

**WHY THE AMERICANS WITH DISABILITIES ACT  
AMENDMENTS ACT IS DESTINED TO FAIL: LACK OF  
PROTECTION FOR THE “TRULY” DISABLED,  
IMPRACTICABILITY OF EMPLOYER COMPLIANCE,  
AND THE NEGATIVE IMPACT IT WILL HAVE ON OUR  
ALREADY STRUGGLING ECONOMY**

*Kate S. Arduini\**

INTRODUCTION

On September 25, 2008, former President George W. Bush signed the Americans with Disabilities Act Amendment Act of 2008 (ADAAA),<sup>1</sup> setting into motion perhaps the most extensive change to employment law in the last decade.<sup>2</sup> The ADAAA, which took effect on January 1, 2009,<sup>3</sup> aims to reinstitute the original congressional intent behind the Americans with Disabilities Act of 1990 (ADA),<sup>4</sup> the Act that grants employment protection to the disabled,<sup>5</sup> which many believe was destroyed by a sequence of Supreme Court rulings that nar-

---

\* J.D., 2009, The Earle Mack School of Law at Drexel University; B.A., 2005, Saint Francis University. I would like to thank Matthew M. Gutt and Tracey E. Diamond for introducing me to this area of law. I am also exceedingly grateful to my family and friends for their uncompromising support and encouragement throughout the drafting and editing process.

1. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>; see also Chai R. Feldbloom, et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 240 (2008).

2. See Denise Bleau, *The ADA Amendments Act of 2008*, 59 LAB. L.J. 277, 277 (2009) (“The most significant [ADA] legislation since 1990 was signed into law on September 25, 2008 . . . . The ADA Amendments Act of 2008 amends the ADA in ways which will have sweeping effects on businesses and employers, as well as individual employees. The amendments will significantly effect [sic] how employers interact with employees and conduct their business.”).

3. See Jeffrey S. Shoskin, *The ABCs of the New ADAAA*, AM. AGENT & BROKER, June 2009, at 28, 28, available at <http://www.agentandbroker.com/Issues/2009/June-2009/Pages/The-ABCs-of-the-new-ADAAA.aspx>.

4. See § 2(b)(1), (5)-(6), 122 Stat. at 3554.

5. See 42 U.S.C. § 12112(a) (2009).

rowed the definition of “disabled.”<sup>6</sup> Notwithstanding Congress’s good intentions, the ADA was unsuccessful at integrating the disabled into the American workforce,<sup>7</sup> and the ADAAA is likely to be just as unsuccessful as its predecessor. This Note aims to explain and analyze the inherent failings of the ADAAA.

Of course, legislation aimed at defeating societal biases and workplace discrimination is both beneficial and necessary—when drafted carefully. Title VII of the Civil Rights Act of 1964 (Title VII), which bans workplace discrimination based on race, gender, and ethnicity, is one historical example of successful employment legislation.<sup>8</sup> However, while Congress’s goal of increasing employment opportunities for the disabled was noble, its drafting of the ADA was riddled with oversights and ambiguities, which ultimately led to its failure. The ADAAA will not correct the negative effects of the ADA; in fact, the ADAAA will likely exacerbate the problems the disabled and employers have encountered under the ADA. Many of whom Congress intended to protect under the ADA will continue to constitute a large portion of the unemployed, even after the ADAAA’s enactment, and employers will be-

---

6. See Shoskin, *supra* note 3, at 28 (“In an unprecedented move, Congress disregarded a series of U.S. Supreme Court decisions that effectively restricted ADA protection to a limited number of employees who truly were ‘disabled’ (as defined under the ADA) instead of bestowing protection on virtually anyone with a physical or mental problem.”); see also Fisher & Phillips LLP, *Meet the New ADA: Massive Changes Ahead for Nation’s Employers*, LEGAL ALERT, Sept. 18, 2008, <http://www.laborlawyers.com/shownews.aspx?Show=10879&Type=1122> (“After the employment provisions of the [ADA] went into effect in 1992, it did not take long for most federal courts to reject the majority of ADA claims brought before them. Culminating in a trilogy of pro-employer decisions in 1999 . . . and a follow-up decision in 2002 . . . the U.S. Supreme Court narrowed the playing field for disability discrimination plaintiffs.”).

7. See Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REG. 21, 23 (2000) [hereinafter DeLeire, *Unintended Consequences*] (explaining that since the ADA’s enactment, employment rates of the disabled have decreased); see also Unemployment Level for Individuals with Disabilities Reaches a Crisis Point, <http://network.diversityjobs.com/profiles/blogs/unemployment-level-for> (Oct. 20, 2007, 13:10 EST) [hereinafter Crisis Point] (explaining that as of late 2007, disabled Americans suffered from a sixty-five percent unemployment rate).

8. I am judging Title VII’s success solely by the fact that it led to increased employment opportunities for racial minorities in the United States workforce. See, e.g., Thomas DeLeire, *The Americans with Disabilities Act and the Employment of People with Disabilities*, in *THE DECLINE IN THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE* 259, 273 (David C. Stapleton & Richard V. Burkhauser eds., 2003) [hereinafter DeLeire, *POLICY PUZZLE*] (“Economic studies have shown that antidiscrimination laws such as the Civil Rights Act of 1964 have reduced labor market discrimination, promoted integration of protected classes (i.e., blacks) into the labor force, and improved their labor earnings and economic well-being.”).

come ever more frustrated with the increased difficulty of compliance.

Few commentators question that, despite anti-discrimination statutes, the disabled continue to struggle more than any other traditionally underprivileged class of United States citizens today, especially in the area of employment.<sup>9</sup> This lag in disabled Americans' societal status could be the result of a number of different factors.<sup>10</sup> The United States government's failure to pass legislation aimed at assisting the disabled in the private employment sector until 1990,<sup>11</sup> decades after similar laws aimed at promoting private workplace equality for women, African-Americans, and other racial and ethnic groups were enacted,<sup>12</sup> certainly thwarted disabled Americans' ability to meet the same socioeconomic milestones throughout history as other minorities. Nonetheless, even after the ADA was passed, the number of unemployed disabled individuals continued to rise,<sup>13</sup> proving the Act's ineffectiveness and negative impact on employment opportunities for the disabled.<sup>14</sup>

Congress, recognizing the ADA's ineffectiveness, revisited the Act in 2008, amending it "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination.'"<sup>15</sup> With broad, sweeping

---

9. See Crisis Point, *supra* note 7 ("People with disabilities represent the largest American minority group, yet they still suffer an astonishingly high rate of unemployment (65 percent).").

10. See *id.* (suggesting that employers' "[l]ack of knowledge," "[a]ccommodation concerns," and "[c]oncerns about job performance and abilities" are contributors to the high number of unemployed disabled individuals).

11. Although Congress passed Section 504 of the Rehabilitation Act, banning discrimination against the disabled in the workplace, in 1973, this Act applied only to public sector employers. It was not until the passage of the ADA in 1990 that the disabled were entitled to protection from workplace discrimination by private employers. See Arlene Mayerson, *The History of the ADA: A Movement Perspective*, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, July 1992, [http://www.dredf.org/publications/ada\\_history.shtml](http://www.dredf.org/publications/ada_history.shtml).

12. See 42 U.S.C. §§ 2000e to 2000e-17 (2009).

13. See Peter Blanck et al., *Is It Time to Declare the ADA a Failed Law?*, in *THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE* 301, 301 (David C. Stapleton & Richard V. Burkhauser eds., 2003).

14. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 259 ("ADA critics today argue that instead of increasing their employment, the costs associated with these mandates had the unintended consequence of reducing the employment opportunities of those with disabilities.").

15. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (2008) (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.) (quoting 42 U.S.C. § 12101(b)(1)), available at <http://www.access-board.gov/about/laws/ada-amendment.s.htm>.

strokes, Congress rewrote the ADA, creating a nightmare for managers, human resource departments, and in-house counsel at businesses throughout the United States.<sup>16</sup> The ADAAA will require countless hours of training, policy revisions, and litigation, as well as an indefinite expenditure of capital for employers, large and small alike,<sup>17</sup> in an economic climate where many businesses are struggling just to survive.<sup>18</sup> Of course, if there were hope that the ADAAA would be effective at accomplishing Congress's goals, these costs would be a modest price to pay. However, the benefits likely to result from the ADAAA are nominal compared to the costs the Act will impose on our economy, and the inevitable abuses that will arise from its enactment.

The ADA is comprised of several different sections, which guarantee the disabled equality in employment,<sup>19</sup> public services,<sup>20</sup> and public accommodations and services operated by

---

16. See *Congress Passes ADA Amendments Act: Greatly Expanded Coverage Means Big Changes for Many Employers' Policies*, BRACEWELL & GIULIANI UPDATE, Sept. 23, 2008, <http://www.bracewellgiuliani.com/index.cfm/fa/news.home/news.cfm> (type "ADAAA" in the "Keyword Search" box, then click on hyperlinked article title) ("Considering the ADAAA's [broad changes], there can be little doubt that a surge in disability discrimination claims is just over the horizon . . . . To minimize their exposure to disability claims, employers should undertake a thorough review of all relevant policies, including job applications and interview inquiries, and pay particular attention to the interactive process policies they use when handling applicant or employee requests for reasonable accommodations."); see also 2009 Starts with New Challenges for Employers, Posting of Frank Steinberg to New Jersey Employment Law Blog, <http://employment.lawfirmnewjersey.com/archives/employment-law-news-2009-starts-with-new-challenges-for-employers.html> (Jan. 6, 2009) ("It looks like the new ADA Amendments Act . . . will be the 800 pound gorilla of employment law for the foreseeable future.").

17. See Fisher & Phillips LLP, *supra* note 6 ("When it comes to day-to-day human resource management, [employers] need to be prepared to immediately adapt [their] interactive process policies, and to offer accommodations to a wider percentage of [their] workforce."); see also Mark Zelek, Special to the Miami Herald, *My View: It's a Bad Time for ADA Expansion*, MIAMI HERALD, Nov. 24, 2008, at G7 ("As a result [of the ADAAA], it will be more problematic for employers to manage day-to-day workplace situations and to defend against ADA lawsuits . . . .").

18. See Edmund L. Andrews, *With Grim Job Loss Figures, No Sign that Worst Is Over*, N.Y. TIMES, Feb. 7, 2009, at B1, available at <http://www.nytimes.com/2009/02/07/business/economy/07jobs.html> ("Businesses are panicked and fighting for survival and slashing their payrolls . . . . [W]e're trapped in a very adverse, self-reinforcing cycle. The downturn is intensifying, and likely to intensify further . . . ." (quoting Mark Zandi)); see also Kenneth Stier, *Small Business Struggling as Credit Dries Up*, CNBC, Sept. 25, 2008, <http://www.cnbc.com/id/26872603> ("[S]mall businesses are struggling to ride out a perfect storm of tougher credit conditions in a badly hobbled economy.").

19. See 42 U.S.C. § 12112 (2009).

20. See *id.* § 12132.

public entities.<sup>21</sup> This Note focuses solely on Title I of the ADA, or the ban on discrimination against disabled individuals in employment.<sup>22</sup> Part I of this Note traces the legislative history of the ADA, as well as the Supreme Court's analysis of the ADA, and discusses why Congress chose to revisit the Act. Part II outlines the details of the ADAAA, pinpoints the problematic nature of this new legislation, and explains why the Act will not effectively accomplish the ADA's goals. Part III discusses why the ADAAA will create employer compliance difficulties; Part IV explains why the ADAAA is counterproductive to recent legislation aimed at assisting United States businesses; and Part V offers a proposal for changes to the ADAAA and its implementation that would prevent some of the problems implicit in the Act.

