

**THE UNDERWHELMING IMPACT OF THE AMERICANS
WITH DISABILITIES ACT AMENDMENTS ACT**

Stacy A. Hickox

TABLE OF CONTENTS

TABLE OF CONTENTS.....	417
ABSTRACT.....	418
I. INTRODUCTION.....	419
II. THE ADA LEGACY.....	421
A. Few Claims Successful Under ADA.....	422
B. Reasons Behind Courts' Narrow Interpretation of ADA.....	423
III. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT.....	427
A. Redefining Disability.....	428
IV. VAGUENESS OF SUBSTANTIAL LIMITATION REQUIREMENT.....	430
A. Ability to Perform some Tasks Associated with a Major Life Activity.....	436
1. Effect of Ability to Work.....	440
2. Focus on Limitations in some Courts.....	441
3. ADDAA's Failure to Address Conflict.....	443
B. Duration and Frequency of the Impairment.....	444
1. Duration.....	448
2. Continuous Effect.....	449
3. Limited Effect of ADAAA.....	452
C. Comparison to the General Population.....	454
1. Some Life Activities Often Compared.....	456
2. Overall Success Leads to Denial of Claims.....	459
3. Claimants Compared to Prior Plaintiffs Rather than "General Population".....	460
4. ADAA's Limited Impact on Comparison to General Population.....	467
D. Professional Evidence of Impairment.....	468
1. Expert Testimony for Less Obvious Impairments.....	480
2. Expert Testimony on Ability to Work.....	484
3. Limited Effect of ADAAA on Reliance on Expert Evidence.....	488
V. CONCLUSIONS.....	490

ABSTRACT

The 2008 amendments to the Americans with Disabilities Act (ADA) were intended to expand the protection against discrimination for persons with disabilities beyond the Supreme Court's narrow interpretation of who is "disabled." While the amendments and the Equal Employment Opportunity Commission (EEOC) Americans with Disabilities Act Amendments Act (ADAAA) regulations address some of the Court's narrow interpretations of the ADA, lower courts may still be able to limit coverage of persons with disabilities who are still able to perform tasks that involve a major life activity, which is limited by their impairment, and persons who have impairments with temporary or intermittent effects. Claimants may also be excluded if they fail to make a concrete comparison of their impairment to others in the general population and to other plaintiffs with similar impairments who have come before them, or if they fail to present professional evidence supporting the extent of their limitations. More importantly, courts may continue to make the largely factual determinations regarding whether the claimant is substantially limited in a major life activity, rather than allowing a jury to decide whether the claimant is covered by the ADA.

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I. INTRODUCTION

Both the ADA and the American with Disabilities Act Amendments Act (ADAAA) require a plaintiff to establish that a major life activity is substantially limited to access the ADA's protections and right to accommodations.¹ The ADAAA was intended to reverse the effects of several Supreme Court decisions that limited the coverage of the ADA and to broaden the coverage of the ADA as suggested under the guidelines issued by the Equal Employment Opportunity Commission (EEOC).² Yet the ADAAA may not resolve all of the issues that Congress or disability advocates wanted to address. Neither the ADAAA nor the EEOC ADAAA regulations that were issued in March 2011 provide sufficient guidance for courts on how to determine whether a person is "substantially limited" in a major life activity so as to be considered disabled under the ADA.³ Moreover, courts may still be free to dismiss claims on employers' motions for summary judgment by making factual determinations about whether the claimant is "substantially limited," rather than allowing juries to make those decisions regarding ADA coverage.

Some sections of the ADAAA specifically reverse the effects of the targeted Supreme Court decisions, including defining what is a "major life activity" and reversing decisions regarding mitigating measures and the determination of whether an employee is "regarded as" disabled.⁴ Congress also took aim at the limitations on the scope of who is "substantially limited" in major life activities so as to be considered a person with a disability.⁵ Yet Congress may have missed the mark by failing to specify more clearly how a person can

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1. See 42 U.S.C. § 12102 (2006); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3555 (2009).
 2. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 188 (2010).
 3. See *id.* at 201-02; David K. Fram, *The ADA Amendments Act: Dramatic Changes in Coverage*, 26 HOFSTRA LAB. & EMP. L.J. 193, 205-06 (2008).
 4. Cox, *supra* note 2, at 202-03.
 5. *Id.* at 202.

establish a “substantial limitation.” Referring the issue of defining “substantial limitation” to the EEOC may also fail to make the ADA more inclusive, as Congress intended.

The EEOC has issued regulations to help define who is substantially limited, as directed by Congress.⁶ The agency even considered expanding the coverage of who is “substantially limited” in their ability to work, which their previous regulations had also defined more narrowly.⁷ Yet the EEOC ADAAA regulations fail to resolve some of the most exclusionary issues for ADA plaintiffs when faced with a motion for summary judgment.

These issues include exclusion from coverage based on one’s ability to complete some tasks, like working, that might require the performance of the major life activity relied upon for ADA coverage.⁸ In addition, claimants with impairments having temporary or intermittent effects but who are still significantly limited may find themselves excluded because their impairment does not occur often enough to be deemed “substantially limiting.”⁹ Further, claimants may still need to establish a “substantial limitation” based on a comparison to the members of the general population.¹⁰ Lastly, coverage may still depend largely on the provision of medical or other expert testimony.¹¹

This article will analyze each of these issues, building on past research regarding the frequent and long-standing denial of many ADA claims on motions for summary judgment, to argue that the ADAAA and EEOC regulations fail to provide sufficient interpretive restrictions and guidance to courts as to how to address these issues.

Thus, despite the Amendments, without specific language from Congress or more specific guidelines from the EEOC to reverse the limiting effects of decisions interpreting the ADA, ADA plaintiffs may still find themselves with claims dismissed on summary judgment by courts that choose to continue to interpret “substantially limited” narrowly. These courts may interpret the failure to address these significant issues as a “green light” to continue with their pre-

6. Fram, *supra* note 3, at 205.

7. *Id.* at 205–06

8. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U. L. REV. 217, 226 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/44/LRColl2008n44Long.pdf>.

9. *Id.* at 227; see also Fram, *supra* note 3, at 212; Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 212–13 (2008).

10. See Fram, *supra* note 3, at 207–08.

11. *Id.* at 208.

2011] Underwhelming Impact of the ADAA 421

ADAAA restrictive interpretations of what it means to be “substantially limited.”

At the same time, some courts may continue to employ a more expansive definition of “disability” in line with their pre-ADAAA decisions. Thus, plaintiffs bringing claims in these courts may continue to enjoy a more inclusive definition of “disability,” which has allowed claims to at least get in front of a jury to determine if the person is “substantially limited” in a “major life activity.”

Therefore, at least some courts may continue to dismiss claims on motions for summary judgment without allowing juries to engage in the fact-intensive determination of whether a claimant should be treated as a person with a disability. For these reasons, the impact of the amendments to the ADA may be underwhelming at best.

II. THE ADA LEGACY

Persons with disabilities and their advocates had high hopes for the ADA when it was passed more than twenty years ago. The ADA was intended to provide protection against discrimination in employment for people with a “range of health conditions, even those not traditionally considered ‘disabilities.’”¹² The goal was to provide more “job opportunities for the disabled” and “to integrate them into the workplace” once they were hired.¹³ More fundamentally, the ADA’s proponents strove to “change the public’s cognitive understanding of ‘disability’ by” covering “people with a range of medical conditions.”¹⁴ The hope was that the ADA would provide “‘a clear and comprehensive national mandate for the elimination of discrimination’ on the basis of disability,” and “‘clear, strong, consistent, enforceable standards’ for addressing such discrimination,” similar to other nondiscrimination statutes’ protections against discrimination based on “race, color, sex, national origin, religion, or age.”¹⁵

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12. Sharona Hoffman et al., *The Definition of Disability in the Americans with Disabilities Act: Its Successes and Shortcomings: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Sections on Employment Discrimination Law; Labor Relations and Employment Law; and Law, Medicine and Health Care*, 9 EMP. RTS. & EMP. POL’Y J. 473, 483 (2005) (comments of Chai R. Feldblum).
 13. Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 522 (2008).
 14. Hoffman et al., *supra* note 12, at 483 (comments of Chai R. Feldblum).
 15. Feldblum et al., *supra* note 9, at 202 (quoting 42 U.S.C. § 12101(b) (Supp. I 2007)).

In its employment section, the ADA was intended to cover those who are able to work, because they “are the ones who may face [employment] discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.”¹⁶ The National Council on Disability (NCD) has explained that Congress did not intend the ADA to treat nondiscrimination as something “‘special’ that can be spread too thin by granting it to too many people.”¹⁷ According to the NCD, “the ADA is premised on fairness and equality, which should be generally available and expected in American society.”¹⁸

A. Few Claims Successful Under ADA

Despite the high hopes for the ADA, employees who sought its protection against discrimination based on a disability have faced “long odds.”¹⁹ After just seven years of the ADA’s application to employers, defendant employers had prevailed in 94% of cases at the federal trial court level and in 84% of cases taken up to the courts of appeal by losing plaintiffs.²⁰ These dismissals were attributed to employers’ success on motions for summary judgment, where courts created an “impossibly high threshold of proof” for ADA plaintiffs.²¹

Experts have since found significant empirical evidence that ADA plaintiffs rarely succeed in litigated cases.²² Win rates have decreased from 7.9% in the 1990’s to 3% in 2004.²³ By 2006, more

16. *Id.* at 217.

17. RIGHTING THE ADA, NAT’L COUNCIL ON DISABILITY, 17 (Dec. 1, 2004), <http://www.ncd.gov/publications/2004/Dec12004> [hereinafter NCD REPORT].

18. *Id.* at 71–72.

19. Long, *supra* note 8, at 217; *see also* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (noting that the defendant wins 84% of cases that are appealed); John W. Parry, *Trend: Employment Decisions Under ADA Title I-Survey Update* 23 MENTAL & PHYSICAL DISABILITY L. REP. 290, 294 (1999) (noting the small percentage of cases that succeed).

20. Colker, *supra* note 19, at 100. In contrast, plaintiffs litigating cases under Title VII of the Civil Rights Act of 1964 (Title VII) obtained reversals in 34% of the cases they appealed. Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 253–54 (2001).

21. Colker, *supra* note 19, at 102.

22. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306 (2008) [hereinafter *Settling the Matter*] (citing Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1813 (2005)).

23. Amy L. Allbright, *2004 Employment Decisions Under the ADA Title I - Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513–15 (2005); *see also* Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I - Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007) [hereinafter

than 97% of the 218 employment discrimination decisions that resolved an ADA claim resulted in the dismissal of the claim.²⁴

Beyond litigation, employees with disabilities may be more successful. One review showed that “employers [have been] reasonably responsive [to employees’] internal requests for accommodation, EEOC conciliations, and settlement negotiations.”²⁵ Despite this potential impact of informal resolution of ADA claims, the ADA has not proven to improve employment opportunities for persons with disabilities. A 2007 review determined that there is “no evidence that the statute has substantially improved their employment opportunities as a group.”²⁶ The data on employment rates confirms this conclusion.²⁷ The Bureau of Labor Statistics report for 2009 shows an unemployment rate of 14.5% for persons with disabilities, compared to a rate of 9% for workers without a disability, and the labor force participation rate for persons with disabilities is 21.5%, compared to a participation rate of 73.7% for persons without disabilities.²⁸

B. Reasons Behind Courts’ Narrow Interpretation of ADA

The effects of the courts’ narrow interpretation of the ADA have been significant, as shown by these low success rates for claimants

2006 *Employment Decisions Under the ADA Title I – Survey Update*] (noting that the percentage of successful cases has declined in recent years).

24. 2006 *Employment Decisions Under the ADA Title I – Survey Update*, *supra* note 23, at 328.
25. *See Settling the Matter*, *supra* note 22, at 307.
26. Scott Burris & Kathryn Moss, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, 25 HOFSTRA LAB. & EMP. L.J. 1, 3 (2007).
27. *See, e.g.*, David C. Stapleton et al., *Has the Employment Rate of People with Disabilities Declined?*, CORNELL U. EMP. & DISABILITY INST., 1 (Dec. 2004), available at http://www.ilr.cornell.edu/edi/publications/PB_EmpDecline.pdf; *see also* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001) (noting that post-ADA there was a decline in employment among disabled persons); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 19–20 (2004) (noting a drop in employment rate for persons with disabilities during the 1990s); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 705 (2000) (noting that statistics show the ADA led to a relative decrease in employment).
28. Press Release, Bureau of Labor Statistics, U.S. Dep’t. of Labor, Persons with a Disability: Labor Force Characteristics – 2009 (Aug. 25, 2010), available at [http://op.bna.com/dlrcases.nsf/id/mroe-88nsrh/\\$File/Disabilities%20Employment%202009.pdf](http://op.bna.com/dlrcases.nsf/id/mroe-88nsrh/$File/Disabilities%20Employment%202009.pdf).

and the underemployment of persons with disabilities. Many believe that the Supreme Court of the United States “weakened the ADA by severely constricting the scope of who qualifies for its protection.”²⁹ Similarly, the NCD has stated that the Supreme Court’s “harsh and restrictive approach to defining disability places difficult, technical, and sometimes insurmountable evidentiary burdens on people who have experienced discrimination.”³⁰

One expert, Professor Chai Feldblum, concluded that “[t]he expectations of Congress with regard to the ADA have not been met” because of the courts’ narrowing of its coverage.³¹ Indeed, Professor Robert Burgdorf has called the courts’ narrow interpretations of the ADA “quite substantial in their detrimental effects” because many people with disabilities have found that “they no longer have the rights” provided in the ADA.³²

Courts often have dismissed ADA claims at a high rate because the plaintiff has an impairment that is not substantially limiting—“[t]hese plaintiffs are simply ‘not disabled enough.’”³³ According to the NCD, the Supreme Court’s narrow interpretations of the ADA definition of “disability” was “directly contrary to what the Congress and the President intended when they enacted the ADA law.”³⁴ Indeed, in passing the ADAAA, Congress explained that “[w]hile [in enacting the ADA] Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”³⁵

Some experts attribute ADA plaintiffs’ lack of success in workplace discrimination claims to a lack of acceptance of the ADA’s protections among the courts, employers, and other members of society, and an unwillingness to accept the disabled or “the notion

29. Bradley A. Areheart, *When Disability Isn't “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 181–82 (2008).

30. NCD REPORT, *supra* note 17, at 72.

31. Chai R. Feldblum, *Roundtable On: The Americans with Disabilities Act and the ADA Amendments of 2008*, 13 TEX. J. C.L. & C.R. 232, 232 (2007).

32. Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 251 (2008).

33. Areheart, *supra* note 29, at 217 (quoting Ruth O'Brien, *Defining Moments: (Dis)ability, Individuality, and Normalcy*, in VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT 40, 100 (Ruth O'Brien ed., 2004)).

34. NCD REPORT, *supra* note 17, at 42.

35. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3555 (codified as amended at 42 U.S.C. § 12101 (Supp. II 2009)).

that the ADA is about rights and equality.”³⁶ Courts interpreting the ADA may be responding to a perception that ADA plaintiffs are really just lazy, malingerers, or whiners.³⁷ Courts’ resistance to the disability category of civil rights protection may also stem from a perceived connection between a disability and job performance.³⁸ Professor Feldblum believes that “there are health conditions that the general public will simply not admit are disabilities because of all the negative stereotyping that comes with being disabled.”³⁹

In addition, courts may be reluctant to place the burden of accommodation on employers to assist this group of employees and applicants,⁴⁰ based on a public perception that disability accommodations are “potentially costly.”⁴¹ Specifically, Professor Michael Selmi suggests that the Supreme Court did not want the ADA to become another vehicle for employees to recover damages based on workplace injuries, in addition to workers’ compensation claims.⁴²

A group of experts have also theorized that the narrow interpretation of the ADA’s coverage may be based in part on a “medical paradigm for understanding disability.”⁴³ Under this model, a disability is treated as “a personal, medical problem, requiring . . . an individualized medical solution”; because it is assumed that people with such individualized disabilities do not face a common societal problem, there is no need for social policy to address collective needs.⁴⁴ “The medical model views the physiological condition itself as the problem.”⁴⁵ Rather than focusing on the effects of society, “the individual is the locus of disability.”⁴⁶ Thus, under

36. Hoffman et al., *supra* note 12, at 494 (comments of Michael Stein).

37. Selmi, *supra* note 13, at 544.

38. *Settling the Matter*, *supra* note 22, at 326–27; see also Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (civil rights model not ideal fit for issue of disability); James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 5 (2005) (noting that ADA moved beyond traditional civil rights laws’ focus on evenhanded treatment).

39. Hoffman et al., *supra* note 12, at 489 (comments of Chai R. Feldblum).

40. *Settling the Matter*, *supra* note 22, at 327.

41. Selmi, *supra* note 13, at 530.

42. *Id.* at 556.

43. Areheart, *supra* note 29, at 183.

44. *Id.* at 185–86 (quoting MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 27 (2003)).

45. *Id.* at 186 (citing PAUL T. JAEGER & CYNTHIA ANN BOWMAN, UNDERSTANDING DISABILITY: INCLUSION, ACCESS, DIVERSITY, AND CIVIL RIGHTS 14 (2005)).

46. Areheart, *supra* note 29, at 186 (quoting JOHNSON, *supra* note 44, at 27).

the medical model, some would see “discrimination against disabled people as rational [because it results from] their own bodies’ deficiencies,” unlike discrimination against other groups.⁴⁷

The medical model contrasts with the social model, under which “the experience of being a disabled person consists largely of encounters with the many barriers erected by society—physical, institutional, and attitudinal—that inhibit full participation in mainstream life.”⁴⁸ Under the social model, “the experience of disability is not inherent or inevitable [based on a person’s] particular medical condition.”⁴⁹ Instead, the focus is on the “particular social context in which [a person] with a disability lives and functions.”⁵⁰ Some believe that the ADA was adopted under this social model, with a goal of addressing “unwarranted and irrational discrimination on the basis of disability.”⁵¹ Courts’ narrow application of the definition of disability may therefore reflect their rejection of this broader social model in favor of the medical model.

In addition to differences in theoretical approach, the narrowing of the ADA’s coverage also may have occurred because of a lack of “political will,” through public support or influential lobbyists, to push for a broader interpretation of the ADA.⁵² With these forces at work, one expert concluded that “[a]bsent either inexplicably clear statutory language or broad public support, it was surely a mistake to think these nontraditional disability issues might be favorably received in the courts.”⁵³

The statutory language of the ADA was far from “inexplicably clear,”⁵⁴ such that the vagueness of the statutory language itself may have led to its narrow interpretation. Experts agree that the original ADA’s definition of “disability” was vague.⁵⁵ This lack of clarity as to who is “disabled” has generally led to a lack of consensus regarding who qualifies as “disabled” under the ADA.⁵⁶ Courts may have responded to this vagueness by summarily agreeing with

47. *Id.* at 190.

48. *Id.* at 188.

49. *Id.* at 189 (citing *Talk of the Nation: Beyond Affliction: Culture of Disability* (NPR radio broadcast May 4, 1998)).

50. *Id.*

51. *Id.* at 191; see also Burgdorf, *supra* note 32, at 265 (citing Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 *BERKELEY J. EMP. & LAB. L.* 476, 480–81 (2000)) (noting that the social or civil rights model is the basis for the ADA).

52. Selmi, *supra* note 13, at 527–28, 540.

53. *Id.* at 546.

54. *Id.*

55. Long, *supra* note 8, at 218.

56. Selmi, *supra* note 13, at 529.

employers that plaintiffs were not disabled, rather than applying a “flexible, individualized definition of disability.”⁵⁷ Professor Paul Steven Miller agrees: “Coverage under the statute is determined by applying a contextual, flexible, individualized definition of disability, and our judicial system abhors vagueness.”⁵⁸

Regardless of the reasons for the overall narrowing of the ADA’s coverage, there is no disagreement that the Supreme Court has interpreted the statute’s coverage so as to exclude many impaired persons from its definition of disability.⁵⁹ This may be based on the Court’s “own preferences, both ideologically and institutionally, as guided by reigning social norms.”⁶⁰

Yet despite the Court’s restrictive interpretation of whether an impairment substantially limits a major life activity, some appellate courts have interpreted the ADA more broadly than others.⁶¹ This variation in judicial application of both the ADA and Supreme Court precedent is particularly apparent in the lower courts’ consideration of a claimant’s ability to perform some activities, the impairment’s duration, a claimant’s comparison to members of the general population, and the necessity of providing medical or other professional evidence of the impairment. The question remaining is whether the ADA and the EEOC’s newly adopted regulations will resolve those conflicts and ensure that the ADA’s protections and rights extend to everyone that Congress intended to cover.

III. THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT

While the courts have interpreted the coverage of the ADA narrowly, Congress has the authority to “rewrite the [ADA] to protect people who can work but whose disabilities have been excluded from coverage under the statute by the courts.”⁶² In 2008, that is what Congress intended to do. As early as 2004, the NCD had suggested

57. Long, *supra* note 8, at 210 (citing Paul Steven Miller, *The Definition of Disability in the Americans with Disabilities Act: Its Successes and Shortcomings*, 9 EMP. RTS. & EMP. POL’Y J. 473, 475 (2005); RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* 164 (2001) (“The federal courts and justices have essentially said ‘enough,’ and limited statutory coverage under Title I.”)).

58. Hoffman et al., *supra* note 12, at 475 (comments of Paul Steven Miller).

59. *Id.* at 527.

60. *Id.* at 525.

61. *See infra* note 184 and accompanying text.

62. Burris & Moss, *supra* note 26, at 5.

that Congress should change the language of the ADA to correct the narrowing of the ADA's coverage by the courts, so that courts would be forced to make determinations about whether discrimination had occurred, rather than focusing on the extent of the claimant's physical or mental condition.⁶³ As envisioned under the social model described earlier, the goal was for ADA claims "to mirror litigation under Title VII of the Civil Rights Act," with the focus on whether discrimination occurred because of one's membership in a protected group.⁶⁴

A. Redefining Disability

The ADAAA attempts to clarify the meaning of "a substantial limitation of a major life activity" as the basis for ADA coverage.⁶⁵ The Findings and Purposes section expresses "Congress' expectation that the [EEOC] will revise that portion of its current regulations that defines the term 'substantially limits' . . . to be consistent with this Act, including the Amendments made by this Act."⁶⁶

Generally, the ADAAA requires that "[t]he definition of disability . . . be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]."⁶⁷ Congress stated in its Findings and Purposes section that the EEOC's regulations that "defin[e] the term 'substantially limits' as 'significantly restricted' . . . express[] too high a standard" and are "inconsistent with congressional intent."⁶⁸ The Amendments further reject the Supreme Court's directive that the ADA's terms should be "interpreted strictly."⁶⁹

Instead, Congress specifically instructs courts that "[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals."⁷⁰ In addition, the ADAAA directs the EEOC to define the term "substantially limits" through regulations.⁷¹ This may have been a compromise to get the bill passed, since the

63. Feldblum et al., *supra* note 9, at 224–25.

64. *Id.* at 225.

65. ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(b)(1)–(2), (4)–(5), 4(a), 3(4)(B), 122 Stat. 3553, 3554–55 (codified as amended at 42 U.S.C. § 12102 (Supp. II 2009)).

66. *Id.* § 2(b)(6).

67. 42 U.S.C. § 12102(4)(A).

68. ADA Amendments Act of 2008 § 2(a)(8) (codified as amended at 42 U.S.C. § 12102 (Supp. II 2009)).

69. *Id.* § 2(b)(4).

70. *Id.* § 4(4)(A).

71. *Id.* § 2(b)(6).

ADAAA bill had been moving slowly when it defined “substantially limits” as “materially restricts.”⁷²

In its stated purposes, the ADAAA also suggests that “[t]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”⁷³ However, the revised definition of disability in the ADAAA does not include specific language fulfilling this purpose.

The definition section of the ADAAA provides some specific guidance, and yet it also neglects some controversial issues regarding ADA coverage. This section changes the definition of disability to exclude consideration of “the ameliorative effects of mitigating measures, such as medication,” artificial aids, “assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications.”⁷⁴ Impairments are to be evaluated in their unmitigated state.⁷⁵

The ADAAA also provides specific coverage for an employee or applicant who establishes that an employer regards him or her as having an “impairment.”⁷⁶ This coverage no longer requires that the employer be shown to regard the person as being “substantially limited in a major life activity.”⁷⁷ Thus, the claimant need only prove that the employer believed the employee or applicant was impaired and took some adverse action based on that belief.⁷⁸

Despite the differences in theoretical approaches applied to interpreting the original ADA, the ADAAA does not resolve the debate about the ADA’s theoretical foundation as a medical model versus a social response similar to the basis for other civil rights statutes, designed to remove the obstacles that persons with disabilities experience.⁷⁹ Nor do the Amendments take a position on the debate as to whether the ADA represents a “welfare benefits regime [providing] preferential treatment to persons with

72. Fram, *supra* note 3, at 206.

73. ADA Amendments Act of 2008 § 2(b)(5).

74. 42 U.S.C. § 12102(4)(E)(i)(I)–(IV) (Supp. II 2009).

75. See H.R. REP. NO. 110-730, pt. 2, at 8 (2008). This provision will provide coverage that most courts allowed prior to the *Sutton v. United Air Lines* decision, so that many more individuals will be considered currently disabled. See Fram, *supra* note 3, at 217.

76. 42 U.S.C. § 12102(3)(A).

77. *Id.*

78. Edward G. Phillips, *The Law at Work: The ADA Amendments Act of 2008: Who Isn’t Disabled?* 45 TENN. B.J. 33, 40 (2009).

79. Cox, *supra* note 2, at 188.

disabilities.”⁸⁰ This omission may help support the position of those who believe that social factors do not significantly contribute to the segregation and limited opportunities experienced by persons with disabilities.⁸¹

The revised language in § 7 of the Findings and Purpose section includes “a more modest depiction of persons with disabilities’ subordinated status.”⁸² “It explains that ‘physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.’”⁸³ Courts could conclude that this language “weakens the connection between the ADA and the political subordination rationale for disability-related accommodations.”⁸⁴

Other controversial issues are not directly addressed by the ADAAA and may therefore continue to provide the basis for denial of ADA coverage, or at least extensive litigation. These issues include exclusion from coverage based on one’s ability to complete some tasks requiring the performance of a major life activity, impairments having temporary or intermittent effects, the need for comparison to the members of the general population, and the need for medical or other expert testimony.

IV. VAGUENESS OF SUBSTANTIAL LIMITATION REQUIREMENT

The ambiguity of the term “substantially limits” has led to a substantial amount of litigation regarding coverage of the original ADA. Before considering these specific ambiguities, trends among the courts in making the more general interpretations of the Supreme Court precedent regarding “substantial limitation” are helpful to understand the underwhelming impact of the ADAAA. These decisions reflect a variety of approaches regarding the amount of evidence needed and the level of deference to be given to a jury to engage in the fact-intensive determination of whether a person is substantially limited in a major life activity. They also reflect differences among the courts as to how much “individualized inquiry” is afforded to a claimant who seeks ADA coverage.

80. *Id.*

81. *Id.* at 190–91.

82. *Id.* at 205.

83. *Id.* at 205–06 (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(1), 122 Stat. 3553, 3554–54 (codified as amended at 42 U.S.C. § 12101(2)(a) (Supp. II 2009)).

84. *Id.* at 206.

Early in the life of the ADA, the Supreme Court held that being HIV positive could substantially limit the ability to reproduce, even though reproduction was still possible.⁸⁵ That Court explained that limitations need not rise to the level of “utter inabilities” to support coverage.⁸⁶ Moreover, the limitation could be considered substantial based on legal and economic consequences, not just based on physical constraints.⁸⁷

The 1999 ADA Supreme Court decisions began narrowing the meaning of substantial limitation.⁸⁸ Emphasis was placed on individual determination, meaning that the application of the “substantially limited” requirement must be made on a case-by-case basis.⁸⁹ The Court’s *Sutton v. United Air Lines, Inc.* decision dictated that a court examine the effect of the impairment on the life of the individual asserting ADA coverage.⁹⁰ Yet in the same year, the Court recognized that “some impairments may invariably cause a substantial limitation of a major life activity.”⁹¹

By 2002, in *Toyota Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court had further narrowed its view of substantial limitation, and yet the Court retained its emphasis on the impact of the impairment on the individual claimant and continued to require that ADA coverage be determined on a case-by-case basis.⁹² The Court focused on “the effect of that impairment on the life of the individual,” rather than the nature of the impairment itself.⁹³

The EEOC also adopted this focus on individual analysis to determine the ADA’s coverage. The ADA’s original EEOC regulations explained that the term “substantially limits” meant

85. *Bragdon v. Abbott*, 524 U.S. 624, 640–41 (1998).

86. *Id.* at 641.

87. *Id.*

88. *See* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 564–66 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

89. *Albertson’s*, 527 U.S. at 566 (1999); *see also Sutton*, 527 U.S. at 483 (1999) (confirming that the analysis must be done on a case-by-case basis).

90. *See* *Didier v. Schwan Food Co.*, 465 F.3d 838 (8th Cir. 2006); *Cassimy v. Bd. of Ed. of Rockford*, 461 F.3d 932, 936 (7th Cir. 2006) (both citing *Sutton*, 527 U.S. at 483).

91. *Albertson’s*, 527 U.S. at 566.

92. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

93. *Id.* (quoting 29 C.F.R. app. § 1630.2(j) (2010)).

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.⁹⁴

The regulations went on to explain that these “factors should be considered in determining whether an individual is substantially limited in a major life activity”:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.⁹⁵

The Supreme Court’s emphasis on individual analysis and the specific factors referenced in the EEOC regulations strongly suggest that the determination of whether a claimant is substantially limited is a factual one. Prior to the passage of the ADA, the Supreme Court had stated that under the Rehabilitation Act, “the issue of whether an individual was disabled . . . was a factual, not legal, question.”⁹⁶ Some courts hearing ADA claims also have recognized that the interpretation and application of substantially limited involves assessing the value of evidence and the “credibility of witnesses, tasks historically given to the jury in our judicial system.”⁹⁷ This

94. 29 C.F.R. § 1630.2(j)(1).

95. *Id.* § 1630.2(j)(2).

96. Dierdre M. Smith, *Who Says You’re Disabled?: The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1, 36 (2007) (citing Sch. Bd. of Nassau Co. v. Arline, 480 U.S. 273, 287 (1987)).

97. *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Bristol v. Clear Creek Cnty. Comm’rs*, 281 F.3d 1148, 1158 (10th Cir. 2002) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991); *see also Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 763 (3d Cir. 2004) (citing *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 569 (3d Cir. 2002) (noting that whether an individual is substantially limited is a question of fact)).

approach allows juries to resolve the factual issues associated with determining whether a person is substantially limited.⁹⁸

On a motion for summary judgment, the question should be whether the claimant has presented sufficient evidence so that a “reasonable jury could [find] that [the claimant is] substantially limited in one or more major life activities.”⁹⁹ To survive a motion for summary judgment, a plaintiff must present “‘some evidence’ of the substantiality of his impairment.”¹⁰⁰ As one court explained, this requires only enough information about the disability so the jury does not need to speculate about the extent of the person’s limitations.¹⁰¹ In a claim involving a sleep disorder, for example, the court, denying a motion for summary judgment, explained that because other courts had reached conflicting conclusions in the face of similar claims, “borderline cases like this turn on fact questions best left to juries rather than to judges ruling on summary judgment.”¹⁰²

Even the relatively conservative Seventh Circuit has noted that the *Toyota* Court may have set “‘a higher threshold for the statute than some had believed it contained.’”¹⁰³

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98. See *Kiphart v. Saturn Corp.*, 251 F.3d 573, 582 (6th Cir. 2001) (calling for an individualized, fact-specific inquiry into the effect of impairment on plaintiff’s life); *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 679 (8th Cir. 2001) (calling the determination of whether an impairment substantially limits a major life activity “highly fact-intensive”); *Santiago Clemente v. Exec. Airlines, Inc.*, 213 F.3d 25, 32 (1st Cir. 2000) (noting that determination of the question of substantially limits is a “fact-specific analysis”); *Colwell v. Suffolk Cnty. Police Dep’t*, 158 F.3d 635, 643 (2d Cir. 1998) (stating that substantial limitation inquiry is “individualized and fact-specific”); *Leisen v. City of Shelbyville*, 153 F.3d 805, 808 (7th Cir. 1998) (holding that the record must include evidence from which a reasonable fact finder could find substantial limitation).
99. *Weber v. Strippit, Inc.*, 186 F.3d 907, 913 (8th Cir. 1999).
100. Cheryl L. Anderson, *Comparative Evidence or Common Experience: When Does “Substantial Limitation” Require Substantial Proof under the Americans with Disabilities Act?*, 57 AM. U. L. REV. 409, 456 (2007).
101. *Huizenga v. Elkay Mfg.*, No. 99–C–50287, 2001 WL 640973, at *6 (N.D. Ill. June 5, 2001).
102. *Desmond v. Mukasey*, 530 F.3d 944, 957 (D.C. Cir. 2008). Compare *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1060 (9th Cir. 2005) (noting that a plaintiff claiming to get “five or six hours a night” for “months” had produced “sufficient evidence to preclude summary judgment”), with *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316–17 (6th Cir. 2001) (noting the inability to sleep more than 4-5 hours per night did not demonstrate substantial limitation in major life activity of sleeping).
103. *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 801 (7th Cir. 2005) (quoting *Dvorak v. Mostardi Platt Assocs., Inc.*, 289 F.3d 479, 484 (7th Cir. 2002)). Yet in reviewing the claim of a Sears employee who could walk no more than a city block without her feet and right leg becoming numb, the court still concluded under *Toyota* that a jury

Despite the factual nature of this inquiry, many courts have relied on the *Toyota* Court's narrow interpretation of "substantially limits" to dismiss ADA claims on summary judgment rather than referring factual determinations to a jury.¹⁰⁴ These courts require enough evidence to allow a jury "to perform the careful analysis that is necessary to determine" whether the claimant was substantially limited.¹⁰⁵

This approach may stem from the *Toyota* Court's direction that the ADA's "terms need to be interpreted strictly to create a demanding standard for qualifying as disabled."¹⁰⁶ The Court's strict interpretation arose from the ADA's finding that forty-three million people have disabilities.¹⁰⁷ The Court explained that "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."¹⁰⁸

Perhaps based on this fear that a broad definition of disability would result in an unmanageable number of ADA claims, some courts have refused to provide ADA coverage to employees based on common limitations like lifting restrictions or back injuries alone.¹⁰⁹ This narrowing of the ADA's coverage may be based in part on concerns openly expressed by the Seventh Circuit that "recognizing claims arising out of back injuries will result in an inordinate number of ADA claims."¹¹⁰ Indeed, back injury claims have been characterized as "a specter that haunts the federal judiciary, their worst fear that the ADA has changed them into workers' compensation forums."¹¹¹

could find that she was covered by the ADA, based on her evidence showing her difficulty in walking as well as the jury's own life experiences. *Id.* at 802.

104. *See* Carroll v. Xerox Corp., 294 F.3d 231, 238 (1st Cir. 2002); *see also* Sheehan v. City of Gloucester, 321 F.3d 21, 23 (1st Cir. 2003) (applying *Toyota* and finding that the plaintiff was not disabled under the ADA).

105. Lebron-Torres v. Whitehall Labs, 251 F.3d 236, 241 (1st Cir. 2001) (quoting Colwell v. Suffolk Cnty. Police Dep't, 158 F.3d 635, 645 (2d Cir. 1998)); *see also* Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 80 (2d Cir. 1998) (finding that a substantial limitation is a mixed question of law and fact).

106. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

107. *Id.*

108. *Id.*

109. Anderson, *supra* note 100, at 446.

110. *Id.*; *see also* Mays v. Principi, 301 F.3d 866, 869 (7th Cir. 2002) (noting a great number of Americans who are restricted by back problems but are not disabled).

111. Anderson, *supra* note 100, at 446.

This narrowing of the meaning of “substantially limits” arguably has “dramatically changed the meaning of ‘disability’ under the ADA over the past number of years so as to make it almost unrecognizable.”¹¹² Many claimants with disabilities “are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition,” because they cannot meet this narrow definition of disability.¹¹³ According to the NCD, the Court’s narrow definition of disability “represents a sharp break from traditional law and expectations” and “ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a ‘comprehensive’ prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability.”¹¹⁴

Other experts believe that the effect of the *Toyota* decision has been limited and that most claims dismissed based on the definition of disability were due to plaintiffs’ failure to present sufficient evidence of the extent of their limitations.¹¹⁵ One commentator concluded that “there is no evidence that the *Toyota* rationale is adversely affecting the claims of plaintiffs filing suit under the ADA.”¹¹⁶ This observation may stem from some courts’ interpretations of *Toyota*, which still allow for a jury to determine whether a claimant is covered by the ADA.¹¹⁷

Regardless of the degree of *Toyota*’s overall impact, the cases outlined below show that diverse approaches to the definition of “substantially limits” have been taken by different courts. First, the ability to perform some tasks involving a major life activity has resulted in the dismissal of claims in some courts, but not in others. Second, there have been differences among the courts regarding how long is long enough for an impairment to be considered “substantial.” Third, courts differ in comparison of the claimant’s abilities to the abilities of members of the general population. Finally, there are inconsistent requirements as to the necessity of professional testimony to establish a substantial limitation. As foreshadowed in past scholarship regarding these disparities in judicial approach and

112. Feldblum et al., *supra* note 9, at 216.

113. *Id.*

114. NCD REPORT, *supra* note 17, at 71.

115. See Shawn D. Vance, *How the Supreme Court’s Toyota Decision Impacted the View of EEOC’S Regulatory Authority*, 26 BERKELEY J. EMP. & LAB. L. 475, 504 (2005).

116. *Id.* at 506.

117. See, e.g., *EEOC v. Sears, Roebuck, & Co.*, 417 F.3d 789, 800–04 (7th Cir. 2005).

interpretation of the original ADA, neither the ADAAA nor the EEOC regulations sufficiently resolve these issues.

A. *Ability to Perform some Tasks Associated with a Major Life Activity*

Many courts tend to focus on a person's abilities, despite an impairment, rather than the extent of their limitations.¹¹⁸ Professor Samuel Marcossan has noted that the *Toyota* Court "frame[d] the inquiry not in terms of what activities the individual cannot do or is substantially limited in doing . . . but in terms of what the person can still do."¹¹⁹ Lower courts often have relied on the claimant's existing abilities to conclude on motions for summary judgment that the person is not substantially limited in a major life activity.¹²⁰

First, the ADAAA specifically states in its definition of disability that "[a]n impairment that substantially limits one major life activity need not limit other major life activities . . . to be considered a disability."¹²¹ This may address the suggestion by the Supreme Court in *Toyota* that if a person can perform most major life activities, they should not be covered by the ADA.¹²² However, the ADAAA's statutory amendments do not directly address decisions that interpret *Toyota* to suggest that a major life activity must be of "central importance," thereby limiting coverage for someone who can perform some tasks that involve the major life activity in question.¹²³ The EEOC's ADAAA regulations do make it clear, however, that a major life activity need not be "of central importance to daily life" for the person to be covered by the ADAAA.¹²⁴

The ADAAA specifies that a person can be covered by the ADA based on a substantial limitation of just one major life activity.¹²⁵ However, this clarification may not be enough to prevent the exclusion of claimants who can still perform some tasks that involve

118. See *infra* notes 139–43 and accompanying text.

119. Samuel A. Marcossan, *Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 361, 375 (2004) (suggesting that further distinction be made between "collective categories" and "a single, discrete activity").

120. See *infra* notes 126–39 and accompanying text.

121. 42 U.S.C. § 12102(4)(C) (Supp. II 2009).

122. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

123. See *id.*

124. 29 C.F.R. § 1630.2(i)(2) (2010).

125. 42 U.S.C. § 12102(1) (2006 & Supp. II 2009).

a major life activity that is the basis for the claimant's ADA coverage.

Professor Fram has warned "that the ADAAA reversed *Toyota* only as to how severe the impairment must be, not as to the relevant evidence on whether the impairment is substantially limiting," so that courts might still be willing to accept and rely on evidence of claimants' abilities to perform other activities.¹²⁶ Just as courts dismissed claims under the ADA if the claimant could perform some tasks associated with a major life activity such as caring for oneself, the ADAAA will not prevent a court from dismissing a claim by a claimant who cannot perform some significant tasks that are a crucial part of a major life activity, if that person can perform some tasks that are part of that activity. Therefore, the ADAAA's admonition against requiring a limitation of more than one major life activity may not result in any fewer dismissals in these types of claims.

