Arguing Disability Under the ADA Amendments Act: Where Do We Stand?

E. Pierce Blue

The Americans with Disabilities Act Amendments Act (ADAAA) celebrated its fourth anniversary on Sept. 28, 2012, and the Equal Employment Opportunity Commission's (EEOC) ADAAA regulation will soon be approaching its second. Employers and employees have had a chance to digest the changes made by the law and the courts are starting to issue decisions in ADAAA cases. Now is an appropriate time to reflect on the implementation of the Amendments Act. Is the law working as intended? Or are we returning to a muddled and restrictive jurisprudence?

A review of the early decisions reveals a troubling answer. In some ways, optimism is justified. The ADAAA and the accompanying regulation from the EEOC have led to noticeable improvements in disability law. A number of impairments that were previously denied coverage have survived the summary judgment phase of litigation and anecdotal evidence indicates that it is now more common for parties to agree that a person is covered under the ADA and move to other issues.

Reasons for pessimism abound as well, though. There have been a number of negative ADAAA decisions to date. These decisions reveal two distinct and problematic trends. First, the newer, and simpler, methods of proof available under the ADAAA are often not being used. Damaged arguments, such as the major life activity of working, continue to appear in pleadings while ADAAA innovations like major bodily functions are underutilized or ignored. Second, attorneys and courts are misinterpreting/misreading provisions in the ADAAA. New concepts such as the reworked definition of "regarded as" and the "transitory and minor" limit that accompanies it are proving to be particularly problematic.

While not wholly undermining the impact of the ADAAA, these developments are frustrating the full potential of the law. This article examines these trends and offers suggestions to attorneys on how to make the ADAAA work as intended.

The Path to the ADAAA

The ADA prohibits discrimination against persons with disabilities in employment, public services, public accommodations, and telecommunications.[1] The law promotes independence and equality for persons with disabilities, a population that has long been held back by social barriers and misplaced fears.

Expectations were high when the ADA was signed in July 1990. Upon attaching his signature to the law, President George H.W. Bush remarked that "every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom."[2]

Much of the substance of the ADA was drawn directly from Section 504 of the Rehabilitation Act of 1973[3]—a provision prohibiting discrimination on the basis of disability by entities that receive federal funds—and the regulations implementing that section. That law and the regulations issued by the Department of Health, Education, and Welfare introduced such concepts as reasonable accommodation, undue hardship, and, most importantly, a function-based definition of disability covering persons who currently have a disability, have a record of a disability, and/or are regarded as having a disability.[4] In each category, the test for "disability" was the presence, record, or perceived presence of a physical or mental impairment that substantially limited one or more major life activities.

This formulation was interpreted broadly by the courts. In 1987, for instance, the Supreme Court held in *Arline v. School Board of Nassau County*[5] that a teacher with tuberculosis easily qualified as a person with a disability under Section 504. According to the majority opinion, the fact that Arline had tuberculosis and required hospitalization for it in the past was "more than sufficient to establish" that she was person with a disability under the "broad" definition in Section 504.[6] The Court went on to state that Congress had enacted Section 504 in order to combat and remedy the pervasive and widespread societal misconceptions about persons with disabilities.[7] That intent, in turn, required an expansive reading of the statute and its protections.

When debating the ADA, Congress largely chose to adopt the Section 504 definition of disability for the ADA.[8] The definition was familiar to disability advocates and employers and it had an established interpretation in the courts. The relevant parties knew, or thought they knew, what they were getting with that construct. The courts, however, had a different idea.

The major decisions in this area were *Sutton v. United Airlines Inc.*[9] and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*.[10] In *Sutton*, the Supreme Court ruled that mitigating measures such as medication, assistive devices, or learned techniques for coping with a disability had to be considered in determining whether an impairment was "substantially limiting." *Toyota* held that an impairment must "prevent or severely restrict" a major life activity in order for it to be "substantially limiting."

Together, the cases created a restrictive standard for proving disability under the ADA. The end result was that ADA cases were frequently decided on the threshold ques-

tion of disability, and persons clearly entitled to protection were denied justice. Epilepsy, diabetes, intellectual disabilities, multiple sclerosis, loss of vision, loss of hearing, post-traumatic stress disorder, and HIV—all disabilities that were covered under Section 504—were found not to be disabilities covered by the ADA.[11]

The ADA Amendments Act[12] sought to remedy this problem. The definition of major life activities was expanded to provide simpler methods of proving disability. Additional rules of construction were added to reinforce Congress' intent that the term "substantially limits" was to be interpreted broadly in favor of expansive coverage. The standard for proving that an individual was "regarded as" a person with a disability was altered so that plaintiffs no longer had to show that their employers perceived them to be substantially limited in a major life activity—evidence of an impairment and an ADA prohibited act would suffice to show coverage. In addition, Congress rejected the *Sutton* holding that mitigating measures had to be taken into account when evaluating whether an impairment substantially limited a major life activity. Under the ADAAA, impairments are evaluated in their active state without regard to mitigating measures such as medication or learned behaviors.

