); *Poole v. Centennial Imports, Inc*., 2014 WL 2090810, at *4 (D. Nev. May 19, 2014) (R.56); *Jordan v. Forfeiture Support Associates*, 928 F. Supp. 2d 588, 605–606 (E.D.N.Y. 2013) (R.12); *Pinckney v. Federal Reserve Bank of Dallas*, 2013 WL 5461873, at *9 (W.D. Tex. Sept. 30, 2013) (R.56) (sufficient evidence that knee impairment was "regarded as" disability); *Lovell v. Champion Car Wash, LLC*, 969 F. Supp. 2d 945, 952 (M.D. Tenn. 2013) (R.56) (heart condition); *Holmes v. Board of County Com'rs*, 2013 WL 2368394, at *3 (W.D. Okla. May 28, 2013) (R.56) (back condition); *Wright v. Memphis Light, Gas & Water Div*., 2013 WL 2014050, at *11 (W.D. Tenn. May 13, 2013) (R.56) (stuttering); *Jennings v. Dow Corning Corp.*, 2013 WL 1962333, at *8–9 (E.D. Mich. May 10, 2013) (R.56) (back and shoulder conditions); *Thoma v. City of Spokane*, 2013 WL 1346988, at *5

(E.D. Wash. Apr. 3, 2013) (ADAAA "made it significantly easier for a plaintiff to bring a regarded-as claim … now, a plaintiff may demonstrate a disability by establishing that he was terminated because of an actual or perceived physical or mental impairment, regardless of how significant that impairment was or was perceived to be."); *Lee v. AT & T Mobility Services LLC*, 2013 WL 1246747, at *6 n.10 (E.D.N.C. Mar. 27, 2013) (similar; sufficient evidence defendant regarded plaintiff as having mental impairment); *Berkner v. Blank*, 2013 WL 951562, at *3–4 (D. Md. Mar. 11, 2013) (R.56) (discussion of involuntary commitment was sufficient evidence employer believed plaintiff had impairment); *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *10 (M.D. Tenn. Aug. 10, 2012); *Harty v. City of Sanford*, 2012 WL 3243282, at *5 (M.D. Fla. Aug. 8, 2012); *Wright v. Hyundai Motor Mfg. Alabama, LLC*, 2012 WL 2814153, at *5 (M.D. Ala. July 10, 2012); *Dube v. Texas Health and Human Services Com'n*, 2012 WL 2397566, at *3–4 (W.D. Tex. June 25, 2012); *Cleveland v. Mueller Copper Tube Co., Inc.*, 2012 WL 1192125, at *4 (N.D. Miss. Apr. 10, 2012); *Culotta v. Sodexo Remote Sites Partnership*, 2012 WL 1069179, at *8 (E.D. La. Mar. 29, 2012); *Grosso v. UPMC*, 2012 WL 787481, at *11 n.24 (W.D. Pa. Mar. 9, 2012); *Wells v. Cincinnati Children's Hosp. Medical Center*, 2012 WL 510913, at *7 (S.D. Ohio Feb. 15, 2012); *Myers v. Winn-Dixie Stores, Inc*., 2012 WL 529552, at *8 (M.D. Fla. Feb. 10, 2012); *Johnson v. Farmers Ins. Exchange*, 2012 WL 95387, at *1 (W.D. Okla. Jan. 12, 2012); *Azzam v. Baptist Healthcare Affiliates, Inc*., 2012 WL 28117, at *7 (W.D. Ky. Jan. 5, 2012); *Garner v. Chevron Phillips Chemical Co., L.P*., 2011 WL 5967244, at *5 (S.D. Tex. Nov. 29, 2011); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *18–19 (W.D. Pa. Sept. 28, 2011) (rejecting pre-ADAAA case law); *Shively v. Henry County, Va*., 2011 WL 3799548, at *4, and nn.3 & 4 (W.D. Va. Aug. 29, 2011) (recognizing that "substantially limited" and "major life activities" are irrelevant in regarded-as case, although not applying ADAAA retroactively); *Darcy v. City of New York*, 2011 WL 841375, at *3–4 (E.D.N.Y. Mar. 8, 2011) (alcoholism); *Scott v. Allied Waste Services of Bucks-Mont*, 2010 WL 5257643, at *3 n.1 (E.D. Pa. Dec. 23, 2010); *Lowe v. American Eurocopter, LLC*, 2010 WL 5232523, at *7 (N.D. Miss. Dec. 16, 2010); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010) (under ADAAA, and "contrary to *Sutton*, an individual who is 'regarded as having such an impairment' is not subject to a functional test"); *Brtalik v. South Huntington Union Free School Dist.*, 2010 WL 3958430, at *8 (E.D.N.Y. Oct. 6, 2010); *Farina v. Branford Bd. of Educ*., 2010 WL 3829160, at *18 n.36 (D. Conn. Sept. 23, 2010); *Brooks v. Kirby Risk Corp*., 2009 WL 3055305, at *3 (N.D. Ind. Sep. 21, 2009) (in the ADAAA "Congress dramatically expanded the reach of the ADA by protecting individuals who are 'regarded as' having a disabling impairment even when the impairment neither is, nor is perceived to be, substantially limiting.").[65]

[65] *See also* Managers Statement, 154 Cong. Rec. at S8840 and S8842 ("Under this bill, the third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity."); Statement of Rep. George Miller, 154 Cong. Rec. at E1841 (an individual with a regarded-as claim "is not subject to the functional test (i.e., required to establish that

iii. Thus, the plaintiff may recover under the "regarded as" prong in the absence of visible symptoms, or any symptoms at all. *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *10 (M.D. Tenn. Aug. 10, 2012).

iv. Nor does plaintiff have to show that the employer had a reasonable basis for its perception. *Jordan v. Forfeiture Support Associates*, 928 F. Supp. 2d 588, 606 (E.D.N.Y. 2013) (R.12). *See also Berkner v. Blank*, 2013 WL 951562, at *3–4 (D. Md. Mar. 11, 2013) (R.56) (discussion of involuntary commitment was sufficient evidence employer believed plaintiff had impairment).

v. Prior "regarded as" case law is superseded by the ADAAA. *Nutall v. Terminals*, 2015 WL 9304350, at *5 n.9 (N.D. Ill. Dec. 22, 2015) (R.56); *Robertson v. Corval Constructors, Inc.*, 2015 WL 1650367, at *5 and n.48 (M.D. La. Apr. 14, 2015) (R.56); *Bocock v. Specialized Youth Services of Virginia, Inc.*, 2014 WL 8515285, at *5 (W.D. Va. Dec. 15. 2014) (R.12), *adopted in relevant part*, 2015 WL 1611387 (W.D. Va. Apr. 10, 2015); *Snyder v. Livingston*, 2012 WL 1493863, at *7–8 (N.D. Ind. Apr. 27, 2012); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011) ("Defendant relies upon cases applying the much narrower, pre-ADAAA definition of "regarded as" disabled, which are not relevant."); *Loperena v. Scott*, 2009 WL 1066253, at *12 n.10 (M.D. Fla. Apr. 21, 2009). *See also Brown v. City of Jacksonville*, 711 F.3d 883, 889 (8th Cir. 2013) ("The district court improperly analyzed Brown's ADA claim under the more restrictive requirements applicable to pre-amendment ADA claims. The district court relied on the precise pre-amendment regulations defining the term 'substantially limits'—cited by us in a pre-amendment case—that Congress expressly rejected in 2008. The district court, which focused on whether Brown had an actual impairment at the time her employment ended, also failed to consider whether Brown made a submissible claim under the post-amendment ADA's expanded definitions of perceived and historical impairment.") (cite and footnotes omitted); *Holmes v. Board of County Com'rs*, 2013 WL 2368394, at *3 (W.D. Okla. May 28, 2013) (R.56) (back condition).

vi. "Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See § 1630.2(l); Appendix to § 1630.2(l).)." 29

the perceived or actual impairment substantially limits a major life activity) . . . [and] an individual with . . . [a] perceived impairment who is disqualified from a job, program, or service and alleges that the adverse action was based upon his or her impairment is covered by the ADA as a member of the protected class, and therefore entitled to bring a claim."); Statement of Rep. Nadler, 154 Cong. Rec. at H8290; Statement of Sen. Hatch, 154 Cong. Rec. at S8354 ("this is a significant step because individuals will no longer have to prove they have a disability or that their impairment limits them in any way.").

C.F.R. Part 1630 App., § 1630.10(b), 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011).

vii. In broadening the "regarded as" prong "Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the 'regarded as' prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17014 (Mar. 25, 2011). *See also Fleck v. WILMAC Corp*., 2011 WL 1899198, at *6 (E.D. Pa. May 19, 2011) (noting the "ADAAA's de-emphasis on an employer's beliefs as to the severity of a perceived impairment").

viii. "To illustrate how straightforward application of the 'regarded as' prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17014–17015 (Mar. 25, 2011). *See also Mileski v. Gulf Health Hosps., Inc*., 2016 WL 1295026, at *15 (S.D. Ala. Mar. 31, 2016) (R.56) (decisionmakers were aware that plaintiff with depression tried to harm herself and as a result, had to take EAP course and fitness-for-duty evaluation); *Cain v. Esthetique*, ___ F. Supp. 3d ___, 2016 WL 1599490, at *9 (S.D.N.Y. Apr. 20, 2016) (R.56) (hallucinations constitutes a "mental impairment" so employer's belief that plaintiff with PTSD suffered from them was sufficient; suggestion that plaintiff might benefit from counseling "also provides some evidence that he perceived her as suffering from mental illness"); *Rifai v. CMS Med. Care Corp*., 2016 WL 739279, at *4 (E.D. Pa. Feb. 25, 2016) (R.12) (defendants advised various employees and others, and took actions, suggesting that plaintiff was crazy, mentally unstable, and a threat to others); *Sheets v. Interra Credit Union*, 2016 WL 362366, at *4 (N.D. Ind. Jan. 29, 2016) (R.56) (employer knew plaintiff had brain hemorrhage and it received several indications that he had cognitive issues or a "brain illness"), *appeal pending*; *Gorman v. Covidien, LLC*, ___ F. Supp. 3d ___, 2015 WL 7308659, at *13 (S.D.N.Y. Nov. 19, 2015) (R.56) (sufficient evidence that employer thought veteran had PTSD); *Lange v. Bon Appetit Mgmt. Co*., 2015 WL 6445134, at *7 (D. Minn. Oct. 21, 2015) (R.56) (although there was no evidence of a PTSD diagnosis or treatment, and thus no actual disability, plaintiff's statements to his employer that he had PTSD was sufficient for a "regarded as" claim, in light of managers' testimony that plaintiff's complaints were delusional and he needed professional help); *Barlow v. Walgreen Co.*, 2012 WL 868807, at *5 (M.D. Fla. Mar. 14, 2012) (evidence that supervisor told plaintiff that she could no longer work for Walgreen because she was disabled, and therefore a liability); *Wells v.*

Cincinnati Children's Hosp. Medical Center, 2012 WL 510913, at *8 (S.D. Ohio Feb. 15, 2012) (admission that plaintiff's health-related problems were reason she was not reinstated was direct evidence that employer perceived her "as being disabled and denied her reinstatement on that basis").

ix. "[A]n individual is 'regarded as having such an impairment' any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action." 29 C.F.R. § 1630.2(*l*)(2).

x. "Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment." 29 C.F.R. § 1630.2(*l*)(1). "A 'prohibited action' under the 'regarded as' prong refers to an action of the type that would be unlawful under the ADA (but for any defenses to liability)." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011). *See also Riley v. St. Mary Medical Center*, 2014 WL 2207347, at *2 (E.D. Pa. May 28, 2014) (R.12); *Holmes v. Board of County Com'rs*, 2013 WL 2368394, at *3 (W.D. Okla. May 28, 2013) (R.56) (back condition). *But cf. Wurzel v. Whirlpool Corp*., 2010 WL 1495197, at *7 (N.D. Ohio Apr. 14, 2010), *aff'd on other grounds*, 2012 WL 1449683 (6th Cir. Apr. 27, 2012) (unpublished) ("we employ a different analysis than did the district court"); *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, Ex. 18 (forced reassignment because employer believes employee was experiencing pregnancy-related complications, even though doctor had cleared her to work).[66]

xi. "Where an employer bases a prohibited employment action on an actual or perceived impairment that is not 'transitory and minor,' the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011). *See also* 29 C.F.R. Part 1630 App., § 1630.5, 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011) (deleting sentence referring to "restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths").

xii. "Establishing that an individual is 'regarded as having such an impairment' does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of . . . 42 U.S.C. 12112." 29 C.F.R. § 1630.2(*l*)(3); 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011).

[66] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

xiii. "Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry." 29 C.F.R. Part 1630 App., § 1630.2(*l*), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011).

b. "The fact that the 'regarded as' prong requires proof of causation in order to show that a person is covered does not mean that proving a 'regarded as' claim is complex. While a person must show, for both coverage under the 'regarded as' prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense." 29 C.F.R. Part 1630 App., § 1630.2(*l*), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011). "Thus, a person proceeding under the 'regarded as' prong may demonstrate a violation of the ADA by meeting the burden of proving that: (1) He or she has an impairment or was perceived by a covered entity to have an impairment, and (2) the covered entity discriminated against him or her because of the impairment in violation of the statute." 76 Fed. Reg. at 16984.

c. Sample case law: *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 592 (5th Cir. 2016) (R.56) (less than two hours after receiving the report of plaintiff's physical, operations officer wrote email that job offer should be rescinded because a field engineer must be "capable of driving, climbing, lifting and walking," and based accommodations sought, plaintiff "will not be able to meet the project needs and required job duties"; that email, and other evidence such as the report itself, support a finding that officials perceived plaintiff's shoulder injury to be an impairment); *Jordan v. City of Union City, Ga*., ___ F. App'x ___, 2016 WL 1127739, at *3 n.4 (11th Cir. Mar. 23, 2016) (R.56) (agreeing with district court that reasonable jury could conclude police captain regarded plaintiff as having a disability);[67] *Burton v. Freescale Semiconductor, Inc*., 798 F.3d 222, 230–31 (5th Cir. 2015) (R.56) (employer's emails extensively discussed plaintiff's health condition and referenced her chest pains, trouble breathing, and her need to sit down); *Cain v. Esthetique*, ___ F. Supp. 3d ___, 2016 WL 1599490, at *9 (S.D.N.Y. Apr. 20, 2016) (R.56) (sufficient evidence that school terminated plaintiff because of hallucinations; defendant stated that: "hearing voices and acting paranoid" was a "clear signs of [her] not being able to get through the program," that program "could not afford to have students who hallucinate in class," and that

[67] The district court's decision is *Jordan v. City of Union City, Ga*., 94 F. Supp. 3d 1328, 1336–37 (N.D. Ga. 2015) (captain directly said he was terminating plaintiff because he had anxiety issues, which may itself have been enough evidence, but here, the decision was also based on reports from other officers regarding their observations of plaintiff's acute anxiety).

