The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities

Allison Ara
THE ADA AMENDMENTS ACT OF 2008: DO THE AMENDMENTS CURE THE INTERPRETATION PROBLEMS OF PERCEIVED DISABILITIES?

Allison Ara*

I. INTRODUCTION

Congress passed the Americans with Disabilities Act\(^1\) (ADA) in 1990 with the hope of eliminating discrimination on the basis of disability.\(^2\) Congress aimed “to provide clear, strong, consistent, [and] enforceable standards addressing discrimination against individuals with disabilities,”\(^3\) however, courts failed to apply a broad standard.\(^4\) Supporters of an extensive interpretation of the ADA vehemently opposed these judicial interpretations, focusing their criticism on the United States Supreme Court’s decision in *Sutton v. United Air Lines*.\(^5\) In *Sutton*, the Court imposed harsh limitations on those bringing ADA claims alleging they were “regarded as”\(^6\) disabled under the Act’s definition of disability.\(^7\) Further, the circuits split over whether to

---

*Managing Editor of Volume 50 of the Santa Clara Law Review; J.D. Candidate 2010 at Santa Clara University School of Law; B.A. in Anthropology from the University of California, Berkeley. I would like to thank our Board of Editors and especially those who worked on my comment for helping to shape it into its final form. Additionally, I would like to thank Nick Manov as well as my family and friends for putting up with me throughout law school.

2. Id. § 12101(b)(1).
3. Id. § 12101(b)(2).
5. See infra Part II.B.2–3.
6. This comment will use the phrases “regarded as” disabled and perceived disability to refer to the third prong of the definition of disability, which states “being regarded as having such an impairment.” ADA Amendments Act sec. 4(a), § 3(1)(C).
7. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489–91 (1999). To show that a plaintiff has an actual disability, he or she must have “a physical or
interpret the ADA as granting reasonable accommodation to those who were "regarded as" disabled, or to restrict this grant to only those with actual disabilities. These decisions left the circuits fractured and protection for those with perceived disabilities extremely limited.

In late 2008, Congress responded to these limitations by passing the ADA Amendments Act of 2008 ("the ADAAA" or "the Amendments"), which supplemented the definition of disability, but did not require covered entities to reasonably accommodate those with perceived disabilities. By superseding the *Sutton* decision, the additional definition of perceived disability established a more inclusive standard. Congress broadened group that can allege discrimination based on perceived disability, but narrowed the remedies available to them. Although Congress intended to provide courts with a clear and enforceable standard, ambiguity remains. By retaining the original definition of disability instead of changing the wording, Congress failed to counteract all of the confusion that the courts struggled with before passing the Amendments. Additionally, the intent of Congress may perplex the courts because it both broadened and restricted the protection

---

9. See ADA Amendments Act sec. 2(a), § 3(3)–(7).
10. *Id.* sec. 4(a), § 3(3), sec. 6(a)(1), § 501(h).
11. *Id.* sec. 2(b)(2)–(5) (stating that a purpose of the ADAAA was to reject the United States Supreme Court decisions in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*).
12. See *id.* sec. 4(a), § 3(3).
13. *Id.* sec. 6(a)(1), § 501(h).
14. *Id.* sec. 2(b)(1); see infra Part IV.A.
15. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1), 122 Stat. 3553, 3553; see infra Part IV.
for those who are "regarded as" disabled.\textsuperscript{16} Based on these potential problems, courts may still misinterpret congressional intent under the ADAAA.

This comment explores the background of the definition of perceived disability and considers potential areas of concern for future litigation. Part II discusses the history of the "regarded as" prong of the definition of disability, from its original inclusion in the Rehabilitation Act of 1973 to the recent amendment of the ADA.\textsuperscript{17} Part III identifies the problem confronting the courts when interpreting the ADA Amendments Act of 2008.\textsuperscript{18} Part IV will analyze the impact of the Amendments along with the potential difficulties the judiciary may face when interpreting the amended ADA.\textsuperscript{19} Lastly, Part V will propose solutions for these difficulties, so that a consistent standard may finally be reached.\textsuperscript{20}

II. BACKGROUND

The ADA defines a disabled individual as one who has "a physical or mental impairment that substantially limits one or more major life activities," "a record of such an impairment," or one who is "regarded as having such an impairment."\textsuperscript{21} This definition was originally included in the Rehabilitation Act of 1973 to define handicap and was interpreted thereunder.\textsuperscript{22} This section will track the history of the third prong, from its original use in the Rehabilitation Act to its current use in the ADA Amendments Act.\textsuperscript{23}

A. The Rehabilitation Act of 1973 and the Rehabilitation Act Amendments of 1974

Congress intended the Rehabilitation Act to prohibit discrimination by federally funded state programs against individuals with handicaps.\textsuperscript{24} The Rehabilitation Act, as

\begin{itemize}
\item \textsuperscript{16} See infra Part IV.B.
\item \textsuperscript{17} See infra Part II.
\item \textsuperscript{18} See infra Part III.
\item \textsuperscript{19} See infra Part IV.
\item \textsuperscript{20} See infra Part V.
\item \textsuperscript{21} ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1), 122 Stat. 3553, 3555.
\item \textsuperscript{23} See infra Part II.A–D.
\item \textsuperscript{24} School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 275 (1987).
\end{itemize}
altered by the Rehabilitation Act Amendments of 1974 defined handicap as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."\textsuperscript{25} Congress intended for this definition to provide some flexibility, without leaving the definition entirely open to interpretation.\textsuperscript{26} Arguably, perceived disabilities were intended to include those who were discriminated against, regardless of whether they were handicapped under the definition's other prongs.\textsuperscript{27}