#### I. THE LEGISLATIVE AND JURISPRUDENTIAL HISTORY OF THE ADA – WHAT LED CONGRESS BACK TO THE DRAWING BOARD

More than 2,000 disability advocates endured the sweltering heat outside the White House in Washington, D.C. on July 26, 1990, to celebrate what they had long awaited – the President was finally signing a bill that promised to bring equality to the disabled.<sup>23</sup> Excitement about the new legislation was not limited to disabled Americans and their supporters; indeed, Congress too had high hopes for the ADA. The House Committee on the Judiciary expressed enthusiasm for the ADA and its ability to combat disability-related unemployment, anticipating that the Act would integrate the disabled “into the economic and social mainstream of American life.”<sup>24</sup> The Committee compared the ADA to Section 504 of the 1973 Rehabilitation Act, which provides equality for the disabled with respect to federally-funded programs,<sup>25</sup> and explained that the ADA “completes the circle begun in 1973 with respect to per-

---

21. *See id.* § 12182.

22. *See id.* § 12112.

23. Op-Ed., *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26, available at <http://www.nytimes.com/1990/07/27/opinion/a-law-for-every-american.html?scp=1&sq=a%20law%20for%20every%20american&st=cse>.

24. H.R. REP. NO. 101-485, pt. 3, at 23 (1990).

25. *See* 29 U.S.C. § 794(a) (2002) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”).

sons with disabilities by extending to them the same basic civil rights provided to women and minorities beginning in 1964.”<sup>26</sup> The Senate Committee on Labor and Human Resources underscored the need for the legislation, noting, “[N]ot working is perhaps the truest definition of what it means to be disabled in America,” and citing then-President George H. W. Bush as stating, “The statistics consistently demonstrate that disabled people are the poorest . . . and largest minority in America.”<sup>27</sup>

Although Congress’s objectives in enacting the ADA were commendable, its drafting of the Act was flawed. The ADA’s vague language necessitated a handful of Supreme Court cases that interpreted the ADA narrowly and, in some cases, against the clear intentions of Congress as exhibited in the ADA’s legislative history.<sup>28</sup> It soon became clear that the ADA was not providing more employment opportunities for the disabled.<sup>29</sup> In fact, the number of disabled individuals in the American workforce was actually shrinking.<sup>30</sup> After nearly two decades, Congress decided to revisit the ADA, and passed the ADAAA in an attempt to fix the Act’s ineffectiveness.<sup>31</sup>

#### A. *Section 504 of the Rehabilitation Act of 1973 – Precursor to the ADA*

Legislative protection for the disabled in employment began in 1973 with section 504 of the Rehabilitation Act, which applied only to the public sector and originally defined a disabled (or “handicapped”) person as “any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services.”<sup>32</sup> Con-

---

26. H.R. REP. NO. 101-485, pt. 3, at 26 (1990).

27. S. REP. NO. 101-116, at 9 (1989).

28. See Bleau, *supra* note 2, at 277, 279.

29. See DeLeire, *Unintended Consequences*, *supra* note 7, at 21 (“[S]tudies of the consequences of the employment provisions of the ADA show that the Act has led to less employment of disabled workers.”).

30. See *id.*

31. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

32. Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, § 6, 87 Stat. 355, 361 (codified as amended at 29 U.S.C. § 705(20)(A) (2009)).

gress soon recognized the problematic narrowness of this definition,<sup>33</sup> and amended the Act one year later to broaden the definition of a disabled individual.<sup>34</sup> The Rehabilitation Act Amendments of 1974 require a substantial limitation on a major life activity, and introduce a three-pronged definition of a disabled individual.<sup>35</sup> An individual can now bring a claim under the Rehabilitation Act if she “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment,”<sup>36</sup> and is discriminated against “solely by reason of her or his disability.”<sup>37</sup>

The landmark Supreme Court case, *School Board of Nassau County v. Arline*,<sup>38</sup> which ruled that a school’s termination of a tuberculosis-infected teacher solely because of her disease was discriminatory under the Rehabilitation Act,<sup>39</sup> is perhaps the most important case on the Act and one oft-cited by Congress in the legislative history of both the ADA and the ADAAA.<sup>40</sup> *Arline* was the first case in which the Supreme Court interpreted the regarded-as prong of the Rehabilitation Act<sup>41</sup> and the Court construed this prong broadly, noting that some impairments, like “visible physical impairment[s] which in fact [do] not substantially limit that person’s . . . physical or mental capabilities . . . could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”<sup>42</sup> Lower courts followed the *Arline* Court’s precedent, construing the regarded-as prong expan-

---

33. See Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 457 (2008) (“Congress found this definition to be ‘troublesome’ and ‘far too narrow and constricting’ . . .”) (quoting S. REP. NO. 93-1297, at 37, 63 (1974)).

34. See Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516 § 111(a), 88 Stat. 1617, 1619 (amended 2008); see also Larson, *supra* note 33, at 457 (explaining that Congress “implemented two fundamental changes with the Rehabilitation Act Amendments of 1974”).

35. See § 111(a), 88 Stat. at 1619.

36. 29 U.S.C. § 705(20)(B) (2006) (amended 2008).

37. *Id.* § 794(a).

38. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

39. See *id.* at 285-86.

40. See, e.g., S. REP. NO. 101-116, at 23 (1989); H.R. REP. NO. 110-730 (I), at 12 (West 2008).

41. See Larson, *supra* note 33, at 458.

42. *Arline*, 490 U.S. at 282-83 (quoting S. REP. NO. 93-1297, at 64 (1974)).

sively.<sup>43</sup> The drafters of the ADA used the Rehabilitation Act as a model for the ADA,<sup>44</sup> and favorably cited the *Arline* Court's expansive interpretation of the definition of "disabled."<sup>45</sup>

*B. The Original ADA: Tension Between Congressional Language and Supreme Court Interpretation*

The ADA essentially expands the rights of the disabled under the Rehabilitation Act to the private sector, specifically employers with fifteen or more employees.<sup>46</sup> The ADA is modeled closely after, and borrows much of its language from, the Rehabilitation Act, including the same three-pronged disability definition.<sup>47</sup> "Disability" is defined under the ADA as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."<sup>48</sup> Prior to the ADAAA's enactment, employers were prohibited under the ADA from discriminating against an individual with respect to employment "because of the disability of such individual . . ."<sup>49</sup>

In order to bring a valid claim under the ADA, an individual must be "a qualified individual with a disability,"<sup>50</sup> which means she must be able to perform the essential functions of the position in question, with or without reasonable accommodation.<sup>51</sup> If a person requires an accommodation in order to be capable of performing the essential functions of the job, the employer must provide the individual with the accommoda-

---

43. See Larson, *supra* note 33, at 459.

44. See S. REP. NO. 101-116, at 9 (1989); H.R. REP. NO. 101-485, pt. 3, at 31 (1990).

45. See H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

46. The ADA originally established a two-year window wherein the Act only applied to those with twenty-five or more employees, and was eventually extended to those with fifteen or more employees. See Pub. L. No. 101-336 § 101(5)(A), 104 Stat. 327, 330 (codified at 42 U.S.C. § 12111(5)(A) (2009)).

47. See, e.g., S. REP. NO. 101-116, at 25 (1989) ("The phrasing of this section is consistent with regulations implementing section 504 of the Rehabilitation Act of 1973."); H.R. REP. NO. 110-730, pt. 1, at 9 (2008) ("In the ADA of 1990, the Committee adopted the definition of 'handicap' from the Rehabilitation Act . . .").

48. 42 U.S.C. § 12102(2) (2006) (amended 2008).

49. *Id.* § 12112(a) (amended 2008).

50. *Id.*

51. See *id.* § 12111(8) (amended 2008).

tion, as long as it is reasonable, meaning that doing so will not impose an undue hardship upon the employer.<sup>52</sup> Required accommodations might include work schedule revisions, special assistance or equipment, extra training or support, or the elimination of nonessential job functions.<sup>53</sup> The ADA prohibits employers from asking a job applicant whether she is disabled or requiring an applicant to undergo a medical examination prior to making a job offer.<sup>54</sup> However, the Act permits employers to require an applicant to have a medical examination after a job offer if all applicants must undergo the same examination and if the reasons for the examination are job-related and necessary for the conduct of business.<sup>55</sup>

### 1. "Substantial limitation"

One area of considerable debate under the original ADA was the definition of "substantial limitation." In order to seek protection under the first prong of the disability definition of the ADA, an individual must prove that she is "substantially limited" in a "major life activity."<sup>56</sup> The phrase substantially limited is not defined within the Act,<sup>57</sup> but the Equal Employment Opportunity Commission (EEOC), the government agency granted the authority to issue regulations on the ADA,<sup>58</sup> developed a definition of this phrase.<sup>59</sup> The EEOC interpreted "substantially limited" to mean "[u]nable to perform a major life activity that the average person in the general population can perform."<sup>60</sup> The EEOC also explained that in order to seek coverage under the first prong of the disability definition, an individual must be "[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to

---

52. See *id.* § 12112(b)(5).

53. DeLeire, *Unintended Consequences*, *supra* note 7, at 22.

54. See § 12112(d)(2)(A).

55. See *id.* § 12112(d)(3)-(4).

56. *Id.* § 12102(2)(A) (amended 2008).

57. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193 (2002) ("There are two potential sources of guidance for interpreting the terms of this definition—the regulations interpreting the Rehabilitation Act of 1973 . . . and the EEOC regulations interpreting the ADA.").

58. See 42 U.S.C. § 12116 (2005).

59. See 29 C.F.R. § 1630.2(j) (2008).

60. *Id.* § 1630.2(j)(1)(i).

the condition, manner, or duration under which the average person in the general population can perform that same major life activity.”<sup>61</sup> The EEOC listed factors to be considered when determining whether an individual is substantially limited in a major life activity, including: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.”<sup>62</sup>

The Supreme Court relied on the EEOC’s guidelines, as well as the dictionary, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, a case that further developed the “substantial limitation” definition.<sup>63</sup> In *Toyota*, the Court held that in order to be substantially limited in a major life activity, “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.”<sup>64</sup> The Supreme Court has applied this rather restrictive interpretation of the “substantial limitation” definition consistently, explaining in *Albertson’s, Inc. v. Kirkingburg*<sup>65</sup> that a “mere difference” between an individual’s ability to perform a major life activity and an average person’s ability to do the same does not amount to a “substantial limitation.”<sup>66</sup>

A brief reading of the ADA lends support to the Supreme Court’s interpretation of “substantial limitation.” Although the Act does not define the phrase, the ADA’s Congressional findings explain that “individuals with disabilities are a discrete and insular minority.”<sup>67</sup> The Act also estimates the number of individuals expected to be covered by the ADA at 43,000,000,<sup>68</sup> a figure, as the Supreme Court has pointed out, that suggests its drafters intended only those with rather significant impairments to be protected.<sup>69</sup> Nonetheless, as described in more detail below, Congress would eventually in-

---

61. *Id.* § 1630.2(j)(1)(ii).

62. *Id.* § 1630.2(j)(2).

63. *See* 534 U.S. 184, 195–97 (2002).

64. *Id.* at 198.

65. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

66. *See id.* at 565.

67. 42 U.S.C. § 12101(a)(7) (2006) (repealed 2008).

68. *See id.* § 12101(a)(1) (amended 2008).

69. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999).

sist that the standard developed by the EEOC and adopted by the Supreme Court “created an inappropriately high level of limitation necessary to obtain coverage under the ADA.”<sup>70</sup> Congress was disappointed by the inability of some individuals to seek coverage under the ADA as a result of the EEOC and Supreme Court’s strict interpretation, and broadened the definition of “substantial limitation” under the ADAAA in response.<sup>71</sup>

## 2. *The regarded-as prong*

During its review of the ADA, the House Committee on the Judiciary favorably cited *School Board of Nassau County v. Arline*, stating that the rationale for the “regarded-as” prong of the disability definition was well-articulated by the *Arline* Court, and that this rationale was essentially as follows: “[A]lthough an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling.”<sup>72</sup> In other words, Congress intended for courts to interpret the regarded-as prong of the disability definition under the ADA in the same broad manner in which the *Arline* Court interpreted this prong under the Rehabilitation Act. However, Congress failed to include any language about the way in which this prong was to be interpreted within the ADA itself, and, consequently, the Supreme Court interpreted the regarded-as prong of the ADA much more strictly than it had interpreted the same prong of the Rehabilitation Act in *Arline*.<sup>73</sup> In *Sutton v. United Air Lines, Inc.*, the Supreme Court stated that an employer is “free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.”<sup>74</sup> Therefore, in order for an employee to bring a claim under the regarded-as prong of the ADA, the individual had to prove

---

70. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(8), (b)(5), 122 Stat. 3553, 3554, (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

71. *Id.* §§ 3(4)(B), 4(a) (to be codified as amended at 42 U.S.C. § 12102).

72. H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

73. See *Sutton*, 527 U.S. at 489.

74. *Id.* at 490-91.

her employer regarded her impairment as “*substantially limiting* [her] ability to work.”<sup>75</sup>

Congress would later overturn *Sutton* and its interpretation of the regarded-as prong with its passage of the ADAAA, claiming that the interpretation was inconsistent with congressional intent.<sup>76</sup> However, the *Sutton* interpretation resulted from a fatal drafting flaw on the part of Congress. The language of the ADA protects those who are “regarded as having . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual[s].”<sup>77</sup> Naturally, then, the *Sutton* Court deduced that an individual can claim protection under the regarded-as prong in one of two ways: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.”<sup>78</sup>

Had Congress truly intended the ADA to protect an individual whose employer merely perceives her as having *any* type of physical or mental impairment, regardless of whether the employer views that impairment as substantially limiting, Congress could have made this clear with only a few minor adjustments to the statutory language. Because Congress chose not to phrase the language of the regarded-as prong differently, it is uncertain whether Congress truly intended this prong to be interpreted more leniently than the *Sutton* Court’s interpretation and this error was a mere oversight,<sup>79</sup> or whether Congress realized the language would likely be read as it was in *Sutton*, but believed broadening the regarded-as

---

75. *Id.* at 491.

76. ADA Amendments Act of 2008, Pub. L. No. 110-325, § (2)(b)(3), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

77. 42 U.S.C. § 12102(2)(A), (C) (2006) (amended 2008).

78. *Sutton*, 527 U.S. at 489.

79. The legislative history of the ADA makes clear, for example, that Congress intended the ADA to cover severe burn victims, individuals who might not be protected under the *Sutton* test. H.R. REP. NO. 101-485, pt. 3, at 30 (1990) (“[S]evere burn victims often face discrimination in employment . . . which results in substantial limitation of major life activities. These persons would be covered under this test because of the attitudes of others towards the impairment, even if they did not view themselves as ‘impaired.’”); see also Larson, *supra* note 33, at 460-61.

prong language would open the door to frivolous litigation.<sup>80</sup> Nonetheless, Congress would later argue, with the enactment of the ADAAA, that the *Sutton* Court interpreted the regarded-as prong too strictly, and would clarify that this prong is to be interpreted more broadly in the future.<sup>81</sup>

### 3. *Mitigating measures*

Another area of confusion under the original ADA was whether mitigating measures were to be taken into account when analyzing whether an individual was disabled for purposes of the ADA. Prior to the ADA's enactment, the Senate Committee on Labor and Human Resources stated, "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."<sup>82</sup> The House Committee on Education and Labor expanded upon this statement, explaining:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.<sup>83</sup>

These statements are irrefutable evidence that Congress did not intend courts to consider the affirmative steps taken by an individual to mitigate her disability when deciding whether she is disabled for purposes of the ADA. Furthermore, the EEOC explained in its Interpretive Guidance to the ADA that whether an individual is disabled should be determined

---

80. After all, when reviewing the ADA, the House Committee on the Judiciary explained that "[p]hysical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair." H.R. REP. NO. 101-485, pt. 3, at 28 (1990).

81. ADA Amendments Act of 2008, Pub. L. No. 110-325, § (2)(b)(3), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

82. S. REP. NO. 101-116, at 23 (1989).

83. H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

“without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”<sup>84</sup>

Although Congress did not explicitly include this language within the ADA, review of the Act’s legislative history makes it clear that the intent behind the ADA was to determine whether an individual was disabled without regard to mitigating measures.<sup>85</sup> Nonetheless, the Supreme Court chose to disregard this legislative history in *Sutton*, when it held that whether an individual is disabled under the ADA should be decided by taking into consideration any mitigating measures undertaken by the individual.<sup>86</sup> The plaintiffs in *Sutton* were severely myopic twins who both wore corrective lenses that completely improved their eyesight.<sup>87</sup> The Court chose to ignore both the legislative history behind the ADA and the EEOC guidelines in holding that “the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA”<sup>88</sup> and that “[b]ecause we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA’s legislative history.”<sup>89</sup>

The Court reasoned that “because the phrase ‘substantially limits’ appears in the Act in the present indicative verb form . . . the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.”<sup>90</sup> The Court also explained that the EEOC’s mandate that individuals be analyzed in their uncorrected state is completely contradictory to the ADA’s explicit directive that whether an impairment substantially limits a person’s major life activities requires an individual inquiry.<sup>91</sup> The EEOC guidelines, the Court said, would require employers to make a disability determination by speculating about the condition an individual *would be in if*

---

84. 29 C.F.R. § 1630.2(h), (j) (1991).

85. See, e.g., H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

86. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 476 (1999).

87. See *id.* at 475.

88. *Id.* at 482.

89. *Id.*

90. *Id.*

91. See *id.* at 483 (“The definition of disability also requires that disabilities be evaluated ‘with respect to an individual’ and determined based on whether an impairment substantially limits the ‘major life activities of such individual.’”) (citing 42 U.S.C. § 12102(2) (1990)).

she chose not to mitigate her condition, rather than focusing on the *actual limitations* of the individual in her corrected state, and deduced that this would be “contrary to both the letter and the spirit of the ADA.”<sup>92</sup> Lastly, the Court reasoned that because congressional findings within the ADA included the statement that “some 43,000,000 Americans have one or more physical or mental disabilities,” Congress did not intend to protect those with mitigated conditions under the ADA umbrella, because if it had aimed to cover all such individuals, this number would have been much higher.<sup>93</sup>

What is perhaps most interesting about the *Sutton* Court’s ruling regarding mitigating measures is its blatant rejection of the legislative history of the ADA, as well as the EEOC’s regulations on the subject, which made explicitly clear Congress’s desire to analyze individuals’ disabilities without deference to mitigating or corrective measures. The Court cleverly pieced together language of the ADA to justify its holding, but, ultimately, the decision to take into account claimants’ corrective measures during ADA analysis was an obvious example of bench legislation. The Court predicted the problems that interpreting the ADA according to Congressional intent would pose for employers,<sup>94</sup> perhaps problems that Congress did not anticipate or chose to ignore. As described in further detail later in this Note, the Court forecasted the difficulties that employers would face if disabilities were to be analyzed without taking into account corrective measures,<sup>95</sup> problems that employers will now inevitably face under the ADAAA.

#### 4. *The ADA vs. the Civil Rights Act of 1964*

The House Committee on the Judiciary likened Title I of the ADA to Section 504 of the Rehabilitation Act of 1973, explaining that the ADA mirrors much of the substantial framework

---

92. *Id.* at 483–84.

93. *Id.* at 484.

94. *See id.* at 483–84.

95. For instance, the *Sutton* Court pointed out that failing to take mitigating measures into account “would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals,” and “could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe.” *Id.*

of the Rehabilitation Act.<sup>96</sup> The Committee only compared Title I of the ADA to Title VII of the Civil Rights Act of 1964 insofar as “[Title I] borrows much of its procedural framework from [T]itle VII of the Civil Rights Act of 1964 . . . by incorporating [T]itle VII’s enforcement provisions, notice posting provisions, and employer coverage provisions.”<sup>97</sup> These statements are relevant because they indicate that Congress intended courts to interpret the ADA in accordance with past judicial interpretations of the Rehabilitation Act, as opposed to the Civil Rights Act. However, the drafters of the ADAAA would later argue otherwise.

For a variety of reasons, courts have historically analyzed ADA employment discrimination claims differently than employment discrimination claims under Title VII,<sup>98</sup> as discussed below. When analyzing race and gender discrimination claims, courts focus almost exclusively on the employer’s acts.<sup>99</sup> The framework for analyzing workplace discrimination claims under Title VII was explained in the landmark Supreme Court case, *McDonnell Douglas Corp. v. Green*.<sup>100</sup> In that case, the Court outlined the burden-shifting analysis for discrimination claims, wherein the plaintiff carries the initial burden of establishing a prima facie case of discrimination, which can be satisfied by demonstrating: “(i) that he belongs to a [particular class of individuals]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”<sup>101</sup> The same test is used whether the claim is for failure to hire or other types of employment discrimination.<sup>102</sup> If the plaintiff succeeds in establishing these elements,

---

96. See H.R. REP. NO. 101-485, pt. 3, at 31 (1990).

97. *Id.*

98. Compare *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII case spending little time analyzing the plaintiff’s prima facie case, and focusing almost entirely on the parties’ ability to meet the requisite burdens that emerge once a plaintiff establishes a prima facie case) with *Sutton*, 527 U.S. 471 (ADA case focusing almost completely on whether the plaintiff is a proper claimant, and therefore able to establish a prima facie case).

99. See, e.g., *McDonnell Douglas*, 411 U.S. at 800-06.

100. *Id.*

101. *Id.* at 802.

102. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 516-20 (1993) (recognizing the applicability of the *McDonnell Douglas* framework to demotion cases); *Moore v. City of Phila-*

the burden then shifts to the employer to articulate a “legitimate, nondiscriminatory reason” for its action.<sup>103</sup> Lastly, the plaintiff has an opportunity to establish that the employer’s reasons are mere pretext.<sup>104</sup>

In Title VII cases, the focus during the summary judgment phase is primarily on the last two prongs of the test, with little emphasis placed on the plaintiff’s ability to establish a prima facie case.<sup>105</sup> The Supreme Court has been rather lenient in allowing individuals to establish a prima facie case, placing the majority of its analysis instead upon the later required elements of discrimination cases, such as the requirement that the claimant prove pretext.<sup>106</sup> Conversely, courts have generally focused their inquiry when analyzing ADA claims on the first part of the test—whether the individual actually is disabled (or was regarded as disabled) and, therefore, a proper ADA claimant.<sup>107</sup>

The reason for this discrepancy is likely threefold. The first explanation for the difference between courts’ analyses of Title VII claims and ADA claims may be quite simple—race and gender are generally outwardly discernable by physical characteristics. It would therefore be a waste of courts’ time and resources to compel plaintiffs to prove with extensive evidence that they are of the race, ethnicity, or gender they claim to be. On the other hand, the same cannot be said of disabilities, which are often not physically evident (diabetes or cancer, for instance).

Secondly, the ADA explicitly states that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations.”<sup>108</sup> This appears to be an attempt by its drafters to avoid extending coverage of the ADA to individuals who have not traditionally faced obstacles in the area of employment because of their disability. The

---

delphia, 461 F.3d 331, 342 (3d Cir. 2006) (authorizing application of the *McDonnell Douglas* framework to retaliation cases).