The animating principle behind the ADA Amendments Act was to return the ADA's coverage analysis to its Section 504 roots. The definition of "disability" is to be construed broadly so that cases can move to the vital question of whether discrimination occurred. Plaintiffs still need to prove that they meet the statutory definition, but the standard is low and the analysis should not be extensive.

The EEOC Final Regulation on the ADAAA

The EEOC's final regulation[13] on the definition of "disability" was the first major interpretative analysis of the Amendments Act. Most of the changes made in that regulation simply reflected the statutory changes made by the Amendments Act, such as the restructuring of the "regarded as" analysis, the instruction not to consider mitigating measures, and the addition of major bodily functions to the definition of "major life activities." The one area where the agency opted to further expound upon the statutory text was in regard to the interpretation of the term "substantially limits."

The meaning of "substantially limits" drove most of the restrictive decisions on the definition of disability under the ADA. The Supreme Court's narrow interpretation of that term led to countless dismissals of ADA claims by persons with valid disabilities. Yet, Congress chose not to redefine "substantially limits" when enacting the ADAAA. Instead, Congress opted to add several "rules of construction" to the statute. These rules were intended to illustrate plainly Congress' decision to repudiate the Supreme Court's interpretation and reinforce that, post-ADAAA, the definition of disability was to be construed broadly. These rules did not, however, provide a clear picture of what a new interpretation should look like. This left a slight gap in the statute and the EEOC, as the agency charged with enforcing Title I of the ADA, sought to fill it.

Like Congress, the EEOC elected to issue interpretive principles for "substantially limits" in place of a set definition. The agency had little choice in this matter as Congress had clearly indicated that "substantially limits" should remain undefined. Unlike the principles adopted by Congress, however, the agency's rules of construction provide a fuller picture of the relationship between the changes made in the law, the repudiation of *Sutton* and *Toyota*, and the broad interpretation of "substantially limits." The result is a clear explanation of the new state of play around the definition of disability and a guide to analyzing disability claims going forward.

The agency adopted nine rules of construction. All attorneys who work with the ADA should take the time to read

the rules of construction in 29 CFR § 1630.2(j)(1)(i)-(ix) (and the entire regulation for that matter), but, for convenience, some of the more important rules are listed below:

> (ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment *need not prevent, or significant restrict or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting*. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
> (iii) The primary object of attention in cases brought under the ADA should be whether the covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. *Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.*
> (iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. *However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.*
> (v) *The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis*. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.
> (vi) The determination of whether an impairment substantially limits a major life *activity shall be made without regard to the ameliorative effects of mitigating measures* ...
> (vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
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> (ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in §1630.15(f) does not apply to the ... ["actual disability" prong or the "record of" disability prong] of this section. *The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.*[14]

The agency followed the rules with a list of what it termed "predictable assessments" under the ADAAA. "Predictable assessments" is the EEOC's term for impairments that, given the principles outlined above and the expanded definition of major life activities, should in "virtually all cases, result in a determination of coverage" under the first two prongs of the definition of disability. Impairments on the "predictable assessment" list include: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

The contents of the "predictable assessment" list and the question of whether or not other impairments should or should not have been listed received most of the attention after the final regulation was issued. However, the manner in which the "predictable assessment" section is framed is just as important as which impairments are listed. A careful reader will note that in almost all cases the impairments are framed as "substantially limiting" a major bodily function, not a major life activity—for example, "cancer substantially limits normal cell growth" and "multiple sclerosis substantially limits neurological function." This does not mean that the listed impairments do not substantially limit one of the older major life activities. No one would deny that a missing leg substantially limits walking, for example. But it does illustrate the fact that limitation of a major bodily function offers the simplest method for proving coverage under the first two prongs. After all, it is possible to deny that certain forms of cancer do not substantially limit a person's ability to care for himself or herself, but it is almost impossible to argue that cancer does not, when active, substantially limit normal cell growth.