one reason for dismissal was student complaints about her speaking "to herself or to the walls"); *Fortkamp v. City of Celina*, 2016 WL 375075, at *8 (N.D. Ohio Feb. 1, 2016) (R.56) (ample evidence of "regarded as" disability; employer refused to reinstate plaintiff because it believed he could not safely perform the essential job functions, given his history of back troubles); *Nutall v. Terminals*, 2015 WL 9304350, at *5 (N.D. Ill. Dec. 22, 2015) (R.56) (even before injury, employer's comp person believed that plaintiff missed work because of sore back and wore weight belt because of chronic back issues; same person made multiple comments to workers' compensation office concerning history of chronic back problems); *Gorman v. Covidien, LLC*, ___ F. Supp. 3d ___, 2015 WL 7308659, at *13 (S.D.N.Y. Nov. 19, 2015) (R.56) ("Furthermore, the timing and substance of the statements—particularly the connection Kelly draws between 'babies' with PTSD and 'babies' who need additional guidance, such as a PIP, to perform their jobs—prevent the Court from saying, as a matter of law, that no connection exists between Kelly's alleged perception of Gorman as disabled and Kelly's subsequent involvement in precipitating and implementing the PIP."); *Ruppen v. Bowser Auto., Inc*., 2015 WL 5472925, at *2 (W.D. Pa. Sept. 16, 2015) (R.12) ("Mr. Bowser specifically referenced the effects of the cancer treatment when terminating Plaintiff and Mr. Bowser told Plaintiff he could return to work when his health improved."); *Kerrigan v. Bd. of Educ. of Carroll Cty*., 2015 WL 4591053, at *5 (D. Md. July 28, 2015) (R.12) (reasonable to infer that employer fired plaintiff because of absences arising from foot injury); *Scruggs v. Berg Spiral Pipe Corp*., 2015 WL 3830983, at *5 (S.D. Ala. June 22, 2015) (R.56) (employer did not retract job offer until it learned of plaintiff's previous back surgery); *Robertson v. Corval Constructors, Inc*., 2015 WL 1650367, at *5 and n.48 (M.D. La. Apr. 14, 2015) (R.56) (plaintiff fired shortly after second seizure at work and after safety director asked for medical release addressing ability to work as welder); *Zabell v. Medpace, Inc*., 2015 WL 1000424, at *4 (S.D. Ohio Mar. 5, 2015), *report and recommendation* adopted, 2015 WL 1475037 (S.D. Ohio Mar. 31, 2015) (R.56) ("Breen believed plaintiff to be HIV positive and, fairly shortly afterwards, decided to terminate her employment."); *Puckett v. Bd. of Trustees of the First Baptist Church of Gainesville, Inc*., 2015 WL 690104, at *9–10 (N.D. Ga. Feb. 18, 2015) (R.56) (sufficient evidence that decisionmaker knew of mental impairment and based firing on it); *Hammel v. Soar Corp*., 2015 WL 505410, at *3 (E.D. Pa. Feb. 6, 2015) (R.56) (close temporal proximity between disclosure of disability and termination); *Rodriguez v. City of New York*, 2015 WL 332989, at *2–3 (E.D.N.Y. Jan. 23, 2015) (R.12) (sufficient allegations that employer forced plaintiff to retire because it believed him to be "delusional"); *Equal Employment Opportunity Comm'n v. Staffmark Inv. LLC*, 67 F. Supp. 3d 885, 895 (N.D. Ill. 2014) ("Given the expanded scope of the ADAAA, Plaintiff does not need to establish that Defendant knew that Shanks was an amputee and, consequently, disabled. Both Reyes and Huynh noticed that Shanks walked in an irregular manner, stating that she walked with a "waddle" and by "swaying back and forth." Shanks was released from the Sony project employment due to safety concerns regarding her being bumped into or knocked down by someone. That Shanks' limping or waddling could have had any number of causes does not preclude Shanks from being "regarded as" having a walking impairment by Sony."); *Taylor v. Renown Health*, 2014 WL 7240226, at *4 (D. Nev. Dec. 18, 2014) (R.56) (employer perceived that

plaintiff had a physical impairment, based on doctor's report that her shoulder condition restricted her ability to lift more than 50 pounds, and this was the reason it did not hire her); *Butler v. State, Louisiana Dep't of Pub. Safety & Corr*., 2014 WL 6959940, at *7 and n.8 (M.D. La. Dec. 4, 2014) (R.56) (various employer statements reflected a belief that plaintiff had a mental impairment); *Bernard v. EDS Noland Episcopal Day Sch*., 62 F. Supp. 3d 535, 541–42 (W.D. La. 2014) (R.56) (plaintiff had eating disorder; termination letter that referenced her perceived inability to "model good health" or display required "energy and strength" was direct evidence of "regarded as" disability); *Stragapede v. City of Evanston*, 69 F. Supp. 3d 856, 862–63 (N.D. Ill. 2014) (R.56) (granting plaintiff's motion for summary judgment as to "regarded as" disability, based on admissions and termination letter evidencing a perceived mental impairment); *Hoey v. County of Nassau*, 2014 WL 4656223, at *4 (E.D.N.Y. Sept. 12, 2014) (R.56) (by police officials characterized plaintiff as someone who had suffered "a mental breakdown," and kept him on restricted duty); *Thomas v. Hill*, 2014 WL 3955656, at *7 (W.D. La. Aug. 13, 2014) (R.56) (employer letter referred to plaintiff's heart condition and need to find less-stressful job); *Wheat v. Rush Health Systems, Inc.*, 2014 WL 3529798, at *5 (S.D. Miss. July 15, 2014) (R.56) (nurse with hearing impairment pulled from surgery schedule because doctors complained that he sometimes could not hear their instructions and they had to repeat); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *6 (M.D. La. July 3, 2014) (R.56) ("Plaintiff's termination therefore occurred within two weeks of disclosing his surgery to Brandt Daniels and approximately one month after making two requests for leave associated with his carotid artery disease."); *Riley v. St. Mary Medical Center*, 2014 WL 2207347, at *4 (E.D. Pa. May 28, 2014) (R.12) (employer told plaintiff she was "too slow" and "was not smart enough," was admonished after disclosing impairments and warned not to make HR complaints, received a poor evaluation, did not receive a raise, and was ultimately terminated); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc*., 2014 WL 2179277, at *11–12, 13 (S.D. Ind. May 22, 2014) (R.56) (termination letter stating that one reason was pregnancy-related complications was direct evidence; there were also facts showing pretext); *E.E.O.C. v. Am. Tool & Mold, Inc.*, 21 F. Supp. 3d 1268, 1278–79 (M.D. Fla. 2014) (R.56) ("regarded as" disability as a matter of law) ("Here, operating under the less exacting standard that now applies for "regarded as" claims, it is undisputed that ATM withdrew its offer of employment because of Matanic's inability to produce the surgeon's records. It is also undisputed that the only reason ATM (through Lakeside) sought those records was because Matanic disclosed he had undergone back surgery in 2003. Lakeside's 'blanket' policy required applicants who revealed such a surgery to produce a release or restrictions from the treating physician prior to the 35 pound lift going forward. Thus, once Defendant was made aware of the surgery, it regarded Matanic as disabled, that is, unfit to perform the job until and unless he could prove otherwise.") (cite omitted); *Flamberg v. Israel*, 2014 WL 1600313, at *3 (S.D. Fla. Apr. 21, 2014) (R.12) (sufficient allegations that employer's personnel regarded plaintiff as suffering a mental disability and mistreated him because of it, including a suspension and transfer, and he was terminated as a result of false statements made about him); *Pagan v. Morrisania Neighborhood Family Health Ctr*., 2014 WL 464787, at *5 (S.D.N.Y. Jan. 22, 2014) (R.12) (plaintiff on disability leave for four months;

supervisor still remarked on his sickness months later, and asked why he did not retire); *Lafata v. Dearborn Heights School Dist. No. 7*, 2013 WL 6500068, at *8 (E.D. Mich. Dec. 11, 2013) (R.56) (employer fired plaintiff based on its doctor's report about his condition and limitations); *Pinckney v. Federal Reserve Bank of Dallas*, 2013 WL 5461873, at *11 n.9 (W.D. Tex. Sept. 30, 2013) (R.56) (causation shown by adverse action shortly after disclosure of disability); *Sigl v. Travel Tags, Inc.*, 2013 WL 5223681, at *5 (D. Or. Sept. 16, 2013) (R.56) (when plaintiff requested assignment to seated task, manager told her to stay home and he would call her, but he never called or returned her calls); *Lovell v. Champion Car Wash, LLC*, 969 F. Supp. 2d 945, 952 (M.D. Tenn. 2013) (R.56) (heart condition) ("In this case, there is no question that Jones' perceived or regarded Plaintiff as being disabled. He knew of Plaintiff's numerous medical issues and, more pertinently, he terminated Plaintiff because of his 'heart issues' and 'health issues.'"); *McCracken v. Carleton College*, 2013 WL 4516333, at *8 (D. Minn. Aug. 26, 2013) (R.56) ("[S]upervisor was aware of McCracken's medical conditions [depression and anxiety, knee injury, and pacemaker] and believed that he could not perform the facility audits due to those conditions."); *Nelson v. City of New York*, 2013 WL 4437224, at *7 (S.D.N.Y. Aug. 19, 2013) (R.56) ("However, there is abundant evidence that Drs. Adams and Archibald advised against reinstating Plaintiff based upon her 'extensive psychological history.'"); *Grote v. Beaver Exp. Service, LLC*, 2013 WL 4402822, at *7 (D. Kan. Aug. 15, 2013) (R.12) (temporal proximity between use of medical leave, her reprimand for attendance three weeks before surgery, and her termination upon her return after surgery, created reasonable inference that defendant regarded her as having a disability); *Baier v. Rohr-Mont Motors, Inc.*, 2013 WL 2384269, at *6 (N.D. Ill. May 29, 2013) (R.12) (heart condition) ("He alleged one of his supervisors made comments he was afraid Baier 'would drop over dead at the manager's work station' and that defendants wanted him to resign. These allegations plausibly suggest Baier was regarded as having an impairment that substantially limited his ability to work.") (record cites omitted); *Joseph v. City of Tampa*, 2013 WL 2237567, at *6 (M.D. Fla. May 21, 2013) (R.12) (after report of depression and bipolar disorder, HR rep told plaintiff to resign because he was a liability, employer refused to provide accommodation, and fired him based on opinion of employer's doctor); *Wright v. Memphis Light, Gas & Water Div.*, 2013 WL 2014050, at *11 (W.D. Tenn. May 13, 2013) (R.56) (influential decision-maker told plaintiff that stuttering might prevent promotion he was seeking); *Kiniropoulos v. Northampton County Child Welfare Service*, 2013 WL 140109, at *5 (E.D. Pa. Jan. 11, 2013) ("I find that the temporal proximity between Plaintiff's disclosure and his termination is sufficient to support an inference that Defendant regarded Plaintiff as disabled."); *Harty v. City of Sanford*, 2012 WL 3243282, at *5 (M.D. Fla. Aug. 8, 2012) ("In this case, there is evidence that, inter alia, Sanford knew of Harty's restrictions, and that his direct supervisor 'asked [him] to resign because of [his] restrictions.' … Taken in a light most favorable to Harty, this is sufficient to survive a motion for summary judgment."); *Wright v. Hyundai Motor Mfg. Alabama, LLC*, 2012 WL 2814153, at *5 (M.D. Ala. July 10, 2012) (evidence that employer refused to allow plaintiff to return from medical leave because of restrictions); *Wright v. Stark Truss Co., Inc.*, 2012 WL 3029638, at *7 n.11 (D.S.C. May 10, 2012) (supervisor said he had previously been unaware that plaintiff was suffering from depression but after he found out about

plaintiff's attempted suicide, he thought plaintiff was unstable and within one week, plaintiff's position was suddenly eliminated, although there had been no prior plan to do so). *See also Butler v. BTC Foods, Inc*., 2014 WL 336649 (E.D. Pa. Jan. 30, 2014) (R.56) (plaintiff fired six days after he disclosed ongoing pain after hernia surgery and probable need for additional leave). *But cf. Mengel v. Reading Eagle Co*., 2013 WL 1285477, at *4 (E.D. Pa. Mar. 29, 2013); *Dube v. Texas Health and Human Services Com'n*, 2012 WL 2397566, at *4 (W.D. Tex. June 25, 2012); *Harris v. Reston Hosp. Center, LLC*, 2012 WL 1080990, at *5 (E.D. Va. Mar. 26, 2012) (no evidence that adverse action was taken because of suicide attempt six years earlier).

d. Note, however, that even under the ADAAA there will need to be admissible evidence of an impairment. *Compare Morriss v. BNSF Ry. Co*., ___ F.3d ___, 2016 WL 1319407, at *8 (8th Cir. Apr. 5, 2016) (R.56) (no evidence that employer perceived obesity or BMI to be physical impairment; questionnaire and treatment records indicated that plaintiff was not suffering from any physical impairment); *Fischer v. Minneapolis Pub. Sch*., 792 F.3d 985, 989 (8th Cir. 2015) (even if employer believed plaintiff's low score on employee testing indicated inadequate back strength, there was no evidence suggesting it regarded plaintiff as suffering from a physiological disorder, cosmetic disfigurement, anatomical loss, or disease); *Wirey v. Richland Community College*, 913 F. Supp. 2d 633, 641 (C.D. Ill. 2012) (only evidence of plaintiff's diagnosis of chronic fatigue syndrome was her own testimony, and medical records reflected treatment but no diagnosis, but because court must draw inferences in her favor, and because defendant did not deny the CFS, for purposes of summary judgment, plaintiff may be treated as having CFS); *Risco v. McHugh*, 868 F.Supp.2d 75, 108–109 (S.D.N.Y. 2012) (fact that supervisor referred to plaintiff's inability to do a task as a "mental thing," and described her inappropriate behavior as "erratic," did not demonstrate that a "regarded as" mental impairment); *Sibilla v. Follett Corp*., 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012) ("The fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment."); *Harris v. Reston Hosp. Center, LLC*, 2012 WL 1080990, at *5 (E.D. Va. Mar. 26, 2012) (statement that plaintiff was drunk did not indicate a belief that she had alcoholism); *Geoghan v. Long Island R.R.*, 2009 WL 982451, at *10 (E.D.N.Y. Apr. 9, 2009) (pre-ADAAA case finding sufficient evidence that plaintiff had ADHD based on doctor's note in medical file, medical records and affidavit of plaintiff's subsequent physician, and deposition testimony of employer's physician's assistant that she could not think of any reason why someone would be taking Adderall other than for ADHD).

e. The EEOC did not take a specific position on whether a covered entity may be liable for "regarded as" discrimination if it takes actions because of an impairment's *symptoms* or because of the *use of mitigating measures*, finding this to be a "complex issue requiring a more comprehensive treatment than is possible in this regulation." But "[n]o negative inference concerning the merits of this issue should be drawn from this deletion, and the "Commission's existing position, as expressed in its policy guidance, court filings, and other regulatory and sub-regulatory documents, remains unchanged." 76 Fed. Reg. 16978, 16985 (Mar. 25, 2011).

Compare Huffman v. Turner Industries Group, L.L.C., 2013 WL 2244205, at *11 (E.D. La. May 21, 2013) (R.56) (injury causing partial loss of hand) ("Considering that Turner does not dispute Plaintiff's disability status and the evidence before the Court is sufficient to demonstrate that Plaintiff is disabled under the ADA because he had a record of disability and/or because Turner regarded Plaintiff as disabled and refused to hire him because of the pain and anxiety medication he required to help manage his disability, Plaintiff has offered sufficient evidence regarding the first element of his prima facie case of discrimination to defeat summary judgment on that issue.").

f. But the covered entity has a defense to a "regarded as" claim if the impairment (whether actual or perceived) is both transitory *and* minor. 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f). *See also* 29 C.F.R. § 1630.2(g)(1)(iii).

i. "Transitory" means having an actual or expected duration of six months or less. 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f). *Compare Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) (R.56) (no evidence how long heart condition would last); *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *10 (M.D. Tenn. Aug. 10, 2012) (sufficient evidence condition not transitory as it is incurable and lifelong, and plaintiff had received treatments for more than two years).

ii. The term "minor" is not defined in the statute, but the legislative history suggests that it refers to trivial impairments,[68] and comparisons to such conditions may be useful. *See, e.g., Stark v. Hartt Transp. Sys., Inc*., 37 F. Supp. 3d 445, 489 n.91 (D. Me. 2014) (R.56); *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *10 (M.D. Tenn. Aug. 10, 2012) (minor impairment include "common ailments like the cold or flu," citing EEOC guidance and legislative history; iron overload, or hemochromatosis, is distinguishable from minor ailment like cold or flu, and is an acute disease requiring regular phlebotomy treatments and care by hematologists); *Cohen v. CHLN, Inc*., 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) ("Such a severe, ongoing impairment stands in distinct contrast to those cited by the EEOC as merely minor and temporary, such as the common cold or flu.") (prong one claim). *See also Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706–07 (7th Cir. 2015) (R.56) (no evidence that heart condition severe enough to require triple bypass surgery could be considered "minor"); *Kerrigan v. Bd. of Educ. of Carroll Cty*., 2015 WL 4591053, at *5 (D. Md. July 28, 2015) (R.12) (plaintiff alleged a severely injured foot with considerable pain, discomfort, and swelling, plus an inability to work for six weeks; although transitory, injury may have been more than minor); *Sobhi v. Sociedad Textil Lonia Corp*., 2014 WL 7474338,