Pre-ADAAA courts consistently granted summary judgment for employers based on the claimant's ability to perform some tasks.¹²⁷ Summary judgment has often been granted to the employers of plaintiffs who sought ADA coverage based on an inability to care for themselves because the plaintiffs were able to perform certain self-care tasks such as bathing, dressing, and driving.¹²⁸ For example, a nurse lost on a motion for summary judgment in part due to her inability to show a substantial limitation in caring for herself because of her back injury, despite her testimony that that she had difficulty performing certain tasks and was limited in performing household tasks like cooking and cleaning.¹²⁹ With deference to the decision in *Toyota*, the court concluded that because she could drive, bathe, brush her teeth, and dress herself, she was not substantially limited in the ability to care for herself.¹³⁰

Even though *Toyota* was addressing the ability to perform manual tasks only, many appellate courts have applied this broad approach to impairments that affect some major life activity other than the ability

126. Fram, *supra* note 3, at 210.

127. *Id.* at 208.

128. *Thomas v. Avon Prods., Inc.*, No. 07-3924, 2008 U.S. App. LEXIS 10327, at *2 (6th Cir. May 8, 2008); *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007).

129. *Squibb*, 497 F.3d at 784.

130. *Id.* (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002)); *see also Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 763 (10th Cir. 2006) (ruling that an individual who has difficulty eating, cannot cut her nails, and sometimes needs help buttoning clothes was not substantially limited in the major life activity of caring for herself).

to perform manual tasks.¹³¹ For example, one court refused to extend ADA coverage to three firefighters with Attention Deficit Hyperactivity Disorder (ADHD), in part because the court was looking for an inability to perform a “variety of tasks central to most people’s daily lives” under *Toyota*.¹³² The court applied this approach even though the firefighters relied on a substantial limitation on their abilities to learn, not to perform manual tasks.¹³³

Most courts have not provided much explanation of their application of the *Toyota* standard to other major life activities beyond the performance of manual tasks.¹³⁴ Yet one court explained its focus on the activities which could be performed:

a finding of disability depends not on whether the plaintiff can perform every one of those functions [listed in the EEOC regulations], but on whether the net effect of the impairment is to prevent or severely restrict the plaintiff from doing the set of activities that are ‘of central importance to most people’s daily lives.’¹³⁵

The ability to perform personal care tasks has also defeated coverage based on the ability to perform some tasks that involve the performance of a major life activity that is alleged to be substantially limited.¹³⁶ For example, an employee with degenerative joint disease that limited his ability to grip, reach, lift, stand, sit, and walk at work

131. *Mack v. Great Dane Trailers*, 308 F.3d 776, 781 (7th Cir. 2002) (finding that there is no reason to limit *Toyota*’s analysis to cases involving performing manual tasks); *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 802–03 (9th Cir. 2002) (ruling that the impairment must prevent or severely restrict use compared with how unimpaired individuals normally function); *see also Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 655 (5th Cir. 2003) (ruling that effects of impairment affecting eating must be severe); *Mulholland v. Pharmacia & Upjohn, Inc.*, 52 F. App’x 641, 644–45 (6th Cir. 2002) (applying the *Toyota* analysis to the major life activity of learning); *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1158–60 (10th Cir. 2002) (assuming without discussing that *Toyota*’s holding was limited to the major life activity of performing manual tasks).

132. *Knapp v. City of Columbus*, 192 F. App’x 323, 328 (6th Cir. 2006) (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200–01 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

133. *Id.*

134. For example, in *Mack v. Great Dane Trailers*, in which the plaintiff attempted to distinguish *Toyota* on the basis of manual tasks, the court simply stated that “[w]e see no basis for confining *Toyota*’s analysis to only those cases involving the specific life activity asserted by the plaintiff in that case.” 308 F.3d at 781.

135. *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 846 (8th Cir. 2005) (citing *Toyota*, 534 U.S. at 198).

136. *See, e.g., Philip v. Ford Motor Co.*, 328 F.3d 1020, 1025 (8th Cir. 2003).

was found not entitled to ADA coverage where he still mowed his grass, dressed and fed himself, and used stairs at home.¹³⁷ Similarly, an individual “whose ability to stand, turn, bend[, or] lift” was denied ADA coverage based on his continued ability to “perform household tasks such as laundry, washing dishes, and taking out the trash,” even though he could only perform those tasks if they did not “involve a lot of bending.”¹³⁸ Instead, these courts were willing to allow ADA coverage only where the claimant was prevented from, or at least severely limited in, performing any task that involved the major life activity, or activities that were offered as the basis for ADA coverage.¹³⁹

Even for impairments that are not physically limiting, courts have looked at the ability to perform some tasks as evidence that the claimant was not limited in the major life activity relied on for coverage. For example, a claimant was not allowed to proceed to a jury trial based on a substantial limitation on his ability “to think and interact with others,” because he was able to do many things involving these major life activities, such as working and teaching several days a week, serving as a local councilman, spending time at family and social outings, and working on weekends.¹⁴⁰

The extreme effects of considering a claimant’s abilities is illustrated by the claim of an applicant for a cart pusher position with Wal-Mart, who had mental retardation for which he received social security disability benefits.¹⁴¹ Despite evidence that he was not hired because of his mental retardation and evidence of his limitations on his ability to learn, think, communicate, socially interact, and work, this applicant was unable to survive a motion for summary judgment.¹⁴² Although the court acknowledged that the evidence showed that he was “somewhat limited in his ability to learn,” summary judgment was granted for the employer based on his graduation from high school (but only with a certificate in special education), his attendance at a technical college, and his ability to read, “perform various types of jobs,” and drive a car.¹⁴³

Like his ability to learn, this claimant’s ability to communicate was not substantially limited: he was able to be “interviewed for a job

137. *Id.*

138. *Wood v. Crown Redi-Mix Inc.*, 339 F.3d 682, 685–87 (8th Cir. 2003).

139. *See, e.g., Philip*, 328 F.3d at 1024–25.

140. *Lloyd v. Washington & Jefferson College*, 288 F. App’x 786, 789 (3d Cir. 2008).

141. *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x 874, 877 (11th Cir. 2007).

142. *Id.* at 876–78.

143. *Id.* at 877.

without any accommodation,” was “very verbal,” and did “not need a job coach to communicate effectively with other people in the workforce.”¹⁴⁴ This case illustrates how a person who was denied employment solely because of his disability could not turn to the ADA for relief, because the court focused on his ability to do certain tasks as evidence that he was not substantially limited.

1. Effect of Ability to Work

Some courts interpreting the ADA have excluded claimants because they could perform one major life activity, like working, even though they based their coverage on a limitation of another major life activity.¹⁴⁵ The Supreme Court stated in *Toyota* that determining “whether an impairment constitutes a disability” should not be based only on “the effect of the impairment in the workplace.”¹⁴⁶ Yet lower courts often consider the work-related activities that a claimant can do in granting an employer’s motion for summary judgment.¹⁴⁷

The ability to work has often undermined an employee’s ADA coverage.¹⁴⁸ An extreme example of this focus on the ability to perform other activities appeared in the claim of an employee with multiple sclerosis (MS), who alleged limitations on her ability to care for herself and her family due to fatigue associated with her MS.¹⁴⁹ With only a very short discussion, the court upheld the dismissal of her claim on summary judgment because she did not establish a limitation on her ability to work, despite the court’s agreement “that she often experienced the symptoms of [MS] to the extent that she is often temporarily unable to function as the average person would.”¹⁵⁰

Similarly, an employee with depression was unable to establish ADA coverage despite her presentation of evidence that it “caused her difficulty in sleeping and getting along with [others].”¹⁵¹ The court granted summary judgment for the employer because she did not show “how these limitations prevented her from performing her

144. *Id.*

145. *See, e.g., Lloyd*, 288 F. App’x at 789.

146. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 201 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

147. *See, e.g., Lloyd*, 288 F. App’x at 789; *Littleton*, 231 F. App’x at 877.

148. *See Croy v. COBE Labs., Inc.*, 345 F.3d 1119, 1203–04 (10th Cir. 2003).

149. *Id.* at 1204.

150. *Id.*

151. *McWilliams v. Jefferson Cnty.*, 463 F.3d 1113, 1116–17 (10th Cir. 2006).

2011] Underwhelming Impact of the ADAA 441

job ‘or that she [was] unable to perform any of the life activities completely.’”¹⁵²

Even an obvious major life activity, such as sight, has not been considered substantially limited if the person is still able to work. A claim by an employee with limited sight in one eye was denied ADA coverage in part because he “continued to work in his regularly assigned position for nine months” after he suffered the eye injury, and he continued to “drive[] a truck . . . and passed [a] vision test for [his] license.”¹⁵³ Similarly, the claim of a bus driver with asthma was dismissed without discussion of limitations on his ability to breathe, where the court found that he failed to establish his inability “to perform a class of jobs or a broad range of jobs.”¹⁵⁴ That court referenced *Toyota*’s requirement that the impairment interfere with an activity that is “of central importance to most people’s daily lives.”¹⁵⁵ Thus, these courts focus on the ability to work or perform some other tasks as evidence that the person is not substantially limited in any major life activity.

2. Focus on Limitations in some Courts

In contrast to this focus on abilities, some courts interpreting the ADA have refused to dismiss claims based on employees’ abilities rather than their limitations.¹⁵⁶ When compared to the decisions just described, these outcomes illustrate the variance in ADA coverage across different circuit courts for claimants who are able to perform some tasks associated with major life activities. One illustration of

152. *Id.* at 1117 (quoting *Croy*, 345 F.3d at 1204).

153. *Watson v. Tex. Youth Comm’n*, 269 F. App’x 498, 501 (5th Cir. 2008); *see also* *EEOC v. United Parcel Serv. Inc.* 306 F.3d 794, 803 (9th Cir. 2002) (holding driver with sight impairment still able to work); *Szmaj v. Am. Tel. & Tel. Co.*, 291 F.3d 955, 956 (7th Cir. 2002) (holding congenital nystagmus causing difficulty in focusing not a disability); *Foore v. City of Richmond*, 6 F. App’x 148, 149 (4th Cir. 2001) (holding 20/400 vision in right eye with no depth perception not a disability); *Tone v. U.S. Postal Serv.*, No. 99-6309, 2000 WL 1836764, at *2 (2d Cir. Dec. 13, 2000) (holding employee who lost eye not substantially limited in major life activity of working); *Shannon v. New York City Transit Auth.*, 189 F. Supp. 2d 55 (S.D.N.Y. 2002) (demonstrating employer does not regard employee who can’t distinguish colors as possessing substantially limiting impairment)

154. *Wofsy v. Palmshores Ret. Comty.*, 285 F. App’x 631, 633–34 (11th Cir. 2008) (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2010)).

155. *Id.* at 633 (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

156. *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 619 (5th Cir. 2009); *Emory v. Astrazeneca Pharm. LP*, 401 F.3d 174, 175 (3d Cir. 2005).

this more expansive coverage comes from the Third Circuit, which reversed the dismissal of a claim of an employee with right-side paralysis and difficulties in learning due to cerebral palsy.¹⁵⁷ The trial court had dismissed the claim because he had graduated from high school (in a special education track), worked as a custodian, and volunteered in his community in several capacities.¹⁵⁸

The appellate court stated bluntly that the trial court's reliance on what the claimant had "managed to achieve misses the mark."¹⁵⁹ His ability "to become a productive member of society" was no justification for dismissing his ADA claim because he still had "significant disability-related obstacles he has overcome" and he still had "significantly restricted ability to learn and perform numerous manual tasks."¹⁶⁰ This appellate court also noted the need for individualized inquiry:

We are mindful of the extraordinarily fact-intensive nature of the inquiry; even if two different plaintiffs alleging substantial limitations suffer from the same impairment, the nuances of its effect on their daily lives will invariably manifest themselves in distinct ways.¹⁶¹

Similarly, the Fifth Circuit specifically rejected a focus on the claimant's ability to work, even though an employee with chronic fatigue syndrome was able to perform her job while experiencing the symptoms of that impairment.¹⁶² Relying on *Toyota*, the court held that an "assessment of whether an individual is disabled [should be] made not just with respect to the workplace, but also by looking at the effect of the impairment on the individual's entire life."¹⁶³ That court explained that using a claimant's

abilities to perform [his or her work duties] as evidence that they are not disabled under the ADA would create an impossible catch-22 for plaintiffs: 'if their disabilities prevented them from doing their jobs altogether they would not be qualified individuals for the job under the ADA, and

157. *Emory*, 401 F.3d at 175–76.

158. *Id.* at 178–79.

159. *Id.* at 180.

160. *Id.* at 181.

161. *Id.* at 182.

162. *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 619 (5th Cir. 2009).

163. *Id.* (citing *Toyota Motor Mfg. v. Williams, Ky., Inc.*, 534 U.S. 184, 201 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

2011] Underwhelming Impact of the ADAA 443

if they were able to work through their disabilities they would then not be considered disabled.’¹⁶⁴

3. ADAAA’s Failure to Address Conflict

The ADAAA does not specifically address the impact of a person’s ability to engage in some tasks that might involve the major life activity relied upon for ADA coverage.¹⁶⁵ The EEOC ADAAA regulations state that “[i]n determining whether an individual has a disability . . . , the focus is on how a major life activity is substantially limited, not on what outcomes an individual can achieve.”¹⁶⁶ The regulations provide the example of someone with a learning disability who is substantially limited in the major life activity of learning, even if he or she has achieved a high level of academic success.¹⁶⁷ The Appendix to the EEOC regulations points out that a person need not “show that he or she is substantially limited in performing all manual tasks” to show a substantial limitation on that major life activity.¹⁶⁸

Despite this explanation, the EEOC regulations do not guarantee coverage for a claimant who can perform some tasks that involve a major life activity but is still substantially limited in that activity because of an inability to perform some tasks associated with that activity.¹⁶⁹ The EEOC regulations may not be clear enough to resolve the conflict among the circuit courts regarding how the remaining abilities of claimants affect their claim that they are substantially limited in a major life activity that involve the use of those abilities.¹⁷⁰ Courts may continue to conclude that if a claimant can engage in tasks, such as working, that involve major life

164. *Id.* (citing *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 24 (1st Cir. 2002)).

165. *See* 29 C.F.R. § 1630.2(j) (2010) (defining “substantially limits” but not addressing a person’s abilities).

166. 29 C.F.R. § 1630.2(i)(4)(iii).

167. Regulations to Implement the Equal Employment Provisions of the ADA, as Amended, 74 Fed. Reg. 48442 (Sept. 23, 2009).

168. 29 C.F.R. Part 1630 app.

169. Regulations to Implement the Equal Employment Provisions of the ADA, as Amended, 74 Fed. Reg. at 48440. “In determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment.” *Id.*

170. *See generally* *Carreras v. Sajo, Garcia & Partners*, 596 F.3d 25, 33–35 (1st Cir. 2010) (denying claimant with blurred vision ADA protection and concluding that his diabetes was not a substantial limitation on the major life activities of eating and seeing because he could drive).

activities, the person is not substantially limited in them.¹⁷¹ Further, nothing in the ADAAA or the EEOC regulations directly prevents a court from making the factual determination about whether the person is substantially limited in a life activity even though he or she can perform some tasks that involve that activity.

B. Duration and Frequency of the Impairment

Numerous ADA claims have been dismissed without a trial because the claimant's impairment was seen as temporary or because the impairment was not disabling when it was not "active."¹⁷² Although the ADA did not specifically address the necessary duration of the impairment,¹⁷³ the EEOC's original regulations stated that the impairment should be "permanent or long term" to be considered substantially limiting.¹⁷⁴ The *Toyota* Court excluded impairments that only interfered with a major life activity in a minor way,¹⁷⁵ and reiterated the EEOC's requirement that the impairment must be "permanent or long term."¹⁷⁶

In the ADAAA, Congress rejected the *Toyota* Court's overall narrow definition of disability and specifically stated that an impairment should be assessed based on its effects when it is active.¹⁷⁷ However, the ADAAA does "not explain how [temporary] impairments should be assessed under the actual disability definition."¹⁷⁸ The EEOC ADAAA regulations state that "[a]n impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months."¹⁷⁹ The use of the word "may" in the one sentence that addresses this issue may keep the door open for courts to find that, at least for some activities, a limitation lasting more than six months or even longer is still not substantial. In addition, neither the ADAAA nor the EEOC regulations address the question of how often an intermittent impairment would need to occur to constitute a substantially limiting

171. Long, *supra* note 8, at 226.

172. NCD REPORT, *supra* note 17, at 61–64.

173. *Id.* at 61.

174. 29 C.F.R. § 1630.2(j)(2)(ii)–(iii) (2010).

175. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

176. *Id.* at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)–(iii)).

177. Long, *supra* note 8, at 221–22.

178. *Id.* at 227.

179. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 74 Fed. Reg. 48439, 48440 (Sept. 23, 2009).

2011] Underwhelming Impact of the ADAA 445

condition.¹⁸⁰ Therefore, disputes about whether an impairment's limitations are substantial because the impairment is not permanent or long-term may continue despite the changes included in the ADAAA.

The EEOC's original ADA regulations provided the following factors to consider, in addition to the "nature and severity of the impairment," to determine whether a "major life activity is substantially limited":

- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.¹⁸¹

Similarly, in its Enforcement Guidance, the EEOC elaborated that "[a]n impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time."¹⁸² In contrast to the Supreme Court's decisions, the EEOC's ADA compliance manual states that if an impairment lasts "at least several months," it is not short term.¹⁸³

Some courts have adopted the EEOC's broader definition of substantially limited despite a limited duration of an impairment. For example, the Tenth Circuit recognized, prior to *Toyota*, that an impairment need not be permanent to be a disability, and held that the plaintiff's flexor tenosynovitis could be a disability since "its anticipated duration was indefinite, unknowable, or was expected to be at least several months."¹⁸⁴

The NCD has been critical of these regulations, citing their departure from the position of the other agencies that have adopted regulations interpreting the other sections of the ADA, which apply to public and private services but do not include a duration standard.¹⁸⁵ The NCD also has criticized the EEOC for suggesting

180. See Long, *supra* note 8, at 227.

181. 29 C.F.R. § 1630.2(j)(2) (2010).

182. ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, EEOC, § 7 (1997), available at <http://www.eeoc.gov/policy/docs/psych.html>.

183. SECTION 902 DEFINITION OF THE TERM "DISABILITY", EEOC (2009), available at <http://www.eeoc.gov/policy/docs/902cm.html>.

184. Aldrich v. Boeing Co., 146 F.3d 1265, 1270 (10th Cir. 1998).

185. NCD REPORT, *supra* note 17, at 60–62; see also 28 C.F.R. §§ 35.104, 36.104 (2010).

that statutory protection should be denied for an employee when recovery is more rapid and the impact on the employer's operations is reduced, while providing coverage "if the disruption takes longer" and the consequential "burden on the employer is greater."¹⁸⁶

Generally, courts have held that the ADA will cover employees with conditions that are "potentially long-term, in that their duration is indefinite and unknowable,"¹⁸⁷ but not conditions that are brief or foreseeably temporary.¹⁸⁸ Subsequent to the Supreme Court's holding in *Toyota* that an impairment must "be permanent or long term,"¹⁸⁹ appellate court decisions furthered this restrictive interpretation to exclude "[s]poradic or otherwise temporary impairments" from covered substantial limitations.¹⁹⁰

One lower court has said that in *Toyota*, the Supreme Court extrapolated, "from some estimated numbers of those to be covered, that severe restrictions of very important activities were what Congress had in mind."¹⁹¹ Similarly, the Seventh Circuit has held that the *Toyota* Court's inclusion of the severely restricts standard established that the threshold for ADA coverage "must remain demanding and not be weakened through reference to regulations or otherwise."¹⁹²

186. NCD REPORT, *supra* note 17, at 62.

187. *See, e.g.,* Santiago Clemente v. Exec. Airlines, Inc., 213 F.3d 25, 31 (1st Cir. 2000) (citation omitted).

188. Carroll v. Xerox Corp., 294 F.3d 231, 240–41 (1st Cir. 2002) (noting three month leave for chest pains); Soileau v. Guilford of Me., Inc., 105 F.3d 12, 16 (1st Cir. 1997) (noting five-week leave and four-month activity restriction because of depressive attack).

189. Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

190. Heiko v. Colombo Sav. Bank, F.S.B., 434 F.3d 249, 257 (4th Cir. 2006); *see also* Rohan v. Networks Presentations LLC, 375 F.3d 266, 276 (4th Cir. 2004) (stating that a employee's trouble with social interactions did not qualify as a disability); Gutridge v. Clure, 153 F.3d 898, 901–02 (8th Cir. 1998) (stating that inability to work while recovering from wrist and elbow surgery did not qualify as a disability under the ADA); Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997) (noting that temporary back injury not covered); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (stating that recovery from ankle injury and surgery not covered); McDonald v. Pennsylvania, 62 F.3d 92, 96 (3d Cir. 1995) (noting that recuperation from abdominal surgery not covered).