The United States Supreme Court interpreted this definition of perceived handicap in School Board of Nassau County, Florida v. Arline.\textsuperscript{28} There, an elementary school teacher was discharged because of a relapse of tuberculosis.\textsuperscript{29} When she brought a claim under the Rehabilitation Act, the district court refused to extend protection to an individual with a contagious disease.\textsuperscript{30} Accordingly, the district court denied relief by holding that she was not handicapped under the Rehabilitation Act.\textsuperscript{31} Alternatively, the court held that even if she were found to be handicapped under the Rehabilitation Act, she was rightfully dismissed because she was not qualified to teach elementary school.\textsuperscript{32} The court of appeals reversed the district court's decision, holding that an individual with a contagious disease was handicapped under the Rehabilitation Act.\textsuperscript{33}

In Arline, the Supreme Court adopted an expansive

\textsuperscript{26} Id.
\textsuperscript{27} Id. at 3.
\textsuperscript{28} Arline, 480 U.S. at 284–85. After Ms. Arline was first diagnosed with tuberculosis in 1957, the disease went into remission for the following twenty years. Id. at 276. When she suffered three relapses in two years, the school board suspended her, with pay, for the remainder of the school year. Id. She was terminated at the end of the school year because of her relapses. Id. Whether or not Ms. Arline was terminated because of her illness is not at issue, since the district court decided on other grounds. Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 277.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
interpretation of the Rehabilitation Act's definition of handicap. The Court found that the inclusion of the "regarded as" prong indicated a Congressional concern with protecting individuals from discrimination based on outdated and stereotypic laws and attitudes. Therefore, the Rehabilitation Act protected those who did not have an actual incapacity as required by the other prongs, but were "regarded as" having an impairment. Furthermore, the Court refused to distinguish between a condition (tuberculosis) and the effects of the condition (contagiousness). The Court reasoned that, if made, such a distinction would allow the school board to fire Ms. Arline because she was contagious without considering whether the decision was motivated by discrimination based on her disease. In sum, the Court found that "the fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from coverage of the Act all persons with actual or perceived contagious diseases."

B. The Americans with Disabilities Act of 1990

The ADA, codified at 42 U.S.C. §§ 12101–12213, was the first comprehensive declaration of equality for those with disabilities. It breezed through Congress with wide margins, listing the provision of a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" as well as "clear, strong, consistent, enforceable standards of addressing discrimination" among its purposes. The ADA defined

35. Id.
36. Id. at 282.
37. Id.
38. Id.
39. Id. at 285.
41. Steny H. Hoyer, Not Exactly What We Intended, Justice O'Connor, WASH. POST, Jan 20, 2002, at B01. The ADA passed with a margin of 403 to twenty in the House and seventy-six to eight in the Senate. Id.
disability exactly as the Rehabilitation Act had defined handicap.\textsuperscript{43} "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."\textsuperscript{44} Despite having the same definition, varied judicial decisions led to extensive disagreement between the judiciary and the legislature.\textsuperscript{45}

1. Legislative Intent at the Time the ADA was Passed

Because legislators may have had different reasons for passing the ADA and it was passed over fifteen years ago,\textsuperscript{46} its legislative history is difficult to divine. Regardless, the Supreme Court relied on legislative intent when interpreting the ADA.\textsuperscript{47} Ultimately, the ADAAA was passed as a means to resolve the dispute between legislators and the Supreme Court over the legislative intent.\textsuperscript{48}

Some contend that "the ADA was designed to extend protection to people working in the private sector and seeking access to the public accommodations, transit systems and communication networks,"\textsuperscript{49} but the stated findings and purposes,\textsuperscript{50} as well as other legislative documents, are more reliable sources of the legislative intent at the time. The ADA included a list of findings that stated that Congress was attempting to counteract pervasive discrimination against those with disabilities and create a national goal of "assur[ing] equality of opportunity, full participation,

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{Finding} & \textbf{Source} \\
\hline
45. See infra Part II.B.3. & \\
46. Hoyer, supra note 41. Congressman Hoyer stated that it had been a decade since the ADA was passed. Id. When the Amendments were passed, it was over fifteen years. See id. & \\
47. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 486 (1999) (discussing the inclusion of the finding that forty-three million individuals had disabilities indicated that Congress did not intend to include those who mitigated their condition); School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987) (indicating that Congress acknowledged that society's fears can be damaging when it added perceived handicap to the Rehabilitation Act). & \\
48. See infra Part II.B.3. & \\
49. Hoyer, supra note 41. & \\
\hline
\end{tabular}
\caption{Table of Findings and Purposes}
\end{table}
independent living and economic self-sufficiency.\textsuperscript{51} These legislative documents clearly indicate that Congress intended for the courts to interpret the "regarded as" prong of the definition of disability in accordance with the Supreme Court's reasoning in \textit{Arlene}\.\textsuperscript{52} Congress emphasized the portion of \textit{Arlene} that protected those with impairments that do not substantially limit their functioning.\textsuperscript{53} Notwithstanding this background, the Court limited the definition of perceived disability in \textit{Sutton}, and spurned harsh legislative backlash.\textsuperscript{54}

2. \textit{Subsequent Treatment of Perceived Disability by the United States Supreme Court}