103. *McDonnell Douglas*, 411 U.S. at 802.

104. *Id.* at 804.

105. *See, e.g., id.* at 800-06.

106. *See, e.g., Hicks*, 509 U.S. at 516-20 (explaining that a plaintiff must only establish pretext to survive summary judgment, but the factfinder ultimately has the opportunity to decide whether the employer’s actual reasons for adverse treatment were discriminatory).

107. *See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 192-202 (2002).

108. 42 U.S.C. § 12101(a)(7) (2006) (amended 2008).

House Committee on the Judiciary cautioned that “[p]hysical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair.”<sup>109</sup> This statement alone illustrates the differences between the ADA and Title VII. Unlike the ADA, individuals are permitted to bring claims under Title VII regardless of whether they are members of any “protected class.”<sup>110</sup> In other words, even a white male can bring a valid Title VII claim.<sup>111</sup> Therefore, an important difference between the ADA and Title VII is that the ADA extends coverage only to a specific protected class of individuals (those who are either disabled, have a history of disability, or are regarded as disabled), whereas Title VII extends coverage to any individual, as long as she is able to prove her employer’s actions were motivated by discrimination.<sup>112</sup>

Third, and perhaps most importantly, the ADA goes a step further than Title VII by affirmatively requiring employers to reasonably accommodate the disabled.<sup>113</sup> Therefore, “the ADA does more than simply add ‘disability’ to the list of classes protected under the Civil Rights Act.”<sup>114</sup> Because the ADA places more responsibilities on employers than does Title VII, it seems to logically follow that the class of individuals able to claim protection under the ADA should be more narrowly defined. After all, the ADA itself,<sup>115</sup> as well as its legislative history,<sup>116</sup> places significant emphasis on the definition of “dis-

---

109. H.R. REP. NO. 101-485, pt. 3, at 28 (1990).

110. See Blake R. Bertagna, *The Internet – Disability or Distraction? An Analysis of Whether “Internet Addiction” Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. & EMP. L.J. 419, 439 (2008) (“The requirement to show that one is disabled under the ADA highlights one notable distinction between the ADA and other civil rights statutes. Under other civil rights statutes, the plaintiff need not prove that he or she is a member of a protected class in order to proceed with his or her cause of action.”).

111. See *id.*

112. See *id.*

113. Note, however, that the ADAAA does clarify that employers are not required to reasonably accommodate individuals covered by the regarded-as prong. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 6(h), 122 Stat. 3553, 3558 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

114. MARGARET P. SPENCER, *The Americans with Disabilities Act: Description and Analysis, in HUMAN RESOURCE MANAGEMENT AND THE AMERICANS WITH DISABILITIES ACT 7*, 7 (John G. Veres III & Ronald R. Sims eds., 1995).

115. See 42 U.S.C. § 12102(2) (2006) (amended 2008).

116. See, e.g., S. REP. NO. 101-116, at 27-29 (1989) (explanation of the definition of “disability” spans four pages).

ability,” which naturally leads to the conclusion that a considerable amount of time should be spent analyzing whether the individual bringing an ADA claim falls under this definition. Nonetheless, as explained below, the drafters of the ADAAA would later insist that ADA claims should be analyzed similarly to Title VII claims, with the emphasis on the employer’s actions, rather than on whether the individual is disabled.<sup>117</sup>

### C. Failure of the ADA

Neither proponents nor critics of the original ADA’s structure can deny the unfortunate truth—that since the ADA’s enactment, empirical studies show that the number of employed disabled individuals in the United States has continually declined.<sup>118</sup> Although there are other contributors to the increasing unemployment rates of the disabled,<sup>119</sup> ADA critics argue that the business costs associated with the ADA’s directives are to blame for this trend.<sup>120</sup> Indeed, one would be hard-pressed to argue that the consistent decrease in the number of disabled in the American workforce since the ADA’s enactment is unrelated to the Act. In fact, economists have conducted empirical studies, employing complex methods to control for other factors, and have concluded that the ADA has most likely contributed to the decline in the employment level of disabled individuals.<sup>121</sup> Similar Title VII studies, on the

---

117. See H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

118. See Blanck, *supra* note 13; Crisis Point, *supra* note 7, at 301.

119. For instance, some blame the recession the United States entered into shortly after the ADA’s enactment or Social Security Disability Insurance and Supplemental Security Income programs for the continual increase in the number of unemployed disabled. See Douglas Kruse & Lisa Schur, *Does the Definition Affect the Outcome? Employment Trends Under Alternative Measures of Disability*, in *THE DECLINE IN THE EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE* 281 (David C. Stapleton & Richard V. Burkhauser eds., 2003).

120. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 259.

121. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 950 (“Since the ADA provides a form of employment protection, it should lead to a lower separation rate for the disabled. Because we found no evidence of an effect of the ADA on separations of the disabled, the employment protection story does not get direct empirical support. This result and the fact that the costs of reasonable accommodation are probably larger than the costs of litigation for wrongful termination suggest that accommodation costs have been at least as important for employers as the fear of lawsuits.”); DeLeire, *POLICY PUZZLE*, *supra* note 8, at 265–70.

other hand, have revealed that Title VII has led to an increase in employment of African-Americans.<sup>122</sup>

In other words, the ADA, unlike other civil rights statutes, has had the unintended effect of actually reducing the number of disabled individuals in the American workforce.<sup>123</sup> Most ADA claims are for wrongful discharge, as opposed to failure to hire, and the majority of EEOC claims under the ADA involve discharge or failure to accommodate.<sup>124</sup> Therefore, ADA critics suggest that employers have responded to this reality by reducing the number of disabled they hire.<sup>125</sup> In other words, the ADA "may have reduced the demand for disabled workers and thereby undone the ADA's intended effects."<sup>126</sup>

## II. WHY THE ADAAA WILL NOT EFFECTIVELY ACCOMPLISH THE ADA'S GOALS AND WILL INSTEAD PROMOTE ABUSE OF THE SYSTEM

After nearly twenty years of disappointment under the ADA, Congress revisited the Act, determined to finally bring some hope to the disabled in the area of employment.<sup>127</sup> On September 25, 2008, former President George W. Bush signed the ADAAA into law, which drastically changed many provisions of the ADA.<sup>128</sup> Among other modifications, the ADAAA broadens both the definition of "substantial limitation" and the regarded-as prong of the disability definition,<sup>129</sup> mandates that all claims are to be analyzed without considering the claimant's use of corrective measures,<sup>130</sup> and explains that case analysis under the ADA is to mirror Title VII analysis.<sup>131</sup> Unfortunately, most of these changes are unlikely to fix the problems encountered under the ADA, and those whom Congress

---

122. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 259.

123. See DeLeire, *Unintended Consequences*, *supra* note 7, at 21.

124. *Id.*

125. *See id.*

126. *Id.*

127. See H.R. REP. NO. 110-730, pt. 1, at 6-7 (2008).

128. See Michael Newman & Faith Isenhath, *The Americans with Disabilities Act of 2008*, 55 *FED. LAW. 12*, 12 (2008).

129. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 4(a), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

130. *See id.* § 4(a).

131. *See id.* § 5(a).

intended to protect under the original ADA will continue to remain unemployed.

*A. Expanding the Definition of "Substantial Limitation"*

The ADAAA attempts to broaden the narrow "substantial limitation" definition<sup>132</sup> that emerged in the EEOC regulations on the ADA<sup>133</sup> and *Toyota*.<sup>134</sup> The regulations and case law that developed around this phrase explained that "substantially limited" meant "significantly restricted"<sup>135</sup> and that an individual could only properly bring a claim under the first prong of the disability definition if she had "an impairment that prevent[ed] or severely restrict[ed] [her] from doing activities that are of central importance to most people's daily lives."<sup>136</sup> The ADAAA states that this interpretation of the phrase is "inconsistent with congressional intent"<sup>137</sup> and "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA."<sup>138</sup>

These statements are difficult to reconcile with the ADA's explanation that "individuals with disabilities are a discrete and insular minority,"<sup>139</sup> and that only 43,000,000 Americans were expected to fall under the ADA's protection at the time of its enactment.<sup>140</sup> Not surprisingly, therefore, the ADAAA's drafters removed this language from the ADAAA,<sup>141</sup> which leads one to question whether the ADAAA truly aims to restore the original congressional intent with this amendment, or if it is merely a desperate attempt to reverse the negative impact the ADA has had on the employment of the disabled. If the answer is the latter, then it is apparent that the drafters of

---

132. *See id.* § 4(a)(4)(B).

133. *See* 29 C.F.R. § 1630.2(j) (1991).

134. *See Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 195-97 (2002).

135. 29 C.F.R. § 1630.2(j) (1991).

136. *Toyota*, 534 U.S. at 198.

137. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a)(8), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

138. *See id.* § 2(b)(5).

139. 42 U.S.C. § 12101(a)(7) (2006) (amended 2008).

140. *Id.* § 12101(a)(1).

141. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3(1)-(2), 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

the ADAAA did not fully recognize why the ADA has led to a decrease in disabled individuals' integration into the American workforce.

One of the main differences between Title VII and the ADA is that the ADA places the affirmative obligation on employers to reasonably accommodate their disabled employees.<sup>142</sup> This extra responsibility is most likely a core reason the ADA does not share the same success as Title VII.<sup>143</sup> The costs associated with providing reasonable accommodations for employees are almost certainly larger than the costs of litigating wrongful discharge claims.<sup>144</sup> This reality has led employers to fear the risk of having to provide reasonable accommodations to employees more than the risk of facing wrongful termination claims, which, in turn, has led employers to be less likely to hire disabled individuals after the ADA's enactment.<sup>145</sup>

Furthermore, studies suggest that employers are more likely to face ADA lawsuits for terminating an individual than for failing to hire or taking other adverse employment actions.<sup>146</sup> Many employers have no doubt calculated their risks after the ADA and have realized that failing to hire disabled individuals is less likely to lead to litigation than failure to accommodate or wrongful discharge, which has led to a decrease in disabled Americans' employment opportunities.<sup>147</sup> By broadening the definition of "substantial limitation," the ADAAA essentially adds further disincentives to hire the disabled, and will likely cause the unemployment level of disabled individuals to continue climbing as a result.<sup>148</sup> Especially during the initial time lapse before case law and regulations develop around this definition,<sup>149</sup> businesses are likely to be especially

---

142. See SPENCER, *supra* note 114, at 7.

143. See Acemoglu & Angrist, *supra* note 121, at 950.

144. See *id.*

145. See *id.*

146. See DeLeire, *Unintended Consequences*, *supra* note 7, at 23.

147. See *id.*

148. See Andrew M. Grossman, *Defining Disability Down: The ADA Amendments Act's Dangerous Details*, *Testimony Before the Committee on Health, Education, Labor, and Pensions, United States Senate* at 9, July 15, 2008, available at [http://help.senate.gov/Hearings/2008\\_07\\_15/Grossman.pdf](http://help.senate.gov/Hearings/2008_07_15/Grossman.pdf) [hereinafter Grossman, *Testimony*].

149. The EEOC recently released proposed regulations on the ADAAA, which explain that "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability," and offer a handful of examples to illustrate this point. 74 Fed. Reg. 183, 48440 (Sept. 23, 2009) (to be codified

cautious, refusing to hire any individuals whom they suspect may fall under the broad umbrella of protection afforded to individuals under the ADAAA.<sup>150</sup> Therefore, the ADAAA is likely to only exacerbate the ADA's unintended and negative consequences for the disabled.