[68] *See* H.R. Rep. 110-730, Pt. I, 110th Cong., 2d Sess., at pp. 14, 18, 30 (June 28, 2008); Joint Statement by Reps. Hoyer and Sensenbrenner, 154 Cong. Rec. at H6067 (June 25, 2008) ("common cold"); Statement of Rep. Nadler, 154 Cong. Rec. at H6064 (June 25, 2008) ("stomachaches, the common cold, mild seasonal allergies, or even a hangnail"); Statement of Rep. Smith, 154 Cong. Rec. at H6074 (June 25, 2008) ("trivial impairments such as a simple infected finger"); *id.* ("stomach aches, a common cold, mild seasonal allergies, or even a hangnail").

at *4 and n.1 (S.D.N.Y. Dec. 30, 2014) (R.12) (surgery requiring eight weeks recovery may be transitory, but court could not conclude that it was minor); *Thomas v. Hill*, 2014 WL 3955656, at *7 (W.D. La. Aug. 13, 2014) (R.56) (court could not say that heart condition requiring bypass surgery was transitory and minor); *Nevitt v. U.S. Steel Corp*., 18 F. Supp. 3d 1322, 1332 (N.D. Ala. 2014) (R.56) ("But, a fact finder could also conclude that Nevitt's account of back pain that lasted for almost six months, combined with the treatment he received for his condition, which included two epidural steroid injections, prescribed narcotics and muscle relaxers, physical therapy, and the use of a TENS unit, indicates that his impairment was far more serious than 'common ailments like the cold or flu' that the EEOC considers a proper basis for a 'transitory and minor' defense.") (cites omitted); *Davis v. NYC Dept. of Educ.*, 2012 WL 139255, at *6 (E.D.N.Y. Jan. 18, 2012) (pleading alleging back and shoulder injuries from car accident, with pain and inability to work for three months, suggests that while it may have been transitory, it was not "minor"). Note that some courts appear to conflate the two elements, which is erroneous and undercuts the precedential value of such cases. *See Stark v. Hartt Transp. Sys., Inc*., 37 F. Supp. 3d 445, 489 n.91 (D. Me. 2014) (R.56).

iii. This is a defense, and the "covered entity must demonstrate that the impairment is both 'transitory' and 'minor.'" 29 C.F.R. § 1630.15(f); *Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) (R.56); *Sheets v. Interra Credit Union*, 2016 WL 362366, at *4 n.3 (N.D. Ind. Jan. 29, 2016) (R.56) ("Interra does not contend that Sheets' impairment was transitory and minor and it had the burden to raise that argument"), *appeal pending*; *Magnotti v. Crossroads Healthcare Mgmt., LLC*, 126 F. Supp. 3d 301, 312 (E.D.N.Y. 2015) (R.12) ("Defendants argue that plaintiff's perceived disability was "transitory and minor," but since his impairment lasted for longer than six months it was not transitory, and, at this stage in the litigation, the Court cannot discredit plaintiff's assertion that it was anything but minor."); Cole v. Weatherford Int'l, 2015 WL 3896835, at *9 (D. Colo. June 23, 2015) (R.56) (rejecting defense claim that because plaintiff felt that his back and heart problems did not limit him, they were "transitory and minor"; the plaintiff's own subjective belief (like focusing on the employer's subjective belief) is inconsistent with required objective analysis, and employer "offered nothing to establish that the sorts of back and heart problems Cole has suffered are objectively transitory and minor"); *Sherman v. County of Suffolk*, 71 F. Supp. 3d 332, 345–46 (E.D.N.Y. 2014) (R.56); *Nevitt v. U.S. Steel Corp*., 18 F. Supp. 3d 1322, 1332 n.6 (N.D. Ala. 2014) (R.56); *Singleton v. United Parcel Serv., Inc*., 2014 WL 943129, at *2 (D. Conn. Mar. 11, 2014) (R.12); *Baier v. Rohr-Mont Motors, Inc*., 2013 WL 2384269, at *6 (N.D. Ill. May 29, 2013) (R.12) (heart condition); *Davis v. Vermont, Dept. of Corr*., 868 F. Supp. 2d 313, 327 (D. Vt. 2012 (R.12) (sufficient pleadings that perceived impairment—hernia surgery and recovery—lasted more than six months, and was more than minor); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *8 (S.D. Fla. July 25,

2012); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *17and 19 (W.D. Pa. Sept. 28, 2011) (irrelevant that employer did not think impairment was permanent; objective evidence suggested it lasted more than six months); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011). *See also* 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); *id*. at § 1630.15(f), 76 Fed. Reg. at 17016. "[T]his limitation on coverage should be construed narrowly." 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); *Robertson v. Corval Constructors, Inc*., 2015 WL 1650367, at *5 (M.D. La. Apr. 14, 2015) (R.56); *Kiniropoulos v. Northampton County Child Welfare Service*, 2013 WL 140109, at *5 (E.D. Pa. Jan. 11, 2013) ("Although Plaintiff does not allege that his injury would last six or more months in duration, it is not apparent from the pleadings that it did not last six or more months.").

iv. "Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively. A covered entity may not defeat 'regarded as' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor." 29 C.F.R. § 1630.15(f); *Silk v. Bd. of Trustees, Moraine Valley Cmty. Coll., Dist. No. 524*, 795 F.3d 698, 706–07 (7th Cir. 2015); *Cole v. Weatherford Int'l*, 2015 WL 3896835, at *9 (D. Colo. June 23, 2015) (R.56) (rejecting defense claim that because plaintiff felt that his back and heart problems did not limit him, they were "transitory and minor"; the plaintiff's own subjective belief [like focusing on the employer's subjective belief] is inconsistent with required objective analysis, and employer "offered nothing to establish that the sorts of back and heart problems Cole has suffered are objectively transitory and minor"); *Stark v. Hartt Transp. Sys., Inc*., 37 F. Supp. 3d 445, 489 (D. Me. 2014) (R.56) (although neck injury only kept plaintiff off work for five days, employer's own expert described condition as "degenerative," with cervical disk herniation and radiculopathy; "Thus, while his impairment may have been only briefly symptomatic in December 2010, Hartt does not adduce objective evidence that it was transitory."); *Kennedy v. Parkview Baptist Sch., Inc*., 2014 WL 7366256, at *6 (M.D. La. Dec. 24, 2014) (R.56); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *5 (M.D. La. July 3, 2014) (R.56); *Saley v. Caney Fork, LLC*, 2012 WL 3286060, at *10 (M.D. Tenn. Aug. 10, 2012); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6, 2011). *See also* 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); *id*. at § 1630.15(f), 76 Fed. Reg. at 17016. "For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively 'transitory and minor' hand

wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have 'regarded' the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not 'transitory and minor.'" 29 C.F.R. Part 1630 App., § 1630.2(l), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); *id*. at § 1630.15(f), 76 Fed. Reg. at 17016–17017. *See also Nevitt v. U.S. Steel Corp*., 18 F. Supp. 3d 1322, 1328–31 (N.D. Ala. 2014) (R.56). Also, "an individual who is denied a promotion because he has a minor back injury would be 'regarded as' an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory." *Id*. at § 1630.15(f), 76 Fed. Reg. at 17016.[69]

v. Moreover, the fact that an impairment only limited job performance for a short while does not mean that the impairment itself is transitory. *See Gilliss v. Dentsply, LLC*, 116 F. Supp. 3d 433, 437 (D. Del. 2015) (R.12) (although employer claimed that back condition was transitory and minor given that plaintiff was released to work within days, there was no indication that condition had completely resolved, and diagnosis that it was related to sciatic nerve indicated it could be longer-term condition); *Rubano v. Farrell Area School Dist*., 991 F. Supp. 2d 678, 692 (W.D. Pa. 2014) (R.56) (although periods of leave totaled less than six months, plaintiff had depression with varying symptoms for a number of years); *Sherman v. County of Suffolk*, 71 F. Supp. 3d 332, 346 (E.D.N.Y. 2014) (R.56) (even though the plaintiff missed no work, evidence showed that injury to leg muscle hampered him for more than six months); *Stark v. Hartt Transp. Sys., Inc*., 37 F. Supp. 3d 445, 489 (D. Me. 2014) (; *Jordan v. Forfeiture Support Associates*, 928 F. Supp. 2d 588, 607 (E.D.N.Y. 2013) (R.12) (although employer only authorized six-week leave, plaintiff alleged that she had had carpal tunnel syndrome for three years); *Ruggles v. Virginia Linen Service, Inc*., 2013 WL 4678408, at *6 n.12 (W.D. Va. Aug. 30, 2013) (R.56) ("However, these statements reflect Plaintiff's position that he could continue to fulfill his duties as an Area Manager with his lifting restrictions in place, rather than an admission that his back condition was transitory and minor.").

vi. Although the plaintiff does not have the burden of proof on this defense, he or she can defeat it by showing either that the impairment was in fact non-transitory or more than minor, or that the employer perceived it as non-transitory or more than minor. *Compare Robinson v. Cardinal Const., Inc*., 2014 WL 2085302, at *2 (N.D. Iowa May 19, 2014) (R.56) (sufficient evidence that bone fractures requiring leave were not transitory and minor); *Nevitt v. U.S. Steel Corp*., 18 F. Supp. 3d 1322, 1331 (N.D. Ala. 2014) (R.56) (employer's request for plaintiff's medical records related to injuries received more than six months ago, and then its revocation of contingent

[69] Note that in the final regulations the EEOC deleted the list of examples of conditions that would be considered transitory and minor. 76 Fed. Reg. 16978, 16985 (Mar. 25, 2011).

offer based on those records, reflected employer's perception that plaintiff continued to be impaired by injuries well over six months after they occurred); *Singleton v. United Parcel Serv., Inc*., 2014 WL 943129, at *4–5 (D. Conn. Mar. 11, 2014) (R.12) (although injury caused only one day off work, plaintiff continued to have pain, and injury was aggravation of earlier condition); *Rubano v. Farrell Area School Dist*., 991 F. Supp. 2d 678, 691 (W.D. Pa. 2014) (R.56) (evidence that depression, when severe, required several weeks of FMLA leave); *Suggs v. Central Oil of Baton Rouge, LLC*, 2014 WL 3037213, at *5 (M.D. La. July 3, 2014) (R.56) (plaintiff produced evidence that his carotid artery disease "has been treated with prescription medication since Plaintiff was diagnosed in 2009—well over 6 months."); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4–5 (W.D. Tex. Sept. 6, 2011) (denying motion to dismiss in light of pleading "serious health condition," and fact that plaintiff would be off work less than six months does not mean impairment did not last longer); *Cohen v. CHLN, Inc*., 2011 WL 2713737, at *8 (E.D. Pa. July 13, 2011) (plaintiff offered "significant evidence" of a severe, on-going impairment—walking with a cane for months, often limping slowly or doubled over with pain and visibly struggling to move around the restaurant and using the stairs, culminating in need for surgery); *Chamberlain v. Valley Health System, Inc*., 2011 WL 560777, at *5 (W.D. Va. Feb. 8, 2011) (sufficient evidence that employer thought plaintiff's visual impairment was not transitory and minor, based on supervisor's statement that plaintiff was completely unable to work at the hospital and needed to apply for disability leave). *See also Pagan v. Morrisania Neighborhood Family Health Ctr*., 2014 WL 464787, at *5 (S.D.N.Y. Jan. 22, 2014) (R.12) (plaintiff was on disability leave for four months; supervisor still remarked on his sickness months later, and asked why he did not retire).

g. "Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment." 29 C.F.R. § 1630.2(g)(3). *See also* 29 C.F.R. Part 1630 App., § 1630.2(g), 76 Fed. Reg. 16978, 17006 (Mar. 25, 2011) ("Congress expected the first and second prongs of the definition of disability 'to be used only by people who are affirmatively seeking reasonable accommodations * * * ' and that '[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation * * * —should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.'"); *id*. at § 1630.2(j), 76 Fed. Reg. at 17008 (similar); *id*. at § 1630.2(l), 76 Fed. Reg. at 17015 (similar); EEOC's "Questions and Answers on the

Final Rule Implementing the ADA Amendments Act of 2008," Question 6;[70] *Wright v. Memphis Light, Gas & Water Div*., 2013 WL 2014050, at *11 (W.D. Tenn. May 13, 2013) (R.56) (stuttering).

h. However, a "regarded as" disability will not support a failure-to-accommodate claim. 42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(o)(4) and 1630.9(d). *See also* 29 C.F.R. Part 1630 App., § 1630.2(o), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); *id*. at § 1630.9(e), 76 Fed. Reg. at 17016; *Pearce-Mato v. Shinseki*, 2012 WL 2116533, at *6 (W.D. Pa. June 11, 2012); *Ryan v. Columbus Regional Healthcare System, Inc.*, 2012 WL 1230234, at *5 (E.D.N.C. Apr. 12, 2012).

i. In creating this exception, Congress expressed confidence that individuals who need accommodations or modifications will receive them because those individuals will now qualify for coverage under the first or second prongs (under the less demanding interpretation of "substantial limitation"). 29 C.F.R. Part 1630 App., § 1630.2(o), 76 Fed. Reg. 16978, 17015 (Mar. 25, 2011); Managers Statement, 154 Cong. Rec. at S8842 (Act does not create "an onerous burden for those seeking accommodations or modifications"); Statement of Rep. Miller, 154 Cong. Rec. at E1841; Statement at Rep. Nadler, 154 Cong. Rec. at H8290.

ii. But "regarded as" will support a claim involving any other conduct that violates the ADA, 42 U.S.C. § 12201(h), for example, a "refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment." 29 C.F.R. § 1630.2(*l*)(1). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j), 76 Fed. Reg. 16978, 17008 (Mar. 25, 2011) (describing "regarded as" as applicable to any case "where reasonable accommodation is not at issue"); *id*. at § 1630.2(l), 76 Fed. Reg. at 17015; *Fleck v. WILMAC Corp*., 2011 WL 1899198, at *6 n.3 (E.D. Pa. May 19, 2011) ("regarded as" argument applicable to discrimination claims, and "actual disability" arguments applicable to accommodation claims).

9. Examples of Actual Disabilities

a. Disability is still determined based on an individualized assessment, 29 C.F.R. § 1630.2(j)(1)(4), and there is no "per se" disability. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).

b. "However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The inherent nature of these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. *Cf. Heiko v. Columbo Savings Bank, F.S.B.*, 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADAAA, that 'certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by

[70] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

blindness'). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).

c. Applying the ADAAA's interpretive principles, "the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(3)(ii). *See also* 29 C.F.R. § 1630.2(j)(4)(iv) ("Given the rules of construction … it may often be unnecessary to conduct an analysis involving … [facts such as condition, manner, or duration]."); 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011) (one of the "express purposes" of the ADAAA is to "carry out the ADA's objectives of providing … clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection under the ADA"); *id*. at § 1630.2(j)(3), 76 Fed. Reg. at 17011–17012.

d. Thus, as set out in 29 C.F.R. § 1630.2(j)(3)(iii), it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:

   i. Deafness substantially limits hearing. *Id*. The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with hearing impairments. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

   ii. Blindness substantially limits seeing. 29 C.F.R. § 1630.2(j)(3)(iii).

   iii. An intellectual disability (formerly termed mental retardation) substantially limits brain function. *Id*.[71] "By using the term 'brain function' to describe the system affected by various mental impairments, the Commission is expressing no view on the debate concerning whether mental illnesses are caused by environmental or biological factors, but rather intends the term to capture functions such as the ability of the brain to regulate thought processes and emotions." 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). The EEOC guidance also notes that Congress intended courts to return to earlier interpretations, which had included intellectual and developmental impairments in the definition of disability. *Id*. *Compare Moloney v. Home Depot U.S.A., Inc.*, 2012 WL

[71] For some of the legislative history concerning intellectual disabilities, see, *e.g*., Managers Statement, 154 Cong. Rec. at S8840–8841; Statement of Rep. Nadler, 154 Cong. Rec. at H8289; Joint Statement of Reps. Hoyer and Sensenbrenner, 154 Cong. Rec. at H8294 (criticizing *Littleton v. Wal-Mart Stores, Inc*., 231 Fed. Appx. 874 (11th Cir. 2007)); Statement of Sen. Harkin, 154 Cong. Rec. at S8349 (similar); Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296; Statement of Sen. Dodd, 154 Cong. Rec. at S8356.