\textit{Sutton v. United Air Lines, Inc.} contains the Supreme Court's controversial interpretation of the ADA's definition of perceived disability.\textsuperscript{55} In \textit{Sutton}, United Air Lines refused to hire two sisters with severe myopia as commercial airline pilots because they did not meet United's uncorrected vision requirements.\textsuperscript{56} Although both sisters would have had difficulty completing daily activities with uncorrected vision, both women had 20/20 vision with corrective lenses and could conduct ordinary tasks without difficulty.\textsuperscript{57} The district court reasoned that, "[b]ecause petitioners could fully correct their visual impairments . . . they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} \S\ 12101(a)(8)-(9).
\item \textsuperscript{53} S. REP. No. 101-116, at 23; H.R. REP. No. 101-485(II), at 53.
\item \textsuperscript{54} \textit{Id.} see \textit{infra} Part II.B.2–3; see also \textit{Sutton v. United Air Lines, Inc.}, 527 U.S. 471 (1999).
\item \textsuperscript{55} \textit{Sutton}, 527 U.S. at 489–91. \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams} was another case that interpreted the definition of disability under the ADA. 534 U.S. 184 (2002). In \textit{Toyota}, the Court defined "substantial" and "major" as used in the ADA. \textit{Id.} at 196–99. Although this case interpreted the ADA, it did not examine issues that were directly pertinent to perceived disability claims. \textit{See id.} at 191.
\item \textsuperscript{56} \textit{Sutton}, 527 U.S. at 475–76. The sisters applied to United Air Lines for positions after meeting United's age, education, certification, and experience requirements. \textit{Id.} Both sisters were invited to interview, but during the interviews, they were told there had been a mistake in inviting them because they did not meet the minimum vision requirements. \textit{Id.} at 476.
\item \textsuperscript{57} \textit{Id.} at 475.
\end{itemize}
The Tenth Circuit adopted the district court's reasoning and affirmed its decision that the sisters were not disabled under the ADA. The Supreme Court reasoned that there were two ways that a person could be "regarded as" disabled. First, an employer could mistakenly presume that an individual has a physical impairment that substantially limited one or more major life activities. Alternatively, the employer could assume that a person was substantially limited in one or more major life activities while the person had an impairment that was not limiting. In either situation, a covered entity must have misperceived an individual's circumstances. The Court stated that misperceptions are generally driven by "stereotypic assumptions."

The Sutton sisters contended that United misperceived their condition and thought it would affect their job performance. Arguably, United relied on a stereotype that ultimately prevented the sisters from seeking a broad range of employment. The sisters claimed that the mere existence of uncorrected vision requirements indicated that United believed that anyone with severe vision impairments were, in effect, substantially limited. United protested, arguing that it did not exclude them from a broad range of jobs, so it did not substantially limit the ability of the sisters to work.

The Court sided with United and held that it was within an employer's discretion to determine the desirable characteristics of potential employees. Essentially, an employer may prefer some physical attributes or

58. Id. at 476.
59. Id. at 477.
60. Id. at 489. The Supreme Court determined that the sisters were not actually disabled before it considered their claim of perceived disability. Id.
61. Id.
63. Id.
64. Id.
65. Id. at 490.
66. Id.
67. Id.
68. Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999). The sisters claimed that denying them positions as "global airline pilots" excluded them from a class of employment. Id. United argued that this did not constitute a class of employment and the sisters were not "regarded as substantially limited in the major life activity of working." Id.
69. Id.
characteristics so long as the characteristics do not constitute a disability.\textsuperscript{70} For example, an employer may make a hiring decision based on a person's height or build since it was not a disability.\textsuperscript{71} The Court concluded that eyesight requirement was comparable to height and should therefore be treated similarly.\textsuperscript{72} Thus, United was free to choose not to hire the sisters because their vision was not a disability.\textsuperscript{73}

The Court further concluded that a condition must "substantially limit a major life activity" to be considered a disability.\textsuperscript{74} If the major life activity is working, a plaintiff must show that he or she has been unable to work in a variety of jobs to constitute a substantial limitation.\textsuperscript{75} Based on this determination, the Court held that the complaint of the sisters was insufficient.\textsuperscript{76} By not hiring them as global airline pilots, United did not deny the sisters work in a variety of jobs.\textsuperscript{77} The sisters could have become copilots or worked for another airline.\textsuperscript{78} "An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it \textit{would} limit a person's employment opportunities in a substantial way \textit{if} it were adopted by a substantial number of employers."\textsuperscript{779} The Court proceeded to dispose of the perceived disability claim because the sisters did not prove that United's vision requirement reflected a belief that poor uncorrected vision was a substantial limitation.\textsuperscript{80}

3. Backlash Against Sutton

Organizations and legislators, advocating the extension of comprehensive rights to the disabled, voiced their dissatisfaction with Sutton. The National Council on Disability ("NCD"),\textsuperscript{81} the current House Democratic Majority
Leader, and the former legislator who drafted the original ADA expressed their outrage for the limiting effect of this decision.

The NCD openly lamented Sutton’s holdings. Its major objection was that Sutton required plaintiffs to delve into a defendant’s thoughts. According to the NCD, this undercut the purpose of the ADA by making it extremely difficult for plaintiffs to bring a claim absent an admission of the nature of a defendant’s motivations. Additionally, the NCD interpreted Sutton as denying relief to those who successfully mitigated their impairment. The Court refused to find that a person who mitigated their condition might still be a victim of discrimination. Next, the NCD disagreed with the finding that “a person has not been regarded as being substantially limited in the major life activity of working unless the person can demonstrate that the employer considered him or her as being unable to perform either a class of jobs or a broad range of jobs in various classes.” Lastly, it opposed the limitation of perceived disabilities to those who were mistakenly considered as having a substantially limiting impairment. The NCD was outraged that the Supreme Court would so greatly restrict the application of the ADA when it was passed to protect a broad group of individuals with disabilities.