### B. Broadening the Regarded-As Prong

The ADAAA was enacted "to restore the intent and protections of the Americans with Disabilities Act of 1990."<sup>151</sup> One way in which the ADAAA attempts to accomplish this goal is by expanding the regarded-as prong of the disability definition.<sup>152</sup> In the ADAAA, Congress expresses its disdain for the *Sutton* Court's interpretation of the regarded-as prong of the disability definition, and indicates its desire to reinstate the *Arline* Court's broad view of the prong.<sup>153</sup> After *Sutton*, in order to prevail on a regarded-as claim, an ADA plaintiff had to show that her employer regarded her as *substantially limited in a major life function*.<sup>154</sup> However, the ADAAA greatly broadens this prong, and in order to prevail on a regarded-as disabled discrimination claim, an individual now need only prove that she was regarded as *having an impairment*.<sup>155</sup> One satisfies this requirement by establishing "that he or she has been subjected to an action prohibited [by the ADA] 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*."<sup>156</sup> As explained in further detail below, this change will mean increased difficulty of employer compliance. It also creates further disincentives for employers to hire any individuals whom they suspect are disabled, as it is now more likely that

---

at 29 C.F.R. pt. 1630.2). However, these regulations have not yet been enacted, and the EEOC accepted comments on the rulemaking until November 23, 2009. *See id.* at 48431.

150. *See* Grossman, *Testimony*, *supra* note 148, at 4–8.

151. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), *available at* <http://www.access-board.gov/about/laws/ada-amendments.htm>.

152. *See id.* § 2(b)(3).

153. *See id.*

154. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489 (1999).

155. *See* ADA Amendments Act of 2008, Pub. L. No. 110–325 § 4(a), 122 Stat. 3553, 3555 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), *available at* <http://www.access-board.gov/about/laws/ada-amendments.htm>.

156. *Id.* § 2(b)(3) (emphasis added).

such individuals will have valid claims under the regarded-as prong.

Despite the inherent shortfalls of the regarded-as prong amendment, of all the changes discussed within this Note, this change will probably provide the most protection to those whom the drafters of the original ADA hoped to assist. After all, the legislative history of the ADA reveals that its drafters intended for the Act to protect individuals who may not be physically incapable of performing any major life activities, but who are nonetheless substantially limited in such activities, because of the irrational fears of others.<sup>157</sup> Severe burn victims are one example of the types of individuals that would fit into this category.<sup>158</sup> Studies show that implicit biases are real and pervasive,<sup>159</sup> and broadening the regarded-as prong may have the potential to curb the effects of such biases in the employment sector. Because the ADAAA also clarifies that employers are not responsible for providing reasonable accommodations to individuals who are covered by the regarded-as prong,<sup>160</sup> employers are less likely to be as reluctant as they may have been in the past to hire individuals who only have potential to fall under the regarded-as prong. Therefore, the expansion of the regarded-as prong is the most likely of all the ADA changes discussed in this Note to actually increase employment opportunities for individuals whom the ADA's drafters intended to protect.

Nonetheless, this change to the ADA invites abuse and has the potential to reach groups of individuals that the drafters of the original ADA probably did not anticipate protecting. Under the ADAAA, a significantly greater number of individuals will be able to form valid claims under the regarded-as prong, as plaintiffs need no longer prove that their employers considered them unable to perform a broad range of jobs.<sup>161</sup> The obese are one example of a group of individuals who will

---

157. H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

158. *See id.*

159. *See Larson, supra* note 33.

160. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325 § 6(a)(1)(h), 122 Stat. 3553, 3558 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

161. *See Top Law Changes Employers Must be Ready for in 2009*, COMPENSATION AND BENEFITS FOR LAW OFFICES, Mar. 2009, at 2.

likely be able to form claims under the amended regarded-as prong with ease.

Prior to the ADAAA, courts rarely extended ADA coverage to obese individuals, as it was difficult for an obese plaintiff to proffer evidence that her employer regarded her as substantially limited in a major life activity.<sup>162</sup> The obese are similar to the types of individuals the drafters of the ADA intended to protect with the regarded-as prong (like burn victims) in that they often suffer from stereotypes about their condition.<sup>163</sup> However, the obese comprise an ever-increasing segment of American society,<sup>164</sup> which means that extending regarded-as coverage to this group could have an unprecedented negative impact on American employers. Likewise, it creates a great potential for abuse of the system, as well as an increased likelihood of frivolous lawsuits.

The drafters of the ADA did not explicitly exempt the obese from the Act's coverage, but Congress's estimate that 43,000,000 individuals would enjoy coverage under the ADA at the time of its enactment<sup>165</sup> suggests that Congress did not intend for all obese Americans to enjoy protection under the ADA. The ADAAA's drafters expressed some intent to limit the ability of large groups of individuals to bring claims under the ADA by explicitly exempting those who corrected visual impairments with contact lenses or eyeglasses.<sup>166</sup> However, the drafters failed to account for other expansive groups, such as the obese, who would likely be able to seek coverage under the regarded-as prong, as amended. It is uncertain whether courts and the EEOC will read the regarded-as prong so broadly as to allow all obese individuals to easily bring regarded-as claims, but one thing is for sure: such individuals can now file ADA claims with a far greater hope of success.

---

162. See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440–43 (6th Cir. 2006).

163. See, e.g., Kari Horner, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589, 592 (2005).

164. See Maggie Fox, *Obese Americans Now Outweigh the Merely Overweight*, REUTERS, Jan. 9, 2009, <http://www.reuters.com/article/domesticNews/idUSTRE50863H20090109> [hereinafter REUTERS] (explaining that the obese now make up more than thirty-four percent of the American population).

165. See 42 U.S.C. § 12101(a)(1) (2006) (amended 2008).

166. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 4(a)(4)(E)(i)(I), 122 Stat. 3553, 3556 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

Therefore, although the ADAAA's broadening of the regarded-as prong may provide more employment opportunities to those whom the drafters of the original ADA envisioned protecting, because of its failure to exempt certain groups, it is likely to lead to coverage for far more individuals than Congress intended.

### C. Disregard of Mitigating Measures

Congress explains that one of the ADAAA's major purposes is to reverse the *Sutton* Court's holding that mitigating measures are to be taken into account when determining whether an individual is disabled.<sup>167</sup> The ADAAA expressly adds this mandate into the ADA<sup>168</sup> and deletes the Congressional finding in the ADA that states that 43,000,000 Americans are disabled<sup>169</sup> (as the *Sutton* Court used this number to reason that Congress did not intend to protect those with mitigated disabilities).<sup>170</sup> As discussed above, the legislative history behind the ADA clearly illustrates the drafters' intent to leave mitigating measures out of the equation when analyzing whether an individual is disabled.<sup>171</sup> Why, then, did the *Sutton* Court choose to disregard this legislative history, as well as the relevant EEOC guidelines,<sup>172</sup> in favor of ADA analysis with regard to mitigating measures? In *Sutton*, the Court made some very significant predictions about the problems that would result if ADA claims were to be analyzed without respect to mitigating measures:

The [EEOC] approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition . . . . The [EEOC] guidelines approach could also lead to the anomalous result that in determining

---

167. See *id.* § 2(b)(2).

168. See *id.* § 4(a)(3)(E)(i).

169. See *id.* § 3(1).

170. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 486 (1999).

171. See S. REP. NO. 101-116, at 23 (1989); see also H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

172. See 29 C.F.R. pt. 1630, app. § 1630.2 (h)-(j) (1999).

whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe.<sup>173</sup>

Fortunately, the drafters of the ADAAA included language to protect against the latter problem flagged by the *Sutton* Court by specifying that only the *ameliorative* effects of corrective measures are to be ignored when analyzing whether an individual is disabled.<sup>174</sup> The ADAAA also clarifies that ordinary glasses and contact lenses are to be exempt from this rule.<sup>175</sup> Nonetheless, the other fears that prevented the *Sutton* Court from accepting the ADA drafters' intent with respect to mitigated conditions undoubtedly will be realized under the ADAAA. The problems this amendment poses for employers are explained in further detail below, but the overall negative consequences of this change are clear. This amendment is likely to provide increased protection, especially for one particular group of individuals—those who have physical or mental impairments that are substantially or completely mitigated by corrective measures, whose employers were, at the time of hiring (or still are), completely unaware of their conditions.

This is so because studies suggest that employers are less likely, after the ADA, to hire individuals whom they suspect are disabled at the time of application or interview because of the threat of litigation or need to provide accommodations.<sup>176</sup> However, for obvious reasons, employers are not able to make the same discriminatory hiring decisions based on mitigated conditions that are not readily apparent. Therefore, individuals with mitigated impairments were, under the ADA, and continue to be, under the ADAAA, more likely than those with unmitigated conditions to be hired by employers. However, the ADAAA provides such individuals with the ability to form *prima facie* cases against their employers relatively easily

---

173. *Sutton*, 527 U.S. at 483–84.

174. See ADA Amendments Act of 2008, Pub. L. No. 110–325 § 4(a)(4)(E)(i), 122 Stat. 3553, 3556 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

175. See *id.* § 4(a)(4)(E)(iii).

176. See DeLeire, *Unintended Consequences*, *supra* note 7, at 23.

where employers take adverse action against them, even if it is unclear whether the employer had reason to know of the mitigated condition.

This reality provides an open door for abuse, especially considering that employers will be more likely to settle claims that survive summary judgment in order to avoid expensive litigation and the risks associated with a jury trial.<sup>177</sup> Individuals with mitigated conditions will be more likely to survive summary judgment under the ADAAA than its predecessor when bringing claims against employers who had no knowledge of their alleged disability. Although such claims would likely not be successful on the merits, they would nonetheless lead to expensive litigation for businesses.<sup>178</sup> Because even frivolous claims now have a decreased chance of being dismissed at the early stages of legal action, more settlements are likely to result, rewarding individuals for abusing the system. Such claims would obviously be void of the requisite discriminatory element and would therefore serve to protect individuals in situations counter to the intentions of the drafters of the original ADA.

#### *D. Likening the ADA to Title VII of the Civil Rights Act of 1964*

Perhaps the most significant way in which the ADAAA amends the ADA is one that may appear to be rather minor: changing the statute from barring discrimination against any qualified individual "with a disability because of the disability of such individual,"<sup>179</sup> to barring discrimination against a qualified individual "on the basis of disability."<sup>180</sup> At first glance, one might fail to even notice the difference between the original section of the ADA and the amended section. This language modification is slight, but significant. The reason this amendment is so important is because it changes the gen-

---

177. See generally Judith E. Harris et al., *Evaluating Risk—What is a Single-Plaintiff Claim Worth?*, Nov. 18, 2002, <https://www.aethr.com/pages/FreeDocumentStreamer.aspx?Type=HR&ID=173> (discussing an employer's process for evaluating the value of employment discrimination claims).

178. See Grossman, *Testimony*, *supra* note 148, at 8.

179. See 42 U.S.C. § 12112(a) (2006) (amended 2008).

180. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 5(a)(2), 122 Stat. 3553, 3557 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>; see also H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

eral definition of discrimination under the ADA to mirror that of Title VII.<sup>181</sup>

As detailed above, the drafters of the original ADA explained that the ADA was modeled after the Rehabilitation Act, as opposed to Title VII.<sup>182</sup> Nonetheless, the drafters of the ADAAA asserted that ADA claims should be analyzed analogously to Title VII claims, with the focus on “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 even a ‘person with a disability’ with any protections under the Act at all.”<sup>183</sup> The House Committee on Education and Labor opined, “Too often cases have turned solely on the question of whether the plaintiff is an individual with a disability; too rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability . . . .”<sup>184</sup>

One critic of the ADAAA, who testified before a Senate committee prior to the Act’s enactment, rightfully pointed out that “[w]ithin this contention . . . is its own rebuttal,” since determining the existence of a disability is a prerequisite to an ADA claim.<sup>185</sup> In other words, if an at-will employee chronically misses work without providing her employer with notice, her employer would ordinarily be justified in terminating her;<sup>186</sup> however, if that individual suffered from severe migraines, which made it difficult for her to get out of bed in the morning, her employer could very well be in violation of the ADA for discriminating against her because of her disability.<sup>187</sup> Thus, whether an ADA claimant has a disability must logically be an area of significant focus when analyzing ADA claims, and permitting individuals to more easily form valid *prima facie* cases under the ADA promotes abuse of the system by allowing individuals who are not proper plaintiffs under the Act to survive summary judgment. Furthermore, the House

---

181. H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

182. H.R. REP. NO. 101-485, pt. 3, at 31 (1990).

183. H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

184. *Id.* at 9.