191. Guzmán-Rosario v. United Parcel Serv., Inc., 397 F.3d 6, 10 (1st Cir. 2005) (citing *Toyota*, 534 U.S. at 198).

192. EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 801 (7th Cir. 2005) (citing Dvorak v. Mostardi Platt Assocs., 289 F.3d 479, 484 (7th Cir. 2002)).

As the EEOC recommended, a court often takes into account the nature, severity, duration, and long-term impact of the impairment.¹⁹³ An impairment is substantially limiting only “if an individual is ‘[s]ignificantly restricted as to the condition, manner or duration under which . . . the average person in the general population can perform that same major life activity.’”¹⁹⁴

The permanency of an impairment may be used by an employer to show that a claimant is not otherwise qualified for the position and therefore not covered by the ADA.¹⁹⁵ Therefore, an employee or applicant must establish that the impairment is not so limiting that he or she cannot perform the duties of the position, either with or without a reasonable accommodation.¹⁹⁶ But a claimant’s presentation of information regarding his remaining or improving ability to perform the duties of a position could often defeat his ADA coverage.¹⁹⁷ For example, an employee with a significant back impairment failed to survive a motion for summary judgment even though he could not bend or carry heavy weight to perform daily tasks.¹⁹⁸ Under *Toyota’s* “demanding standard,” the employee’s admissions regarding his improvement in his abilities prior to the alleged discrimination supported the motion for summary judgment in favor of the employer, despite medical evidence that he still could lift no more than ten to twenty pounds occasionally.¹⁹⁹

The improvement of an area store supervisor under the Fourth Circuit’s jurisdiction also defeated her ability to establish her disability under the Supreme Court’s guidance from *Sutton* and *Toyota*, despite her limitations on lifting and working hours.²⁰⁰ Her nine-month absence from work due to a back injury was insufficient

193. *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 685 (8th Cir. 2003) (citing 29 C.F.R. § 1630.2(j)(2) (2002); *Cooper v. Olin Corp.*, Winchester Div., 246 F.3d 1083, 1088 (8th Cir. 2001)).

194. *Moysis v. DTG Datanet*, 278 F.3d 819, 825 (8th Cir. 2002) (quoting 29 C.F.R. § 1630.2(j)(1)(ii) (2010)).

195. NCD REPORT, *supra* note 17, at 65–66.

196. 42 U.S.C. § 12111(8) (Supp. III 2009).

197. *Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 944 (D.C. Cir. 2009).

198. *Id.* at 943–44.

199. *Id.* at 944 (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

200. *Pollard v. High's of Balt., Inc.*, 281 F.3d 462, 468 (4th Cir. 2002) (citing *Toyota*, 534 U.S. at 198; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1991), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

in duration to establish a disability, where her medical evidence supported the temporary nature of the impairment, even though the doctor later determined that she was permanently disabled.²⁰¹ This case provides an example of how evaluations that indicate improvement in an individual's impairment can be used by an employer to show that the impairment is only temporary, and therefore not substantially limiting.²⁰²

1. Duration

Like evidence of improvement in a claimant's condition, the limited duration of an impairment has often defeated ADA coverage.²⁰³ But courts have varied on how long is long enough to establish coverage. Often, if the limitation lasts as long as several months but has no lasting effects, then it is treated as "short-term" and cannot support ADA coverage.²⁰⁴ Temporary conditions like broken bones or a temporary lifting restriction typically do not support ADA coverage.²⁰⁵ Similarly, temporary mental health impairments lasting a short period of time generally do not provide for ADA coverage.²⁰⁶

Some courts have denied ADA coverage even if a claim meets the EEOC's "several month" rule.²⁰⁷ For example, the Eighth Circuit dismissed the claim of a teacher whose impairments were expected to last six months, even though they had already lasted for approximately four months.²⁰⁸

201. *Id.* at 469.

202. *Id.* (citing *Mellon v. Fed. Express Corp.*, 239 F.3d 954, 956–57 (8th Cir. 2001); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997)); *see also* *Brunker v. Schwan's Home Serv. Inc.*, 583 F.3d 1004, 1008 (7th Cir. 2009) (noting that employee not covered where symptoms of MS were decreasing); *Sánchez-Figueroa v. Banco Popular De P.R.*, 527 F.3d 209, 215 (1st Cir. 2008) (noting that good prognosis for situational disorder defeated ADA coverage).

203. *Fram*, *supra* note 3, at 210.

204. *Id.*

205. *See* *Vierra v. Wayne Mem'l Hosp.*, 168 F. App'x 492, 496 (3d Cir. 2006) (noting that broken finger requiring a splint for one month not permanent or long-term); *Velarde v. Associated Reg'l & Univ. Pathologists*, 61 F. App'x 627, 630 (10th Cir. 2003) (noting that lifting impairment for less than two months not long-term).

206. *Oblas v. Am. Home Assurance Co.*, No. 98-9350, 1999 U.S. App. LEXIS 23371, at *4 (2d Cir. Sept. 24, 1999) (noting that one-month depression not a disability because of lack of sufficient duration).

207. ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, *supra* note 182, § 7.

208. *Samuels v. Kan. City Sch. Dist.*, 437 F.3d 797, 802 (8th Cir. 2006). Interestingly, the court denied a subsequent workers' compensation evaluation that she suffered a 60% permanent partial disability of her body as a whole. *Id.* at 802.

Similarly, the First Circuit dismissed the claim of an employee suffering from ovarian cysts for a period of at least seven months.²⁰⁹ Referencing *Toyota*, the court explained that a condition must last for more than “several months,” which had been the First Circuit’s previous standard.²¹⁰ The court instead suggested that the condition must last from six to twenty-four months but implied that more severe impairments might be covered even if they lasted for a shorter period.²¹¹

Some courts have been much less demanding in their requirement of permanency.²¹² These courts tend to directly reference the EEOC guidelines. For example, the EEOC guidance has justified determining whether a limitation that is substantial is measured in terms of months, not years, when considering a limitation on the ability to sleep.²¹³ Similarly, a police officer who suffered from major depression for about two years as an employee and at least an additional year thereafter survived a motion for summary judgment.²¹⁴ This conclusion was based in part on medical testimony that his condition was recurrent and “severe, would a have long-term impact, and was likely to persist.”²¹⁵ Compared to the cases discussed earlier, which required a longer and more definite duration, these cases illustrate the variation in how long is long enough for a non-permanent impairment to establish ADA coverage.²¹⁶

2. Continuous Effect

Substantial limitation may also be lacking where a claimant is not continuously affected by the impairment. Prior to the ADAAA, courts often dismissed the claim of an employee or applicant with a chronic condition because the effects of that condition did not occur often enough.²¹⁷ For example, an employee with chronic pancreatitis

209. *Guzmán-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 9 (1st Cir. 2005).

210. *Id.* at 10.

211. *See id.*

212. *See Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 765 (3rd Cir. 2004).

213. *Desmond v. Mukasey*, 530 F.3d 944, 958 (D.C. Cir. 2008).

214. *Williams*, 380 F.3d at 755–56.

215. *Id.* at 765.

216. *Compare Samuels v. Kan. City Mo. Sch. Dist.*, 437 F.3d 797, 802 (8th Cir. 2006) (dismissing a claim for an extremity disability expected to last six months), *and Guzmán-Rosario*, 397 F.3d at 8 (dismissing a claim for ovarian cysts expected to last at least seven months), *with Desmond*, 530 F.3d at 957 (surviving summary judgment for a sleep disorder lasting five months), *and Williams*, 380 F.3d at 765 (surviving summary judgment for a depression disorder lasting two years).

217. *See Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 656 (5th Cir. 2003).

that caused him to miss a few days of work when his condition “flared up” was not covered by the ADA, because “such temporary effects do not amount to a substantial limitation.”²¹⁸

Similarly, a brittle-diabetic employee was unable to show that she was substantially impaired in the ability to care for herself or think, even though when she was “unsuccessful in attaining a proper blood sugar level, she [could not] properly care for herself” or think clearly.²¹⁹ She failed to present “evidence that she [was] so unsuccessful in monitoring her blood sugar levels that she [was] substantially limited in caring for herself” or in her ability to think.²²⁰ Likewise, another diabetic employee was not entitled to ADA coverage based on a limitation on his sight, despite frequent episodes of blurred vision, because he was still able to engage in routine daily activities that required sight.²²¹ The court failed to specify whether he could perform these activities when he was experiencing the blurred vision.²²²

Even the inability to continue working on a regular basis still was not always enough to establish ADA coverage based on an intermittent condition. For example, an employee with ADHD and depression was unable to establish a substantial limitation, despite numerous problems at work that both he and his psychologist attributed to his ADHD.²²³ The record lacked evidence that the plaintiff “could not perform some usual activity compared with the general population, or that he had a continuing inability to handle stress at all times, rather than only episodically.”²²⁴ The failure to establish ADA coverage based on the inability to work in these situations contrasts sharply with the cases discussed earlier, where the ability to work was relied upon to deny ADA coverage.²²⁵

In contrast to those claims that were dismissed due to the temporary or episodic nature of the impairment, some courts recognized even before the ADAAA’s passage that employees with

218. *Id.* at 656–57.

219. *Fraser v. Goodale*, 342 F.3d 1032, 1035 (9th Cir. 2003).

220. *Id.* at 1043.

221. *Carreras v. Sajo, García & Partners*, 596 F.3d 25, 34 (1st Cir. 2010); *see also* *Turner v. Saloon Ltd.*, 595 F.3d 679, 689 (7th Cir. 2010) (noting that employee not covered where psoriasis only occasionally limited ability to walk).

222. *See Carreras*, 596 F.3d at 34.

223. *Calef v. Gillette Co.*, 322 F.3d 75, 80–84 (1st Cir. 2003).

224. *Id.* at 86; *see also* *Corley v. Dep’t of Veterans’ Affairs*, 218 F. App’x 727, 735 (10th Cir. 2007) (noting that monthly seizures insufficient to establish Rehabilitation Act coverage).

225. *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1271 (10th Cir. 1998).

episodic conditions could be covered.²²⁶ Yet these claimants may have been successful because their symptoms occurred often enough. For example, an employee with end-stage renal disease was able to show that his condition was sufficiently persistent to be substantially limiting, where to accomplish the equivalent of urination, he needed to use a dialysis machine three afternoons per week.²²⁷ The court also relied on the fact that at all times relevant to the claim, he was restricted in his ability to urinate.²²⁸

Similarly, an employee with chronic fatigue syndrome, which was intermittent and temporary in its effects, was still able to survive a motion for summary judgment.²²⁹ This ADA coverage was based on her testimony that her cognitive deficits occurred daily (even though she could perform some tasks during these periods) and she suffered “headaches at least three times a week and low-grade fevers in the afternoons.”²³⁰ The appellate court found that she submitted sufficient evidence of limitations on her ability to care for herself based on her inability to shower regularly “cook, shop for food, zip up her own clothes, or even use the bathroom without her sister’s assistance.”²³¹ The court concluded that the indefinite nature of her impairment did not defeat her claim, even though she had gone fifteen years without symptoms before her relapse, because her chronic fatigue was more like epilepsy or MS than a temporary condition like a broken limb or influenza.²³²

Some claimants have been successful in showing a substantial limitation even if their conditions affected them less frequently. Yet the courts still rely heavily on how often these “flare ups” occur. For example, an employee with psoriasis and psoriatic arthritis presented evidence to support the jury’s verdict in his favor regarding ADA

226. *See, e.g.*, *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 618 (5th Cir. 2009) (“Many courts have recognized that relapsing-remitting conditions like multiple sclerosis, epilepsy, or colitis can constitute ADA disabilities depending on the nature of each individual case.”).

227. *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 259, 251–52 (4th Cir. 2006).

228. *Id.* at 257.

229. *Chevron Phillips Chem. Co.*, 570 F.3d at 615–16.

230. *Id.* at 609, 612.

231. *Id.* at 617 (citing *Desmond v. Mukasey*, 530 F.3d 944, 956 (D.C. Cir. 2008); *Fenney v. Dakota, Minn. & E. R. Co.*, 327 F.3d 707, 715 (8th Cir. 2003); *EEOC v. United Parcel Serv.*, 249 F.3d 557, 562–63 (6th Cir. 2001); *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999)).

232. *Id.* at 618–19 (citing *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 780 (6th Cir. 1998); *Ryan v. Grae & Rybicki*, 135 F.3d 867, 871–72 (2d Cir. 1998); *Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995)).

coverage, even though his condition was episodic.²³³ This employee established a substantial limitation on his ability to walk during times when his condition flared up.²³⁴ The Fifth Circuit distinguished another of its decisions that denied ADA coverage under the proposition that an intermittent “flare up” cannot support ADA coverage because that case involved a plaintiff who only occasionally missed a few days of work due to his condition, described as “few and far between” by the court.²³⁵ This employee, in contrast, “spen[t] anywhere from about one-third to about one-half of each month unable to [walk] without [excruciating] pain.”²³⁶ His ability to work during flare-ups did not undermine his ADA coverage, because he sat and stood to perform his work, and he based coverage on an inability to walk.²³⁷

3. Limited Effect of ADAAA

The ADAAA states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”²³⁸ In addition, the EEOC’s regulations under the ADAAA state that “[a]n impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.”²³⁹ The EEOC declined to insert a six-month requirement explaining that, “impairments that last only a short period of time may be covered if sufficiently severe.”²⁴⁰ But the EEOC also declined to specify how long is long enough to establish a substantial limitation.

This limited guidance may be insufficient to address the question of “how long is long enough” and the variations in approaching the question of an intermittent condition, as demonstrated by the decisions outlined above. The ADAAA is clear that a person with a chronic condition can establish ADA coverage based on the extent of the limitations at the time the condition is “active.”²⁴¹ However, neither the ADAAA nor the EEOC regulations directly address how

233. *Carmona v. Sw. Airlines Co.*, 604 F.3d 848, 859 (5th Cir. 2010).

234. *Id.* at 857, 859.

235. *Id.* at 858 (citing *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 652, 657 (5th Cir. 2003)).

236. *Id.* at 851.

237. *Id.* at 858.

238. 42 U.S.C. §12102(4)(D) (Supp. II 2009).

239. Regulations to Implement the Equal Employment Provisions of the ADA, as Amended, 74 Fed. Reg. 48431, 48440 (Sept. 23, 2009).

240. 29 C.F.R. pt. 1630 Summary.

241. 42 U.S.C. § 12102(4)(D) (Supp. II 2009).

2011]

Underwhelming Impact of the ADAA

453

often the chronic condition must be active to establish ADA coverage.

As with the ability to perform some activities, the limited duration or sporadic nature of an impairment may continue to be relied upon by a court to dismiss a claim on summary judgment. This may be inappropriate given the heavily factual nature of the determination of how long or how often is enough to be substantially limiting. The expectation of a specific time period or frequency to support a claim also conflicts with direction from the Supreme Court that claimants deserve an individualized inquiry into whether their impairment is substantially limiting for them.²⁴²

Second, specific guidance is provided by the definition section's statement that an impairment that is episodic or in remission qualifies as a disability if it would substantially limit a major life activity in its active state.²⁴³ In claims by a person whose condition is in remission, coverage now depends on "whether the disease would substantially limit a major life activity in its active phase, regardless of whether the disease has a significant effect on the employee while in remission."²⁴⁴ This amendment "represents a subtle, but fairly substantial change in meaning."²⁴⁵ This section should address the disparity among courts regarding whether an impairment that is episodic is substantial enough to support ADA coverage.²⁴⁶ Yet the courts still do not have guidance on how long the effects of an impairment need to last, or how often an intermittent condition needs to occur, for the impairment to be substantially limiting.

Despite this limited guidance on intermittent conditions, the ADAAA failed to even reference certain controversial issues regarding the specific length of time that a condition must continue to support ADA coverage. This clarification was omitted despite the history of conflicting decisions regarding the length of time an impairment must last to support coverage.²⁴⁷ The Amendments only state that an individual should not be covered as "regarded as"

242. See *supra* notes 95–96 and accompanying text.

243. 42 U.S.C. § 12102(4)(D).

244. Philip A. Kilgore & John T. Merrell, *Redefining "Disabled": The ADA Amendments Act of 2008*, 21 S.C. LAW. 24, 26 (2009).

245. Long, *supra* note 8, at 221.

246. See *infra* Part IV.B.

247. Compare *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1270 (10th Cir. 1998) (recognizing flexor tenosynovitis as a substantial limitation although the duration of the impairment was unknown), with *Guzman-Rosario v. United Parcel Serv., Inc.*, 397 F.3d 6, 8–10 (1st Cir. 2005) (rejecting ovarian cysts over a seven month period as a substantially limiting impairment).

disabled if the condition is minor and lasts for less than six months.²⁴⁸ Given the House of Representatives Committee on Education and Labor Report's statement that this six-month rule does not apply to actual disabilities, actual impairments lasting even less than six months arguably could provide for ADA coverage.²⁴⁹

C. Comparison to the General Population

The interpretation of "substantially limits" has been significantly influenced by the comparison of a person's limitations and remaining abilities to the abilities of members of the general population.²⁵⁰ Nothing in the original ADA required this comparison.²⁵¹ The EEOC suggested in its original regulations that the coverage of the ADA depends on a comparison between the effects of the employee's impairment and the abilities of the average person in the general population.²⁵² Even though many claims have been dismissed for failure to present sufficient evidence of how a claimant's abilities compare to those of the general population, little academic commentary on the ADA focuses on this "average person" requirement.²⁵³

The comparison to members of the general population relates back to the emphasis of both the EEOC and the Supreme Court on individualized inquiry into the claimant's limitations.²⁵⁴ Yet courts have used this case-by-case assessment to dismiss claims based on how incompetent the average person is by comparison.²⁵⁵ This has meant that someone with a "debilitating impairment [but] with more education or training than the 'average person' may not be disabled enough."²⁵⁶

Using this approach, some "courts examine how a person functions *generally* and essentially compare disabled people with 'normal' ones."²⁵⁷ This has resulted, at times, in disabled persons lacking the protection of the ADA, often based on evidence presented to show

248. Long, *supra* note 8, at 224 (citing 42 U.S.C. § 12102(3)(B)).

249. H.R. REP. NO. 110-730 at 3, 24–25 (2008).

250. 29 C.F.R. § 1630.2(j)(1) (2010).

251. 42 U.S.C. § 12102(2)(A) (2006) (using the term "substantially limits" in the definition of disability, but not expressly providing guidance for interpreting the term).

252. 29 C.F.R. § 1630.2(i)(1).

253. Anderson, *supra* note 100, at 411 & n.6; *see also* PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY § 3.2(B)(1) (2004) (emphasizing the importance of individualized inquiry).

254. BLANCK ET AL., *supra* note 253, § 3.2(B)(1).

255. Anderson, *supra* note 100, at 411.

256. O'Brien, *supra* note 33, at 50.

257. *Id.* (alteration in original).

that they are “qualified” to perform the duties of their job.²⁵⁸ Courts have also had a tendency to compare the limitations of the claimant at hand with other ADA plaintiffs who had similar limitations, using that previous court’s determination that the earlier plaintiff was not more limited than members of the general population.²⁵⁹ Thus, a plaintiff who fails to present sufficient evidence on how her limitations compare to the those of the general population will find her claim dismissed on a motion for summary judgment, unless she is “more disabled” than other plaintiffs who have come before her.²⁶⁰

Even though the *Toyota* Court referenced the EEOC regulations for some purposes and agreed that an individualized inquiry is appropriate, the Court did not accept the EEOC’s approach of comparing an employee’s ability with the abilities of others.²⁶¹ The *Toyota* Court focused instead on the “‘large potential differences in the severity and duration of the effects’” of certain impairments on “the major life activity of performing manual tasks.”²⁶² However, this has not stopped lower courts from making this comparison to members of the general population on a motion for summary judgment.²⁶³

Because substantial limitation is a subjective standard, its definition is subject to “‘social influences on what one recognizes as significant life activities and a ‘substantial limit[ation]’ of those activities.’”²⁶⁴ Therefore, a judgment call must be made regarding what is different

258. See, e.g., *Taylor v. Fed. Express Corp.*, 429 F.3d 461 (4th Cir. 2005).

259. *Anderson*, *supra* note 100, at 439 & 439–40 n.165.

260. See *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 847–50 (8th Cir. 2005) (comparing claimant’s lifting restrictions to those of the claimant in *Webner v. Titan Distrib., Inc.*, 267 F.3d 828 (8th Cir. 2001), to find insufficient demonstration of substantial limitation on the major life activity of working).