Steny Hoyer, the current House Democratic Majority Leader, voiced his concerns with Sutton’s restrictive interpretation of the ADA. Hoyer insisted that the impetus
for enacting the ADA was the prevention of discrimination. When Congress included the definition of perceived disability, it aimed to overcome society's negative perception of disability. Today, Hoyer claims that "it was important [to the legislature] to protect not only people who had genuine trouble functioning normally, but also people whose employers might wrongly perceive [them] as being substantially impaired." The Supreme Court ignored this purpose and focused on whether or not a person's impairment fell under the Court's self-determined definition of disability. Hoyer disagreed with Sutton and thought that the Court should have allowed protection for those who successfully mitigated their condition. Additionally, he disliked what he deemed the Court's arbitrary provision of its own definition of "substantially limited." In sum, Hoyer believed that the Sutton decision failed to acknowledge the "regarded as" prong, which he believed was meant to protect a broader swath of individuals.

Tony Coelho, the original sponsor of the ADA, has also discussed his concerns about the courts tendency to narrow the scope of the ADA. Congressman Coelho suffered from epilepsy and mitigated his condition with medication, so when he drafted the ADA, he intended for the bill to protect those who mitigated their condition. Because the courts considered epilepsy an "episodic disability," Coelho would not be considered disabled under the law he drafted. Coelho even went so far as to state that the courts "were smoking something" when they interpreted the ADA in this manner. He argued that the courts have slowly eroded the protected class by adopting narrow limitations on who may be considered disabled under the Act. This trend made it

93. Id.
94. Id.
95. Id.
96. Hoyer, supra note 40.
97. Id.
98. Id.
99. Id.
100. Americans with Disabilities Act: Sixteen Years Later, supra note 83, at 35.
101. Id. at 27–28.
102. Id.
103. Id. at 70.
104. Id. at 35.
extremely difficult for a plaintiff to bring a claim under the ADA, and therefore, discrimination was going unpunished.\footnote{105}{Id.}

Undoubtedly, the original ADA brought about monumental change in the area of disability discrimination.\footnote{106}{Hoyer, supra note 40.} Although this is an impressive achievement, the promise of protection from discrimination based on disability was unduly restricted by the "particularly egregious" Supreme Court decision in \textit{Sutton}\footnote{107}{Id.} and the general trend of the some courts to narrowly define perceived disability.\footnote{108}{\textit{Americans with Disabilities Act: Sixteen Years Later}, supra note 83, at 35.} A circuit split over the definition of perceived disability only fueled the impassioned disagreement over the interpretation of the ADA.

\textbf{C. The Circuit Split over how to Interpret Perceived Disability}

\textit{Sutton}'s aftermath created a confusing atmosphere that ultimately led to lower court conclusions that seemed counter to the purposes of the ADA.\footnote{109}{ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 2(a)(6), 122 Stat. 3553, 3553.} Consequently, a circuit split developed over whether a person who was "regarded as" disabled was entitled to reasonable accommodation.

The First, Third, Tenth, and Eleventh Circuits broadly interpreted the ADA when determining whether a plaintiff could make a claim based on perceived disability.\footnote{110}{See Kelly v. Metallics W., Inc., 410 F.3d 670, 675 (10th Cir. 2005) (interpreting the ADA as protecting those with perceived disabilities the same as those with actual disabilities); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 767 (3d Cir. 2004) (finding that the plaintiff showed there was an issue of fact in determining that the defendant "regarded him as being substantially limited in the major life activity of working"); Rossbach v. City of Miami, 371 F.3d 1354, 1356 (11th Cir. 2004) (indicating that a plaintiff must show that the perceived disability involves a major life activity and it is substantially limiting to proceed under the "regarded as" prong of the ADA); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) ("[B]oth the language and the policy of the statute seem . . . to offer protection . . . to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so."). Although \textit{Katz} was decided before \textit{Sutton}, it was still an integral case that comprised part of the circuit split. See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231, 1231 n.6 (9th Cir. 2003) (noting that the First Circuit in \textit{Katz} assumed a plaintiff "regarded as" disabled was entitled to reasonable accommodation).} These
circuits generally accepted that an individual could be "regarded as" disabled in three instances.\(^\text{111}\) The first occurred when an individual had an impairment that was not substantially limiting but was treated by his or her employer as a substantially limiting impairment.\(^\text{112}\) The second took place when an individual had an impairment that was substantially limiting only because of the attitudes others held towards that impairment.\(^\text{113}\) Third, a plaintiff may have a perceived disability if he or she did not have a substantially limiting impairment, but was treated as if he or she did.\(^\text{114}\) In addition to employing a broad analysis when determining if an individual was "regarded as" disabled, these circuits determined that a finding of perceived disability could entitle a plaintiff to reasonable accommodation under the ADA.\(^\text{115}\)

The Fifth, Sixth, Eighth, and Ninth Circuits limited protection of plaintiffs with perceived disabilities by narrowly
interpreting disability.\(^\text{116}\) In *Newberry v. East Texas State University*, for example, the Fifth Circuit was unconvinced by a terminated professor's allegations that the university discriminated against him because of his mental disability.\(^\text{117}\) The Fifth Circuit required the plaintiff to show that the perception of disability was the motivating factor for his dismissal.\(^\text{118}\) Therefore, the court demanded a showing of the employer's rationale, which Newberry could not accomplish.\(^\text{119}\) In *Weber v. Strippit, Inc.*, the Eighth Circuit added to Newberry's requirements.\(^\text{120}\) The plaintiff argued that he need only show that he was discriminated against on the basis of an impairment.\(^\text{121}\) The Eighth Circuit disagreed, holding that the plaintiff must show not only that he was dismissed on the basis of his impairment, but also that his employer thought his impairment substantially limited one or more major life activities.\(^\text{122}\)

Additionally, these circuits limited the application of the ADA by refusing to extend reasonable accommodation to those who proved they were "regarded as" disabled.\(^\text{123}\) In *Kaplan v. City of North Las Vegas*, the Ninth Circuit held that a misdiagnosed peace officer could not bring a claim for reasonable accommodation based on a perceived disability.\(^\text{124}\) The officer was misdiagnosed with rheumatoid arthritis after an injury he sustained during training, and was terminated because his doctor concluded he could no longer fire a gun.\(^\text{125}\) The Ninth Circuit held that, although there was textual support for a broad interpretation, "[t]he ADA cannot reasonably have been intended to create a disparity in

---

\(^{116}\) See infra notes 117–22 and accompanying text.