185. Grossman, *Testimony*, *supra* note 148, at 6.

186. *Id.* at 6-7.

187. *See id.* at 7.

Committee on the Judiciary's explanation that "[p]hysical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair,"<sup>188</sup> emphasizes the ADA drafters' recognition of the importance of defining the group of individuals entitled to protection under the Act. By shifting the focus of the initial inquiry under the ADA from the claimant's status to the employer's actions, the ADAAA creates the risk of trivializing the importance of clearly defining the individuals Congress intended to protect under the ADA.

Overall, the broad changes Congress made to the ADA by way of the ADAAA are more likely to promote abuse than to help protect those whom the drafters of the original ADA sought to protect. Most of the ADAAA amendments are both illogical and contrary to original legislative intent. Taken together, the changes create further disincentives to employers to hire disabled individuals and will provide individuals who are not proper plaintiffs under the ADA the opportunity to survive summary judgment and be unfairly rewarded.

### III. WHAT THE ADAAA MEANS FOR BUSINESSES — THE INEFFICIENT SPENDING AND MISAPPROPRIATION OF RESOURCES THAT WILL RESULT FROM THE IMPRACTICABILITY OF COMPLIANCE

In order to better understand why the ADAAA will result in major difficulty in, if not the impossibility of, employer compliance, it is important to understand the process that employers follow in order to ensure compliance with the ADA. Under both the ADA and the ADAAA, employers are permitted to require applicants to undergo medical examinations after a job offer has been extended.<sup>189</sup> This information can be used to determine whether the applicant is able to perform the essential functions of the job with or without reasonable accommodation.<sup>190</sup> Responsible employers have a system in place for handling reasonable accommodation requests from employees and determining when and which type of reasonable accom-

---

188. H.R. REP. NO. 101-485, pt. 3, at 28 (1990).

189. See 42 U.S.C. § 12112(d)(3)-(4) (2006) (amended 2008).

190. See SPENCER, *supra* note 114, at 17-19.

modations to provide.<sup>191</sup> Additionally, employers should engage in an “interactive process” with their employees, as outlined in the EEOC guidelines, in order to assess employees’ potential restrictions and analyze essential job functions.<sup>192</sup> Moreover, they must carefully document the performance of employees, verifying that any adverse actions taken against workers are appropriate and nondiscriminatory.<sup>193</sup> These measures are preventative in nature, and a means by which employers limit ADA litigation.

What is perhaps most important to businesses when developing policies and creating management procedures is risk assessment.<sup>194</sup> Employers follow case law and regulations to pinpoint the groups of individuals likely to survive summary judgment in any given area of potential litigation.<sup>195</sup> If a claim is likely to be dismissed on summary judgment, then employers naturally have little chance of facing expensive litigation or settlement costs and are more apt to take the risk of having to defend such a claim.<sup>196</sup> If a claim is likely to be green-lighted for trial, however, businesses are more likely to spend more time protecting against ever having to face such a claim in the first place.<sup>197</sup> Naturally, then, any employment statute that increases the likelihood that a large group of individuals will have a higher chance of surviving summary judgment will also increase the burden on businesses. The ADAAA’s drastic broadening of the ADA will inevitably have this effect on American businesses.

---

191. See Ronald R. Sims et al., *Improving HRM’s Responsiveness to the ADA*, in *HUMAN RESOURCE MANAGEMENT AND THE AMERICANS WITH DISABILITIES ACT 171*, 178-79 (John G. Veres III & Ronald R. Sims eds. 1995).

192. 29 C.F.R. § 1630.2(o)(3) (2008) (“To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations.”).

193. See Sims et al., *supra* note 191, at 180-81.

194. See Harris et al., *supra* note 177.

195. See generally *id.* (instructing employers on assessing the likelihood of success prior to an employment discrimination claim).

196. See Grossman, *Testimony*, *supra* note 148, at 8.

197. See generally Harris et al., *supra* note 177.

A. *The Effect of the Expansion of the “Substantial Limitation” Definition on Employers*

Although the ADA failed to include a definition of “substantial limitation,” the development of EEOC regulations and relevant case law created guidance for employers and enabled businesses to institute policies and assess risk with relative certainty.<sup>198</sup> The ADAAA’s vague language that “disability” be interpreted “in favor of broad coverage of individuals under the Act,”<sup>199</sup> and that the term “substantially limits” “be interpreted consistently with the findings and purposes of the [ADAAA],”<sup>200</sup> will create confusion and uncertainty for employers, at least until explanatory EEOC regulations and case law develop, making employer compliance nearly impossible.<sup>201</sup> Even after the development of regulations and case law surrounding this amendment, employers will continue to face an increased burden as a result of this change. The ADAAA mandates that the definition be broadened,<sup>202</sup> meaning that more individuals will now be encompassed by this prong and will therefore be capable of surviving summary judgment. As a result, businesses will face increased litigation costs and more incentives to settle ADA cases.

The drastic broadening of the “substantial limitation” definition could end up protecting some individuals that the drafters of the original ADA probably never even considered—for instance, individuals suffering from “Internet addiction.”<sup>203</sup> Although such a condition would have not likely been granted coverage under the ADA, the ADAAA’s expansive language may very well capture individuals whose Internet use inter-

---

198. See Grossman, *Testimony*, *supra* note 148, at 1–2 (explaining that where legal uncertainty exists, employers are more likely to settle borderline discrimination claims).

199. See ADA Amendments Act of 2008, Pub. L. No. 110–325 § 4(a)(4)(A), 122 Stat. 3553, 3555 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

200. See *id.* § 4(a)(4)(B).

201. See Grossman, *Testimony*, *supra* note 148, at 7 (“For all employers, legal uncertainty, especially concerning the risk of liability for discharging an employee, undermines the doctrine of at-will employment.”).

202. See ADA Amendments Act of 2008, Pub. L. No. 110–325 § 4(a)(4)(A)–(B), 122 Stat. 3553, 3555 (to be codified at 29 U.S.C. § 705 and in scattered sections of 42 U.S.C.), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

203. See Bertagna, *supra* note 110, at 435.

feres with their ability to perform satisfactorily at their jobs.<sup>204</sup> Employee Internet use on the job can cut into employer profits,<sup>205</sup> open businesses up to liability in the form of claims from other workers,<sup>206</sup> and endanger employer security.<sup>207</sup> It is no surprise, therefore, that a large portion of American businesses terminate employees for Internet misuse on the job.<sup>208</sup> Since the ADAAA's enactment, however, employers may now face discrimination claims for such decisions, based, in part, on the fact that individuals will have a much easier time proving that their limitation is substantial.<sup>209</sup>

Furthermore, the ADAAA's clarification that an impairment need only substantially limit one major life activity in order to render an individual disabled<sup>210</sup> has the potential to disproportionately negatively affect businesses that require employees to perform physically demanding labor, such as manufacturing plants. The *Toyota* Court explained that a worker with carpal tunnel syndrome was not necessarily disabled just because she was unable to complete the tasks required of her in a rigorous factory position.<sup>211</sup> Rather, she had to prove that she was limited to performing "the variety of tasks central to most

---

204. See *id.* at 480–81.

205. See *id.* at 430 ("As of 2002, one study estimated that Internet misuse was costing American businesses over \$85 billion a year in loss of productivity.") (citing *Workplace Web Abuse Costs Corporate America \$85 Billion This Year, Reports Websense Inc.: Internet Abuse Continues to Increase, Jumps 35 Percent Year over Year*, BUS. WIRE, Nov. 12, 2002, [http://www.thefree-library.com/Workplace+Web+Abuse+Costs+Corporate+America+\\$85+Billion+This+Year,...-a094155338](http://www.thefree-library.com/Workplace+Web+Abuse+Costs+Corporate+America+$85+Billion+This+Year,...-a094155338)).

206. See *id.* at 431 ("In the last few years, the [EEOC] has filed multiple causes of action against employers based on complaints lodged by current or former employees 'who claimed they saw co-workers viewing or distributing adult-oriented material at work.'") (quoting Stephanie Armour, *Technology Makes Porn Easier To Access at Work*, USA TODAY, Oct. 18, 2007, at 1A).

207. See *id.* at 432 ("[T]he websites visited and material downloaded by employees while at work may jeopardize the security of the employer's network, through such threats as viruses and hackers, incurring more costs for the employer.") (citing Correy E. Stephenson, *Employer Concerns Grow with Increased Employee Internet Use*, MICH. LAW. WKLY., May 22, 2006, at 1, available at [http://www.accessmylibrary.com/coms2/summary\\_0286-15532354\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-15532354_ITM)).

208. See Nancy Gohring, *Over 50% of Companies Fire Workers for E-Mail, 'Net Abuse*, IT WORLD, Feb. 28, 2008, <http://www.itworld.com/companies-fire-employees-email-080228> ("A new survey found that more than a quarter of employers have fired workers for misusing e-mail and one third have fired workers for misusing the Internet on the job.").

209. See Bertagna, *supra* note 110, at 480–81.

210. See ADA Amendments Act of 2008, Pub. L. No. 110–325, sec. 4(a), § 3(1)(A), 122 Stat. 3553, 3555 (to be codified at 42 U.S.C. § 12102).

211. See *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 200–02 (2002).

people's daily lives."<sup>212</sup> The ADAAA renounces this analysis, and one can imagine that many individuals, while capable of completing the ordinary tasks associated with a desk job, would be nonetheless unable to perform satisfactorily at a physically demanding construction job or assembly line position. Therefore, it is likely that this amendment will not only make employer compliance difficult for all businesses prior to the issuance of explanatory regulations and case law, but it will also ultimately hurt America's labor-oriented businesses to a greater degree than others.

*B. How the Broadening of the Regarded-As Prong Will Make Employer Compliance More Difficult*

The expansion of the regarded-as prong will create unique problems for employers. Prior to the ADAAA, employers could train their supervisors and human resource directors to refrain from making employment decisions based on the assumption that an employee was substantially limited in performing any major life activity, and they could be confident that following that guideline would prevent ADA liability. This is no longer the case, however, and employers are now susceptible to ADA claims, even where there was no real wrongdoing on the part of the employer.

The best way to explain this dangerous potential is with a hypothetical situation. Consider, for instance, a scenario wherein Jane, an obese woman, works as a customer service representative for Alpha Company. Jane is in no way limited in performing any major life activities, has no history of health problems, and would therefore not qualify for protection under the "actually disabled" prong of the ADA. Jane is often late for work, and her performance record indicates that her customer satisfaction rate is much lower than her coworkers' rates. Alpha desires to discharge Jane, based solely on her poor performance, and does not view Jane's obesity as attributing to this problem at all.