261. *Vance*, *supra* note 115, at 508.

262. *Id.* (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196, 199 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

263. See, e.g., *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App’x 738, 740 (9th Cir. 2010); *Desmond v. Mukasey*, 530 F.3d 944, 954–55 (D.C. Cir. 2008); *Nadler v. Harvey*, No. 06-12692, 2007 U.S. App. LEXIS 20272, at *18–19 (11th Cir. Aug. 24, 2007); *Capobianco v. City of N.Y.*, 422 F.3d 47, 60 (2d Cir. 2005); *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274–75 (4th Cir. 2004); *Heisler v. Metro Council*, 339 F.3d 622, 627–28 (8th Cir. 2003).

264. *Anderson*, *supra* note 100, at 414 (alteration in original) (quoting Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disability Analysis*, 6 YALE J. HEALTH POL’Y L. & ETHICS 221, 252 (2006)).

enough to be “a significant deviation from” average human experience.²⁶⁵

Under the ADA, some courts have been more than willing to make that judgment call by comparing the claimant’s abilities to members of the general population.²⁶⁶ Particularly when considering the abilities of the general population, courts should instead recognize that the jury is in a better position to make that comparison.²⁶⁷ Members of the jury are “[t]he best judge[s] of whether the experiences of an individual are outside the norm.”²⁶⁸ Professor Cheryl Anderson, went so far as to say “[j]ury common sense is preferable to judge-made common sense when the issue is one of common experience.”²⁶⁹

Despite the jury’s role, courts have often made those factual determinations to support the exclusion of a claimant from the ADA’s coverage.²⁷⁰

The high-incidence of dismissal of claims based on a claimant’s failure to make an influential comparison to the limitations of the general population, or based on the court’s comparison to other ADA plaintiffs, illustrates the difficulties faced by claimants under the ADA.

1. Some Life Activities Often Compared

Some major life activities seem particularly susceptible to a court requiring the comparison to the claimant’s abilities to those of the general population. For the activity of sleeping, commonly relied upon by ADA claimants, it has been difficult for an employee claiming a disability to show that disruption of their sleep is significant, particularly if the employee fails to compare herself to the general population.²⁷¹ For example, an employee with depression was unable to establish ADA coverage based on her lack of sleep, even though her medical records reflected that she had disturbed

265. *Id.*

266. *Id.* at 477.

267. *Id.*

268. *Id.*

269. *Id.*

270. For example, one claim based on an inability to interact with others was dismissed, in part based on the court’s conclusions regarding the cause of the employee’s limited interactions with her family, and its interpretation of facts showing that she had made friends at work. *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 275–76 (4th Cir. 2004).

271. *See Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir. 2003).

sleep, was diagnosed with sleep apnea, and was taking medication to help her sleep.²⁷²

This court concluded that her testimony did not explain the severity of her sleep apnea compared to others in the general population.²⁷³ Similarly, she failed to establish a limitation on her ability to concentrate based on her conclusory statements that she had difficulty concentrating, in part because she did not compare herself to the general population.²⁷⁴

Even when a comparison to others is made, a sleep-deprived employee may not be substantially limited according to many courts.²⁷⁵ Often employees have been unable to establish a disability based on a lack of sleep because difficulty in sleeping is widespread among those who do not have a disability.²⁷⁶ To establish a substantial limitation in the ability to sleep, a claimant must present evidence that his or her inability to sleep is more severe than that of “the average person in the general population.”²⁷⁷

In contrast to these uncovered employees, other employees have been able to show a substantial limitation on sleep activity based on either a comparison to others or to the claimant’s past behavior.²⁷⁸ Testimony by one employee that he was sleeping an average of three to five hours per night and then later only two to four hours each night was sufficient for ADA coverage, in light of the fact that after leaving his employment, he received approximately six hours of sleep per night.²⁷⁹ The court noted the lack of medical or expert testimony regarding his sleeplessness but referenced the guidance that “a plaintiff’s personal testimony cannot be inadequate to raise a genuine

272. *Id.* at 627–28.

273. *Id.* at 628.

274. *Id.* at 629.

275. *See, e.g.,* *Nuzum v. Ozark Auto. Distribs., Inc.*, 432 F.3d 839, 848 (8th Cir. 2005) (“It has been held as a matter of law that inability to sleep for more than five hours per night is not a substantial limitation on the major life activity of sleeping.”).

276. *See, e.g.,* *Nadler v. Harvey*, No. 06-12692, 2007 U.S. App. LEXIS 20272, at *18–19 (11th Cir. Aug. 24, 2007) (quoting *Rossbach v. City of Miami*, 371 F.3d 1354, 1358 (11th Cir. 2004)); *Colwell v. Suffolk Cnty. Police Dep’t*, 158 F.3d 635, 644 (2d Cir. 1998).

277. *See Nuzum*, 432 F.3d at 848 (sleeping patterns of two-and-a-half hours at a time and five hours a night failed to constitute a substantial impairment for lack of demonstrated significant difference from general population).

278. *Desmond v. Mukasey*, 530 F.3d 944, 955–56 (D.C. Cir. 2008); *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1060 (9th Cir. 2005) (noting that five to six hours of sleep is enough to raise a genuine issue of material fact).

279. *Desmond*, 530 F.3d at 955–56.

issue regarding his own experience.”²⁸⁰ This lack of medical testimony may have been compensated by the employee’s comparison of himself to “the average person in the general population,” based on “a study showing that [71%] of adults get five to eight hours of sleep per night,” which was not contradicted.²⁸¹

Vision is another major life activity for which employees have been required to compare the limitations on their sight to the average person in the general population.²⁸² A court reviewing the claims of several applicants for driving positions with UPS held “that for a monocular individual to show that his impairment is a disability, the impairment must prevent or severely restrict use of his eyesight compared with how unimpaired individuals normally use their eyesight in daily life.”²⁸³ This court explained that “it does not follow that seeing as a whole is substantially limited just because the individual has a deficiency in some aspect of vision.”²⁸⁴ These applicants failed to present sufficient evidence regarding how their vision compared to the average person in the general population.²⁸⁵

Like the sleep-deprived claimant above, who relied on information about the abilities of the general population, a sanitation worker with night blindness was able to survive a motion for summary judgment based on the rarity of his condition.²⁸⁶ One of his medical experts offered evidence that his condition of congenital stationary night blindness affected only one in ten thousand, and that he required “more than 100 times as much light to see as a normally-sighted person.”²⁸⁷ He also offered “evidence that [his] night blindness prevent[ed] him from driving at night or in dim light,” which helped determine the extent of his limitation on seeing in general and in holding jobs that required driving at night.²⁸⁸ The court referred the claim to a jury, which was free to conclude that an “‘average person in the general population’ can drive at night.”²⁸⁹

More recently, the Ninth Circuit similarly held that a person whose visual impairment affected her ability to walk and drive safely after dark raised a genuine issue of material fact as to whether she was a

280. *Id.* at 956 (quoting *Haynes v. Williams*, 392 F.3d 478, 482 (D.C. Cir. 2004)).

281. *Id.* (quoting 29 C.F.R. § 1630.2(j)(1) (2010)).

282. *See, e.g.*, *EEOC v. United Parcel Serv., Inc.*, 306 F.3d 794, 802 (9th Cir. 2002).

283. *Id.*

284. *Id.* at 803.

285. *Id.*

286. *Capobianco v. City of New York*, 422 F.3d 47, 53, 58 (2d Cir. 2005).

287. *Id.* at 53.

288. *Id.* at 58.

289. *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(ii) (2010)).

person with a disability under the ADA.²⁹⁰ The court reversed the trial court's dismissal of the claim on summary judgment under the EEOC's regulations because the average person can safely drive and walk at night.²⁹¹

These cases demonstrate the different approaches by courts with regard to evidence about the abilities of the general population compared to the claimant's limitations. Some claims are dismissed without such a comparison, even on a motion for summary judgment, while other courts, including the Ninth and Second Circuits, will allow a jury to use its common sense or general information about what people typically are able to do so as to make a determination on the ADA's coverage.²⁹²

2. Overall Success Leads to Denial of Claims

A claimant may be denied ADA coverage despite significant limitations on a major life activity if the claimant is still able to be relatively successful, compared to the achievements of members of the general population.²⁹³ This is similar to a court's focus on the person's abilities rather than on the extent of their limitations, as discussed in Part III.A of this article. Courts will consider the abilities of the claimant and make a comparison to abilities that are generally found in others, rather than asking whether this person is more or less limited than others who have similar training and education.²⁹⁴

This approach makes it extremely difficult for a well-educated or well-trained person to gain ADA coverage. For example, an employee with ADHD and depression was unable to establish that these impairments substantially affected his ability to learn, compared to the general population.²⁹⁵ The fact that "he found certain subjects or educational contexts challenging or frustrating" was not enough to defeat summary judgment, where he had "graduated from high school, successfully completed the first two years of the Program, passed seven of seventeen tests [in the

290. See *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738, 740–42 (9th Cir. 2010).

291. *Id.*

292. See, e.g., *Livingston*, 388 F. App'x at 742; *Capobianco*, 422 F.3d at 58.

293. See generally *Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763, 769–70 (8th Cir. 2004); *Leisen v. City of Shelbyville*, 153 F.3d 805, 806, 808 (7th Cir. 1998) (both noting that an inability to complete advanced training does not show that a plaintiff is substantially limited in the major life activity of learning).

294. See *Ristrom*, 370 F.3d at 769–70.

295. *Id.* at 769.

Program], and held a full-time job.”²⁹⁶ The court dismissed the claim based on the lack of evidence on how the average person in the general population would perform in the highly specialized courses the claimant was taking.²⁹⁷

By comparing a claimant to anyone in the general population rather than a person with comparable training or skills, the courts are failing to make an individualized inquiry, as suggested by the Supreme Court and the EEOC.²⁹⁸ Moreover, the courts are ignoring the effects of the impairment on that particular claimant, who might need more than average abilities to continue to function both at home and at work. Such a comparison also fails to recognize the difference between that particular claimant’s abilities before and after the onset of their impairment.

3. Claimants Compared to Prior Plaintiffs Rather than “General Population”

Even though courts may recognize the notion of comparing a claimant to members of the general population, they often conduct such a comparison by measuring the abilities of an employee asserting coverage under the ADA against other plaintiffs who have come before them.²⁹⁹ This is an easy way for courts to support the dismissal of an ADA claim on summary judgment.³⁰⁰ However, comparison to a few other plaintiffs does not equate with consideration of the abilities of members of the general population. At most, the second court is relying on the first court’s comparison of the first plaintiff’s abilities to those of the general population. In addition, reliance on such comparison across types of disabilities and personal, work, and home situations flies in the face of the

296. *Id.*

297. *Id.* at 770.

298. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.); 29 C.F.R. § 1630.2(j)(3)(i) (2010).

299. *See, e.g., Simpson v. Vanderbilt Univ.*, 359 F. App’x 562, 567 (6th Cir. 2009) (citing *Squibb v. Mem’l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007); *Greathouse v. Westfall*, 212 F. App’x 379, 383 (6th Cir. 2006); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316–17 (6th Cir. 2001); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999)) (noting that where a plaintiff urged the court to consider his sleep deprivation as a disability, the court looked to the abilities of other plaintiffs in similar cases and compared their holdings).

300. Jennifer Gozdowski Brown, Comment, *Mitigating Measures and the ADA after Sutton: Can Employers Limit our Ability to Care for Ourselves in the Workplace?*, 7 J. SMALL & EMERGING BUS. L. 113, 129–30 (2003).

requirement of the Supreme Court and the suggestion of the EEOC that courts conduct an individualized assessment of a person's coverage.³⁰¹

In making a comparison to the abilities of the general population, courts hearing claims based on an inability to sleep commonly have compared the limitations of the claimant in question to past plaintiffs to find that the current claimant is not covered by the ADA.³⁰² For example, an employee who could not sleep more than five hours per night and whose sleep was not restful due to his eczema was not covered by the ADA based in part on a comparison to one other plaintiff who was not covered by the ADA despite an inability to sleep more than five hours.³⁰³

This same employee also failed to show a substantial limitation on his ability to care for himself, despite his testimony regarding his limitations in cleaning and dressing himself, when found to be less impaired than one other plaintiff with psoriasis and a second plaintiff with allergies in another unpublished case.³⁰⁴ Using the same methodology, the court compared the limitations on his ability to think due to his eczema to those of a plaintiff with a mental illness that affected memory and focus, despite the former's testimony that the impairment was so distracting that his cognitive processes were impaired.³⁰⁵

As that case illustrates, courts often make cross-case comparisons even if the impairments are completely different. Courts also do not seem concerned that the circumstances of an individual claimant may make a condition more limiting, disregarding the emphasis of the

301. See *Carroll v. Xerox Corp.*, 294 F.3d 231, 240 (1st Cir. 2002) (citing *Lebron-Torres v. Whitehall Labs.*, 251 F.3d 236, 241 (1st Cir. 2001); *Santiago Clemente v. Exec. Airlines, Inc.*, 213 F.3d 25, 32–33 (1st Cir. 2000); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997)) (comparing plaintiff's ability to proffer evidence of jobs he can perform while having a heart condition with abilities of prior plaintiffs with hearing loss, back conditions, and depression); 29 C.F.R. § 1630.2(j)(1)(ii).

302. See *infra* note 309.

303. *Verhoff v. Time Warner Cable Inc.*, 299 F. App'x. 488, 492 (6th Cir. 2008) (citing *Swanson*, 268 F.3d at 314).

304. *Id.* at 493 (citing *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998); *Cantrell v. Nashville Elec. Serv.*, No. 97-5839, 1999 WL 68571, at *3 (6th Cir. Jan. 23, 1999)).

305. *Id.* (citing *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1061 (9th Cir. 2005)); see also *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 617 (5th Cir. 2009) (comparing claimant's limitations to other plaintiffs with different impairments but who had similar limitations).

Supreme Court and the EEOC on individualized inquiry.³⁰⁶ In addition, these comparisons do not consider the claimant's previous abilities as a point of reference for determining if the impairment has limited those abilities.³⁰⁷

Instead, this comparison to other plaintiffs seems to hold more weight than a comparison to the claimant's previous abilities prior to the onset of his or her impairment.³⁰⁸ For example, an employee's testimony that "he slept fewer hours than he felt he needed" was disregarded in light of evidence that his average amount of sleep was greater than the sleep average for other plaintiffs who had been found to lack the coverage of the ADA by other courts.³⁰⁹ This comparison to other ADA plaintiffs was more influential for the court than the employee's medical testimony that his "condition 'substantially limited his sleep activity compared to the normal population,'" and the health care provider's opinion that the claimant was "suffering 'a severe sleep disorder,'" which was relegated to a footnote.³¹⁰ At the same time, this court noted that assessment "'must be made on a case-by-case basis.'"³¹¹

Learning difficulties have also been compared across plaintiffs to support a motion for summary judgment finding no ADA coverage.³¹² For example, the Eighth Circuit compared the limitations of a person with learning difficulties because of his ADHD and depression to another plaintiff who was unable to establish ADA coverage based on her emotional impairments that prevented her from passing a few highly specialized courses.³¹³ Both plaintiffs had difficulty passing examinations for their respective

306. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.); 29 C.F.R. § 1630.2(j).

307. *See Fredricksen v. United Parcel Serv., Co.*, 581 F.3d 516, 521–22 (7th Cir. 2009).

308. *See id.* at 522.

309. *Nadler v. Harvey*, No. 06-12692, 2007 U.S. App. LEXIS 20272, at *20 (11th Cir. Aug. 24, 2007); *see also Simpson v. Vanderbilt Univ.*, 359 F. App'x 562, 564, 566–67 (6th Cir. 2009) (citing *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007) (noting that unsupported assertions about amount of sleep are insufficient); *Greathouse v. Westfall*, 212 F. App'x 379, 383 (6th Cir. 2006) (dismissing the case based on only general statements from the plaintiff and his doctors about his sleep problems); *Boerst v. Gen. Mills Operations, Inc.*, 25 F. App'x 403, 407 (6th Cir. 2002)).

310. *Nadler*, 2007 U.S. App. LEXIS 20272 at *21 & n.7.

311. *Id.* at *21 n.7 (quoting 29 C.F.R. § 1630, app. (2011)).

312. *Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763, 770–71 (8th Cir. 2004) (citing *Leisen v. City of Shelbyville*, 153 F.3d 805, 806–08 (7th Cir. 1998)).

313. *Id.* (citing *Leisen*, 153 F.3d at 806–08).

professions, but their conditions and the requirements of the examinations were completely different.³¹⁴

Courts have even made more specific comparisons across plaintiffs. In deciding that Dawn Holt, an employee of a mental health clinic, was not substantially limited in performing manual tasks despite the limitations caused by her cerebral palsy, the appellate court compared her limitations in eating and caring for herself to other plaintiffs who were “restricted from doing a few specific tasks, but can otherwise perform a variety of manual activities.”³¹⁵ The court also compared her to other plaintiffs whose impairment restricted them from performing a wider range of manual tasks.³¹⁶ Despite her personal testimony that she needed help “when chopping, cutting, and slicing food” and cutting her nails, the court dismissed her claim, concluding that “a rational jury could not find [that she] is substantially limited in her ability to perform manual tasks.”³¹⁷

A comparison of the current claimant to previous ADA claims can continue back for several generations of cases. For example, the comparison across plaintiffs continued beyond Ms. Holt, described above.³¹⁸ A year after that decision, the same court compared an employee with MS to Ms. Holt.³¹⁹ The court concluded that the employee with MS was likewise not disabled, because she could perform manual tasks “given sufficient rest,” and could rely on her family members to perform some tasks, even though she had testified that she was frequently unable to perform several life activities, such as lifting and performing household chores, because of her fatigue.³²⁰

This comparison across plaintiffs also has been used to deny coverage of claimants who base ADA claims on restrictions on an ability to work. For example, a registered nurse with a back condition that limited her abilities to lift and stand could not establish a substantial limitation of her ability to work, despite her testimony that she could not perform any nursing jobs that involved patient

314. *Id.*

315. *Holt v. Grand Lake Mental Health Ctr., Inc.*, 443 F.3d 762, 763, 766 (10th Cir. 2006) (citing *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 797 (9th Cir. 2001); *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1223 (11th Cir. 2000)).

316. *Id.* at 766 (citing *Emory v. AstraZeneca Pharms. LP*, 401 F.3d 174, 181 (3d Cir. 2005)).

317. *Id.* at 767.

318. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1218 (10th Cir. 2007) (citing *Holt*, 443 F.3d at 767).

319. *Id.* at 1215, 1218.

320. *Id.* at 1218.

care.³²¹ Even though the court recognized that the ADA requires “case-specific, individualized inquiry,” it granted summary judgment for the hospital by comparing her limitations to those of other plaintiffs, both nurses and others, who had the same lifting restriction.³²² The court did not consider any difference in job duties between the claimant and these other plaintiffs. It is notable that the courts sometimes referenced the commonality of back issues among all workers whom the court assumed were “not disabled.”³²³

Like this nurse, claimants with lifting restrictions are often compared to other plaintiffs with similar restrictions. For example, one grocery store clerk who had been restricted to lift no more than “forty pounds occasionally and ten to fifteen pounds frequently” was unable to establish a significant limitation on his ability to lift.³²⁴ The court compared his abilities to plaintiffs in other ADA cases, without regard to his particular lifting needs or personal situation, and found that he could lift more than others who had not been covered by the ADA.³²⁵ The court noted that other appellate courts had been even more stringent in their lifting restrictions as a basis for coverage.³²⁶

Common limitations like back problems may not be enough to establish an ADA disability, particularly when shared by earlier unsuccessful ADA plaintiffs. For example, an employee who suffered a back injury that prevented both standing for long periods without a break and standing on one leg was compared to another employee who was unable to walk or stand for more than fifty minutes, as well as other plaintiffs who lacked an ability to stand for long periods, all of whom were not covered by the ADA.³²⁷ In

321. *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 778, 778–79 (7th Cir. 2007).

322. *Id.* at 781–82 (citing *Mays v. Principi*, 301 F.3d 866, 869–70 (7th Cir. 2002); *Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001)).

323. *Id.* (quoting *Mays*, 301 F.3d at 869).

324. *Rakity v. Dillon Cos.*, 302 F.3d 1159, 1159–60 (10th Cir. 2002).

325. *Id.* at 1160 (citing *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1240–41 (10th Cir. 2001)).