\(^{117}\) Newberry v. E. Tex. State Univ., 161 F.3d 276, 279 (5th Cir. 1998).

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) See Weber v. Strippit, Inc., 186 F.3d 907, 915 (8th Cir. 1999).

\(^{121}\) Id. Weber, the plaintiff, was hired as an international sales manager. *Id.* at 910. After three years of employment, Weber suffered a major heart attack, after which, his doctor imposed strict physical limitations. *Id.* Although Weber was hospitalized for heart disease, hypertension, and anxiety, he continued to perform his job responsibilities. *Id.* The defendant eventually required Weber to relocate or accept a position at a much lower salary even though his doctor instructed him to remain in Minnesota for six months. *Id.*

\(^{122}\) Id. at 915.

\(^{123}\) See infra notes 124–30 and accompanying text.

\(^{124}\) Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003).

\(^{125}\) Id. at 1227, 1229.
treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others[] because of their employers’ misperceptions."\textsuperscript{126} The Kaplan court refused to hold that an individual who was “regarded as” disabled had the same right to reasonable accommodation as those with actual disabilities.\textsuperscript{127}

Much like the Ninth Circuit, the Eighth Circuit found that “[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.”\textsuperscript{128} Accordingly, this circuit refused to require accommodation for an employee who was terminated after refusing to relocate based on advice from his doctor after a major heart attack.\textsuperscript{129} In Workman v. Frito-Lay, the Sixth Circuit followed similar reasoning and held that a worker with irritable bowel syndrome was not entitled to reasonable accommodation.\textsuperscript{130} These decisions, along with Sutton, formed the basis for interpretation of the ADA until the ADA Amendments Act was enacted in 2009.\textsuperscript{131}

\textbf{D. The ADA Amendments Act of 2008}

Fortunately for those who were outraged by the limiting decisions of the courts, “[i]n matters of statutory interpretation, unlike constitutional matters, Congress has the last word.”\textsuperscript{132} The ADA Amendments Act of 2008 passed easily through Congress;\textsuperscript{133} was signed into law on September

\begin{itemize}
\item 126. Id. at 1232 (quoting Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999)).
\item 127. Id.
\item 128. Weber, 186 F.3d at 916.
\item 129. Id. at 917.
\item 130. Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999). On an appeal by Frito-Lay, the court limited reasonable accommodation to those with actual disabilities. Id. Individuals who were “regarded as” disabled were only entitled to protection insofar as the defendant was not permitted to fire an employee it “regarded as” disabled if that employee did not require reasonable accommodation to perform the essential functions of the position. Id.
\item 132. Hoyer, supra note 41.
\item 133. See Senate Measure Would Expand Disabilities Act, N.Y Times, Sept. 12, 2008, at A16. The ADAAA passed through the Senate on a voice vote without dissent and through the House of Representatives with a vote of 402 to seventeen. Id.
\end{itemize}

The ADAAA addresses most of the legislative concerns about prior judicial interpretations of the ADA.\footnote{See Hoyer, \textit{supra} note 40. Hoyer stated that he wanted Congress to amend the ADA to abolish interpretational traps that limit the effectiveness of the ADA and include a section that instructed that the ADA should be interpreted broadly. \textit{Id.}} Although Congress did not change the wording of the definition of disability,\footnote{Id.} it added a section that further defined perceived disability.\footnote{ADA Amendments Act of 2008, Pub. L. No. 110-325, sec 4(a), § 3(3), 122 Stat. 3553, 3555.} This section states that the requirements of proving a perceived disability are met when an "individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."\footnote{Id. sec. 4(a), § 3(4)(A).} The ADAAA includes instructions for understanding the definition of disability,\footnote{Id. sec. 4(a), § 3(3)(B).} including a requirement to interpret the definition broadly so as to be applicable to the maximum extent possible.\footnote{Id. sec. 2(b)(3).} Congress bolstered this by rejecting the Supreme Court's reasoning in \textit{Sutton}, and reinstating \textit{Arline} as the applicable standard when interpreting the definition of disability.\footnote{Id. sec. 2(b)(1)-(2).} The ADAAA limits on perceived disability status should not be afforded to those with "transitory impairments," which the Amendments define as lasting for six months or less.\footnote{Id. sec. 2(b)(3).} In passing the Amendments, Congress intended to reestablish a broad scope of protection under the ADA.\footnote{ADA Amendments Act of 2008, Pub. L. No. 110-325, sec 4(a), § 3(3), 122 Stat. 3553, 3555.}

Although Congress explicitly required a broad interpretation of perceived disability, it chose not to require employers to reasonably accommodate individuals "regarded
The ADAAA provided that a “covered entity . . . need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) of this title solely under subparagraph (C).”

Although Congress offered no articulation of its reasons for this decision, assumedly, this section was meant to resolve the circuit split over whether a defendant must provide reasonable accommodation to those with perceived disabilities.

Generally, the Amendments change how the definition of disability should be interpreted. In addition, the ADAAA states that an impairment that is episodic or in remission should be found to be a disability if it would be considered a disability when active, and instructs that mitigating measures, other than eyeglasses or contact lenses, should not be considered when determining whether a person has a disability. The ADAAA expanded on the definition of major life activities by including a list of major life activities and major bodily functions.