The final major change made in the EEOC regulation involved moving a section on the major life activity of working from the main text of the regulation to the interpretive appendix.[15] The EEOC's former regulation on the ADA had included an extended discussion on proving substantial limitation in the major life activity of working. The subsection was controversial within the disability community as many thought that it brought undue attention to a standard that was difficult to meet and of relatively limited impact.[16] It was essentially, a distraction for plaintiffs and judges seeking to interpret the law properly.

A person seeking to show substantial limitation in the major life activity of working must show that his or her impairment substantially limits him or her in a class of jobs or range of jobs. Not many impairments meet this standard. In addition, the few that do reach it or come close to reaching it can often be more easily proved by arguing substantial limitation in another major life activity or bodily function. The House Judiciary Committee report on the ADA offers an excellent example. The report notes that a painter who experiences allergic reactions that are limited to "a specialized paint used by one employer which is not generally used in the field in which the person works" is likely not substantially limited in the major life activity of working.[17] However, if the reaction is to a common paint that was used widely in that person's field, then there is a stronger case.[18] Of course, as the report notes, a severe reaction to the unique paint on its own, regardless of its use in the employee's field, should be enough to show coverage under another major life activity.[19]

The ADAAA did not impact the substance of the major

life of working analysis apart from the general lowering of the threshold for "substantially limits." However, in redrafting its regulations in response to the ADAAA, the EEOC appears to have concluded that a separate section on the subject was incongruous with the relative importance of the term. As the agency states, "no other major life activity is singled out in the regulations for elaboration" and "in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations. In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working. ..."[20]

In sum, the regulation clarified the changes made in the ADAAA and provided important guidance regarding how regulated entities should evaluate coverage under the law. The question going forward is whether employers, employees, and the courts would follow this guidance.

The ADAAA in Court

Implementation of the ADAAA in the courts has been mixed to date.[21] Things are certainly not as bad as they were pre-ADAAA. As Prof. Kevin Barry of Quinnipiac Law points out in a forthcoming law review article, a number of impairments that were routinely dismissed under the old case law are now being found to constitute disabilities under the ADA.[22] Ankle injury, back injury, anxiety disorder, bipolar disorder, leg fracture, cancer, depression, diabetes, and multiple sclerosis have all been recognized as covered disabilities in court decisions handed down under the ADAAA.[23]

However, some courts continue to misinterpret and misapply the ADA.[24] Many of these negative decisions are the result of poor pleading or simple confusion over the appropriate standards to apply.

In *Allen v. Southcrest Hospital*,[25] for example, the Tenth Circuit ignored the statutory requirement that the plaintiff's impairment be considered in its active state without reference to mitigating measures as required by the statute. Instead, the court considered the impairment, migraine headaches, "when active *and treated with medication*."[26] Not surprisingly, the court proceeded to rule that the employee was not substantially limited in her ability to care for herself when compared to the general population.

In *Curley v. City of North Las Vegas*,[27] the court's opinion cited the ADAAA, the new EEOC regulation, *and* portions of the old EEOC regulation that had been superseded by the 2010 regulation as relevant authority. The court then proceeded to rely on the superseded definitions in deciding that the plaintiff's hearing impairment was not covered under the ADAAA.[28]

The Western District of North Carolina, relying on a law firm alert, offered the following interpretation of the new "regarded as" definition: "an employee may be 'regarded as disabled' if discriminated against because of an actual or perceived impairment regardless of whether it has any disabling effect. ... It is enough that the perceived impairment is perceived to 'limit' (not 'substantially limit') a major life activity."[29] This formulation is surprising since the ADAAA removed any mention of limitations or major life activities from the definition of "regarded as." The statute only requires that a person show that he or she was subjected to an act prohibited by the ADA because of an actual or perceived impairment.

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The Western District is not alone in struggling with that portion of the law. The new "regarded as" definition has been the source of trouble for a number of courts. Some have incorrectly applied the old standard—requiring the plaintiff to show that the employer believes he or she is substantially limited in a major life activity—to post-ADAAA cases.[30] Others have correctly applied the new standard but then proceeded to the reasonable accommodation question,[31] ignoring the ADAAA provision that removed the obligation to provide reasonable accommodations to persons qualifying solely under the "regarded as" prong.[32] And a large number of courts have read the independent terms "transitory" and "minor" to simply mean that any impairment that is "transitory"—i.e., lasting less than six months—is automatically "minor" and ruled out under "regarded as" coverage.[33]

Attorneys have also been slow to grasp significant portions of the law. The failure to utilize major bodily functions is the most prominent example of this.