1957627, at *5–6 (E.D. Mich. May 31, 2012) (finding sufficient evidence of intellectual disability).

iv. Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function. 29 C.F.R. § 1630.2(j)(3)(iii).[72] In addition, "mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking." 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with amputations. *Id*.

v. Autism substantially limits brain function. 29 C.F.R. § 1630.2(j)(3)(iii).

vi. Cancer substantially limits normal cell growth. *Id*.[73] In addition, the ADAAA requirement for assessing conditions that are episodic or in remission rejects the results in cases finding that cancer in remission is not a disability because it was too short-lived. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011).[74] "It is thus expected that individuals with impairments that are episodic or in remission (e.g. . . . cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests . . . substantially limits a major life activity." *Id*. The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with cancer. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also Punt v. Kelly Services, & GE Controls Solutions*, 2016 WL 67654, at *7-8 (D. Colo. Jan. 6, 2016) (R.56) (based on post-ADAAA cases and EEOC regulation stating it should be easily concluded that cancer substantially limits normal cell growth, plaintiff's breast cancer—which required surgery and treatments—was a disability), *appeal pending on other grounds*; *E.E.O.C. v. Midwest Reg'l Med. Ctr., LLC*, 2014 WL 4063145, at *3–4 (W.D. Okla. Aug. 18, 2014)

[72] For some of the legislative history concerning amputations, see, e.g., Managers Statement, 154 Cong. Rec. at S8840–8841; Statement of Rep. Nadler, 154 Cong. Rec. at H8290; Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8349; *id*. at S8350 ("Think about the troops coming home from Iraq, losing limbs, getting prostheses. The Court might find they are not disabled. If they might need some reasonable accommodations to get a decent job, the Court would find they are not covered by the Americans with Disabilities Act. As a result, we have to have this bill…."); Statement of Sen. Dodd, 154 Cong. Rec. at S8356.

[73] For some of the legislative history concerning cancer, see, e.g., Managers Statement, 154 Cong. Rec. at S8840–8841; Statement of Rep. Nadler, 154 Cong. Rec. at H8290 (describing the case of Mary Ann Pimental; *see Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002).); Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 and H8927; Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8349; *id*. at S8350 (Adding major bodily functions to the definition of major life activities "is important for people with … cancer … because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability."); Statement of Sen. Dodd, 154 Cong. Rec. at S8356.

[74] Cancer cases specifically discredited include *Pimental v. Dartmouth-Hitchock Clinic*, 236 F. Supp. 2d 177, 182–183 (D.N.H. 2002), 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011), and *Olds v. United Parcel Serv., Inc*., 127 F. App'x. 779, 782 (6th Cir. 2005). *Id*., Substantially Limited in Working, 76 Fed. Reg. at 17013. As to the latter the EEOC noted that regardless of its impact on working, the plaintiff's bone-marrow cancer would substantially limit normal cell growth. *Id*.

(R.56); *Dean v. One Life America, Inc*., 2013 WL 870352, at *3 (S.D. Miss. Mar. 7, 2013) ("Cancer will 'virtually always' be a qualifying disability."); *Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *10–11 (S.D. Ohio Jan. 28, 2013) (cancer a disability considering broad construction, in its active state, major life activity of normal cell growth, EEOC's "j(3)(iii)" list, and case law); *Angell v. Fairmount Fire Protection Dist*., 907 F. Supp. 2d 1242, 1250 (D. Colo. 2012) (cancer requiring surgeries and treatment was an actual disability based on the statute, EEOC regulations including "j(3)(iii)" list, and ADAAA case law); *Katz v. Adecco USA, Inc*., 2012 WL 78156, at *5–6 (S.D.N.Y. Jan. 10, 2012) (cancer in remission covered); *Norton v. Assisted Living Concepts, Inc*., 786 F. Supp. 2d 1173, 1185–1186 (E.D. Tex. 2011) (concluding that EEOC's (j)(3)(iii) list and guidance bolstered its finding that renal cancer was capable of qualifying as a disability); *Hoffman v. Carefirst of Fort Wayne, Inc*., 737 F. Supp. 2d 976, 985–986 (N.D. Ind. 2010) (similar result relying on then-proposed regulations). *Compare E.E.O.C. v. Midwest Regional Medical Center, LLC.*, 2014 WL 3881418, at *3–4 (W.D. Okla. Aug. 7, 2014) (R.56) (finding fact issue whether successfully treated skin cancer was an "actual" disability, but also holding it was a "record of" disability as a matter of law); *Coker v. Enhanced Senior Living, Inc*., 897 F. Supp. 2d 1366, 1375–1376 (N.D. Ga. 2012) (partial summary judgment to plaintiff on disability, based on regulations, including "j(3)(iii)" list, and doctor's affidavit that non-cancerous breast disease was "the result of abnormal cell growth and abnormal endocrine and reproductive functioning").

vii. Cerebral palsy substantially limits brain function. 29 C.F.R. § 1630.2(j)(3)(iii).[75] The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with CP. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

viii. Diabetes substantially limits endocrine function. 29 C.F.R. § 1630.2(j)(3)(iii).[76] *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011) ("[A]n individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong."); EEOC's "Questions and Answers on the Final Rule Implementing

[75] For some of the legislative history concerning CP, see, e.g., Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 and H8927.

[76] For some of the legislative history about diabetes, see, *e.g*., Managers Statement, 154 Cong. Rec. at S8840B8841; Statement of Rep. Miller, 154 Cong. Rec. at E1841; Statement of Rep. Nadler, 154 Cong. Rec. at H8289; Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 and H8927; Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8349; Statement of Sen. Dodd, 154 Cong. Rec. at S8356; Statement of Rep. Andrews, 154 Cong. Rec. at H8291. The statement by Rep. Andrews criticizes the analysis in *Orr v. Wal-Mart Stores, Inc*., 297 F.3d 720 (8th Cir. 2002). The plaintiff in that case, pharmacist Stephen Orr, testified before the House Judiciary Committee (concerning the substantially similar H.R. 3195), and later testified before the Senate HELP Committee. Managers Statement, 154 Cong. Rec. at S8843.

the ADA Amendments Act of 2008," Question 2.[77] The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with diabetes. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *See also Bellofatto v. Red Robin Int'l, Inc*., 2014 WL 7365788, at *10 (W.D. Va. Dec. 24, 2014) (R.56); *Tadder v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2014 WL 1405171, at *12 n.9 (W.D. Wis. Apr. 10, 2014) (R.56); *Ray v. N. Am. Stainless. Inc*., 2014 WL 1047120, at *4 (E.D. Ky. Mar. 18, 2014) (R.12) (type 1 diabetes); *Willoughby v. Connecticut Container Corp*., 2013 WL 6198210, at *9 (D. Conn. Nov. 27, 2013) (R.56) (citing EEOC regulations and noting that diabetes, which by definition impacts endocrine functioning, could easily be found to be a disability); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *3 (E.D. Pa. June 27, 2013) (R.12) (type 2 diabetes).

ix. Epilepsy substantially limits neurological function. 29 C.F.R. § 1630.2(j)(3)(iii). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011) (The statute's requirement for assessing episodic conditions "is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions . . . such as epilepsy . . . were not protected by the ADA because their conditions were episodic or intermittent. . . . It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy . . .) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.");[78] EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 2.[79] The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with epilepsy. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).

x. Human Immunodeficiency Virus (HIV) infection substantially limits immune function. 29 C.F.R. § 1630.2(j)(3)(iii).[80] *See also* 29 C.F.R. Part

[77] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[78] Pre-ADAAA epilepsy cases specifically listed as overruled include *Todd v. Academy Corp*., 57 F. Supp. 2d 448, 453 (S.D. Tex. 1999), 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011), and *Corley v. Dep't of Veterans Affairs ex rel Principi*, 218 F. App'x. 727, 738 (10th Cir. 2007). *Id*., Substantially Limited in Working, 76 Fed. Reg. at 17013. As to the latter the EEOC noted that regardless of its impact on working, a seizure disorder would now be found to substantially limit neurological function. *Id*.

For some of the ADAAA's legislative history concerning epilepsy, see, *e.g*., Managers Statement, 154 Cong. Rec. at S8840B8841; Statement of Rep. Miller, 154 Cong. Rec. at E1841; Statement of Rep. Nadler, 154 Cong. Rec. at H8289; Statement of Rep. Hoyer, 154 Cong. Rec. at H8293 (regarding former Rep. Coelho's epilepsy); Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 and H8927; Statement of Sen. Harkin, 154 Cong. Rec. at S8349; *id*. at S8350 ("It boggles the mind that any court would say that . . . epilepsy is not a disability covered by the ADA, but that is where we are today."); Statement of Sen. Dodd, 154 Cong. Rec. at S8356.

[79] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[80] *See also Roggenbach v. Touro College of Osteopathic Medicine*, 7 F. Supp. 3d 338, 344 (S.D.N.Y. 2014) (R.56); *Horgan v. Simmons*, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010) ("[I]t is certainly plausible—particularly, under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his

1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011) ("[A] an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction."); *Croy v. Blue Ridge Bread, Inc*., 2013 WL 3776802, at *3 n.1 (W.D. Va. July 15, 2013) (R.56) (HIV).

xi. Multiple sclerosis substantially limits neurological function. 29 C.F.R. § 1630.2(j)(3)(iii). But this is not the only way to establish MS as a disability. It is also "expected that individuals with impairments that are episodic or in remission (e.g. . . . multiple sclerosis . . .) will be able to establish coverage if, when active, the impairment or the manner in which it manifests . . . substantially limits a major life activity." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 2;[81] *E.E.O.C. v. Aurora Health Care, Inc*., 2015 WL 2344727, at *12 (E.D. Wis. May 14, 2015) (R.56) (finding "a general understanding that MS is a disabling condition," citing EEOC regulation, but refusing to grant summary judgment for plaintiff based on medical record calling it a "mild" case); *Birks v. YRC, Inc*., 2015 WL 394097, at *2 (N.D. Ill. Jan. 29, 2015) (R.56); *Gaylor v. Greenbriar of Dahlonega Shopping Center, Inc*., 975 F. Supp. 2d 1374, 1385 (N.D. Ga. 2013) (R.56) (Title III case) (MS); *Feldman v. Law Enforcement Associates Corp*., 955 F. Supp. 2d 528, 542 (E.D.N.C. 2013) (relying on the EEOC regulations regarding MS).[82] The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with MS. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). *But cf: Holmes v. Alive Hospice, Inc.*, 2015 WL 459330, at *4 (M.D. Tenn. Feb. 3, 2015) (R.56) ("The Court has been unable to identify, and neither party has pointed to, any written record showing that Plaintiff has ever been diagnosed with or treated for

immune system. Such a conclusion is consistent with the EEOC's proposed regulations to implement the ADAAA which lists HIV as an impairment that will consistently meet the definition of disability.").

For some of the legislative history concerning HIV infection, see, e.g., Statement of Rep. Baldwin, 154 Cong. Rec. at H8927–H8928. Rep. Baldwin expressly criticized cases that turn on the personal choice about having children, including *Cruz Carrillo v. AMR Eagle, Inc*., 148 F. Supp. 2d 142 (D.P.R. 2001); *Rodriguez v. Manpower*, 2006 WL 2726871 (D.P.R. Sep. 22, 2006); *Gutwaks v. American Airlines, Inc*., 1999 WL 1611328 (N.D. Tex. Sep. 2, 1999); and *Blanks v. Southwestern Bell Communications, Inc*., 2001 WL 1636359 (N.D. Tex. Dec. 18, 2001), *aff'd*, 310 F.3d 398 (5th Cir. 2002).

For some of the legislative history concerning immune disorders generally, see, *e.g*., Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8350 (adding major bodily functions to the definition of major life activities "is important for people with immune disorders . . . because they no longer need to show what specific activity they are limited in, in order to meet the statutory definition of disability.").

[81] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[82] For some of the legislative history concerning MS, see, *e*.g., Managers Statement, 154 Cong. Rec. at S8840–8841; Statement of Rep. Nadler, 154 Cong. Rec. at H8289; Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296 and H8927; Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8349; *id*. at S8350 ("It boggles the mind that any court would say that multiple sclerosis . . . is not a disability covered by the ADA, but that is where we are today."); Statement of Sen. Dodd, 154 Cong. Rec. at S8356.

M.S. The only evidence Plaintiff offers to show that she was diagnosed with or treated for M.S. are Plaintiff's self-serving statements in her deposition that she was diagnosed with M.S. in January 2010 while on medical leave. Plaintiff's uncorroborated testimony does not raise a triable issue.").

xii. Muscular dystrophy substantially limits neurological function. 29 C.F.R. § 1630.2(j)(3)(iii).[83]

xiii. Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function." *Id*.[84] Other parts of the ADAAA provide additional support. For example, the requirement for assessing conditions that are episodic or in remission "is intended to reject the reasoning of court decisions concluding that certain individuals with conditions . . . [like] post traumatic stress disorder . . . were not protected by the ADA because their conditions were episodic or intermittent." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 2 (listing major depression and bipolar disorder as covered disabilities).[85] "It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also Elkharwily v. Franciscan Health Sys*., 2015 WL 7758550, at *3 (W.D. Wash. Dec. 1, 2015) (R.12) ("Assuming, as Plaintiff alleges, that Plaintiff is diagnosed with bipolar disorder, then under the statute Plaintiff is disabled."); *Deister v. AAA Auto Club of Michigan*, 91 F. Supp. 3d 905, 917 (E.D. Mich. 2015) (R.56) (doctor stated that depression, anxiety and stress limited ability to function by 50 percent or more in several activities, including performing a variety of duties, dealing with people, and making judgments and decisions); *Russell v. City of Tampa*, 2015 WL 5871189, at *2 (M.D. Fla. Oct. 5, 2015) (R.56) (PTSD on non-exhaustive list of impairments that substantially limit major life activities); *Gaube v.*

[83] For some of the legislative history concerning muscular dystrophy, see, e.g., Managers Statement, 154 Cong. Rec. at S8840–8841; Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8296; Statement of Sen. Harkin, 154 Cong. Rec. at S7957; *id*. at S8349; *id*. at S8350 ("It boggles the mind that any court would say that . . . muscular dystrophy . . . is not a disability covered by the ADA, but that is where we are today."); Statement of Sen. Dodd, 154 Cong. Rec. at S8356; Statement of Rep. Miller, 154 Cong. Rec. at E1841 ("this means the end of the 'catch-22' that Carey McClure and so many others have encountered when seeking justice."). The case referenced by Rep. Miller is *McClure v. General Motors Corp*., 2003 WL 124480 (N.D. Tex. Jan. 10, 2003), *aff'd*, 75 Fed. Appx. 983 (5th Cir. 2003) (unreported) (*per curiam*).

[84] The EEOC notes that the outcome will change in cases like *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 763–764 (3d Cir. 2004), because regardless of its impact on working, a police officer's major depression will substantially limit brain function). 29 C.F.R. Part 1630 App., Substantially Limited in Working, 76 Fed. Reg. 16978, 17013 (Mar. 25, 2011).

For some of the legislative history concerning mental illness, see, *e.g.*, Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8297 (quoting testimony of Rep. Steny Hoyer).