326. *Id.* (citing *Pryor v. Trane Co.*, 138 F.3d 1024, 1025 n.2 (5th Cir. 1998) (twenty pounds); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997) (twenty-five pounds); *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997) (ten pounds); *Wooten v. Farmland Foods*, 58 F.3d 382, 384, 386 (8th Cir. 1995) (ten to twenty pounds)).

327. *Williams v. Excel Foundry & Mach. Inc.*, 489 F.3d 309, 311–12 (7th Cir. 2007) (citing *Dupre v. Charter Behavioral Health Sys. of LaFayette, Inc.*, 242 F.3d 610, 614 (5th Cir. 2001); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 186 (3d Cir. 1999); *Colwell v. Suffolk Cnty. Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998), *superseded by statute*, 42 U.S.C. § 12102(3)(A) (Supp. III 2009); *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985)); *see also Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 944 (D.C. Cir. 2009) (citing *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d

denying these claims, courts may be reacting to the fears expressed by the *Toyota* Court that a broad interpretation of ADA coverage could result in a large proportion of the workforce being covered by its protections.³²⁸

Like the sleep cases discussed earlier, a comparison to other unsuccessful ADA plaintiffs with an inability to lift often influences the outcome.³²⁹ One court even suggested that even if the plaintiff presented additional evidence concerning his restrictions, it would not have affected the decision to dismiss.³³⁰ That court, like others, placed greater importance on other courts' rejection of "claims of disability based on an inability to lift similar weights."³³¹

This ad hoc method of determining whether a limitation on lifting is substantial has led to inconsistent results.³³² There are a number of simple lifting cases that assert a twenty-five pound restriction is not substantially limiting,³³³ and other courts have found that a ten- or fifteen-pound restriction was insufficient as a matter of law, despite evidence of restrictions on the claimant's daily activities.³³⁴ Yet in other cases, a twenty-pound restriction was substantial enough to raise a jury question on limited comparative evidence.³³⁵

These decisions demonstrate the courts' inconsistent requirement for comparative evidence. On one hand, the courts insist on comparative evidence in some circumstances. On the other hand, they have also have used individual, particularized evidence of a claimants ability to lift weight to rule that the claimant's disability

1110, 1116 (D.C. Cir. 2001); *Marinelli v. City of Erie*, 216 F.3d 354, 363–64 (3d Cir. 2000); *Colwell*, 158 F.3d at 644).

328. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 543 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

329. *See supra* notes 321–23 and accompanying text.

330. *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 363–64 (3d Cir. 2000).

331. *See id.*

332. Anderson, *supra* note 100, at 438–39.

333. *See, e.g.*, *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997) (comparing lifting restrictions); *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (twenty-five pound limit).

334. *See, e.g.*, *Marinelli*, 216 F.3d at 364; *Mays v. Principi*, 301 F.3d 866, 868–70 (7th Cir. 2002) (denying disability recognition to claimant with a lifting restriction of ten pounds who was instructed by her physician to not perform work at or above her shoulder level, and not lift patients); *Zarzycki v. United Tech. Corp.*, 30 F. Supp. 2d 283, 286, 289 (D. Conn. 1998).

335. *See Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 2d 434, 439 (D. Del. 1999) (observing that a normal healthy adult is able to lift more than twenty pounds).

was “not substantial enough.”³³⁶ Instead, a court should be considering the “effect of a lifting restriction on the employee” or a “true expert evaluation of deviation from the average abilities of the general population.”³³⁷

Even in claims based on such an individualized activity as the inability to interact with others, courts have compared that employee to other plaintiffs who have asserted a limitation on the same life activity. For example, one court compared an employee with bipolar disorder to another employee with obsessive-compulsive disorder who was not covered by the ADA, because they both had problems interacting with coworkers.³³⁸ Like employees who have not been covered because they can perform at least some life activities, these employees were not covered because they did not establish that they had problems with interacting with others outside of work.³³⁹

Similarly, the Fourth Circuit held that an actor was not substantially limited in her interactions with others even though the court cited a Ninth Circuit case that recognized such a disability.³⁴⁰ The court reasoned that the claimant was not substantially limited because she was not as reclusive as the covered plaintiff in the Ninth Circuit case, despite the claimant’s testimony that her impairment caused her to avoid interaction with her family, making friends, or having a social life, and “cause[d] her to have episodes,” during which her employer admitted that she “was unable to behave in a normal manner.”³⁴¹ Thus, even for such a “personal” disability as the inability to interact with others, courts have rejected an individualized approach in favor of comparing the current claimant to other plaintiffs with somewhat similar limitations.³⁴²

These comparisons to other plaintiffs are sometimes, but rarely, used to support a decision to deny a motion for summary judgment for the employer. For example, an employee who was required to refrain from prolonged walking, frequent bending or stooping with the knee, or standing for more than two hours, survived a motion for judgment as a matter of law because the court compared him to another employee who was also limited in his ability to walk or stand

336. Anderson, *supra* note 100, at 440.

337. *See id.*

338. Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1129–30 (10th Cir. 2003).

339. *Id.* at 1131 (citing Steele v. Thiokol Corp., 241 F.3d 1248, 1254–55 (10th Cir. 2001)).

340. Rohan v. Network Presentations, LLC, 375 F.3d 266, 274–75 (4th Cir. 2004) (citing McAlindin v. Cnty. of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999)).

341. *Id.* at 275.

342. *See id.* at 275–76.

and had a similar impairment rating.³⁴³ Similarly, another court denied ADA coverage after comparing an employee with an inability to sit for more than two hours without a break to another plaintiff who had been denied ADA coverage despite an inability to sit for more than thirty minutes.³⁴⁴ Thus, the success of these claimants depends largely on the other ADA plaintiffs chosen for comparison.

4. ADAA's Limited Impact on Comparison to General Population

Unfortunately, the ADAAA and the EEOC's ADAAA regulations may be insufficient to address the common practice among courts of requiring evidence of the abilities of others in the general population while disregarding the claimant's own account of their limitations, and the even more common practice of comparing claimants to other plaintiffs with somewhat similar limitations.³⁴⁵ The EEOC ADAAA regulations suggest a shift to comparing the claimant to "most people in the general population" rather than the average person.³⁴⁶ The ADAAA regulations do allow for a comparison between actual versus expected achievement for claimants with a learning disability.³⁴⁷

However, there is no guarantee that the courts will discontinue their requirement of expert testimony, even in cases involving a learning disability. In fact, using "expected achievement" as a reference point may require expert testimony. Consequently, courts may still require evidence supporting a comparison to the abilities of "most people" rather than the average person in the general population.

Courts may also continue to use the somewhat similar limitations of former plaintiffs who have been excluded from ADA coverage to justify the dismissal of new claims, despite personal or even medical testimony regarding the extent of the limitation.³⁴⁸ As with the reliance on the ability to perform other tasks and the consideration of the duration or frequency of the impairment, these comparisons by

343. *Christensen v. Titan Distribution Inc.*, 481 F.3d 1085, 1092, 1094 (8th Cir. 2007) (comparing the employee to the plaintiff in *Webner v. Titan Distrib., Inc.*, 267 F.3d 828, 834 (8th Cir. 2001)).

344. *Maclin v. SBC Ameritech*, 520 F.3d 781, 787 (7th Cir. 2008) (citing *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 784–85 (7th Cir. 2007)).

345. *See Selmi*, *supra* note 13, at 570 ("[T]he [Supreme] Court adopts EEOC interpretations when they support its decisions and ignores them when they do not.").

346. 29 C.F.R. § 1630.2(i)(1)(ii) (2010).

347. *Id.* § 1630.2(i)(1)(v).

348. *See Selmi*, *supra* note 13, at 570 (criticizing the Supreme Court for turning away from EEOC regulations defining disability).

the courts tend to take the fact-reliant interpretation of substantial limitation away from the jury.

The ADAAA also lacks any specific language regarding what evidence is needed for a jury to determine whether a person is substantially limited. This omission ignores the conflicting case law discussed below regarding a variety of reasoning among appellate courts on how to compare the effects of a plaintiff's impairment to the abilities of members of the general population, and the requirement of medical or other expert testimony to support ADA coverage.³⁴⁹

The interpretation of "substantially limited" remains murky because nothing in the ADAAA indicates how the limitations of a person claiming a disability should be compared to the abilities of others. The legislative history may provide some guidance, even though the EEOC ADAAA regulations do not. The House of Representatives Committee on Education and Labor Report states that the individual should be compared to most people, not simply to someone with the same demographics as the employee, such as gender, age, or education.³⁵⁰ This method of comparison was adopted in the EEOC ADAAA regulations.³⁵¹ Previous EEOC regulations directed a comparison of the employee to an "average person in the general population," while some courts compared the plaintiff to the "average person of similar age, education and experience."³⁵²

D. Professional Evidence of Impairment

The ADA Amendments fail to address the requirement of medical and other expert evidence imposed by many appellate courts under the ADA.³⁵³ Even though the Supreme Court has not specifically required such evidence to avoid summary judgment, some lower courts had often required something more than the individual's testimony regarding the extent of their limitations.³⁵⁴ Other courts have allowed a claimant to continue to trial based on their own testimony, particularly where their limitations were obvious and

349. *See* Moysis v. DTG Datanet, 278 F.3d 819, 824–25 (8th Cir. 2002); *see also* Pollard v. High's of Baltimore, Inc., 281 F.3d 462, 469 (4th Cir. 2002).

350. H.R. REP. NO. 110-730, at 9–10 (2008).

351. 29 C.F.R. § 1630.2(a)(ii) (2011).

352. *Weisberg v. Riverside Twp. Bd. of Educ.*, 180 F. App'x 357, 362 n.2 (3d Cir. 2006).

353. *See generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.).

354. *See* Douglas v. Victor Capital Grp., 21 F. Supp. 2d 379, 392 (S.D.N.Y. 1998).

could be easily understood by a jury.³⁵⁵ These varying approaches are discussed below.

Many ADA claims have been dismissed based on a lack of reliable professional testimony.³⁵⁶ Yet the original ADA did not address the role of expert testimony from medical professionals or vocational experts in establishing the scope of the ADA's coverage.³⁵⁷ The legislative history for the original ADA is also silent on this issue.³⁵⁸ Even the EEOC's original regulations failed to indicate whether medical evidence was required to establish the substantial nature of the disability.³⁵⁹

Despite a lack of language specific to the question of professional testimony, the legislative history of the ADA suggests that a comparison to an "'average' person is not based on a scientifically precise calculation," which likely would come from an expert witness.³⁶⁰ Instead, that history suggests that the determination of coverage should be based "on commonly understood human capabilities."³⁶¹ The House Report provides one example: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."³⁶² This history supports the position that ADA coverage can be "based on a common sense understanding" of the effects of the impairment, rather than suggesting that "Congress had an exacting standard in mind."³⁶³

In contrast to this history, the EEOC provides only limited support for requiring expert testimony to establish a substantial limitation. With respect to the limitation on the ability to work, the EEOC guidance stated,

The terms 'number and types of jobs,' . . . are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general

355. See *Cambria v. Ass'n of Flight Attendants, AFL-CIO*, No. 03-CV-5605, 2005 WL 1563343, at *10 (E.D. Pa. June 30, 2005).

356. See, e.g., *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1116–17 (D.C. Cir. 2001).

357. Smith, *supra* note 96, at 13.

358. *Id.* at 14.

359. Anderson, *supra* note 100, at 416.

360. *Id.*

361. *Id.*

362. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

363. Anderson, *supra* note 100, at 417–18.

employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment.³⁶⁴

This section suggests that even vocational expert testimony should not be required.³⁶⁵

The lack of additional guidance from either the ADA or the EEOC regulations has led to a variety of approaches among courts that are either presented with expert testimony or who seek but do not receive it. Unfortunately, neither the ADAAA nor the EEOC ADAAA regulations interpreting the amendments provide much additional guidance on this influential issue.

Even though the EEOC did not address the use of medical evidence directly in its original regulations, some experts believe that the regulations' emphasis on individualized assessment gave courts the basis for requiring expert testimony to establish the coverage of the ADA.³⁶⁶ The ADA regulations only state "that specific information is required regarding the impact of the impairment on the plaintiff, along with comparative evidence regarding how that impact compares with limitations experienced by the average person in the general population."³⁶⁷

The 1997 EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities provides stronger indication of the agency's preference for expert testimony:

Relevant evidence for EEOC investigators includes descriptions of an individual's typical level of functioning at home, at work, and in other settings, as well as evidence showing that the individual's functional limitations are linked to his/her impairment. Expert testimony about substantial limitation is not necessarily required. Credible testimony from the individual with a disability and his/her family members, friends, or coworkers may suffice.³⁶⁸

364. 29 C.F.R. pt. 1630, app. § 1630.2(j) (2010).

365. *See id.*

366. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 135 (2000); Smith, *supra* note 96, at 15.

367. Smith, *supra* note 96, at 15.

368. ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, *supra* note 182, § 4.

In contrast, in the part discussing the Title I (employment) definition of the term “disability” contained in the Commission’s ADA Compliance Manual, a publication directed at EEOC investigators, the EEOC suggests that medical documentation may be necessary as part of an investigation if the claimed disability is not “obvious” to the investigator.³⁶⁹ In those situations, the investigator should take steps to obtain medical documentation.³⁷⁰ A footnote also states that medical documentation may be necessary to determine if the impairment results in a substantial limitation of one or more major life activities.³⁷¹

The Supreme Court has not specifically addressed the issue of whether medical or other professional evidence should be required to establish ADA coverage. After the passage of the ADA, the *Albertson’s* Court stated generally that the burden to establish a substantial limitation should not be “onerous.”³⁷² Professor Anderson has interpreted this decision as allowing “ADA plaintiffs to prove a disability by offering evidence that the extent of the limitation in terms of their own experience . . . is substantial.”³⁷³ One can interpret this decision as establishing that “insisting on additional ‘scientific’ evidence of average is unnecessary in many . . . cases.”³⁷⁴

Since both the ADA regulations and the Supreme Court require an individualized case-by-case review of the impact of an alleged impairment on the individual, courts should focus on the claimant’s individual experience of her disability, particularly as it impacts her major life activities. The claimant has the most direct information about these facts.³⁷⁵ Therefore, the courts’ “focus [should] be on ‘barriers in that person’s environment,’ rather than requiring” evidence of the “medical details about the impairment.”³⁷⁶ Some courts follow this reasoning and allow a claimant to establish his or her ADA coverage using “the common sense and life experience of the fact finder, . . . based only on enough evidence to alert the jury to the individualized nature of her limitations.”³⁷⁷

369. SECTION 902: DEFINITION OF THE TERM “DISABILITY”, *supra* note 183, § 902.2(b)(2).

370. *Id.*

371. *Id.* at n.6.

372. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566–67 (1999).

373. *Id.*; *see also* Anderson, *supra* note 100, at 475.

374. Anderson, *supra* note 100, at 475.

375. Smith, *supra* note 96, at 70.

376. *Id.* at 74 (quoting Claudia Center & Andrew J. Imparato, *Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL’Y REV. 321, 324 (2003)).

377. Anderson, *supra* note 100, at 424–25.

More often, though, courts criticize and even exclude a claimant's evidence about the impact of his or her own impairment because the claimant's testimony is "self-serving" and therefore insufficient to prevent summary judgment for the employer.³⁷⁸ Yet generally accepted rules of evidence would allow an employee to testify regarding medical information that is within his or her knowledge, including one's "general condition" and symptoms, as well as the impact of that condition on daily life.³⁷⁹ Under these general rules, an employee's opinion about her own condition is admissible so long as her opinion is "rationally based" upon her own perception of the condition, rather than upon "scientific, technical, or other specialized knowledge."³⁸⁰

Despite the fact that claimants often have the most information about the extent of their impairments, some courts have excluded their testimony on this issue. For example, one trial court held that the claimant was incompetent to testify about the impact of his HIV infection on his ability to reproduce, and his claim was dismissed without medical evidence on the issue.³⁸¹ Similarly, another claimant was not allowed by a trial court to testify that she had been diagnosed with certain impairments, although she could generally "describe[] her physical condition."³⁸²

Even when the claimant is allowed to present information about the impact of his or her impairment, a good number of ADA claims have been dismissed based on a failure to present medical or other professional evidence to establish the extent of the claimant's limitation.³⁸³ Several judges have specifically stated that a claimant's "failure to include expert medical evidence" was the primary basis for granting summary judgment for the employer.³⁸⁴ These courts give medical evidence a "central and indispensable role" in deciding motions for summary judgment based on a lack of ADA coverage.³⁸⁵

Those who view the ADA as an extension of other civil rights protections have criticized this "medical model" approach.³⁸⁶ Professor Smith contrasts the medical evidence requirement for ADA plaintiffs with religious discrimination claims, which are rarely, if

378. Smith, *supra* note 96, at 30–31.

379. *Id.* at 66.

380. FED. R. EVID. 701.

381. *See Cruz Carrillo v. AMR Eagle, Inc.*, 148 F. Supp. 2d 142, 145 (D.P.R. 2001).

382. *See Holt v. Olmsted Twp. Bd. of Trs.*, 43 F. Supp. 2d 812, 819–20 (N.D. Ohio 1998).

383. *See* Smith, *supra* note 96, at 21–24.

384. *Id.* at 20.

385. *Id.*

386. *See id.* at 8, 37.

ever, dismissed on a motion for summary judgment for failing to present expert testimony regarding the sincerity of their religious beliefs, even if there is some question as to their credibility.³⁸⁷

Reliance on expert testimony focuses on the physical effects of an impairment on the claimant rather than its effects on the claimant in their work and home environment.³⁸⁸ Critics of the medical model have stated that the medical evidence requirement is based on the perspective that the employee's limitations arise only because of "a defective, or abnormal, or pathological feature," rather than the limitations presented by the workplace.³⁸⁹

A requirement of providing expert testimony in defense of a motion for summary judgment furthers the focus on the pathology of the person's impairment, which is characteristic of the medical model discussed above, rather than considering the "externally-imposed barriers that limit a person's access to all segments of society."³⁹⁰ This focus undermines the role of the ADA as a civil rights statute meant to decrease discrimination, rather than a tool to exclude people from protection based on their abilities.³⁹¹

In dismissing claims, courts often distinguish between a health care provider's finding of an "impairment" and a conclusion that the impairment is substantially limiting. For example, one court held that the report of a claimant's doctor was conclusory and was insufficient to defeat summary judgment for the employer because the person's "inability to localize sound did not substantially limit her overall ability to hear."³⁹² Combined with an unwillingness to rely on the claimant's testimony as to the extent of his or her limitations, this approach places a significant burden on claimants to obtain in-depth information about the effects of the impairment from their health care provider.³⁹³

Experts also have criticized the reliance on medical evidence to interpret substantial limitation because health care providers might not be proficient in providing the information that is most relevant to that determination.³⁹⁴ Even though health care providers can

387. *Id.* at 38.

388. *See id.* at 52–53.

389. *See id.* at 12–13.

390. *Id.* at 5.

391. *Id.* at 3.

392. *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007) (citing *Broussard v. Univ. of Cal.*, at Berkeley, 192 F.3d 1252, 1258–59 (9th Cir. 1999)).

393. *See Smith*, *supra* note 96, at 40–41.

394. *See Anderson*, *supra* note 100, at 467.

“measure average capacity versus diminished capacity,” they may not be sufficiently “able to measure how [an] impairment” does or does not satisfy the statute’s definition of disability.³⁹⁵ This inability comes from a healthcare provider’s focus on symptoms and treatment rather than a “comparison of that individual to some” average ability amongst the general population.³⁹⁶

Relying on medical evidence to interpret the scope of a substantial limitation poses difficulties of proof for claimants.³⁹⁷ Since courts determine what is “average” based on medical science, “comparative evidence must have sufficient scientific validity to be admissible . . . [and] must also assist the trier of fact in understanding a fact in issue.”³⁹⁸ This type of information may not be available “if there is no science of ‘average’ in regard to the impairment at issue.”³⁹⁹ For example, one court rejected the testimony of a physician who used a percentile formula to compare a plaintiff’s ten-pound lifting restriction to the overall population, where the court found that the physician’s report provided no basis for the percentile comparison.⁴⁰⁰

If neither the ADA nor the regulations clearly require medical evidence to establish a substantial limitation, what is the basis of this requirement? The expectation of medical evidence could arise from courts’ skepticism about the genuine extent of a claimant’s limitations.⁴⁰¹ The concern about “malingering is [demonstrated] by courts’ persistence in assigning physicians the role of screening out specious claims of disability.”⁴⁰² Consequently, a claim is often dismissed if a claimant’s description of her impairment varies from the health care provider’s description, even though this can be seen as a disputed issue of fact to be resolved by a jury.⁴⁰³

This deference to the healthcare provider’s view may be inappropriate, especially on summary judgment, because the provider may not be fully aware of the obstacles faced by the claimant, because these factors may not be relevant to their diagnosis and treatment.⁴⁰⁴ Several studies also point out that physicians may be

395. *Id.* at 467, 470.