---

144. Id. sec. 6(a)(1), § 501(h).
145. Id.
147. ADA Amendments Act sec. 4(a), § 3(4)(D).
148. Id. sec. 4(a), § 3(4)(E)(i). Examples mitigating measures that should not be considered are “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.” Id. sec. 4(a), § 3(4)(E)(i)(I). Additionally, the courts should not consider “use of assistive technology,” “reasonable accommodations or auxiliary aids or services,” and “learned behavioral or adaptive neurological modifications.” Id. sec. 4(a), § 3(4)(E)(i)(II)–(IV).
149. Id. sec. 4(a), § 3(2). This section states that major life activities “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Id. sec. 4(a), § 3(2)(A). “[M]ajor life activity also includes the operation of a major bodily function including, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” Id. sec. 4(a), § 3(2)(B). Because the impact of these changes is not yet clear, the Equal Employment Opportunity Commission will be evaluating the “impact of these changes on its enforcement guidelines [sic] and other publications addressing the ADA” so as to properly enforce the Amendments. See Press Release, U.S. Equal Employment Opportunity Commission, supra
III. THE PROBLEM

Courts found it difficult to interpret the ADA's definition of disability. The Supreme Court restricted the application of perceived disabilities, and the circuit courts split over whether to apply the ADA broadly or narrowly when allowing for reasonable accommodation. Although the ADAAA appears to have clearly addressed these problems, the Amendments do not cure every flaw that previously allowed the courts to make these decisions. Because the ADAAA has only recently come into effect, it is unclear how the courts will interpret the language of the Amendments and how their interpretations will affect claims based on perceived disability in the future. While it is likely that the Amendments were meant to be comprehensive, it is uncertain if the original intent of Congress in passing the ADA will be realized.

IV. ANALYSIS

The ADAAA has been touted as legislation that will reinstate the broad scope of protection Congress intended under the original ADA. Because this legislation has only recently gone into effect, and there are no judicial interpretations of the newly altered definition of perceived disability, it is unclear how courts will interpret the Amendments. A topic that might spur future litigation is the interpretation of the original definition of perceived disability, while considering the supplemental definition added by the ADAAA. Additionally, there may be litigation...

---

150. See supra Parts II.B.2, II.C.
151. See supra Part II.B.2.
152. See supra Part II.C.
154. See infra Part IV.
155. ADA Amendments Act sec. 2(b)(1); see supra note 133.
156. Press Release, U.S. Equal Employment Opportunity Commission, supra note 134. As of the time this comment was published, courts had only considered whether the ADAAA applied retroactively. See, e.g., Jenkins v. Nat. Bd. of Med. Exam'rs, No. 08-5371, 2009 WL 331368, at *1 (6th Cir. Feb. 11, 2009) (finding the ADAAA applied retroactively to a claim for prospective relief because there would be no injustice in applying the ADAAA); Kirkeberg v. Canadian Pac. Ry., No. 07-4621, 2009 WL 169403, at *5 n.7 (D. Minn. Jan. 26, 2009) (finding the ADAAA did not apply retroactively).
157. See infra Part IV.A.
disputing the nature of Congressional intent because the Amendments do not require reasonable accommodation for those “regarded as” disabled.158 These areas of interpretation are unsettled and, in future litigation, could once again result in deep disagreement over how to interpret the ADA.

A. Definitions of Perceived Disability: New and Old

The ADAAA did not change the basic definition of disability.159 Instead, the Amendments added a supplemental definition of “regarded as having such an impairment.” This new section states:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.161

Prior to the Amendments, courts focused on determining whether a plaintiff had a disability within the meaning of the ADA.162 Employers litigated this issue extensively because it was an opportunity to end an ADA claim at an early stage.163 With the passing of the ADAAA, the focus of the definition of perceived disability has shifted from whether a person was considered disabled to the existence of discrimination on the basis of a perceived disability.164 This shift reflects the intent of legislature as calling on courts focus on discrimination instead of whether an individual fits under a narrowly interpreted definition of disability.165

Despite Congress’s attempt to focus ADA litigation on discrimination, there are two potential areas of confusion that remain. First, the basic definition of perceived disability incorporates language from the definition of actual

158. See infra Part IV.B.
159. See ADA Amendments Act sec. 4(a), § 3(1). The ADAA changed only the location of the definition of disability and included a reference to a supplemental definition of perceived disability. Id.
160. Id. sec. 4(a), § 3(3).
161. Id.
163. Id.
164. See ADA Amendments Act sec. 4(a), § 3(3).
165. See Hoyer, supra note 40; Hoyer, supra note 41.
An actual disability is defined as "a physical or mental impairment that substantially limits one or more major life activities." The definition of perceived disability refers to "such an impairment" which ties this definition to the definition of actual disability. Prior to the Amendments, the United States Supreme Court and the Courts of Appeals deduced that the phrase "such an impairment" in the definition of perceived disability referred to the definition of actual disability. While the ADAAA explicitly states that the courts should no longer rely on the Sutton's rationale, it is inconceivable that the courts would not similarly interpret the wording in the basic definition of perceived disability.

The Amendments did not alter the language that led to this inference; instead, they include an additional definition that is contradictory to this interpretation. This new definition states that requirements of a perceived disability claim are satisfied "whether or not the impairment limits or is perceived to limit a major life activity." Although the ADAAA is to be construed broadly enough to be applicable to the maximum extent possible, this may not be sufficient to block courts from applying a stricter standard than Congress intended. Conceivably, the courts could find that Congress made an error in including these contradictory definitions in the ADAAA and interpret the definition of disability in numerous ways. By not changing the wording of the third prong's definition of disability, Congress allowed for the possibility that a circuit may impose a stricter limitation on

167. ADA Amendments Act sec. 4(a), § 3(1)(A).
168. Id. sec. 4(a), § 3(1)(B)-(C).
169. Id.
170. ADA Amendments Act sec. 2(b)(2)-(3).
171. Id. sec. 4(a), § 3(1)(C).
172. Id. sec. 4(a), § 3(3).
173. Id.
174. Id. sec. 4(a), § 3(4)(A).
175. See id. sec. 4(a), § 3(1)(C).
perceived disability than it intended.