[85] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

Day Kimball Hosp., 2015 WL 1347000, at *9 (D. Conn. Mar. 24, 2015) (R.12) ("In light of the strong presumption of finding a disability in cases involving a major depressive disorder, 29 C.F.R. §§ 1630.2(j)(3)(ii)–(iii), the Court concludes that Plaintiff plausibly alleged that she has a disability."); *Puckett v. Bd. of Trustees of the First Baptist Church of Gainesville, Inc*., 2015 WL 690104, at *8–9 (N.D. Ga. Feb. 18, 2015) (R.56) ("As an initial matter, the fact that Plaintiff was not diagnosed with schizophrenia until after he was terminated is not dispositive. The record contains evidence that Plaintiff suffered and was treated for mental impairments while he worked for the Church."); *Latham v. Donahue*, 40 F. Supp. 3d 1023, 1027 (N.D. Ill. 2014) (R.56) (plaintiff with bipolar disorder unable to sleep for four to five days in a row at times, and medication caused nausea and grogginess requiring leave from work); *Bocock v. Specialized Youth Services of Virginia, Inc*., 2014 WL 8515285, at *4 (W.D. Va. Dec. 15. 2014) (R.12), *adopted in relevant part*, 2015 WL 1611387 (W.D. Va. Apr. 10, 2015); *Doby v. Sisters of St. Mary of Oregon Ministries Corp*., 2014 WL 3943713, at *4 (D. Or. Aug. 11, 2014) (R.56) (OCD); *Mazzocchi v. Windsor Owners Corp*., 2013 WL 5295089, at *7 (S.D.N.Y. Sept. 17, 2013) (R.12) (bipolar disorder); *Stiles v. Judd*, 2013 WL 4714402, at *8 (M.D. Fla. Aug. 30, 2013) (R.12) ("Paired with these allegations, § 1630.2(j)(3)(iii) creates a presumption of impairment and 'it should be easily concluded' that Norris' clinically depressed and bipolar states substantially limited his participation in major life activities."); *Beair v. Summit Polymers*, 2013 WL 4099196, at *2–3 (E.D. Ky. Aug. 13, 2013) (R.56) (major depression and PTSD); *Franklin v. City of Slidell*, 936 F. Supp. 2d 691, 709 (E.D. La. 2013) (PTSD); *Palacios v. Continental Airlines, Inc.*, 2013 WL 499866, at *4 (S.D. Tex. Feb. 11, 2013) ("self-described severity of Plaintiff's depression and its adverse effects on his desire to work, his sleeping, his eating, and his attention to ordinary care of himself, supported by some medical evidence Plaintiff presents, would appear sufficient under the more lenient standard of the ADAAA"); *Duggins v. Appoquinimink School Dist*., 921 F. Supp. 2d 283, 289–290 (D. Del. 2013) (six-month bout of severe depression, which might recur and which prevented work for a month, "inevitably" qualifies as a disability); *Howard v. Pennsylvania Dept. of Public Welfare*, 2013 WL 102662, at *11 n.32 (E.D. Pa. Jan. 9, 2013) (finding sufficient evidence that fibromyalgia a disability, but noting that bipolar disorder may also be a disability, citing "(j)(3)(iii)" list); *Mecca v. School Bd. of Broward County*, 2012 WL 2735066, at *3 (S.D. Fla. July 9, 2012) (relying in part on "j(3)(iii)" list to find plaintiff adequately pleaded that PTSD was a disability); *Wright v. Stark Truss Co., Inc*., 2012 WL 3029638, at *7 (D.S.C. May 10, 2012) (sufficient evidence anxiety and depression was actual and "record of" disability); *Holland v. Shinseki*, 2012 WL 162333, at *6 (N.D. Tex. Jan. 18, 2012) (major depression, panic, anxiety and acute stress disorder limited sleep to one hour per night at times); *Naber v. Dover Healthcare Associates, Inc*., 765 F. Supp. 2d 622, 646–647 (D. Del. 2011) (depression caused one or two sleepless nights per week); *Garner v. Chevron Phillips Chemical Co., L.P*., 2011 WL 5967244, at *28 (S.D. Tex. Nov. 29, 2011) (although

uncontested, court noted that plaintiff had introduced sufficient evidence that her depression, panic disorder and agoraphobia constituted a disability under all three prongs); *Kinney v. Century Services Corp. II*, 2011 WL 3476569, at *10 (S.D. Ind. Aug. 9, 2011) (sufficient evidence depression was substantially limiting). *Compare Bracken v. DASCO Home Medical Equipment, Inc*., 2014 WL 4388261, at *10 n.19 (S.D. Ohio Sept. 5, 2014) (R.56) (although plaintiff "did not have a specific diagnosis of major depressive disorder, he was diagnosed with a 'mood disorder,' a category under which major depressive disorder may fall … [in the DSM]. In addition, Plaintiff was prescribed an anti-depressant medication and displayed anhedonia, a common symptom of major depressive disorder."); *Kravits v. Shinseki*, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012) (case presented possibility of "particularly brief inquiry" because PTSD is on EEOC's (j)(3)(iii) list, but there was no evidence plaintiff actually had PTSD, and bare assertion in complaint insufficient); *Estate of Murray v. UHS of Fairmount, Inc*., 2011 WL 5449364 (E.D. Pa. Nov. 10, 2011) (sufficient evidence that employer regarded plaintiff's depression and anxiety as disability; court questioned whether there was enough evidence of actual disability, but did not reach the issue).

e. Note that the types of impairments described above may substantially limit additional major life activities not explicitly listed above. 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011); *id*. at § 1630.2(j)(3), 76 Fed. Reg. at 17012. On the other hand, only one major life activity need be considered for "actual" and "record of" disabilities. *See* ¶ 5(k) above.

f. Note, too, that conditions closely related to those listed above may benefit from the EEOC's simplified analysis set out in 29 C.F.R. § 1630.2(j)(3)(iii). *See, e.g., Bracken v. DASCO Home Medical Equipment, Inc*., 2014 WL 4388261, at *10 n.19 (S.D. Ohio Sept. 5, 2014) (R.56) (although plaintiff "did not have a specific diagnosis of major depressive disorder, he was diagnosed with a 'mood disorder,' a category under which major depressive disorder may fall … [in the DSM]. In addition, Plaintiff was prescribed an anti-depressant medication and displayed anhedonia, a common symptom of major depressive disorder.").

g. "Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(v), 76 Fed. Reg. 16978, 17009 (Mar. 25, 2011).[86]

[86] For some of the legislative history on dyslexia, *see*, e.g., Statement of Rep. Stark, 154 Cong. Rec. at H8291; Statement of Rep. Courtney, 154 Cong. Rec. at H8296. For some of the history on learning disabilities generally, see, e.g., Statement of Rep. Stark, 154 Cong. Rec. at H8291; Statement of Rep. Courtney, 154 Cong. Rec. at H8296;

h. The EEOC guidance also notes that Congress intended for courts to return to earlier interpretations under which the law protected persons with, e.g., monocular vision, developmental disabilities, heart conditions or heart disease. 29 C.F.R. Part 1630 App., § 1630.2(j)(3), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011). People with coronary artery disease would be substantially limited in walking if they experience shortness of breath and fatigue when walking distances that most people could walk without experiencing those effects. 29 C.F.R. Part 1630 App., § 1630.2(j)(4), 76 Fed. Reg. 16978, 17012 (Mar. 25, 2011).[87] "[S]omeone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require seeing in order to be substantially limited in seeing." 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(viii), 76 Fed. Reg. 16978, 17011 (Mar. 25, 2011). *See also Fahey v. Twin City Fan Companies, Ltd*., 2014 WL 131196, at *3 (D.S.D. Jan. 13, 2014) (bench trial) (monocular vision a disability); *Markham v. Boeing Co*., 2011 WL 6217117, at *4 (D. Kan. Dec. 14, 2011) (similar); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 238 n.2 (D. Mass. 2010) (citing EEOC's monocular-vision example above); *Pridgen v. Department of Public Works/Bureau of Highways*, 2009 WL 4726619, at *4 n.17 (D. Md. Dec. 1, 2009) (monocular vision a disability under ADAAA standard).

i. The legislative history also supports finding that head trauma may be a disability. *See, e.g*., Statement of Rep. Nadler, 154 Cong. Rec. at H8290.

j. Some courts have also relied on the table in the EEOC's *proposed* regulations, which categorized certain impairments as those that 'almost always,' 'sometimes,' and 'never' constitute a disability under the ADA. Although those tables were not included in the final EEOC regulation, at least one court opined that "they may still shed light on Congress' intended interpretation." *Garcia-Hicks v. Vocational Rehab. Admin*., ___ F. Supp. 3d ___, 2015 WL 7720343, at *7 (D.P.R. Nov. 30, 2015) (R.12).

10. Other issues

a. *Authority to issue regulations*—The Act clarifies that the authority to issue regulations implementing the Act's definition of disability is granted to the EEOC, DOJ, and DOT. 42 U.S.C. § 12205a. *See also* 29 C.F.R. Part 1630 App., Introduction, 76 Fed. Reg. 16978, 17003 (Mar. 25, 2011); Managers Statement, 154 Cong. Rec. at S8843. This change responds to the Supreme Court's hesitation to

Managers Statement, 154 Cong. Rec. at S8842. *See also Geoghan v. Long Island R.R.*, 2009 WL 982451, at *17 (E.D.N.Y. Apr. 9, 2009) (ADAAA is intended to cover those with ADHD).

[87] For some of the legislative history regarding heart conditions, see, *e.g*., Statement of Rep. Jackson-Lee, 154 Cong. Rec. at H8927 (quoting testimony of Rep. Steny Hoyer).

accept EEOC regulations defining disability. *See, e.g., Toyota Motor Mfg., supra*, 534 U.S. at 194.[88]

b. *Rehabilitation Act conformed*—The Act also conforms the definition of disability for civil rights claims under the Rehabilitation Act of 1973. 29 U.S.C. §§ 705(9)(B) and (20)(B), as amended. *See also* EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 3;[89] *Akerson v. Pritzker*, 980 F. Supp. 2d 18, 29 (D. Mass. 2013) (R.56); *Caviness v. Atwood*, 2011 WL 6056870, at *2 n.9 (S.D. Miss. Dec. 6, 2011); *Franchi v. New Hampton School*, 656 F. Supp. 2d 252, 258 n.4 (D.N.H. 2009) (noting that ADAAA applies to Rehabilitation Act claims, and in the absence of contrary argument by the defendant, to the Fair Housing Act as well).[90]

c. *Reverse discrimination*—The ADAAA clarifies that the law does not provide for "reverse discrimination" claims. 42 U.S.C. § 12201(g); 29 C.F.R. § 1630.4(b); 29 C.F.R. Part 1630 App., § 1630.4, 76 Fed. Reg. 16978, 17015–17016 (Mar. 25, 2011); *Ingram v. Henry Ford Health Sys*., 2014 WL 1584355, at *5–6 (E.D. Mich. Apr. 21, 2014); *Hamilton v. Trail*, 2011 WL 2971223, at *3 (E.D. Tex. June 14, 2011).

d. *Affirmative action*—"[T]he ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities." 29 C.F.R. Part 1630 App., § 1630.4, 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011).

e. *Disability not always required*—Note that proof of disability is not always required in order to show an ADA violation. 29 C.F.R. Part 1630 App., Intro. n.1, 76 Fed. Reg. 16978, 17003–17004 (Mar. 25, 2011) ("Claims of improper disability-related inquiries or medical examinations, improper disclosure of confidential medical information, or retaliation may be brought by any applicant or employee, not just individuals with disabilities. Likewise, a nondisabled applicant or employee may challenge an employment action that is based on the disability of an individual with whom the applicant or employee is known to have a relationship or association.") (citations omitted).[91]

f. *Other changes in terminology*

[88] The Department of Education may also draft new regulations consistent with the Act. Managers Statement, 154 Cong. Rec. at S8843.

[89] Available online at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

[90] Other courts have applied the ADAAA's definition of disability to claims under the Fair Housing Act. *See, e.g., Mazzocchi v. Windsor Owners Corp*., 2013 WL 5295089, at *7 (S.D.N.Y. Sept. 17, 2013) (R.12). *But cf. Rodriguez v. Vill. Green Realty, Inc*., 788 F.3d 31, 43 n.13 (2d Cir. 2015); *Brooker v. Altoona Housing Authority*, 2013 WL 2896814, at *9 n.8 (W.D. Pa. June 12, 2013) (raising but not resolving the question).

[91] *See also* EEOC Compliance Manual Sec. 2, Threshold Issues § 2-II(A)(4)(b), available online at http://www.eeoc.gov/policy/docs/threshold.html#2-II-A-4-b.

i. The ADAAA now refers to "individual with a disability" and "qualified individual" as separate terms, and it outlaws discrimination "on the basis of disability" instead of prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual." *See* 42 U.S.C. § 12111(8), and § 12112(a) and (b); 29 C.F.R. §§ 1630.9(d) and 1630.16(a) and (f). *See also* 29 C.F.R. Part 1630 App., Note on Certain Terminology Used, 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011); *id*. at § 1630.4, 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011). The purpose of these changes 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.'" 29 C.F.R. Part 1630 App., Note on Certain Terminology Used, 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011), citing the Managers Statement;[92] *id*. at § 1630.4, 76 Fed. Reg. 16978, 17016 (Mar. 25, 2011). Courts have come to various conclusions about the effect of this change. *Compare Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 315 (6th Cir. 2012) (en banc) (suggesting that this language is additional evidence that the ADA does not require proof of sole cause); *Serwatka v. Rockwell Automation, Inc*., 591 F.3d 957, 961 n.1 (7th Cir. 2010) ("Whether 'on the basis of' means anything different from 'because of,' and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, are not questions that we need to consider in this appeal."); *Notarnicola v. Johnson Controls Inc*., 2014 WL 1304591, at *4 (E.D. Mich. Mar. 28, 2014) (R.56) (change in causation language does not change standard); *Bielich v. Johnson & Johnson, Inc*., 6 F. Supp. 3d 589, 602 (W.D. Pa. 2014) (R.56) ("It is not yet clear whether this change in language will result in the less-exacting, motivating factor test being applied to ADA disability discrimination claims."); *Barkhorn v. Ports America Chesapeake, LLC*, 2011 WL 4479694, at *7 (D. Md. Sept. 26, 2011) (relying on this change to adopt correct view of associational discrimination).

ii. "The term 'qualified' . . . means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." (Note that there are exceptions to this definition in § 1630.3. 29 C.F.R. § 1630.2(m).)

g. *Interactive process*—The EEOC's ADAAA guidance confirms the employer's obligation to engage in the reasonable accommodation "interactive process" in appropriate cases. 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011); *id*. at § 1630.2(g), 76 Fed. Reg. 16978, 17006.

h. *Effect on state laws*

[92] *See* 154 Cong. Rec. at S8843.

i. "The ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA." 29 C.F.R. Part 1630 App., § 1630.1(c), 76 Fed. Reg. 16978, 17005 (Mar. 25, 2011).

ii. The effect of the ADAAA on state laws that track the ADA's disability definition is not yet clear. *See Becker v. Elmwood Local School Dist*., 2012 WL 13569, at *9 n.4 (N.D. Ohio Jan. 4, 2012) (concerning "regarded as" disability); *Damron v. Butler County Children's Services*, 2009 WL 5217086, at *10 n.14 (S.D. Ohio Dec. 30, 2009) ("It is yet unclear whether federal caselaw applying the ADAA will also be applicable to the analysis of Ohio law disability discrimination claims or whether disability claims under Ohio law will continue to be analyzed using the pre-amendment standards.").

iii. Some states have amended their own statutes to adopt or track the ADAAA, *e.g., Tamburino v. Old Dominion Freight Lines, Inc.*, 2012 WL 526426, at *6 (D. Or. Feb. 16, 2012); *Molina v. DSI Renal, Inc*., 840 F. Supp. 2d 984, 993 and n.69 (W.D. Tex. 2012); *Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 508 and n.11 (Tex. 2012); *City of Houston v. Proler*, 373 S.W.3d 748, 772 (Tex. App.–Houston [14th Dist.] 2012, review granted on other grounds).

iv. Courts in many other states appear to assume that state laws that follow ADA guidance will conform to the ADAAA. *Compare Varone v. Great Wolf Lodge of the Poconos, LLC*, 2016 WL 1393393, at *3 n.2 (M.D. Pa. Apr. 8, 2016) (R.12); *Partin v. Weltman Weinberg & Reis Co., LPA*, 2016 WL 67299, at *11 (S.D. Ohio Jan. 5, 2016), *report and recommendation adopted*, 2016 WL 454909 (S.D. Ohio Feb. 5, 2016) (R.56), *appeal pending*; *Jones v. Honda of Am. Mfg., Inc.*, 2015 WL 1036382, at *9 (S.D. Ohio Mar. 9, 2015); *Pick v. City of Remsen*, 2014 WL 4258738, at *22 (N.D. Iowa Aug. 27, 2014); *Casas v. School Dist. of Hillsborough County*, 2014 WL 2988059, at *7 n.3 (M.D. Fla. July 2, 2014) (R.56); *Butler v. BTC Foods, Inc*., 2014 WL 336649, at *3 (E.D. Pa. Jan. 30, 2014) (R.56); *Feltner v. Mike's Trucking*, 2014 WL 272446, at *7 n.6 (S.D. Ohio Jan. 23, 2014) (R.56); *Barnhart v. Regions Hosp.*, 2014 WL 258578 (D. Minn. Jan. 23, 2014) (R.56); *Fahey v. Twin City Fan Companies, Ltd*., 2014 WL 131196, at *2 n.4 and *3 (D.S.D. Jan. 13, 2014) (bench trial); *McFadden v. Biomedical Systems Corp.*, 2014 WL 80717, at *2 (E.D. Pa. Jan. 9, 2014) (R.12); *Lafata v. Dearborn Heights School Dist. No. 7*, 2013 WL 6500068, at *7 (E.D. Mich. Dec. 11, 2013) (R.56); *McCracken v. Carleton College*, 2013 WL 4516333, at *7–8 (D. Minn. Aug. 26, 2013); *Esparza v. Pierre Foods*, 2013 WL 550671 (S.D. Ohio Feb. 12, 2013); *Thomas v. Bala Nursing & Retirement Center*, 2012 WL 2581057, at *5 (E.D. Pa. July 3, 2012); *Schrack v. R±L Carriers, Inc.*, 2012 WL 2309365, at *12 (S.D. Ohio June 18, 2012); *Medlin v. Honeywell Analytics, Inc*., 2012 WL 511997, at *4 (M.D. Tenn. Feb. 15, 2012); *Myles v. University of Pennsylvania Health*