396. *Id.* at 467.

397. *See id.* at 415, 473.

398. *Id.* at 471.

399. *Id.*

400. *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 640 (D. Colo. 2006).

401. *Smith*, *supra* note 96, at 40.

402. *Id.* at 40–41.

403. *Id.* at 41.

404. *Id.* at 57.

unable to accurately judge patients' subjective complaints, especially pain.⁴⁰⁵

In ADA cases, courts have tended to look to expert witnesses to make credibility determinations and take away the fact-finding role of the jury by interpreting evidence about issues that should be decided by the finder of fact, including whether or not the plaintiff is reliable.⁴⁰⁶ At the same time, doctors do not claim "to be able to ascertain disability or malingering or to accurately assess limitations on major life activities to any degree of accuracy."⁴⁰⁷ In addition, medical research establishes that physicians cannot reliably detect malingering.⁴⁰⁸

Dismissing claims on summary judgment based on a lack of medical evidence is undermining the role of juries in ADA claims.⁴⁰⁹ By excluding or discounting the testimony of claimants regarding the extent of their limitations, juries are not being allowed to determine the validity of those limitations.⁴¹⁰ Instead, expectations of medical evidence to defend against summary judgment motions places requirements on ADA claimants that are beyond the statutory requirements and that "misapply the core principles of summary judgment analysis."⁴¹¹

405. See John T. Chibnall et al., *Internist Judgments of Chronic Low Back Pain*, 1 PAIN MED. 231, 235–36 (2000); John T. Chibnall et al., *The Effects of Medical Evidence and Pain Intensity on Medical Student Judgments of Chronic Pain Patients*, 20 J. BEHAV. MED. 257, 266–68 (1997); Laetitia Marquié et al., *Pain Rating by Patients and Physicians: Evidence of Systematic Pain Miscalibration*, 102 PAIN 289, 289–94 (2003); Maida J. Sewitch et al., *Measuring Differences Between Patients' and Physicians' Health Perceptions: The Patient-Physician Discordance Scale*, 26 J. BEHAV. MED. 245, 254 (2003).

406. George Mendelson & Danuta Mendelson, *Malingering Pain in the Medicolegal Context*, 20 CLINICAL J. PAIN 423, 429 (2004).

407. Smith, *supra* note 96, at 4.

408. See Mark Thimineur et al., *Malingering and Symptom Magnification: A Case Report Illustrating the Limitations of Clinical Judgment*, 64 CONN. MED. 399, 400 (2000) ("There are . . . no reliable methods to identify the malingering chronic pain patient."); Kenneth D. Craig & Melanie A. Badali, *Introduction to the Special Series on Pain Deception and Malingering*, 20 CLINICAL J. PAIN 377, 378–80 (2004); David A. Fishbain et al., *Is There a Relationship Between Nonorganic Physical Findings (Waddell Signs) and Secondary Gain/Malingering?*, 20 CLINICAL J. PAIN 399, 400, 408 (2004); Mark Sullivan, *Exaggerated Pain Behavior: By What Standard?*, 20 CLINICAL J. PAIN 433, 433–34 (2004).

409. Smith, *supra* note 96, at 36.

410. *Id.* at 30, 36.

411. *Id.*

In reviewing a motion for summary judgment, a court should not weigh the evidence to determine if the claimant is substantially limited in a major life activity, but should only determine if there is a genuine issue of material fact for trial.⁴¹² Juries should make the factual determination as to whether a claimant is truly disabled or is overstating her limitations to gain ADA's protections because the probative value of both expert and non-expert testimony should be evaluated by the jury.⁴¹³

Despite the lack of requirements for expert evidence in the ADA, courts often have required expert evidence that clearly outlines "what is 'average' and how the [claimant] deviates from that standard."⁴¹⁴ Comparative evidence is required even more often "where the disability is not plain 'on its face.'"⁴¹⁵ Thus, some courts are willing to allow fact finders to determine ADA coverage without expert testimony if the effects of the impairment are obvious, such as "a person confined to a wheelchair [being] substantially limited in the major life activity of walking."⁴¹⁶ Although courts do sometimes recognize that some impairments are obviously limiting, many courts will still fail to credit evidence from non-experts, including the claimants themselves, that would be sufficient for the fact finder to judge whether the impairment presents a substantial limitation.⁴¹⁷

Some courts place so much value on medical or other expert evidence that a verdict will be given greater deference if the jury agrees with that evidence. For example, a jury verdict in favor of an employee with depression, anxiety, and obsessive-compulsive disorder was upheld on appeal based on medical evidence establishing the extent of the employee's impairment.⁴¹⁸ The employer challenged the verdict based on the physician's credibility, but the court concluded that the credibility of the physician's "testimony was a question of fact [that should be] resolved by the jury."⁴¹⁹

Medical evidence can also help a claimant survive a motion for summary judgment. For example, a utility company employee who was unable to sit for more than three hours per day survived a motion

412. *Id.* at 35 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

413. *Id.* at 4.

414. *Anderson*, *supra* note 100, at 424.

415. *Id.* at 430 (quoting *Lusk v. Ryder Integrated Logistics*, 238 F.3d 1237, 1241 (10th Cir. 2001)).

416. *Witt v. Nw. Aluminum Co.*, 177 F. Supp. 2d 1127, 1131 (D. Or. 2001).

417. *See id.* at 430-31.

418. *Battle v. United Parcel Serv. Inc.*, 438 F.3d 856, 862 (8th Cir. 2006).

419. *Id.* (citing *KammueLLer v. Loomis, Fargo & Co.*, 383 F.3d 779, 788 (8th Cir. 2004)).

for summary judgment because in granting the motion, the lower court had mischaracterized the medical evidence submitted, particularly where that testimony was consistent with the employee's own testimony "that sitting during the training was difficult and that others noticed his discomfort."⁴²⁰ The court concluded that the employee's "ability to sit [was] significantly more restricted than the average person."⁴²¹

Without medical evidence in his or her favor, a claimant may be able to rely on his or her own testimony if the impairment and the limitations caused by it are obvious. For some courts, a claimant's testimony "*may* be sufficient to support a finding against the defendant assuming that the witness can present admissible testimony on each element of the claim."⁴²² For example, the lack of a thumb and a finger on the right hand of an employee was sufficient to defeat a motion for summary judgment under the *Toyota* standard for establishing a significant limitation in caring for oneself.⁴²³ The court relied on the claimant's testimony that it took him twice as long to perform tasks like shaving or preparing a meal, but he also submitted a supportive letter from his doctor that confirmed these difficulties.⁴²⁴ It is important to note that the employer did not produce contradictory medical evidence, but only attacked this employee's credibility.⁴²⁵

In contrast to "less obvious" impairments, like lifting restrictions or limitations on working, some conditions have been seen as "sufficiently 'obvious' and therefore [did] not requir[e] expert testimony," at least to survive a summary judgment motion.⁴²⁶ Those conditions have "include[d] arm and neck pain,⁴²⁷ back and abdominal pain,⁴²⁸ and hearing loss⁴²⁹."⁴³⁰ Thus, claimants with

420. *Jenkins v. Cleco Power LLC*, 487 F.3d 309, 315 (5th Cir. 2007).

421. *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(ii) (2010)).

422. *Smith*, *supra* note 96, at 32–33.

423. *Fenney v. Dakota Minn. & E. R.R.*, 327 F.3d 707, 713–16 (8th Cir. 2003) (citing *Toyota Motor Mfg., Ky., Inc. v. Williams*, 543 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42, 47 U.S.C.)).

424. *Id.* at 715–16.

425. *Id.* at 716.

426. *Smith*, *supra* note 96, at 60.

427. *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 361 (3d Cir. 2000).

428. *Dicino v. Aetna U.S. Healthcare*, No. 01-3206(JBS), 2003 U.S. Dist. LEXIS 26487, at *1, *21 (D.N.J. June 23, 2003).

429. *Gourley v. Home Depot*, No. 99-5728, 2001 U.S. Dist. LEXIS 9089, at *3 & n.6 (E.D. Pa. June 29, 2001).

physically obvious impairments may be more likely to survive a motion for summary judgment.

Even some lifting-restricted claimants have not required medical evidence where the limitations were based on an obvious physical condition. For example, an applicant for an EMT position who could not perform the two-hand lift because of her lack of a hand and lower arm on one side was able to establish ADA coverage.⁴³¹ Even without any medical testimony, the court recognized that “a one-handed individual must develop an array of techniques to overcome her innate limitation.”⁴³² Similarly, the Tenth Circuit accepted, with little question, a fifteen-pound weight restriction while noting that the restriction was the result of the plaintiff’s multiple sclerosis.⁴³³ The trial court relied merely on the fact that she had multiple sclerosis, a long-term, incurable disease, and as a result, was unable to lift more than fifteen pounds.⁴³⁴

At the other extreme from these claims involving “obvious” limitations, other courts will grant summary judgment for an employer in the absence of medical evidence. If a court requires medical evidence to support ADA coverage, that court may also require “that any medical evidence be limited to a physician’s ‘independent’ assessment of the nature of the impairment and the extent of any limitations.”⁴³⁵ Under such a requirement, medical testimony is rejected as a basis for ADA coverage if it is based on statements of the claimant, even if those statements were a part of the person’s treatment, because the medical evidence is treated as lacking objectivity.⁴³⁶

Decisions in ADA cases provide numerous examples of the importance attached to medical and other expert testimony.⁴³⁷ Claimants who lack any professional description of their limitations often fail at the summary judgment stage.⁴³⁸ The First Circuit established early in the life of the ADA that medical evidence was required to demonstrate that the claimant was substantially limited in

430. Smith, *supra* note 96, at 60.

431. Gillen v. Fallon Ambulance Serv. Inc., 283 F.3d 11, 18 (1st Cir. 2002).

432. *Id.* at 23.

433. Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir. 1996).

434. *Id.*

435. Smith, *supra* note 96, at 54.

436. *Id.* at 54–55.

437. See, e.g., Fredricksen v. United Parcel Serv. Co., 581 F.3d 516 (7th Cir. 2009); McPhaul v. Madison Cnty. Bd. of Comm'rs, 226 F.3d 558 (7th Cir. 2000); Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996).

438. See Smith, *supra* note 96, at 54–55.

a major life activity, although medical evidence was not required to establish the existence of the impairment itself.⁴³⁹ In a claim of an employee with a heart condition that affected his breathing and walking, the court explained that “there is . . . no general rule that medical testimony is always necessary to establish disability,” including “long-term impairments [that] would be obvious to a lay jury.”⁴⁴⁰ The court allowed that some claimants could provide “a description of treatments and symptoms over a substantial period” providing a basis for ADA coverage.⁴⁴¹ This decision was one of the first to directly require the presentation of medical evidence to establish ADA coverage, depending on the nature and the “obviousness” or long term impact of the impairment, and “whether the limitations from [the] impairment would be understood by a lay jury without the assistance of expert testimony.”⁴⁴²

The effects of this emphasis on the need for medical evidence are seen in the more recent Seventh Circuit claim of a woman diagnosed with fibromyalgia, for which she sought a reasonable accommodation.⁴⁴³ Her claim was dismissed on summary judgment despite her evidence that her “symptoms included fatigue, insomnia, shortness of breath and muscle pain, including sore hands and joints” and “that her condition made it difficult for her to concentrate, bathe, walk, write and work.”⁴⁴⁴ The court noted the absence of medical evidence, and stated that her “self-serving testimony” could not support a finding that she was “a qualified individual with a disability.”⁴⁴⁵

In 2009, the Seventh Circuit also dismissed the ADA claim of an employee with leukemia who was unable to establish a substantial limitation on his ability to walk despite his own testimony that he was unable “to walk for ‘the same period of time or in the same way’ as a ‘normal individual’ because of muscle and joint fatigue.”⁴⁴⁶ Without any medical testimony to support his position, the court compared his walking abilities to other employees who had been included or

439. *See Katz*, 87 F.3d at 31.

440. *Id.* at 32.

441. *Id.*

442. Smith, *supra* note 96, at 25–26.

443. *McPhaul v. Madison Cnty. Bd. of Comm’rs*, 226 F.3d 558, 562 (7th Cir. 2000).

444. *Id.* at 562.

445. *Id.* at 564.

446. *Fredricksen v. United Parcel Serv. Co.*, 581 F.3d 516, 521 (7th Cir. 2009) (quoting the plaintiff).

excluded under the ADA by other courts.⁴⁴⁷ Despite his own testimony that he “occasionally [became] winded when walking up stairs [and grew] tired while grocery shopping,” the court concluded that he failed to “demonstrate that his ability to walk diverged significantly from that of the general population.”⁴⁴⁸ These cases demonstrate that where the limitation is less than obvious, at least some courts will not provide ADA coverage based only on the claimant’s description of his or her own limitations.

1. Expert Testimony for Less Obvious Impairments

Some courts take a somewhat more lenient approach, requiring medical testimony only to support the coverage of employees with less obvious impairments.⁴⁴⁹ Under this approach, conditions still requiring expert testimony have included a heart condition,⁴⁵⁰ deep vein thrombosis,⁴⁵¹ fibromyalgia,⁴⁵² a learning disorder⁴⁵³ or cognitive impairment,⁴⁵⁴ sleep disorders,⁴⁵⁵ as well as anxiety disorders and agoraphobia.⁴⁵⁶ For example, the Eighth Circuit granted summary judgment against an employee who could not perform tasks with his right arm, in part because he did not provide medical testimony.⁴⁵⁷

Comparative evidence will often be required “[w]here the disability is less [than] obvious” because without it, claimants cannot establish that their abilities are less than “some ‘average’ norm.”⁴⁵⁸ In particular, in claims based on an inability to lift, courts have often required such comparative evidence and where there is none, “often

447. *Id.* at 522.

448. *Id.* at 522–23.

449. Smith, *supra* note 96, at 58.

450. See Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996).

451. Lakota v. Sonoco Prods. Co., No. 00-30219-FHF, 2002 U.S. Dist. LEXIS 6422, at *10–11 (D. Mass. Apr. 4, 2002).

452. Brandon v. Klingensmith Healthcare, Inc., No. 03-1963, 2005 U.S. Dist. LEXIS 32577, at *12–15 (W.D. Pa. Dec. 13, 2005).

453. Dorn v. Potter, 191 F. Supp. 2d 612, 623 (W.D. Pa. 2002).

454. Kurten v. Hanger Prosthetic & Orthotics, Inc., 402 F. Supp. 2d 572, 581 n.7 (W.D. Pa. 2005).

455. Peter v. Lincoln Technical Inst., 255 F. Supp. 2d 417, 429 (E.D. Pa. 2002).

456. Ashton v. AT&T Corp., No. 03-CV-3158 (DMC), 2005 U.S. Dist. LEXIS 21419, at *9–10 (D.N.J. Sept. 21, 2005), *aff’d*, 225 F. App’x 61 (3d Cir. 2007).

457. Didier v. Schwan Food Co., 465 F.3d 838, 841–42 (8th Cir. 2006) (distinguishing Fenney v. Dakota, Minn. & E. R.R., 327 F.3d 707, 716 (8th Cir. 2003) and citing Bass v. SBC Commc’ns, Inc., 418 F.3d 870, 873–74 (8th Cir. 2005) (noting that plaintiff’s opinions that he could have returned to work were insufficient evidence to survive summary judgment)).

458. Anderson, *supra* note 100, at 431.

2011] Underwhelming Impact of the ADAA 481

find lifting restrictions not substantially limiting as a matter of law.”⁴⁵⁹

For example, the Sixth Circuit refused to find that a person with a lifting restriction was disabled, even with medical evidence that the claimant could lift no more than five to ten pounds in the work setting.⁴⁶⁰ Because the doctor’s report only discussed the limitation with respect to work-related activities, the claimant failed to present any evidence showing that her inability to lift more than ten pounds substantially affected her daily life outside of work.⁴⁶¹ It seems contradictory that, in its decision, the court had earlier “acknowledged that specific comparative evidence [generally] was not required and that common sense and life experience are a sufficient basis for the fact finder to draw a conclusion” but that this common sense approach did not extend to lifting restrictions.⁴⁶²

Concerns about the review of lifting restrictions have included a lack of a consistent doctrine as to when the claimant can rely on his or her own testimony regarding the limitations and when expert comparative evidence is required.⁴⁶³ Overall, some courts “dismiss the claim simply because the claimant failed to present evidence of average ability.”⁴⁶⁴ In contrast, more lenient courts are willing to assume the importance of the activities the claimant is limited to, even without “comparative evidence . . . to [support] that assumption.”⁴⁶⁵ In most circumstances, however, expert comparative evidence will be needed to prevent a court from assuming that a person’s ability to lift is not important, even though what is average for lifting could be seen as “a matter of common sense and life experience” that a jury could apply.⁴⁶⁶

Like the ability-to-lift analysis, the treatment of other less obvious limitations has placed significant emphasis on expert medical testimony to support ADA coverage.⁴⁶⁷ The D.C. Circuit Court failed

459. *Id.* at 434.

460. *Id.* at 449 (citing *Gerton v. Verizon S., Inc.*, 145 F. App’x 159, 165–66 (6th Cir. 2005)).

461. *Id.* (citing *Gerton*, 145 F. App’x at 166).

462. *Id.* (citing *Gerton*, 145 F. App’x at 165–66).

463. *See* Anderson, *supra* note 100, at 412.

464. *Id.* at 426.

465. *Id.*

466. *Id.* at 426–27.

467. *See, e.g.*, *Stein v. Ashcroft*, 284 F.3d 721, 726 (7th Cir. 2002) (affirming the district court’s grant of summary judgment, in part because plaintiff failed to present medical records, evaluations, or opinions to support plaintiff’s allegations); *Contreras v. Suncast Corp.*, 237 F.3d 756, 764 (7th Cir. 2001) (affirming summary judgment

to recognize an employee's disability based on a severe skin irritation from the work environment, in the absence of specific medical evidence "regarding the extent to which [his skin irritation] impacted his ability to sleep."⁴⁶⁸ The claim was dismissed on summary judgment based on the employee's failure to submit expert medical testimony, even while referencing the Supreme Court's guidance that a jury, not the judge, should make credibility determinations, weigh the evidence, and draw inferences from the facts.⁴⁶⁹

Even for less than obvious limitations, a limited amount of medical evidence may be sufficient in some courts to establish a substantial limitation. For example, an employee with MS was able to survive a motion for summary judgment in the Third Circuit based in part on testimony from her doctor that her abilities to concentrate and remember were the result of her MS and that there was no cure for MS.⁴⁷⁰ It is interesting that neither this medical expert nor the personal testimony establishing her fatigue compared her ability to concentrate and remember to her abilities prior to the illness or to others in the general population.⁴⁷¹

Like this MS claimant, an employee with asthma was able to survive a motion for summary judgment in the Tenth Circuit based on a combination of her testimony and information from her health-care providers.⁴⁷² Together, this evidence established that her asthma prevented her from engaging in a variety of activities (such as exposure to cold air and cleaning agents), that the effects could not be completely controlled by medication, and that she "is symptomatic most of the time."⁴⁷³ The court also compared her ability to breathe to the general population and found that her "reactions to common substances, the limitations on her activities, her multiple hospitalizations, and her frequent trips to the emergency room all" supported her allegations that she was substantially limited in her ability to breathe.⁴⁷⁴

because plaintiff failed to substantiate his claim of sexual difficulties with any documentation or testimony beyond a general assertion).

468. *Haynes v. Williams*, 392 F.3d 478, 482 (D.C. Cir. 2004) (quoting the district court below, 279 F. Supp. 2d 1, 10 (D.D.C. 2003)).

469. *Id.* at 482 (citing *Anderson v. Liberty Looby, Inc.*, 477 U.S. 242, 255 (1986)).

470. *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 569–70 (3d Cir. 2002).

471. *See id.* (lacking any discussion or comparison of plaintiff to the average person in the general population).

472. *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1251 (10th Cir. 2004).

473. *Id.* at 1250–51.