Even if the courts apply an entirely new standard, unrelated to the definition of actual disability, the courts will have carte blanche to interpret the meaning of "impairment" from the ADAAA's additional definition.\textsuperscript{176} Congress does not define "impairment" without reference to actual disability.\textsuperscript{177} Therefore, courts will need to police the distinction between an "impairment" and any other sort of condition that a court may believe does not rise to the level of an "impairment." This will force the courts to either devise their own definition of "impairment," or find that any condition can be considered an "impairment" for purposes of bringing a claim under the amended definition of disability.

A second possible ambiguity involves the language of the section added by the ADAAA defining a perceived disability.\textsuperscript{178} The specific language at issue is "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."\textsuperscript{179} A question of whether this language can be interpreted as referring generally to any impairment an employer or other covered entity may suspect, or whether there must be a specific impairment in mind has risen.\textsuperscript{180} Interpretation of this section may allow for the employer's mindset to return to the definition of perceived disability, leaving the ADA powerless to stop employers who unconsciously discriminate.\textsuperscript{181} Although it is unclear whether Congress meant to punish unconscious discrimination, if this was one of its aims, it should have included an explanation to that effect.

\textsuperscript{176} See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). Sutton defined "such an impairment" based on the definition of actual disability by incorporating the language "major life activity" and "substantially limits" into the Court's definition of a perceived disability. \textit{Id}. Thus, the prior judicial decisions offer no guidance of how a perceived impairment should be defined when it is no longer linked to the definition of actual disability.

\textsuperscript{177} See ADA Amendments Act sec. 4(a), § 3(3).

\textsuperscript{178} Id. sec. 4(a), § 3(3)(A).

\textsuperscript{179} Id.


\textsuperscript{181} Id.
B. The Impact of Lack of Reasonable Accommodation to Those with Perceived Disabilities

The debate over reasonable accommodation resulted in a circuit split. Circuits that interpreted perceived disability broadly also found plaintiffs who were “regarded as” disabled were entitled to reasonable accommodation. Those circuits that restricted the application of the ADA did not allow for reasonable accommodation. In passing the ADAAA, Congress jumbled these decisions by calling for a broad interpretation of perceived disability, while not allowing reasonable accommodation for successful plaintiffs under this prong.

The restriction seems counter to the overarching intent of the ADAAA—"reinstating a broad scope of protection." It not only distorts Congressional intent, but creates a puzzling situation for the courts because although more claims can assumedly be litigated, there will fewer remedies available. Furthermore, the denial of reasonable accommodation is troublesome because it goes against the great weight of ADA scholarship that saw no distinction between actual and perceived disability when it came to reasonable accommodation. Congress apparently agreed with the

[182. See supra Part II.C.
183. See supra Part II.D.
184. ADA Amendments Act sec. 2(b)(1).
185. See id. sec. 6(a)(1), § 501(h).
186. See, e.g., Cheryl L. Anderson, What is “Because of the Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine, 27 BERKELEY J. EMP. & LAB. L. 323, 361–74 (2006) (stating, amongst other things, that “[t]here is no statutory basis for denying reasonable accommodation to employees regarded as having a disability because the court categorically finds such accommodations insufficiently connected to disability”); Matthew M. Cannon, Mending a Monumental Mountain: Resolving Two Critical Circuit Splits Under the Americans with Disabilities Act for the Sake of Logic, Unity, and the Mentally Disabled, 2006 BYU L. REV. 529, 566 (arguing that the Supreme Court of the United States should have resolved the circuit split “by recognizing an employer's duty to reasonably accommodate employees perceived as disabled”); Daniel Egan, The Dwindling Class of “Disabled Individuals”: An Exemplification of the Americans with Disabilities Act's Inadequacies in D'Angelo v. ConAgra Foods, Inc., 81 ST. JOHN'S L. REV. 491, 513 (2007) (stating that the Eleventh Circuit “correctly answered in the affirmative the question of whether a 'regarded as' disabled individual is entitled to reasonable accommodations”); Elizabeth Mills, How Bizarre? The Application of Reasonable Accommodation to Employees “Regarded As” Disabled Under the ADA Does Not Necessarily Lead To Bizarre Results, 75 MISS. L.J.
Fifth, Sixth, Eighth, and Ninth Circuits’ determination that allowing reasonable accommodation for those who were “regarded as” disabled would be bizarre.\textsuperscript{187}

\textbf{C. How the Decisions Will Be Different Under the ADAAA}

The provision of an additional definition of perceived disability in the ADAAA indicates that the courts should allow more cases to go forward.\textsuperscript{188} The extensive new definition seems to extend past even the broad interpretations of the First, Third, Tenth, and Eleventh Circuits.\textsuperscript{189} Under the ADAAA, the decisions of the Fifth, Sixth, Eighth, and Ninth Circuits will not likely be followed in the future because the plaintiffs now meet the “regarded as” disabled requirement, as amended by the ADAAA.\textsuperscript{190} The teacher with mental problems in Newberry,\textsuperscript{191} the worker with irritable bowel syndrome in Workman,\textsuperscript{192} the heart attack victim who refused to relocate in Weber,\textsuperscript{193} and the misdiagnosed peace officer in Kaplan,\textsuperscript{194} all appear able to bring cases under the ADAAA\textsuperscript{195} because the focus of the definition of perceived disability is discrimination.\textsuperscript{196}