System, 2011 WL 6150638, at *6 n.8 (E.D. Pa. Dec. 12, 2011); *Barlar v. Marshall County Bd. of Educ*., 2011 WL 3472338, at *4 n.5 (M.D. Tenn. June 6, 2011); *Seim v. Three Eagles Communications, Inc*., 2011 WL 2149061, at *2 nn.4 and 5 (N.D. Iowa June 1, 2011); *Gesegnet v. J.B. Hunt Transport, Inc*., 2011 WL 2119248, at *2 (W.D. Ky. May 26, 2011); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 239 (D. Mass. 2010) (ADAAA standards apply under Mass. state law based on state-law precedent rejecting *Sutton* and adopting more liberal disability standard); *Medlin v. Springfield Metro. Hous. Auth*., 2010 WL 3065772, at *7 n.5 (Ohio App. Aug. 6, 2010) (suggesting ADAAA analysis may apply to state-law claim after effective date of the statute); *Sansom v. Cincinnati Bell Telephone*, 2009 WL 3418646, at *7 n.1 (S.D. Ohio Oct. 19, 2009) (similar); *Canady v. Rekau & Rekau, Inc*., 2009 WL 3021764, at *8 n.2 (Ohio App. Sept. 22, 2009) (similar). *See also Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *9–10 (S.D. Fla. July 25, 2012); *Estate of Welch v. Holcim, Inc*., 316 P.3d 823, 828 n.1 (Mont. 2014).

v. *But cf. Strange v. Stryker Sales Corp*., 2015 WL 3463629, at *4 (E.D. Ky. June 1, 2015) (R.56) (assuming KY law tracks pre-ADAAA analysis); *Showers v. Endoscopy Ctr. of Cent. Pennsylvania, LLC*, 58 F. Supp. 3d 446, 461–62 (M.D. Pa. 2014) (R.56) (PA law does not conform to ADAAA); *Jacobs v. York Union Rescue Mission, Inc*., 2014 WL 6982618, at *13 (M.D. Pa. Dec. 10, 2014) (R.56); *Hann v. Nestle USA, Inc*., 2014 WL 4639502, at *2 (E.D. Mich. Sept. 16, 2014) (R.12) (plaintiff did not provide case law to support relying on ADAAA); *Riley v. St. Mary Medical Center*, 2014 WL 2207347, at *3 (E.D. Pa. May 28, 2014) (R.12); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *5 (E.D. Pa. Dec. 12, 2013) (R.12) (similar); *Lee v. Spectranetics Corporation*, 2013 WL 5416972, at *4 (D. Colo. Sept. 27, 2013) (Colorado law has not adopted ADAAA); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *2 (E.D. Pa. June 27, 2013) (R.12) (type 2 diabetes); *Andrew O. v. Racing Corp. of W.Va*., 2013 WL 3184641, at *5–6 (W. Va. June 24, 2013); *Brown v. Humana Ins. Co*., 942 F. Supp. 2d 723, 731 (W.D. Ky. 2013) ("However, Kentucky has yet to adopt the amendments."); *Deserne v. Madlyn and Leonard Abramson Center for Jewish Life, Inc*., 2012 WL 1758187, at *3 n.3 (E.D. Pa. May 17, 2012); *Azzam v. Baptist Healthcare Affiliates, Inc*., 2012 WL 28117, at *3 n.2 (W.D. Ky. Jan. 5, 2012) (court would not assume state law conforms to ADAAA); *Fields v. Verizon Services Corp*., 2011 WL 4102087, at *5 (D. Md. Sept. 13, 2011) (state definition of "disability" does not mention impairments that are "episodic or in remission," and court declines to adopt that interpretation of the ADA amendments); *Suchanek v. University of Kentucky*, 2011 WL 3045986, at *6 n.1 (E.D. Ky. July 25, 2011) (observing that state law has not been amended).

vi. Other states expressly follow the ADAAA. *See Welch v. IAC Huron, LLC*, 2013 WL 4817591, at *3 (N.D. Ohio Sept. 10, 2013) (R.56); *Knudsen v. Tiger Tots Community Child Care Center*, 2013 WL 85798 (Iowa App. Jan.

9, 2013) (unpublished); *Jenkins v. Medical Laboratories of Eastern Iowa, Inc.*, 880 F. Supp. 2d 946, 957 (N.D. Iowa 2012).

vii. Even in states with differing statutory definitions, courts may rely on the ADAAA as a basis for rejecting a restrictive view of disability like those that existed in pre-ADAAA federal case law. *See, e.g., Goodpaster v. Schwan's Home Service, Inc*., 849 N.W.2d 1, 7–13 (Iowa 2014) (state law does not always track federal law, but court adopts ADAAA's interpretation and finds multiple sclerosis a disability); *Roghelia v. Hopedale Mining, L.L.C.*, 21 N.E.3d 1114 (Ohio App. June 23, 2014) (Ohio's disability law had been interpreted more generously than federal law, but ADAAA now has a similar "regarded as" standard); *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 228, 230–31 (Mont. 2012); *Meade v. Shangri-La Partnership*, 36 A.3d 483, 490–91 (Md. 2012).

i. *Effect on statute of limitations*—Title I of the ADA continues to require the same exhaustion and limitations periods as does Title VII, 42 U.S.C. § 12117(a), but one unresolved issue is whether, for employment claims brought under § 504 or Title II of the ADA,[93] the ADAAA will be interpreted as creating "a civil action . . . enacted after the date" of the federal four-year "catchall" statute of limitations in 28 U.S.C. § 1658. *Cf. Mercado v. Puerto Rico*, 814 F.3d 581 (1st Cir. 2016) (R.12) (claim necessarily depended on substantive changes in ADAAA, so catch-all limitations period applied); *Cordova v. University of Notre Dame Du Lac*, 936 F. Supp. 2d 1003 (N.D. Ind. 2013) (insufficient support for argument that claim made possible by ADAAA); *Keitt v. New York City*, 882 F. Supp. 2d 412, 450–52 (S.D.N.Y. 2011) (suggesting that four-year statute would apply to claims made possible by ADAAA); *Peters v. Board of Trustees of Vista Unified School Dist*., 2009 WL 4626644, at *3 (S.D. Cal. Dec. 7, 2009) (raising the question but not resolving it).

j. *Effect on post-Iqbal pleading standards*

i. Courts have found that the broadened disability definition makes pleading disability easier. *See, e.g., Martinez-Rivera v. Commonwealth of Puerto Rico*, 812 F.3d 69, 78 n.8 (1st Cir. 2016) (R.12) (in light of mandated "expansive coverage," plaintiff's allegation that her condition "impairs her mobility at a regular rate than other nondisabled individuals" was sufficient); *Dooley v. JetBlue Airways Corp*., ___ F. App'x ___, 2015 WL 9261293, at *5 (2d Cir. Dec. 18, 2015) (R.12) (plausible allegation of disability; fractured hand, with damage to ulnar and median nerves, took plaintiff off work for medical care and treatment, and resulted in temporary total disability, then permanent partial disability with limitations on lifting and repetitive motion); *Garcia-Hicks v. Vocational Rehab. Admin*., ___ F. Supp. 3d ___, 2015 WL 7720343, at *6, 8 (D.P.R. Nov. 30, 2015) (R.12); *Elkharwily v. Franciscan Health Sys*., 2015 WL 7758550, at *3 (W.D.

[93] Note that the courts are split on whether Title II of the ADA applies to claims of employment discrimination. *See, e.g., Currie v. Group Ins. Comm'n*, 290 F.3d 1, 6 (1st Cir. 2002) (collecting authorities).

Wash. Dec. 1, 2015) (R.12); *Smith v. The Pub. Sch. of Northborough-Southborough Massachusetts*, ___ F. Supp. 3d ___, 2015 WL 5634511, at *4 (D. Mass. Sept. 24, 2015) (R.12); *Bray v. Town of Wake Forest*, 2015 WL 1534515, at *10–11 (E.D.N.C. Apr. 6, 2015) (R.12) (unnamed pregnancy-related limitations); *Jurczyk v. Cox Commc'ns Kansas, LLC*, 2015 WL 84758, at *3 (N.D. Okla. Jan. 7, 2015) (R.12) (allegations that chronic migraines caused severe pain, affected her ability to see, walk, communicate, think, and drive, and resulted in two hospitalizations); *Barrilleaux v. Mendocino Cty*., 61 F. Supp. 3d 906, 915–16 (N.D. Cal. 2014) (R.12) (after surgery on fractured knee, plaintiff walked with pain and used crutches); *Bocock v. Specialized Youth Services of Virginia, Inc*., 2014 WL 8515285, at *3–4 (W.D. Va. Dec. 15. 2014) (R.12) (sufficient pleadings that depression and anxiety were disabilities under all three prong), *adopted in relevant part*, 2015 WL 1611387 (W.D. Va. Apr. 10, 2015); *Riley v. St. Mary Medical Center*, 2014 WL 2207347, at *3–4 (E.D. Pa. May 28, 2014) (R.12) (identifying specific limitation, along with the life activities it impacts, is generally sufficient); *Whittaker v. Am.'s Car-Mart, Inc*., 2014 WL 1648816, at *2 (E.D. Mo. Apr. 24, 2014) (R.12) (pleading severe obesity was sufficient, despite more restrictive pre-ADAAA case law); *Johnson v. Baltimore City Police Dept*., 2014 WL 1281602, at *15 (D. Md. Mar. 27, 2014) (R.12) (various injuries, including to her back, plus fibroid tumor leading to partial hysterectomy); *Todd v. Prince George's County, Md*, 2014 WL 1276573, at *6 (D. Md. Mar. 26, 2014) (R.12) (leg injury lasted more than three years and plaintiff can still not ambulate without crutches and fracture boot); *Makeda-Phillips v. Illinois Sec'y of State*, 2014 WL 518938 at *6 (C.D. Ill. Feb. 10, 2014) (R.12) (stress disorder); *McFadden v. Biomedical Systems Corp.*, 2014 WL 80717, at *3 (E.D. Pa. Jan. 9, 2014) (R.12); *Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *4 (E.D. Pa. Dec. 12, 2013) (R.12); *Baier v. Rohr-Mont Motors, Inc*., 2013 WL 2384269, at *6 (N.D. Ill. May 29, 2013) (R.12) (heart condition); *Bordonaro v. Johnston County Bd. of Educ*., 938 F. Supp. 2d 573, 578–579 (E.D.N.C. 2013) (glaucoma and vision loss); *Klaes v. Jamestown Bd. of Public Utilities*, 2013 WL 1337188, at *7 (W.D.N.Y. Mar. 29, 2013) (R.12) (nerve and musculoskeletal damage, sleep apnea, and depression caused limitations in sleeping); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *4 and 6 (S.D. Fla. July 25, 2012); *Munoz v. Baltimore County, Md.*, 2012 WL 3038602, at *7 (D. Md. July 25, 2012); *Davis v. Vermont, Dept. of Corrections*, 2012 WL 1269123, at *6 (D. Vt. Apr. 16, 2012) ("regarded as" prong); *Coffman v. Robert J. Young Co., Inc*., 2011 WL 2174465, at *6 (M.D. Tenn. June 1, 2011) (although plaintiff did not explicitly identify her disability nor the major life activity impacted, she did plead serious injuries requiring more than six months leave, restrictions on lifting and limited motions affecting her ability to work, and the receipt of short- and long-term disability benefits; that was sufficient to plead a physical impairment that substantially limited working); *Fleck v. WILMAC Corp*., 2011 WL 1899198, at *5–6 (E.D. Pa. May 19, 2011) ("Under the broadened standards of the ADAAA, the Court finds Plaintiff's allegations as to her [actual] disability sufficient to withstand the pleading requirements

of Rule 12(b)(6). . . . Given the broad standards of the ADAAA and the factually-intensive nature of this inquiry, the Court finds that these allegations raise a plausible inference that Defendants regarded Plaintiff as disabled within the meaning of the Act."); *Lowe v. American Eurocopter, LLC*, 2010 WL 5232523, at *7–8 (N.D. Miss. Dec. 16, 2010); *Markham v. Salina Concrete Products, Inc*., 2010 WL 5093769, at *3 (D. Kan. Dec. 8, 2010); *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (plaintiff adequately pled actual disability based on leukemia and heart disease because of seven-months leave to undergo chemotherapy; condition in remission but lifelong and at times caused fatigue and easy bleeding/bruising; he also alleged substantial limitation in normal cell growth and circulatory function); *Horgan v. Simmons*, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010) ("[I]t is certainly plausible—particularly, under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system."); *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 239–240 (D. Mass. 2010) (recognizing that meeting *Twombly* pleading standard on disability should be easier under ADAAA; "[h]ere, the facts viewed in the light most favorable to Gil establish a plausible allegation that Vortex believed him to be disabled, and terminated him as a result.").

ii. *But cf. Sheller-Paire v. Gray*, 888 F. Supp. 2d 34, 42 (D.D.C. 2012) (pleading an unidentified "mental disability" was insufficient); *Moore v. Donahoe*, 2012 WL 2979024, at *4 (N.D. Cal. July 19, 2012) (EEOC charge stating plaintiff "sick" was insufficient); *Mercer v. Arbor E & T*, 2012 WL 1425133, at *7 (S.D. Tex. Apr. 21, 2012) ("Plaintiff nowhere directly alleges that she suffered from a severe anxiety disorder; nor does she allege facts to support a claim of substantial impairment."); *Carter v. City of Syracuse School Dist*., 2012 WL 930798, at *5 (N.D.N.Y. Mar. 19, 2012) ("bare and conclusory allegation" that plaintiff's "work related stress condition renders her disabled" is insufficient, even under the ADAAA's substantially-broadened definition of disability); *Bess v. County of Cumberland*, 2011 WL 3055289, at *7 (E.D.N.C. July 25, 2011); *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 514 n.6 (E.D. Pa. 2012) (allegation that plaintiff had "difficulty" moving his leg shortly after surgery because of a cast was insufficient to establish substantial limitation); *Aguirre v. W.L. Flowers Machine & Welding Co., Inc.*, 2011 WL 2672348, at *2 (S.D. Tex. July 7, 2011) (reference to a medical condition that limited working to no more than 45 hours per week did not adequately allege a disability because it neither stated the nature of the impairment nor the manner in which plaintiff's major life activities are substantially limited); *Broderick v. Research Foundation of State University of New York*, 2010 WL 3173832, at *2 (E.D.N.Y. Aug. 11, 2010) (dismissing complaint with leave to replead because plaintiff, who was proceeding under the "actual disability" prong, did not allege what major life activities were substantially limited); *Pridgen v. Department of Public Works/Bureau of Highways*, 2009 WL 4726619, at *4 n.17 (D. Md. Dec. 1, 2009) (monocular vision is a disability under the ADAAA but the brief

explanation of other injuries was insufficient to show additional disabilities "because the severity, duration, and lasting effects of these injuries are unknown.").

k. *Effective Date*—"This Act and the amendments made by this Act shall become effective on January 1, 2009." Pub. L. 110–325, § 8, 122 Stat. 3553 (Sep. 25, 2008), codified at, e.g., 42 U.S.C. § 12101 (Note).

i. Supreme Court precedent suggests that the Act may not govern claims involving conduct that predates January 1, 2009. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Rivers v. Roadway Exp., Inc*., 511 U.S. 298 (1994).