474. *Id.* at 1251; *see also Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1103, 1106–07 (6th Cir. 2008) (showing that an employee with degenerative osteoarthritis of her cervical and lumbar spine, who was unable to stand for long

In contrast to some of the claims discussed above, some appellate courts will allow a claim to proceed to trial based on the evidence from the claimant alone, even if the limitations are not overtly obvious.⁴⁷⁵ These courts are more willing to allow a jury to make the final determination on the ADA's coverage, as long as the claimant sufficiently explains the extent of his or her limitations.⁴⁷⁶ For example, a truck driver with a heart condition was able to survive a motion for summary judgment challenging his ADA coverage in the Ninth Circuit, based on his testimony that his impairment caused him to become "light-headed, ha[ve] difficulty concentrating and breathing, ha[ve] chest pain when undertaking activities in extreme heat for extended periods of time, and ha[ve] similar symptoms when lifting weight over 50 pounds."⁴⁷⁷

The trial court had based its dismissal of the truck driver's claim on the lack of a comparison to the average person in the general population, but the appellate court held that the employee's testimony alone was enough to create genuine issues of material fact regarding his ADA coverage.⁴⁷⁸ Even so, the court referenced the deposition testimony of the employee's cardiologist regarding his limitations, in combination with the employee's own description of his limitations in breathing, in denying summary judgment.⁴⁷⁹

Another Ninth Circuit decision relied upon in the truck driver's case provides a more thorough explanation of that court's

periods, survived a motion for summary judgment based on her testimony regarding the extent of her inability to stand, testimony of coworkers regarding her pain while standing at work, and doctors' letters and evaluations).

475. *See, e.g., Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1170 (9th Cir. 2008) ("[Plaintiff's] testimony alone regarding the significance of his impairment is sufficient to create a genuine issue of material fact at the summary judgment stage."); *Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1058 (9th Cir. 2005) (noting that a plaintiff's testimony may be sufficient to establish a genuine issue of material fact at the summary judgment stage).

476. *See, e.g., Head*, 413 F.3d at 1059 ("[A]n affidavit supporting the existence of a disability must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment."); *Fraser v. Goodale*, 342 F.3d 1032, 1042 (9th Cir. 2003) (stating that plaintiff presented sufficient evidence to demonstrate the extent of her limitation).

477. *Gribben*, 528 F.3d at 1168, 1171.

478. *Id.* at 1170 (citing *Head*, 413 F.3d at 1058).

479. It is notable that summary judgment was not granted even though no comparison was made to the breathing capacities of the average person in the general population or other ADA plaintiffs. *Id.* at 1171; *see also Fraser*, 342 F.3d at 1042 (finding that diabetic employee survives motion for summary judgment based on her testimony and information from her doctor regarding the risks of her condition).

reasoning.⁴⁸⁰ The trial court had granted partial summary judgment for the employer because the claimant failed to present medical evidence in support of his claim that he was disabled due to depression and bipolar disorder.⁴⁸¹ The claimant had submitted a detailed affidavit describing the impact of these conditions on his ability to sleep, interact with others, read, and think.⁴⁸² The appellate court explained its reversal:

Ninth Circuit precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity at the summary judgment stage. Rather, our precedent supports the principle that a plaintiff's testimony may suffice to establish a genuine issue of material fact.⁴⁸³

The appeals court did still note that any supporting affidavits “must not be merely self-serving and must contain sufficient detail to convey the existence of an impairment.”⁴⁸⁴ Even so, the court's denial of summary judgment was based on the employee's own declaration outlining the extent of his limitations in his interactions with others.⁴⁸⁵

These cases demonstrate the wide variety of evidentiary requirements applied to claims of ADA coverage where the limitation is less than obvious. Some courts require expert testimony to support coverage, while others will at least refuse a motion for summary judgment if the claimant can establish the extent of the limitation through his or her own testimony.

2. Expert Testimony on Ability to Work

Like the courts that require medical evidence to support claims based on other less obvious limitations on other major life activities, courts typically have looked for specific expert evidence regarding the extent of a claimant's limitations on working.⁴⁸⁶ Inability to work

480. *Head*, 413 F.3d at 1058.

481. *Id.* at 1057.

482. *Id.* at 1060–62.

483. *Id.* at 1058.

484. *Id.* at 1059; *see also* *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1235–36 (9th Cir. 1999) (noting that the employee's “alleged ‘fear reaction’ and ‘communicative paralysis’ are sufficiently severe to raise a genuine issue of material fact about his ability to interact with others”), *amended on denial of reh'g*, 201 F.3d 1211 (9th Cir. 2000).

485. *Head*, 431 F.3d at 1060–61.

486. *See* *Smith*, *supra* note 96, at 19–30.

2011] Underwhelming Impact of the ADA 485

just one job typically is not enough to establish ADA coverage.⁴⁸⁷ Although not required under the ADA, courts often have adopted the EEOC's regulatory requirement that a person be prevented from performing a broad class of jobs or a wide range of jobs to be substantially limited in their ability to work.⁴⁸⁸

In this direction, to establish an inability to perform more than just one job, the EEOC regulations do not require expert testimony to show an inability to perform a broad class or wide range of jobs.⁴⁸⁹ Yet courts often require such evidence, even in response to a motion for summary judgment. For example, an alcoholic was not disabled as a matter of law despite limitations on his ability to work, where he failed to produce "evidence concerning the accessible geographic area, the numbers and types of jobs in the area foreclosed due to the impairment, and the types of training, skills, and abilities required by the jobs."⁴⁹⁰

Either in response to a motion for summary judgment or to support a jury verdict, a claimant typically must offer specific evidence about relevant labor markets to show a substantial limitation of their ability to work.⁴⁹¹ This requirement is illustrated by the District of Columbia's Circuit Court's decision in a claim by an employee suffering from degenerative disc disease that limited his ability to lift and to work.⁴⁹² The original appellate opinion included a strong dissent by Justice Edwards that the majority required too much evidence from the claimant on a motion for summary judgment.⁴⁹³ This position was later adopted by the court.⁴⁹⁴

487. 29 C.F.R. § 1630.2(j)(3)(i) (2010); *see Colwell v. Suffolk Cnty. Police Dep't*, 158 F.3d 635, 643–44 (2d Cir. 1998) (explaining that an inability to perform a narrow range of jobs was not enough), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3353, *as recognized in Ragusa v. Malverne Union Free Sch. Dist.*, 381 F. App'x 85, 88 n.2 (2d Cir. 2010); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir. 1997) (explaining that the claimant could perform other work at the plant).

488. 29 C.F.R. § 1630.2(j)(3)(i); *see Colwell*, 158 F.3d at 643–44; *Foreman*, 117 F.3d at 806.

489. *See* 29 C.F.R. § 1630.2(j)(3).

490. *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002) (citing 29 C.F.R. § 1630.2(j)(3)(ii)(A)–(C)); *Duncan v. Wash. Metro Area Transit Auth.*, 240 F.3d 1110, 1115–16 (D.C. Cir. 2001) (en banc).

491. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 795–96 (9th Cir. 2001), *clarified*, 292 F.3d 1045 (9th Cir. 2002).

492. *Duncan*, 240 F.3d at 1114–16.

493. *Duncan v. Wash. Metro. Area Transit Auth.*, 201 F.3d 482, 489 (D.C. Cir. 2000) (Edwards, C.J., dissenting), *on reh'g* 240 F.3d 1110 (D.C. Cir. 2001).

494. *Duncan*, 240 F.3d at 1115–16.

In this same case, the court later reversed a jury verdict in the claimant's favor, based on a lack of evidence establishing a substantial limitation on the ability to work, such as the number and type of jobs from which he was excluded.⁴⁹⁵ Even though the court recognized that a claimant "need not necessarily produce expert vocational testimony," it apparently reversed based on a lack of such evidence, and noted that "such evidence might be very persuasive."⁴⁹⁶ Justice Edwards again dissented because the claimant had presented some evidence of his personal characteristics and the job market from which a jury could conclude that he was covered by the ADA.⁴⁹⁷

The ramifications for an employee who fails to present what the court finds to be sufficient professional evidence in support of his or her impairment can be severe.⁴⁹⁸ In another District of Columbia case, a police officer who could not engage in activities that could result in trauma because he was taking a blood-thinning medication was successful in front a jury,⁴⁹⁹ only to have the court of appeals reverse and enter judgment for the employer.⁵⁰⁰ The court based its reversal on the lack of evidence from the vocational expert regarding the number of jobs he could not perform because they posed a risk of trauma, even though he did provide evidence that the employee was precluded from all but 28.6% of the jobs for which he was eligible without his impairment, assuming that he could only perform duties "that resembled the desk duties he [was performing] while [placed] on limited duty."⁵⁰¹

Even with medical evidence describing one's limitations, claims based on work limitations have failed for the lack of expert testimony on relevant labor markets and the claimant's level of training, knowledge, skills, or abilities.⁵⁰² In one claim, a medical expert's testimony that the claimant could not perform "a substantial number of jobs," or even a medical opinion that the claimant could not work

495. *Id.*

496. *Id.* at 1117.

497. *Id.* at 1124–25 (Edwards, C.J., dissenting).

498. *See, e.g., infra* text accompanying notes 503–09.

499. *Gasser v. District of Columbia*, 442 F.3d 758, 761–62 (D.C. Cir. 2006).

500. *Id.* at 766.

501. *Id.* at 761–62, 764–65.

502. *E.g., Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1009 (9th Cir. 2007); *Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006); *Bristol v. Bd. of Cnty. Comm'rs*, 281 F.3d 1148, 1162 (10th Cir. 2002) (citing *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994)), *vacated in part on rehearing en banc*, 312 F.3d 1213 (10th Cir. 2002).

2011]

Underwhelming Impact of the ADAA

487

at all, has been insufficient.⁵⁰³ Courts have also rejected “conclusory” testimony from a doctor that the claimant was “significantly restricted” in their ability to work “compared to the average person in the working community” and the doctor’s opinion that “the condition, manner or duration under which she can work are significantly restricted.”⁵⁰⁴

Even where a claimant presents expert testimony regarding his or her inability to work, courts sometimes engage in a determination of the value of the expert evidence to support a decision to deny ADA coverage on a motion for summary judgment.⁵⁰⁵ Such “fact finding” by the courts is comparable to the discounting of some medical expert testimony discussed above.⁵⁰⁶ For example, the Sixth Circuit held that a truck driver was not substantially limited in his ability to work where he could drive trucks if they were equipped with cruise control, and the record established “that a high percentage of [his employer’s] trucks and . . . trucks in general included cruise control as standard equipment.”⁵⁰⁷

Even though the truck driver’s employer could not guarantee that he would only be required to drive trucks with cruise control, the court wanted to know “how many trucking jobs would require [the claimant] to drive trucks without cruise control.”⁵⁰⁸ The employee’s vocational expert opined that with his limitations, he would be prevented from working “in approximately 75% of the type of jobs for which he [did] not have skills, but could have performed prior to [his knee injury].”⁵⁰⁹ This expert opinion was insufficient to defeat the employer’s motion for summary judgment because the expert “did not provide any evidence regarding the number of trucking jobs from which [the employee was] disqualified,” because of the need to drive without cruise control, “or the number of other jobs from which he [was] disqualified.”⁵¹⁰

The cases discussed above demonstrate how a claimant’s remaining abilities can defeat ADA coverage.⁵¹¹ Similarly, even expert

503. *Bristol*, 281 F.3d at 1162; *see also* *Zwygart v. Bd. of Cnty. Comm’rs*, 483 F.3d 1086, 1092 (10th Cir. 2007) (finding doctor’s opinion that claimant could not work was insufficient without vocational expert).

504. *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 73–74 (1st Cir. 2002).

505. *See supra* text accompanying notes 486–504.

506. *See supra* text accompanying notes 392, 461.

507. *Black v. Roadway Express, Inc.*, 297 F.3d 445, 452–54 (6th Cir. 2002).

508. *Id.* at 453.

509. *Id.* at 454.

510. *Id.* at 454–55.

511. *See supra* Part IV.A.

testimony regarding an inability to work a class or range of jobs may not prevent a court from focusing on the claimant's remaining abilities related to working.⁵¹² A Federal Express employee, for example, was unable to establish a substantial limitation on his ability to lift or to work, despite testimony from a vocational expert that he was unable to perform 57% of the jobs for which he was qualified absent his impairment.⁵¹³ Instead of sending the claim to a jury, the Fourth Circuit dismissed it based on the employee's continued ability to "perform a range of daily activities requiring endurance, flexibility and some strength," and his continued qualification "for over 1,400 different types of jobs and over 130,000 actual jobs" in his geographic area.⁵¹⁴ Making its own interpretation of that evidence, the court concluded that "a reasonable juror could not find that his impairment substantially limits his ability to work, or for that reason renders him disabled for purposes of the ADA."⁵¹⁵

Other employees who have presented what the courts see as powerful expert testimony regarding their restrictions on working have been more successful.⁵¹⁶ One employee who was denied a position as a shift supervisor successfully survived a motion for summary judgment in the Eighth Circuit using expert testimony showing an exclusion from at least 70% of the jobs listed in the Dictionary of Occupational Titles.⁵¹⁷ Similarly, a court upheld a jury verdict in favor of an employee who offered expert testimony that her "'potential occupational base' was substantially reduced by her impairments."⁵¹⁸ The Tenth Circuit, reviewing that verdict, noted that the expert's testimony "was detailed and was supported by his description of the workplace ramifications of [her] condition."⁵¹⁹ These cases establish that fairly detailed, well-supported expert testimony has been required to establish a limitation from a "less than obvious" condition or in the ability to work.

3. Limited Effect of ADAAA on Reliance on Expert Evidence

The ADAAA and the EEOC ADAAA regulations do little to resolve these drastically different approaches to the necessity of

512. See *supra* text accompanying note 510.

513. Taylor v. Fed. Express Corp., 429 F.3d 461, 463–64 (4th Cir. 2005).

514. *Id.* at 464.

515. *Id.* at 465.

516. See *supra* text accompanying note 479.

517. See Chalfant v. Titan Distrib., Inc., 475 F.3d 982, 989 (8th Cir. 2007).

518. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1251 (10th Cir. 2005) (quoting the claimant's expert witness).

519. *Id.*

medical or vocational expert evidence. The regulations do state that the comparison of the person's abilities to the general population "usually will not require scientific, medical or statistical evidence."⁵²⁰ Yet the final regulations also make it explicit that the presentation of such evidence is not prohibited "where appropriate."⁵²¹ In discussing mitigating measures, the Appendix to the regulations provides some guidance to the courts that expert evidence should not be required when it states that the definition of disability "should not demand extensive analysis," and notes that "covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence."⁵²²

With respect to a substantial limitation on the ability to work, the ADAAA regulations retain the requirement that a person show a limitation on performing a class of jobs or broad range of jobs. In its explanation for retaining this standard, the EEOC states that a determination of coverage "should not require extensive and elaborate assessment."⁵²³ The terms "class of jobs" and "broad range of jobs" are to be "applied in a more straightforward and simple manner than they were applied by the courts" prior to the ADAAA.⁵²⁴

Despite this general indication of the EEOC's approach, neither the ADAAA nor the regulations explain when, if ever, expert medical or vocational testimony should be required on a motion for summary judgment. In some courts, including the Ninth Circuit, a claimant may survive a motion for summary judgment based on his or her testimony alone.⁵²⁵

In other courts, claimants may still be required to present expert medical or vocational testimony even in response to a motion for summary judgment.⁵²⁶ This requirement arises in some courts only with less obvious types of impairments, such as the inability to lift or work.⁵²⁷

The ADAAA regulations may even contribute to the tendency of courts to require expert testimony. In discussing mitigating measures, for example, the regulations state that a person could show

520. 29 C.F.R. § 1630.2(i)(1)(v) (2010).

521. *Id.*

522. 29 C.F.R. pt. 1630 app.

523. *Id.*

524. *Id.*

525. *See supra* text accompanying notes 102–103, 280, 475–77.

526. *See supra* Part IV.D.

527. *See supra* Part IV.D.1.

substantial limitation with the effects of a mitigating measure with “evidence concerning the expected courts of a particular disorder absent mitigating measures.”⁵²⁸ Such evidence would need to come from a medical expert.

Without further clarification, requirements for expert testimony will continue to place a significant burden on ADA claimants seeking a trial on the substance of their discrimination claim. Moreover, the reliance on expert testimony, or the lack thereof, in granting employers motions for summary judgment will continue to undermine the role of the jury in making factual determinations associated with determining whether an impairment is substantially limiting.

V. CONCLUSIONS

This failure of the ADAAA to resolve these issues may result in a continuation of dismissing claims on motions for summary judgment. In fact, courts that have interpreted the ADA narrowly under these controversial issues may feel emboldened by the fact that Congress failed to reverse their interpretations of the original ADA in the ADAAA.⁵²⁹ In addition, without Supreme Court intervention, plaintiffs will see a variety of outcomes regarding ADA coverage depending on which district or circuit court hears their claim, since the courts vary considerably in their interpretations of what it means to be “substantially limited” in a major life activity. In each of these areas, courts may remain free to resolve these fact-intensive issues rather than allowing a jury to determine whether the claimant is covered by the ADA’s protections.

These decisions that interpret the meaning of “substantially limits” illustrate how the original ADA failed to live up to the hopes of persons with disabilities and their advocates. Some circuits in particular are often willing to make factual determinations about the extent of the effects of an employee’s impairment.⁵³⁰ If excluded from ADA coverage based on these determinations, these employees have no protection against discrimination based on their disability and no right to reasonable accommodations.

After years of criticism of the Supreme Court for limiting the ADA’s coverage, Congress responded with the ADAAA and directed the EEOC to broaden coverage through its regulations.⁵³¹ Some

528. 29 C.F.R. pt. 1630 Summary app.

529. Cox, *supra* note 2, at 208 & n.100.

530. See *supra* text accompanying notes 104, 133, 171-172.

531. See *supra* text accompanying notes 2, 71.

barriers to ADA created by the Supreme Court, such as the effect of mitigating measures and the requirements to establish a “regarded as” claim, have been directly addressed by the ADAAA’s language.⁵³² Yet other ambiguities regarding the application of the “substantially limits” requirement, described above, have not been addressed by either the ADAAA’s language or the EEOC ADAAA regulations.⁵³³ This may prove to be an influential gap in the ADAAA’s protection, since these ambiguities have resulted in the exclusion of numerous ADA claimants from coverage prior to the ADAAA’s passage.

Leaving these issues once again to the Supreme Court, even with the broad purposes stated in support of the ADAAA, may not result in sufficiently broad ADA coverage. Even the EEOC’s ADAAA regulations may be insufficient. Professor Selmi has explained that “the Court adopts EEOC interpretations when they support the decision and ignores them when they do not, and . . . [t]he Court emphasizes statutory language and sentence structure in some cases but turns its eye on clear language in others.”⁵³⁴

Without an effective social movement to positively influence courts’ interpretation of the ADA,⁵³⁵ claimants may still have their claims dismissed because they are not limited in all tasks that require the performance of a major life activity, because the effects of their impairment are not permanent or frequent enough, because they have failed to make a comparison to the general population, or because they cannot present sufficient expert testimony as to their impairment.⁵³⁶ As Professor Selmi observed before the passage of the ADAAA, “[w]ith greater social pressure or attention [to these more specific issues], Congress may have drafted more specific legislation, or at least addressed some of the imminent issues more clearly.”⁵³⁷

Without such amendments or more specific guidance from the EEOC, courts may be free to continue to dismiss claims on motions for summary judgment because the impairment has not been shown to “substantially limit” a major life activity of the claimant. Therefore, plaintiffs are well advised to continue to present evidence regarding the extended duration or frequency of the limitations, as well as the abilities of either the average person or most people in the

532. See *supra* text accompanying note 4.

533. See *supra* Part IV.A.

534. Selmi, *supra* note 13, at 570.

535. *Id.* at 571.

536. See *supra* Part IV.A–D.

537. Selmi, *supra* note 13, at 573.

general population. Perhaps most importantly, plaintiffs facing summary judgment may need to continue to present medical or vocational testimony regarding the extent of the limitation rather than relying on the plaintiff's own description of his or her limitations.⁵³⁸

Even if ADA claimants present the evidence of substantial limitation that has been required under the unamended ADA, they may still be unsuccessful unless courts respect the fact-finding role of juries. In light of the failure of either the ADAAA or the EEOC ADAAA regulations to command this respect, the Supreme Court, or at least the circuit courts, must fulfill the promise of the ADA to protect working people with disabilities against discrimination by referring arguably valid claims to juries.⁵³⁹ Then, a jury can interpret the evidence in light of its common understanding of the abilities of a non-disabled person to determine if the claimant with an impairment deserves protection against discrimination. Without attention to these continuing barriers to ADA claims, the impact of the amendments to the ADA may be at most underwhelming.

538. *See supra* Part IV.D.

539. *See supra* text accompanying notes 288–89, 475–77, 483.