Under the original ADA, Alpha could be confident that it could terminate Jane without fear of a potential ADA claim, as long as her supervisor or other managerial party did not re-

---

212. *Id.* at 200.

gard her as substantially limited in any major life activity.<sup>213</sup> Under the ADAAA, on the other hand, Jane would have a much easier time bringing a discrimination claim against Alpha capable of surviving summary judgment. Under the new Act, Jane would only have to set forth evidence that Alpha regarded her as physically impaired, a much easier standard to meet.<sup>214</sup> Even though Alpha did not regard Jane as physically impaired, proving that it did not, especially considering that the obese often suffer from biases about their condition,<sup>215</sup> will be a great challenge. Prevention of such claims will require a more detailed paper trail and stricter evaluation of adverse employment actions on the part of employers.<sup>216</sup>

The ADA's original regarded-as standard enabled employers to make necessary decisions to ensure a successful business, without fear of potentially frivolous claims. Although the broadening of the regarded-as prong will provide better job security for individuals whom others often irrationally fear (like burn victims), it will ultimately do more harm than good. The broadening of this prong lays out a welcome mat for abuse of the system, as illustrated by the above hypothetical. Obesity is just one example of a condition that could lead to abuse under the broadened regarded-as prong. Although the obese are often the victims of social biases,<sup>217</sup> the incidence of obesity in the United States is drastically increasing.<sup>218</sup> More than thirty-four percent of Americans are now obese.<sup>219</sup> Because all obese individuals who suffer adverse employment can now bring ADA claims, this confluence could devastate American businesses.

Furthermore, considering the increased risks employers now face when taking adverse action against employees who have

---

213. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

214. See Stephanie Wilson & E. David Krulewicz, *Disabling the ADAAA*, N.J. LAW., Feb. 2009, at 37.

215. See Horner, *supra* note 163, at 592.

216. See *ADA Amendment Means Increased Burdens for Employers: Expected Increase in ADA-related Claims and Lawsuits Means Employers Need to Prepare Quickly*, BUS. & LEGAL REP., Sept. 30, 2008, [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20080930005939&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20080930005939&newsLang=en).

217. See, e.g., Horner, *supra* note 163, at 592.

218. See American Sports Data, Inc., *Fitness and Fatness Boom? The New American Paradox: Exercise and the Ballooning of the Nation*, <http://www.americansportsdata.com/pr-obesity-research-bmi.asp> (last visited Dec. 3, 2009).

219. REUTERS, *supra* note 164.

greater potential to have a regarded-as claim, employers may simply decide to retain certain under-performing individuals, thereby decreasing efficiency and adversely impacting other, more capable, individuals. Studies show that employee abuse of government-administered employment regulations is real.<sup>220</sup> Therefore, by broadening the regarded-as claim and opening the door to abuse, the ADAAA may have an unfair negative impact on non-disabled employees as well as businesses. It is thus a fair prediction that this amendment will ultimately do far more harm than good.

### C. *Why Disregarding Mitigating Measures Will Increase Compliance Costs for Employers*

Pursuant to the ADAAA, when analyzing whether an individual is sufficiently disabled to receive protection under the ADA, one must ignore all ameliorative effects of corrective measures used by the claimant (apart from contact lenses and eyeglasses).<sup>221</sup> This change in the ADA creates coverage for an overwhelming number of individuals—diabetics who take insulin and individuals who take medication to control mental health conditions, for example. The effect of this amendment on employers is that they must now regularly speculate about what an employee's condition might be like without the use of corrective measures, rather than what the employee's condition actually is with the use of such measures.<sup>222</sup> This amendment probably makes employer compliance more difficult than any of the other amendments discussed within this Note.

The fact that mitigating measures are not to be considered will make compliance more difficult for employers at all stages of the employment process. When engaging in the interactive process with employees and when communicating with healthcare providers conducting employer-mandated medical examinations, employers must now specify that the em-

---

220. See generally JAMES SHERK, USE AND ABUSE OF THE FAMILY AND MEDICAL LEAVE ACT (2007), available at [https://www.policyarchive.org/bitstream/handle/10207/12888/sr\\_16.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/12888/sr_16.pdf?sequence=1) (discussing evidence that many workers use the Family and Medical Leave Act (FMLA) for reasons other than those permitted within the Act).

221. See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(4)(E), 122 Stat. 3553, 3556 (to be codified at 42 U.S.C. § 12102), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

222. See Fisher & Phillips LLP, *supra* note 6, at 2.

ployee's condition must be determined without regard to mitigating measures.<sup>223</sup> How will employers determine who is covered under the new ADAAA and who is not? There is no clear answer to this question. Obviously, employers will not be able to require employees to stop taking medication or cease using auxiliary devices in order to discover what their conditions would be without the use of corrective measures. Therefore, employers and healthcare providers will be forced to play a guessing game. This problem is precisely the issue that the *Sutton* Court envisioned and sought to prevent.<sup>224</sup> Unfortunately, businesses and courts must now wrestle with this problem on a daily basis.

*D. The Problems Employers Will Encounter as a Result of the ADA's Shift to a Title VII Analysis*

The ADAAA's mandate that ADA claims be analyzed analogous to Title VII claims<sup>225</sup> will also place an increased burden on employers. As explained above, whether an individual is disabled is a logical and necessary threshold question for ADA case analysis. The ADAAA makes clear, however, that ADA cases must now focus on the employer's actions, as opposed to whether the claimant falls under the disability definition.<sup>226</sup>

Perhaps the easiest way to understand why this amendment will unfairly burden employers is to consider the following hypothetical situation. Jack is an at-will employee at Alpha Company. Shortly after one of Jack's close family members dies, he misses several days of work without notifying Alpha, and his quality of work drastically diminishes. Alpha terminates Jack because of his performance problems. Jack promptly files an ADA claim against Alpha for wrongful discharge, claiming he was suffering from depression at the time of his termination.

Under the original ADA, the court would first analyze whether Jack was indeed depressed and, if so, whether his de-

---

223. *See id.*

224. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483-84 (1999).

225. *See* ADA Amendments Act § 5(a); *see also* H.R. REP. NO. 110-730, pt. 1, at 16 (2008) (explaining that the ADAAA is modeled on "the structure of nondiscrimination protection in Title VII").

226. *See* ADA Amendments Act § 5(a); *see also* H.R. REP. NO. 110-730, pt. 1, at 15 (2008).

pression rose to the level necessary for ADA protection.<sup>227</sup> If the answer to this inquiry was no, the court's analysis would end at this point, as Jack could not have a valid ADA claim.<sup>228</sup> However, under the ADAAA, the court's inquiry will no longer focus on this question. Rather, courts are instructed under the ADAAA to focus primarily on the employer's actions and whether they were discriminatory under the ADA.<sup>229</sup> Therefore, employers can now expect many more claimants to survive summary judgment.<sup>230</sup>

This reality means that employers will be forced to spend more capital on frivolous litigation and settlements. Studies suggest that the primary reason businesses terminate employees is lack of "will or desire to perform," and additional reasons often given include "[a]ttitude problems . . . and [a]ttendance [i]ssues."<sup>231</sup> Any one of these performance problems could possibly stem from an individual's mental health problem, such as depression.<sup>232</sup> Assuming the individual was still able to perform the essential functions of her job with or without a reasonable accommodation, the change in focus on the employer's actions, rather than the employee's condition, means that employers are now more likely to face costly litigation or settlement expenditures even where the discharged individual was not "disabled" for purposes of the ADA. Therefore, employers must now second-guess nearly all seemingly no-brainer decisions to terminate based on legitimate performance issues.

---

227. Cf. *Sutton*, 527 U.S. 471 (focusing on the plaintiffs' ability to prove they were proper claimants under the ADA).

228. Cf. *id.* (finding that a claim must rise to a minimum level to receive ADA protection).

229. See ADA Amendments Act § 5(a); see also H.R. REP. NO. 110-730, pt. 1, at 15 (2008) (changing the definition of discrimination under the ADA to mirror that of Title VII, indicating a shift to Title VII analysis which focuses primarily on employers' actions rather than plaintiffs' ability to prove a prima facie case).

230. See Sarah Jeffords Pister, *New ADA Amendments Increase Burden for Employers*, BUS. FIRST OF LOUISVILLE, Jan. 9, 2009, at 3, available at <http://philadelphia.bizjournals.com/louisville/stories/2009/01/12/story5.html>.

231. *SurePayroll Insights Survey: Business Owners Share Opinions and Advice on Firing People*, ANDHRANEWS.NET, Mar. 19, 2007, <http://www.andhranews.net/intl/2007/March/19/em-SurePayroll-Insights-Survey.asp>.

232. Mayo Clinic Staff, *Depression (Major Depression): Symptoms*, MayoClinic.com (Feb. 14, 2008), <http://www.mayoclinic.com/health/depression/DS00175/DSECTION=symptoms> (listing "[l]oss of interest in normal daily activities," "[t]rouble focusing or concentrating," and "[b]eing easily annoyed" as symptoms of major depression, which could easily lead to lack of desire to perform at one's job, work absenteeism, or attitude problems on the job).

It is clear that the enactment of the ADAAA will lead to an increased burden on American businesses in nearly every aspect of the employment process.<sup>233</sup> Employers will need to rewrite policies, second-guess even legitimate business decisions regarding adverse action against employees, and regularly speculate about whether employees' conditions rise to the level of ADAAA protection.<sup>234</sup> Considering the likelihood of overall failure of these amendments, the extra costs and substantial burdens the ADAAA will place on employers cannot be justified.

#### IV. WHY THE ADAAA IS COUNTER-PRODUCTIVE TO CURRENT LEGISLATION AIMED AT ASSISTING AMERICAN BUSINESSES AND WHAT THE ACT MEANS FOR OUR ECONOMY

The United States currently faces one of the most devastating recessions of modern American history, with no immediate end in sight.<sup>235</sup> As of September 2009, the country's unemployment rate had reached 9.8 percent, the highest it has been since 1983.<sup>236</sup> The American government has recognized the economy's need for state intervention. From the Bush administration's bailout bill, which permitted the United States Treasury to purchase hundreds of billions of dollars worth of troubled assets from American businesses,<sup>237</sup> to the enactment of the stimulus plan under President Obama, which provides billions of dollars of funding to be used for job creation and tax cuts,<sup>238</sup> the government continues to pump capital into the economy with the hope of finally putting an end to the economic crisis.

---

233. See Pister, *supra* note 230, at 3.

234. See Fisher & Phillips LLP, *supra* note 6.

235. Andrews, *supra* note 18 ("Losing more than a half million jobs in each of the last three months, the country is trapped in a vortex of plunging consumer demand, rising joblessness and a deepening crisis in the banking system.").

236. *Unemployment Rate Rises to 9.8 Percent*, N.Y. Post Online, Oct. 2, 2009, [http://www.nypost.com/p/news/national/unemployment\\_rate\\_rises\\_to\\_percent\\_sCkoRcGRzvtjiv5uGJGc6L](http://www.nypost.com/p/news/national/unemployment_rate_rises_to_percent_sCkoRcGRzvtjiv5uGJGc6L).

237. See Jeanne Sahadi, *Bailout Is Law: President Bush Signs Historic \$700 Billion Plan Aimed at Stemming Credit Crisis*, CNNMONEY.COM, Oct. 4, 2008, [http://money.cnn.com/2008/10/03/news/economy/house\\_friday\\_bailout/index.htm?postversion=2008100309](http://money.cnn.com/2008/10/03/news/economy/house_friday_bailout/index.htm?postversion=2008100309).

238. *Obama Signs Stimulus Plan into Law*, CBS NEWS, Feb. 17, 2009, <http://www.cbsnews.com/stories/2009/02/17/politics/100days/economy/main4805436.shtml>.