ii. Most courts to address the issue have said that the new law is not applied retroactively, i.e., to employer actions occurring before January 1, 2009. *See, e.g., Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33 n.7 (1st Cir. 2010); *Parada v. Banco Industrial De Venezuela, C.A.*, 753 F.3d 62, 68 n.2 (2d Cir. 2014); *Reynolds v. American Nat. Red Cross*, 701 F.3d 143, 151–152 (4th Cir. 2012); *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Milholland v. Sumner County Bd. of Educ*., 569 F.3d 562, 565–567 (6th Cir. 2009); *Fredricksen v. United Parcel Service, Co*., 581 F.3d 516, 521 n.1 (7th Cir. 2009); *Nyrop v. Indep. Sch. Dist. No.* 11, 616 F.3d 728, 734 n.4 (8th Cir. 2010); *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *Carter v. Pathfinder Energy Services, Inc*., 662 F.3d 1134, 1144 (10th Cir. 2011); *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936 (D.C. Cir. 2009).

iii. The EEOC sides with those courts. EEOC's "Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008," Question 1, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.[94] The EEOC also confirms, however, that "the ADAAA would apply to denials of reasonable accommodations where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009. *Id*. Substantially similar earlier guidance was cited in *Lawson v. Plantation General Hosp., L.P*., 704 F. Supp. 2d 1254, 1273 (S.D. Fla. 2010). *See also Rumbin v. Association of American Medical Colleges,* 2011 WL 1085618, at *8 n.4 (D. Conn. Mar. 21, 2011) (non-employment claim) ("The ADAAA does, however, apply to [plaintiff's] claim that he continues to be denied accommodations after January 1, 2009.").

iv. Note that in *Jenkins v National Bd. of Medical Examiners*, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (unpublished), the court pointed out that whether or not the ADAAA applies to *all* claims arising pre-2009, it *does* apply to

[94] *See also* Transcript of Commission Meeting of June 17, 2009, http://www.eeoc.gov/eeoc/meetings/6-17-09/transcript.cfm.

claims for prospective injunctive relief. *See also Michael M. v. Board of Educ. of Evanston Tp. High School Dist. No. 202*, 2009 WL 2258982, at *3 (N.D. Ill. July 29, 2009) (non-employment case in which plaintiff sought meeting to determine student's future eligibility for § 504 accommodations under the ADAAA). However, several courts have distinguished *Jenkins* in the employment context. *See, e.g., Steffen v. Donahoe*, 680 F.3d 738, 744–745 (7th Cir. 2012); *Villanti v. Cold Spring Harbor Cent. School Dist*., 733 F. Supp. 2d 371, 377 (E.D.N.Y. 2010); *Lawson v. Plantation General Hosp., L.P*., 704 F. Supp. 2d 1254, 1273 (S.D. Fla. 2010); *Strolberg v. U.S. Marshals Service*, 2010 WL 1266274, at *4–5 (D. Idaho March 25, 2010); *Pinegar v. Shinseki*, 2010 WL 891700, at *1 n.2 (M.D. Pa. March 10, 2010); *Britting v. Shineski*, 2010 WL 500442, at *5 (M.D. Pa. Feb. 5, 2010); *Dave v. Lanier*, 681 F. Supp. 2d 68, 72 n.3 (D.D.C. 2010); *Jones v. Wal-Mart Stores, East, L.P*., 2009 WL 1588656 (E.D. Tenn. June 5, 2009); *Geiger v. Pfizer, Inc*., 2009 WL 973545 (S.D. Ohio Apr. 10, 2009); and *Nyrop v. Independent School Dist. No*. 11, 2009 WL 961372 (D. Minn. Apr. 7, 2009), *aff'd*, 616 F.3d 728 (8th Cir. 2010). *See also Singh v. George Washington University School of Medicine and Health Sciences*, 667 F.3d 1, 5 (D.C. Cir. 2011) (although plaintiff sought injunctive relief rather than monetary damages, to gain that relief she had to be reinstated, overturning the University's decision in 2003 to dismiss her; "Much as with a request for damages, reinstatement is backward-looking and seeks to remedy a past unlawful act.").

v. Note, too, that because the Act simply clarifies past misinterpretations of the ADA, court may well consult the Act in cases that are not controlled by binding precedent. *See, e.g., Green v. American University*, 647 F. Supp. 2d 21, 29–30 (D.D.C. 2009) (relying in part on ADAAA to determine that bowel functioning is a major life activity); *Menchaca v. Maricopa Community College Dist*., 2009 WL 166923, at *4–6 (D. Ariz. Jan. 26, 2009) (relying on the Amendments Act as guidance in interpreting the ADA). *See also Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 862 (9th Cir. 2009) ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions."); *E.E.O.C. v. AutoZone, Inc*., 630 F.3d 635, 640 and 642 n.4 (7th Cir. 2010); *Young v. United Parcel Service, Inc.*, 2011 WL 665321, at *19 (D. Md. Feb. 14, 2011) ("the amendments further buttress the notion that Congress never intended" the accommodation provision to protect employees with "regarded as" disabilities); *Yount v. Regent University, Inc*., 2009 WL 995596, at *4 n.3 (D. Ariz. Apr. 14, 2009); *Geoghan v. Long Island R.R*., 2009 WL 982451, at *11 (E.D.N.Y. Apr. 9, 2009) (using ADAAA to bolster holding that concentrating is a major life activity); *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 228, 230–231 (Mont. 2012) (construing term "impairment" in state law for the first time). *Compare Schmitz v. Louisiana*, 2009 WL 210497, at *3 n.6 (M.D. La. Jan. 27, 2009) (court's holding that *Landgraf* and *Rivers* precluded retroactive application only applied to portion of ADAAA at issue [mitigating-measures analysis] because it changed the

legal consequences that attached to the defendant's actions). But this argument will not work if it requires the court to ignore then-binding precedent like *Toyota Motor* or *Sutton*. *Cf. Steffen v. Donahoe*, 680 F.3d 738, 744 (7th Cir. 2012) (court found argument—which from briefing appeared to be arguing against *Toyota* and *Sutton*—"simply repackages a retroactivity argument repeatedly rejected by this Court"); *Carmona v. Southwest Airlines Co.*, 604 F.3d 848, 856–857 (5th Cir. 2010) (rejecting attempt to argue around *Toyota* and *Sutton*); *Brooks v. Kirby Risk Corp*., 2009 WL 3055305, at *4–5 (N.D. Ind. Sep. 21, 2009) (similar).

vi. Sometimes the date of a claim is itself in dispute. *See, e.g., Morris v. Sequa Corp*., 564 Fed. Appx. 516 (11th Cir. 2014) (R.56); *Brown v. City of Jacksonville*, 711 F.3d 883, 888 n.6 (8th Cir. 2013) (ADAAA applies because although onset of disability was in 2008, termination was in 2009); *Diaz v. City of Philadelphia*, 2012 WL 1657866, at *8 n.24 (E.D. Pa. May 10, 2012) (despite defendant's argument, "[t]he core of Plaintiff's ADA claim involves events that occurred after January 1, 2009"); *Markham v. Boeing Co*., 2011 WL 6217117, at *3 (D. Kan. Dec. 14, 2011) (although employer argued that RIF decision was made in December 2008, actual termination notice was not issued until January, supporting finding that some discrimination occurred in 2009); *Myles v. University of Pennsylvania Health System*, 2011 WL 6150638, at *7 n.9 (E.D. Pa. Dec. 12, 2011) (ADA claims stemmed from termination in March 2009, not from medical exams she was required to attend in 2008); *Hutchinson v. Ecolab, Inc*., 2011 WL 4542957, at *7 (D. Conn. Sept. 28, 2011) (finding that claim arose in January 2009, after effective date of ADAAA). *But cf. Jones v. Nationwide Life Ins. Co*., 847 F. Supp. 2d 218, 223 (D. Mass. 2012) (decision to terminate occurred in 2008 so pre-ADAAA law applied, even though employer gave plaintiff 30 days to look for alternate position, which carried into 2009).

vii. In cases in which discrete adverse actions took place both before and after the effective date, courts should apply the ADAAA standards to the post-2008 actions. *See, e.g., Martin v. District of Columbia*, 78 F. Supp. 3d 279, 297 n.18 (D.D.C. 2015) (R.56); *Powers v. USF Holland Inc*., 2015 WL 1455209, at *5–6 (N.D. Ind. Mar. 30, 2015), *reconsid. den'd*, 2015 WL 3905261 (N.D. Ind. June 25, 2015) (R.56); *Whalen v. City of Syracuse*, 2014 WL 3529976, at *4 (N.D.N.Y. July 15, 2014) (R.56); *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *3 n.3 (E.D. Mo. Mar. 5, 2013); *Shelton v. City of Cincinnati*, 2012 WL 5385601, at *8 (S.D. Ohio Nov. 1, 2012); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *11 (W.D. Pa. Sept. 28, 2011); *Barkhorn v. Ports America Chesapeake, LLC*, 2011 WL 4479694, at *7 (D. Md. Sept. 26, 2011); *Sharif v. J.C. Penney Corp., Inc*., 2010 WL 4659548, at *4 n.3 (M.D. Tenn. Nov. 9, 2010); *Cook v. Equilon Enterprises, L.L.C*., 2010 WL 4367004, at *6 (S.D. Tex. Oct. 26, 2010); *Brtalik v. South Huntington Union Free School Dist.*, 2010 WL 3958430, at *7 (E.D.N.Y. Oct. 6, 2010). *Compare Woodman v. Runyon*, 132 F.3d 1330, 1342 (10th Cir. 1997).

viii. Pre-ADAAA cases may provide guidance regarding the law's application to continuing violations that straddle the effective date. *Compare Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Title VII case); *Morton v. GTE North Inc.*, 922 F. Supp. 1169, 1177 (N.D. Tex. 1996) (ADA). Continuing violations that extend past the ADAAA's effective date should be covered by the new law, but courts may disagree about whether a violation is truly continuing. *See, e.g., Latham v. Board of Educ. of the Albuquerque Public Schools*, 2010 WL 4137537, at *4 (D.N.M. Sept. 21, 2010) (pre-2009 refusal to accommodate is not covered by the ADAAA just because the employer failed to reverse itself upon the effective date), *aff'd*, 489 Fed. Appx. 239 (10th Cir. 2012).

ix. Moreover, even if not separately actionable, a discriminatory act that "occurred before the statute was passed . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *Hazelwood School District v. United States*, 433 U.S. 299, 310 n.15 (1977) (Title VII case); *Diaz v. City of Philadelphia*, 2012 WL 1657866, at *8 n.24 (E.D. Pa. May 10, 2012) ("events that preceded January 1, 2009 provide the background for Plaintiff's [ADAAA] claim"). *See also United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (similar).

l. *Affect on FMLA*—ADAAA's broad definition of disability means that more "serious health conditions" under the FMLA will be ADA disabilities as well. Also, FMLA leave may be taken to care for an adult son or daughter who is incapable of self-care because of a "disability," defined by reference to prong one of the ADA. 29 C.F.R. § 825.122(c)(2). Under the ADAAA those conditions may be broader, *e.g., Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 967–968 (S.D. Tex. 2011), but they will still have to result in one who is "incapable of self-care" as defined by the FMLA.

m. *Affect on "100% healed" policies*—Many courts have found such policies inconsistent with the ADA, but many pre-ADAAA cases failed on the basis of disability. "The risk of such a policy is even greater (if not absolute) now that the ADAAA has changed the definition of 'regarded as' disabled." *Powers v. USF Holland, Inc.*, 667 F.3d 815, 824 (7th Cir. 2011) (parentheses omitted).

Proving A Pregnancy Discrimination Case After Young v. UPS: Comparators, Statistics & Accommodation

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The Pregnancy Discrimination Act (PDA) requires employers to treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

In March 2015, the United States Supreme Court issued its first PDA accommodations case--*Peggy Young v. United Parcel Service*, 575 U.S. ___, 135 S. Ct. 1338 (2015), *vacating and remanding* 707 F.3d 437 (4th Cir. 2013), *aff'g* 2011 WL 665321 (D. Md. Feb. 14, 2011). UPS required Peggy Young to take nearly seven months of unpaid leave when she brought in a doctor's note recommending that she not lift more than 20 pounds for the duration her pregnancy, even though UPS provides alternate work to a wide range of non-pregnant employees with physical limitations.

So far, legal commentators have focused primarily on the Supreme Court's significant holding (discussed below) that relates to a PDA plaintiff's proof that an employer's "nondiscriminatory reasons" for disparate treatment are actually a pretext for discrimination. However, an equally significant development is the Supreme Court's holding that the plaintiff had successfully set out a *prima facie*

case of pregnancy discrimination, under the standard paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

I. The *Prima Facie* Case of Pregnancy Discrimination

A. The Lower Courts' Holding as to the *Prima Facie* Case

In this district court, Peggy Young, like most other plaintiffs in accommodations cases under the PDA, lost her case at the *prima facie* stage. Although the issue of accommodations under the PDA had not previously been decided by the District of Maryland or by the Fourth Circuit, the district court in *Young v. UPS*, rightly anticipating the manner in which the Fourth Circuit would interpret the PDA, shot down the case before it got out of the gate by holding that Ms. Young had failed to point to a similarly situated comparator whom UPS had treated better and that she had failed to come forward with "other circumstantial evidence [which] suggests discrimination." 2011 WL 665321, at n.18.

Although the Supreme Court had previously held that making a *prima facie* case of discrimination is not an onerous burden, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), and although the Supreme Court had held that a plaintiff can make out a *prima facie* case of sex discrimination even in the absence of comparators, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989), the courts of appeal have routinely ended accommodation-type PDA claims by holding that the pregnancy discrimination plaintiff cannot state a *prima facie* case of discrimination because she cannot make a showing as to the fourth prong of the *prima facie* case: that is, she cannot point to non-pregnant comparators who were treated better than she was treated.

The district court in *Young v. UPS*, finding such a defect as to comparators in the plaintiff's case, stated wearily, "Time and again, Young argues that UPS accommodates employees 'affected by such things as high blood pressure, diabetes, vision problems, and drunk driving convictions,' while it denies accommodations for pregnant women. She suggests all of these individuals were similar to her in their inability to work and represent valid comparators." 2011 WL 665321, *13. But the district court--like the Fourth Circuit after it--agreed with UPS's contention that none of the employees whom UPS had accommodated qualified as comparators similarly situated to Young. *Id.*, *14. For this same

reason, the District Court denied Young any discovery on certain of her claimed comparators. ("As the court has already indicated on more than one occasion, drivers who lose their DOT certification are not similar in their inability to work to Young"*;* and "Plaintiff is prohibited from asking about . . . UPS's assignment of alternative work to employees who lost their driver's licenses or failed the DOT exam." *Id., *13*.)

Holding that "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees", *id., *14* (internal citation omitted), the District Court explained:

> It is important here to recall the objective of this element of the *prima facie* case: to discern whether a reasonable inference can be drawn that the employer has animus directed specifically at pregnant women. When an employer grants pregnant employees and some class of non-pregnant employees equally harsh terms, it undermines such an inference. In such circumstances, an employer might have some form of animus that is not to be applauded, but the animus is not directed towards a protected trait and, consequently, is not actionable.
>
> Lacking any similarly situated comparator--or any other circumstantial evidence--Young's disparate treatment claims fails. [*Id., *14*.]

Affirming the decision of the district court, the Fourth Circuit stated:

> Thus, the dispute here centers on the final element of the *prima facie* case: whether similarly-situated employees outside the protected class received more favorable treatment than Young, or more broadly, whether UPS's decision to prevent Young from either receiving an accommodation or returning to work occurred "under circumstance[s] giving rise to an inference of unlawful discrimination." [Citation omitted.] ...
>
> ... Young seeks to compare herself to employees accommodated under the ADA, drivers who have lost their DOT certification for medical reasons, and the employees injured on the job.... [T]hese

> accommodations were created by a neutral, pregnancy-blind policy--a policy she can attack indirectly no more successfully than she could directly.
>
> Moreover, we conclude that a pregnant worker subject to a temporary lifting restriction is not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." [707 F.3d at450.]

Under the reasoning of the district court and the Fourth Circuit, Peggy Young could not compare herself to those injured on the job because Young had not been injured on the job. She could not compare herself to those who, due to some medical condition, had lost their Department of Transportation commercial drivers certifications, because Young had not lost hers. She could not compare herself to those disabled under the ADA because pregnancy is not a disability and Young was not disabled. In effect, for purposes of her pregnancy discrimination claim, Peggy Young could compare herself only to the hypothetical, unidentified other non-pregnant employees whom UPS does not accommodate.