Although much has been made of the former interpretations of the ADA, it is unclear whether much significant change will result. One considerable result is that cases requesting only reasonable accommodation to remedy

\begin{footnotesize}
\begin{enumerate}
\item[187.] See supra Part II.C.
\item[188.] \textit{See ADA Amendments Act sec. 4(a), § 3(4)(A).}
\item[189.] \textit{Id. sec. 4(a), § 3(3).}
\item[190.] \textit{Id. sec. 4(a), § 3(3)(A); see infra notes 193–98 and accompanying text.}
\item[191.] Newberry v. E. Tex. State Univ., 161 F.3d 276, 279 (5th Cir. 1998).
\item[192.] Workman v. Frito-Lay, Inc., 165 F.3d 460, 463 (6th Cir. 1999).
\item[193.] Weber v. Strippit, Inc., 186 F.3d 907, 910 (8th Cir. 1999).
\item[194.] Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003).
\item[195.] \textit{See ADA Amendments Act sec. 4(a), § 3(3)(A).}
\item[196.] \textit{See id. sec. 4(a), § 3(3).}
\end{enumerate}
\end{footnotesize}
discrimination based on perceived disabilities can no longer survive pretrial motions in any circuit because it does not state a claim that is entitled to relief. Additionally, whether the claims brought by plaintiffs who are "regarded as" disabled under the amended definition will succeed at trial remains to be seen. If the perceived disability does not, as was formerly required, substantially limit one or more major life activities, the judge or jury might not find discrimination because for a minor condition may not logically give rise to discrimination. Ultimately, the likelihood of success when bringing an ADA claim might not be greatly increased by the changes made by the ADAAA. The ADAAA's effect will only be determined as new cases are litigated.

V. PROPOSAL

Even though the ADAAA was recently enacted, Congress may still want to change some facets of the Amendments to ensure that it is applied according to its intent. Changing the basic definition of disability would elucidate Congressional intent and curtail potential confusion over the definition's wording. Congress seems apprehensive to change the basic definition of disability. When the ADA was first written, the drafters employed the definition of handicap from the Rehabilitation Act to define disability under the ADA. Legislators insist that this was done to promote consistency, but even though the definition failed to achieve that goal, Congress avoided changing the definition seemingly out of fear of how the courts might interpret a new definition. Congress indicated the changes desired, but these changes may be insufficient. Changing the organization of the ADA, noting that the definition of disability should be broadly construed, and adding a definition of a perceived disability might still allow the courts to confine the scope of the ADAAA.

197. See FED. R. CIV. P. 12(b)(6).
199. Hoyer, supra note 40; Hoyer, supra note 41.
200. ADA Amendments Act sec. 4(a), § 3(1)(C).
201. Id. sec. 4(a), § 3(4)(A).
202. Id. sec. 4(a), § 3(3)(A).
Congress should amend the definition of perceived disability to avoid potential confusion. Such a change should eliminate any reference to the definition of actual disability to circumvent any confusion related to this language. This will also reinforce the broad standard Congress wished to reinstate when passing the ADAAA. Congress can revise the definition by replacing its reference to “such an impairment” with a reference to “a mental or physical impairment.” This will then define perceived disability as “being regarded as having a physical or mental impairment.” This definition will turn the focus to discrimination while ensuring that it will be interpreted broadly because it will no longer refer to the definition of actual disability. Congress can also separately define “impairment,” or “mental or physical impairment” to restrict the latitude given to the courts.

Courts can confront this confusion when determining how to interpret “such an impairment.” The ADAAA was meant to extend the protection available under the ADA; accordingly, the courts should interpret this language broadly so as not to use “such an impairment” to limit coverage. The courts can come to this determination in a number of ways. First, the courts can conclude that “such an impairment” only refers to “a physical or mental impairment” from the definition of actual disability, instead of the entire first prong definition. This will alleviate problems of interpretation while still allowing “such an impairment” to refer to the definition of actual disability. Secondly, the courts can find that Congress made a mistake when it left “such an impairment” in the definition of perceived disability because it contradicts the newly added definition of perceived disability. Congress may have overlooked the fact that the courts have implied that this phrase referred to “a physical or mental impairment that substantially limited one or more of the major life activities.” Lastly, the courts can find that Congress was apprehensive about changing the basic definition of disability, so the inconsistent language that caused confusion was not meant to be controlling. Therefore,

203. See supra Part IV.A.
204. See ADA Amendments Act sec. 2(b)(1).
205. See id. sec. 4(a), § 3(4)(A).
the courts can ignore the inclusion of "such an impairment" and only interpret the new supplemental definition of "regarded as" disabled. These alternatives will ultimately have the same effect as if Congress had amended the definition to exclude "such an impairment."

No court can logically interpret the ADAAA to provide reasonable accommodation to those "regarded as" disabled. Congress should seriously reconsider its denial of reasonable accommodation because it seems inconsistent with its concern with broadly interpreting perceived disability. There may be situations where reasonable accommodation could be appropriate, but the courts do not have the discretion to grant it. Congress can limit the application of reasonable accommodation to those "regarded as" disabled without entirely excluding it. The ADAAA could have stated that reasonable accommodation was not generally available for plaintiffs who were "regarded as" disabled, but set some exceptions for situations where the courts may find it in the interest of justice and fairness that the plaintiff be accommodated. This would allow for judicial discretion in deciding whether reasonable accommodation is warranted.

VI. CONCLUSION

The battle over the interpretation of the ADAAA is just beginning. By including language that appears contradictory, Congress may have allowed some circuits to interpret the definition of perceived disability narrowly, and by not providing reasonable accommodation for those who are "regarded as" disabled, less discrimination will be punished. Ultimately, legislators will only be able to see the results of the ADAAA after cases are brought under these new sections.

207. See ADA Amendments Act sec. 6(a)(1), § 501(h).
208. See supra Part IV.A.
209. See supra Part IV.B.