In light of the state of our country and the extraordinary measures the American government is taking in an attempt to revive the United States economy, one might ask why Congress worked so hard to pass legislation that increases the regulatory burden on American businesses.<sup>239</sup> Employers in today's tough economy are regularly faced with difficult decisions, and are being forced to terminate or layoff more and more employees just to have a chance of survival.<sup>240</sup> In order to increase efficiency and remain viable, employers must be able to make decisions about terminating employees without fear of frivolous litigation. However, high costs of defending wrongful termination suits means that threats of litigation have made it more difficult for employers to rid themselves of problem employees.<sup>241</sup>

The ADA adds to businesses' woes by increasing the risks they face in making these decisions.<sup>242</sup> Studies show that the ADA had a definitive negative impact on businesses, which were unable to successfully adjust to the new regulations.<sup>243</sup> It therefore seems entirely counterproductive for the United States government to continue to increase federal funding to the American private economy, while simultaneously imposing regulations that will increase the financial burden on businesses and the likelihood of their failure.

Furthermore, one of our country's major concerns at the moment is the failure of the American automotive industry.<sup>244</sup>

---

239. See Andrew M. Grossman, *The Senate's ADA Amendments Act: Only Half Bad*, HERITAGE FOUND., Aug. 18, 2008, <http://www.heritage.org/Research/Legalissues/wm2028.cfm>.

240. See *Employment Law Issues and Risks in the Current Financial Crisis*, FIN. MARKETS CRISIS TASK FORCE ALERT (Dykema Gossett PLLC, Detroit, Mich.), Oct. 24, 2008, at 1, available at [http://financialcrisislawyers.com/Financial/docs/Employmen1024\\_08.pdf](http://financialcrisislawyers.com/Financial/docs/Employmen1024_08.pdf).

241. See Michael Orey, *Fear of Firing: How the Threat of Litigation Is Making Companies Skittish About Axing Problem Workers*, BUS. WK., Apr. 23, 2007, at 52, available at [http://www.businessweek.com/magazine/content/07\\_17/b4031001.htm](http://www.businessweek.com/magazine/content/07_17/b4031001.htm).

242. See Pister, *supra* note 230.

243. See James E. Priege, *The Impacts of the Americans with Disabilities Act on the Entry and Exit of Retail Firms* 23 (Jan. 30, 2004) ("In the ADA period, there were fewer retail establishments than before, and the drop was larger in states in which the ADA was more of a legal innovation, and in states that had more disabled people, and more ADA-related lawsuits, and more ADA-related labor complaints.") (unpublished manuscript on file with author).

244. See Tom Krishner & Ken Thomas, *Failure of Auto Industry Could Set of Catastrophe*, USATODAY.COM, Nov. 12, 2008, [http://www.usatoday.com/money/economy/2008-11-12-1321081233\\_x.htm](http://www.usatoday.com/money/economy/2008-11-12-1321081233_x.htm); see also Kimberly S. Johnson & Dan Strumpf, *September U.S. Auto Sales Fall Amid Clunkers Letdown*, CHARLESTON GAZETTE, Oct. 2, 2009, at 10A.

The United States government is currently implementing programs to help its carmakers weather the economic crisis.<sup>245</sup> However, as explained above, the broadening of the term “substantially limited” under the ADAAA<sup>246</sup> is likely to negatively affect these types of factory employers to a greater degree than other businesses, a result that seems entirely nonsensical. By implementing the ADAAA at this time, the government is imposing substantial costs on the same group of failing businesses that it is desperately trying to save.

The ADA’s drafters introduced the Act, in part, to reduce governmental spending; they hoped to decrease Americans’ reliance on governmental benefits and to subsidize these costs by pushing them onto the private sector.<sup>247</sup> Indeed, the costs of regulations like the ADAAA on businesses are high—including “the fixed costs of becoming aware of the regulations, the costs of completing paperwork associated with the regulations, and the cost of making changes in . . . operating practices in order to meet the letter of new regulations.”<sup>248</sup> Studies show that regulations rarely produce benefits that outweigh their costs,<sup>249</sup> and the ADA is one notorious example, often cited by economists, as a regulation that actually had the opposite effect of its intended effect, ultimately costing the government more money as a result.<sup>250</sup> Why the government decided to introduce this legislation during this difficult eco-

---

245. See, e.g., Peter Whoriskey, *With Bankruptcy Behind It, GM Focuses on Culture Change*, WASH. POST, July 11, 2009, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071100470.html>; see also Kendra Marr, “Cash for Clunkers” Bill Passes in Bid to Revive Car Sales, WASH. POST, June 19, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/18/AR2009061804060.html>.

246. See ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(4), 122 Stat. 3553, 3555-56 (to be codified at 42 U.S.C. § 12102), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

247. See S. REP. NO. 101-116, at 16-17 (1989) (“[D]iscrimination results in dependency on social welfare programs that cost taxpayers unnecessary billions of dollars each year . . . . Dependency . . . is a major and totally unnecessary contributor to public deficits . . . . It is contrary to sound principles of fiscal responsibility to spend billions of Federal tax dollars to relegate people with disabilities to positions of dependency upon public support.”).

248. Thomas A. Gray, *Federal Regulation and the American Economy*, ECON. AFF., June 2001, at 25.

249. See *id.* at 26.

250. See, e.g., *id.* at 27 (“Ten years following the passage of the law[,] . . . the proportion of disabled individuals working has actually fallen. This decline is difficult to reconcile with an economy that has generated more than 20 million new jobs in the last ten years, and which has reduced the unemployment rate . . . .”).

conomic time is a baffling question to which there seems to be no clear answer. The timing of the ADAAA's passage appears to be an example of poor planning on the part of the United States government.

V. A PROPOSAL FOR CHANGES TO THE ADAAA AND ITS IMPLEMENTATION: HOW CONGRESS COULD HAVE AMENDED THE ADA AND FOCUSED ON OTHER AREAS OF LAW TO AVOID THE PROBLEMS THAT WILL RESULT FROM THE ADAAA

Critics of the original ADA at the time of its passage wisely predicted the Act's failure and proposed alternative means of achieving the same ends which would have likely been more successful.<sup>251</sup> Congress chose to ignore these suggestions with the passage of the ADAAA, and, as detailed above, these amendments are likely to lead to the same problems as the original ADA, and, in some circumstances, even exacerbate them. History has proven that "[t]he contingent liability introduced by the government rule that a company must make changes to accommodate a disability has apparently discouraged businesses from hiring individuals with disabilities even when the cost of adjustment is very small."<sup>252</sup> The ADAAA only places more liability on employers and is therefore likely to further decrease employment opportunities for disabled Americans.

Early critics of the ADA suggested that tax credits for providing reasonable accommodations to employees or hiring disabled individuals would be more likely to produce favorable results than the ADA.<sup>253</sup> Some tax credits have since been added to the federal tax code, many available only to small businesses.<sup>254</sup> Working to expand upon these tax credits, while educating employers about their existence, would be more likely than the ADAAA to increase employment opportunities

---

251. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 263 (outlining the theories of critics who opposed the ADA prior to its passage).

252. Gray, *supra* note 248, at 27.

253. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 264.

254. See *Facts About Disability-Related Tax Provisions*, <http://www.eoc.gov/facts/fs-disab.html> (last visited Dec. 4, 2009); see also Beth Gaudio, *ADA Tax Breaks Help Small Businesses Stay Accessible*, N.F.I.B. LEGAL FOUNDATION, May 15, 2007, available at <http://www.accessible.solutions.com/Res-NewsArticles.htm> (last visited Dec. 4, 2009) (highlighting governmental incentives for small businesses to comply with the ADA).

for the disabled. Increasing the tax incentives for employers would help to alleviate employers' liability fears of having to provide potentially costly reasonable accommodations, thereby increasing the desirability of disabled workers to businesses.<sup>255</sup>

However, increasing tax incentives will not completely solve the problems created by the ADA. There is little question that the ADA led to a decreased number of disabled individuals in the American workforce,<sup>256</sup> and Congress was correct in its conviction that amendments were necessary. Nonetheless, Congress's attempts at remedying the problems of the ADA were critically flawed. The ADAAA's "substantial limitation" amendment,<sup>257</sup> the mitigating measures change,<sup>258</sup> and the mandate that ADA claims be interpreted similarly to Title VII claims<sup>259</sup> are completely unfounded, impracticable, and, as discussed above, likely to do more harm than good.

The ADAAA's broadening of the regarded-as prong does have some merit, however, as this change will help protect a group of individuals the drafters of the original ADA sought to protect—those who suffer from the results of irrational fears or beliefs about their condition.<sup>260</sup> Nonetheless, Congress should qualify this change in order to limit the occurrence of abuse. As discussed above, there may be entire groups of individuals that will now be able to claim protection under the regarded-as prong of the ADA, groups that the drafters of the ADA probably never intended to protect.<sup>261</sup> Congress could remedy this potential problem by including language in the ADAAA that keeps the *Toyota* analysis<sup>262</sup> intact for certain groups of individuals, such as the obese. This would help to ensure that the ADAAA's new, broader regarded-as prong would not lead to increased abuse and overwhelming cover-

---

255. See DeLeire, *POLICY PUZZLE*, *supra* note 8, at 265.

256. See Gray, *supra* note 248, at 27.

257. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), §(3)(4)(B), 122 Stat. 3553, 3555 (to be codified at 429 U.S.C. § 12102), available at <http://www.access-board.gov/about/laws/ada-amendments.htm>.

258. *Id.* sec. 4(a), § 3(4)(E).

259. See *id.* § 5(a); see also H.R. REP. NO. 110-730, pt. 1, at 16 (2008).

260. See H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

261. See REUTERS, *supra* note 164.

262. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

age beyond what was intended by the drafters of the original ADA.

None of the changes to the ADA introduced by the ADAAA are likely to remedy the problems encountered under the original ADA. Because the ADAAA increases employer liability under the ADA, hiring of the disabled will probably continue to decrease, and other strategies, such as tax breaks, should be examined as a means of reversing this trend. Nonetheless, the broadening of the regarded-as prong has the potential to increase job protection for a group the ADA drafters originally intended to aid. If Congress clarifies the language of the ADAAA to lessen the possibility of abuse of the system under this prong, then the ADAAA could be more successful than its predecessor.

#### CONCLUSION

Unlike other civil rights laws, which served the purposes Congress intended,<sup>263</sup> the unfortunate truth is that the ADA has not provided increased employment opportunities for the American disabled.<sup>264</sup> The fact that the ADA places increased affirmative obligations on businesses is likely a contributing factor to the Act's failure.<sup>265</sup> The ADAAA fails to remedy this problem and, instead, increases this burden on employers. An astoundingly high number of Americans will now be able to establish a *prima facie* disability discrimination claim under the ADAAA, and, even where the employment decision was completely unrelated to the impairment in question, "the employer would still face expensive litigation and be far less likely than [it would have been prior to the ADAAA's enactment] to prevail on a motion for summary judgment," resulting in employers being more reluctant to hire those suspected to be ADAAA-protected.<sup>266</sup> The ADAAA will therefore be ineffective in accomplishing Congress's goals of integrating the disabled into the American workforce, and will, at the same time, provide an increased opportunity for abuse while imposing a substantial burden on American businesses.

---

263. See, e.g., DeLeire, *POLICY PUZZLE*, *supra* note 8.

264. See *id.* at 259.

265. See Acemoglu & Angrist, *supra* note 121.

266. Grossman, *Testimony*, *supra* note 148, at 7.

The amendments under the ADAAA are impracticable and incompatible with the ADA's legislative intent. Furthermore, these changes are ill-timed and counterproductive to simultaneous government legislation aimed at providing the private business sector with funding to reverse the current economic crisis.<sup>267</sup> Only time will tell whether the ADAAA will follow the course of its unsuccessful predecessor, but, because the ADAAA fails to correct the problems of the ADA, history is likely to repeat itself.

---

267. *See id.* at 4-8.