UPS argued that a reason that those workers injured on the job were not similarly situated to Young is that UPS experienced cost savings by accommodating those injured on the job (who would otherwise draw workers compensation benefits while not working), and that UPS would not realize such a cost benefit if it accommodated pregnant workers.

Young argued that the class of valid comparators was not so narrow, based on the Supreme Court's prior statement that "in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the 'decision to forbid special treatment of pregnancy despite the social costs associated therewith'", *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (citation omitted). From this principle, Young argued that a motive of cost savings would not protect an employer from PDA liability where the employer treated more favorably the employee injured on the job than it treated the pregnant employee, and that those injured on the job were therefore fair comparators.

Young further argued that even if workers' compensation costs are an appropriate employer defense in a PDA case, this must be so not at the *prima facie* case stage--where as to the fourth prong the employee must show that others were treated more favorably--but rather at the stage where the employer produces evidence of its "nondiscriminatory reason". Where the employer truly accommodated only limitations arising from on-the-job injuries as a means of saving workers compensation costs, such a defense would have merit under the reasoning of some circuits. But in a case (like *Young v. UPS*) in which the employer also accommodates limitations arising from non-pregnancy off-the-job circumstances (e.g., medical problems and drunk driving situations), *i.e.*, circumstances in which workers' compensation costs are not at issue, such a defense would be vulnerable to evidence that the employer's alleged non-discriminatory reason was a pretext for discrimination against pregnant employees. *See Parker v. Albertson's Inc*., 325 F. Supp.2d 1239, 1247 (D. Utah 2004) (warning against "'shortcircuit[ing]'" case at the *prima facie* stage and denying plaintiff "the opportunity to show that the policy, which may be facially neutral, is actually a pretext for unlawful discrimination"), *citing EEOC v. Horizon/CMS Healthcare Corp*., 220 F.3d 1184, 1195 n.7 (10th Cir. 2000).

B. The Supreme Court's Holding as to the *Prima Facie* Case

The Supreme Court briefly cited its earlier Title VII decisions for the propositions that the *prima facie* case of discrimination required by *McDonnell Douglas* "is 'not intended to be an inflexible rule'" (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978)); that a "plaintiff may establish a *prima facie* case by 'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion.' *Id.*, at 576. . . . The burden of making this showing is 'not onerous.' *Burdine*, 450 U.S. at 253." 135 S. Ct. at 1353-1354.

The Supreme Court then held the *prima facie* case of discrimination under the second clause of the Pregnancy Discrimination Act to be:

> that [the plaintiff] belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" [135 S. Ct. at 1342.]

The Supreme Court held that "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis." *Id*. at 1355.

The Supreme Court thus quickly pushed aside the stumblingblock that has tripped the vast majority of PDA plaintiffs in accommodations cases. In so holding, the Supreme Court made clear that the PDA means what it says: the employees to whom a pregnancy discrimination plaintiff can compare herself are not only those employees whose limitations derive from similar causes or similar conditions, but rather those employees who simply are similar in ability or inability to work.

Three months after the Supreme Court decided Young v. UPS, the EEOC issued revised Pregnancy Discrimination Guidance which included a summary of the Young case to illustrate how facially neutral discrimination can be disparate treatment based on pregnancy. The EEOC noted that the pregnancy discrimination plaintiff does not need to show an employee who is similar to the plaintiff in all but the protected ways. Rather, the pregnancy discrimination plaintiff can satisfy her burden by identifying an employee similar in ability to work due to an impairment who was provided the accommodation that the pregnant employee sought.

II. Legitimate Non-Discriminatory Reasons

Under *McDonnell Douglas*, once Ms. Young had established her *prima facie* case of pregnancy discrimination, the burden fell to UPS to rebut the suggestion that UPS had discriminated on the basis of pregnancy by coming forward with its legitimate nondiscriminatory reasons that it accommodated other workers but did not accommodate pregnant workers. To meet that burden, UPS argued that its collective bargaining agreement (CBA) required it to accommodate several categories of employees but not pregnant employees. Young argued that UPS could not defend itself by pointing to provisions of the collective bargaining agreement any more than an employer could defend itself in a race discrimination case by pointing to CBA provisions that permitted an employer to discriminate against employees on the basis of race. Young presented the sworn statement of

the person who negotiated the CBA on behalf of the union as evidence that the Union had sought a CBA provision that would have protected pregnant employees with limitations just as it protected those injured on the job, and UPS had refused to agree to such a provision. The lower courts sided with UPS.

UPS argued two additional business reasons for its disparate treatment–workers compensation savings and maintaining employees' routine to reduce the burden of hiring new employees–reasons that Young characterized as mere cost and convenience. Given their other holdings, the lower courts did not need to decide whether these constituted legitimate nondiscriminatory reasons.

Though Justice Alito's concurring opinion observed that "it is not at all clear that [UPS] had any neutral business ground for treating pregnant drivers less favorably", 135 S. Ct. at 1361, the Supreme Court majority did not resolve this question of "legitimate non-discriminatory reasons". However, the majority did reject the lower courts' conclusion that a collection of "pregnancy blind", "facially neutral" policies are sufficient to protect an employer from liability for pregnancy discrimination, 135 S. Ct. at 1349, and did expressly hold that the employer's "legitimate non-discriminatory reason" for accommodating some employees but not pregnant employees "normally cannot consist simply of a claim that it is more expensive or less convenient" to accommodate pregnant workers. 135 S. Ct. at 1354.

(In its brief filed with the Supreme Court seven years after Ms. Young instituted this action, UPS announced that, effective January 1, 2015, it would provide to workers who have pregnancy-related limitations the same accommodations it provides to workers with work-related limitations. This announcement may have influenced the Supreme Court's decision not to expressly address UPS's earlier argument that its CBA prohibited it from providing such accommodations to its pregnant employees.)

III. Pretext

The focus of the Supreme Court's opinion (and the principal focus of subsequent commentary) was on the issue of pretext--the nature of the evidence to which a PDA plaintiff could point in order to demonstrate that any "legitimate nondiscriminatory reason" for differential treatment that the employer might assert

is actually a pretext for pregnancy discrimination. The Supreme Court did not decide this question, but rather left the question for the lower courts to make on remand.

Young had argued several different indices of pretext, and chief among them was the Building Manager's statement to Young that she must go home until she was no longer pregnant because she was too much of a liability.

The district court and the Fourth Circuit both held this statement to be irrelevant since UPS had contended that the decisionmaker was not the Building Manager, but rather the Health Officer who denied the accommodation. Young argued that neither the Building Manager nor the Health Officer were making any decisions at all. Rather, both of them were simply implementing UPS's discriminatory corporate policy of not accommodating workers with pregnancy-related limitations.

The Supreme Court evidently vindicated the relevance of the Building Manager's statement by citing it in its opinion. 135 S. Ct. at 1346. The Supreme Court also cited the assessment of the shop steward--a statement ruled irrelevant by the lower courts--that the only time UPS had a problem accommodating lifting restrictions was in the case of pregnant employees. *Id.* at. 1347.

The holding of the Supreme Court most helpful to PDA plaintiffs on the issue of pretext is its holding that:

> [T]he plaintiff may reach a jury on this issue [of pretext] by evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather--when considered along with the burden imposed--give rise to an inference of intentional discrimination. [135 S. Ct. at 1354.]

–and by its holding that:

> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to

accommodate a large percentage of pregnant workers. [135 S. Ct. at 1354.]

This holding is particularly instructive in its indication that the intent necessary for intentional pregnancy discrimination does not require that a PDA plaintiff be able to point to a decisionmaker who shows animus against pregnant employees. Rather, sufficient discriminatory intent can properly be inferred from the manner in which an employer treats its employees. A comparison of the number of non-pregnant employees accommodated and the number of pregnant employees not accommodated may be a sufficient basis for a finding of intentional discrimination.

An interesting question that remains is whether the PDA plaintiff must meet a qualitative standard or a quantitative standard. In the Young decision, the Supreme Court held that Young had set out a prima facie case of pregnancy discrimination because "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's." *Id*. at 1355. This seems to suggest a qualitative standard. However, later the Supreme Court states that a plaintiff can satisfy her burden with evidence "that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers" which seems to suggest a quantitative standard.

The Supreme Court summarized its holding when instructing the Fourth Circuit to consider the combined effects of UPS's separate accommodation policies and the strength of UPS's justifications for each when combined. "That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?"

Epilogue

Litigation is not for the faint of heart–nor for the impatient. Peggy Young was sent home from work because of her pregnancy in October 2006. She filed her EEOC Charge against UPS in July 2007 and her district court complaint in October 2008. The district court held against her in 2011, and the Fourth Circuit held against her in 2013. Not until March of 2015 did the Supreme Court reverse those holdings; and on October 1, 2015–almost nine years after she was sent home pregnant--Ms. Young and UPS filed a stipulation of dismissal in the case, after

amicably resolving the matter.

Ms. Young is pleased that her case was influential in that: (1) UPS changed its policy and agreed to extend to pregnant women the same accommodations that it extends to those injured on the job; (2) the State of Maryland passed its own Reasonable Accommodations for Disabilities Due to Pregnancy Law (and nine other states have followed suit), (3) the Solicitor General announced that the U.S. government has changed its position on the issue of pregnancy accommodations, (4) the EEOC has issued new guidelines strengthening the protections that employers must provide to pregnant employees, and (5) the Supreme Court vindicated an interpretation of the PDA that results in equal treatment for pregnant workers.

* * *

Pregnancy Discrimination Decisions since *Young v. UPS*

Luke v. Cplace Forest Park SNF, No. 14-31347, (5th Cir. 2015).

The plaintiff claimed her employer (a rehabilitation center) violated the PDA when it terminated her employment after refusing to make reasonable accommodations that would have permitted her to continue working during her pregnancy. The district court granted summary judgment to the defendant, and the plaintiff appealed. While the appeal was pending, the Supreme Court handed down *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

"The Court in Young, abrogating precedent from this circuit, [citation omitted], laid out a new analysis for Title VII claims, such as the one presented here, that an employer's failure to accommodate pregnancy constitutes sex discrimination. [Citation omitted.] Given this intervening change in the law, we conclude that the parties here must be afforded an opportunity to present their claims and defenses in light of *Young*, and the district court should decide the matter under current law in the first instance.... Therefore, the district court's summary judgment as to the Title VII claim is VACATED ...."

Hicks v. City of Tuscaloosa, Case No. 13-02063, (N.D. Ala. 2015).

District court denied employer's motion for summary judgment on PDA claim.

Patrol officer on narcotics squad who was reassigned to patrol duty after her return from maternity leave claimed she was constructively discharged because she was breastfeeding and lactating. Her doctor advised her not to wear a snug-fitting ballistics vest while lactating and the employer denied her request for a desk job, though other officers had been temporarily assigned to a desk job for medical conditions. The employer's policy required the ballistics vest except where an "approved physician determines that an officer has a medical condition that would preclude wearing body armor" or "the department determines that circumstances make it inappropriate to mandate wearing body armor." [Citation omitted.]

The City did not grant Hicks' request for a desk job, but put her on patrol and gavfe her the choice of wearing a larger vest or no vest at all. The court found that "[a] reasonable jury could conclude that, given the dangers of patrolling without a vest and the [employer's] unwillingness to give her a temporary desk assignment while breastfeeding, plaintiff was left with no choice but to resign. She could not reasonably do her patrol duties safely, as other patrol officers could, without wearing a properly fitting ballistics vest, but she could not wear the vest while lactating."

McQuiston v. City of Clinton, Iowa, No. 14-0413, (Iowa, 2015).

Pregnant paramedic brought claim under Iowa statute after she was denied light duty for pregnancy. The Iowa Supreme Court noted that "language of the PDA differs from the language of [the Iowa statute], but the concepts at play parallel each other and support similar outcomes."

"The City's statutory argument tracked those made by UPS before the Supreme Court in Young—that the employer need not accommodate disability caused by pregnancy unless it falls within specifically defined categories singled

out for accommodation. [Citations omitted.] The City argued McQuiston's treatment under the policy should only be compared with how the City treats those suffering from a disability arising outside of employment. The district court, without the benefit of the *Young* decision at the time, agreed the narrow classification was the proper comparison group. Yet, as with Young, the statutory remedy provided in [the Iowa statute] would be rendered moot and defeat the purpose and intent of the legislature if we permitted such an easy way for employers to evade the antidiscrimination statute. [Citation omitted.] We therefore remand to the district court to evaluate McQuiston's claim under the standard articulated in *Young*, comparing her with all those temporarily disabled, not just those injured off the job."

Allen-Brown. v. District of Columbia, No. 13-1341, (D.D.C. 2016).

Allen-Brown was a D.C. police officer who was lactating when she returned from maternity leave in 2011. Because she needed to express breast milk during work hours, she requested a temporary assignment that would not require her to wear a bullet-proof vest that can interfere with lactation by causing pain and clogged milk ducts. The DC police department denied Allen-Brown's request for a limited-duty accommodation. Allen-Brown sued under the PDA and the D.C. Human Rights Act which requires employers to take steps to accommodate lactating women. The court denied both parties' cross motions for summary judgment.

"In the normal course of a Title VII case, and under the approach advocated by Justice Alito in his separate opinion, [citation omitted], a plaintiff can raise a genuine issue of material fact about whether the asserted rationale was pretextual by, for example, showing that the employer's justification was not plausible, that it was contradicted by other evidence, or that the employer offered shifting rationales, [citations omitted]. To this, the Young majority added the possibility that a PDA plaintiff "may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden." Young, 135 S. Ct. at 1354. One way that a plaintiff might make this showing is by producing "evidence that the employer accommodates a large percentage of nonpregnant workers while failing

to accommodate a large percentage of pregnant workers." Id.

"[T]he only relevant inquiry is whether Allen-Brown has produced sufficient evidence for a reasonable jury to find that the MPD, in fact,

discriminated against her based on her gender or her pregnancy-related condition. But, unlike in the typical Title VII case, she can carry that burden in one of two ways. She can produce "traditional" evidence that the reason given by the MPD was a pretext for discrimination—that is, evidence that the MPD is "making up or lying about the underlying facts," [citations omitted]. Or, following Young, she could produce "evidence that [the MPD's] policies impose a significant burden on pregnant workers, and that [its] 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden . . . —give rise to an inference of intentional discrimination." Young, 135 S. Ct. at 1354.

Legg v. Ulster County, No. 143636, (2nd Cir. 2016).

Legg, a corrections officer at the county jail, presented to her employer a doctor's note advising that she not have contact with inmates during her pregnancy. The employer denied her request for light duty because light duty policy was available only to those injured on the job and told Legg that she must return to work full duty or go on disability.

Legg sued under the Pregnancy Discrimination Act. At the close of Plaintiff's case, the district court granted judgment as a matter of law because the employer's policy was "facially neutral with respect to pregnancy."

"While this appeal was pending, the Supreme Court decided Young v. United Parcel Service, Inc., 135 S. Ct. 1338 (2015). Young held that an employer's facially neutral accommodation policy gives rise to an inference of pregnancy discrimination if it imposes a significant burden on pregnant employees that is not justified by the employer's non-discriminatory explanation. We conclude that Legg has presented sufficient evidence to support a pregnancy discrimination claim under Young and therefore vacate the judgment in part and remand with instructions to conduct a new trial."

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LITIGATING FAILURE TO ACCOMMODATE CLAIMS

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Attorneys who represent pregnant women today have a variety of employee-protective laws at their disposal. But they aren't straightforward. Plaintiffs' lawyers must master the amendment of the Americans with Disabilities Act, the Supreme Court's Pregnancy Discrimination Act decision in *Young v. UPS*, the EEOC's pregnancy discrimination guidance, and state pregnancy accommodation laws.

The Center for WorkLife Law at the University of California, Hastings College of the Law has developed Pregnant@Work, www.pregnantatwork.org, an online resource center with (free) materials for attorneys representing pregnant women seeking accommodations at work, including:

- Legal overview of all federal, state, and local laws concerning pregnancy accommodation
- Comprehensive audio training for plaintiffs' attorneys
- Case list and analyses of major pregnancy accommodation decisions
- Issue spotting checklist

Attorneys representing employees in pregnancy accommodation or family responsibilities discrimination matters may **seek guidance from the experts at WorkLife Law directly**. Send an email to info@worklifelaw.org or call 415-565-4640.