For example, the plaintiff in *Allen v. Southcrest*[34] suffered from migraine headaches. Migraines are "the most common form of a vascular headache, which is the abnormal function of the brain's blood vessels."[35] When active, a migraine causes the blood vessels in the brain to contract and expand sharply, leading to severe pain. Assuming that Allen's migraines followed the classic model, she should have been able to easily establish coverage by showing substantial limitation in neurological and vascular functioning. Instead, Allen relied on the major life activities of working and caring for herself.

McElwee v. County of Orange[36] provides a similar example. The plaintiff in this case suffered from Asperger's Syndrome. Asperger's is a developmental disorder on the autism spectrum. As the EEOC regulation stated, given the new rules of construction for "substantially limits," autism spectrum disorders should generally qualify as ADA disabilities since they substantially limit brain function.[37] However,

McElwee did not argue that his Asperger's substantially limited his brain function. He stated that the syndrome substantially limited him in the major life activity of communication. The court was willing to say that his communication was often "inappropriate, ineffective, or unsuccessful" but it ultimately decided that he was not substantially limited in that area.

Some initial "stumbles" with implementation are inevitable with any law. But, given the history of the ADA, a proactive response is appropriate in this situation. It is paramount that everyone involved—private attorneys, government agencies, and judges—work to get the basics of the law correct.

The EEOC and other government agencies responsible for ADA implementation continue to conduct outreach and education regarding the law. Trainings, webinars, and informational materials are all readily available through the EEOC website (www.eeoc.gov) and the government websites ADA.gov and Disability.gov. In addition, the EEOC's amicus program seeks out ADAAA cases where the Commission can help correct errors in analysis.[38]

Attorneys who bring these cases are in the best position to ensure that the ADAAA is properly implemented. What follows are three suggestions for attorneys working with the ADA that, if followed, can help to ensure that the law is argued correctly:

1. *Take advantage of opportunities to educate the courts.* Few, if any, judges are intimately familiar with the changes made by the ADAAA. Plaintiffs and defendants should use initial pleadings as opportunities to educate the courts to changes made. Brian East of Disability Rights Texas recommends that attorneys refer to the fact that the ADA has been amended, reiterate some of the specific rules related to the disability analysis in the ADAAA such as the prohibition on considering mitigating measures, and generally tie the language of the new law and regulation into pleadings and briefs as much as possible. By adopting this approach, attorneys will ensure that both they and the judges they argue in front of are fully aware of all the changes made by the ADAAA.
2. *Use the new tools and avoid old traps.* The ADAAA was about more than repealing bad case law. The Amendments created a number of new, and simpler, paths to showing coverage for plaintiffs. These tools have been underutilized. When arguing "actual disability," nearly every plaintiff should start with major bodily functions. The old major life activities are, of course, still relevant but they are often weighed down by old case law and are generally more difficult to prove. Plaintiffs should also take advantage of the rules of construction and predictable assessment language in the EEOC regulation. Finally, as the EEOC states in its regulation, the major life activity of working should always be a last resort. The ADAAA undoubtedly makes it easier to prove substantial limitation in working but there will almost always be easier and simpler ways to show coverage.
3. *If you are unsure, check with the experts.* The final and most important recommendation is that attorneys defending against or bringing ADA claims should not be afraid to reach out to persons with knowledge or experience. The ADA is a complex law with a number of moving parts. The definition question is just one of many issues. Government agencies like the Department of Justice and the EEOC and outside groups such as the National Employment Lawyers Association all have excellent materials on the ADAAA and the ADA. These organizations also have or know of resident experts who can help with most any issue. There is no reason that any ADA question should go unanswered.

Conclusion

The ADAAA remains on shaky ground four years after it was signed into law. The positive changes made by the law are often ignored and many of the new terms are misread or applied incorrectly. The good news is that these problems are readily fixable through education and outreach. As more attorneys and courts become familiar with the changes made by the Amendments and the EEOC regulation, we should see the errors in legal reasoning and pleading decrease. Hopefully, in another four years, we will be able to say that the ADAAA is a great success. **TFL**

E. Pierce Blue is special assistant and attorney-advisor to Commissioner Chai R. Feldblum, U.S. Equal Employment Opportunity Commission. All opinions expressed in this article are the author's and do not reflect the opinions of the U.S. Equal Employment Opportunity Commission or Commissioner Chai Feldblum.

Endnotes

[1]42 U.S.C. § 12101 *et seq.*

[2]Remarks by the President During Ceremony for the Signing of The Americans With Disabilities Act of 1990 (July 26, 1990), bushlibrary.tamu.edu/features/2010-ada/RemarksbythePresident.pdf.

[3]29 U.S.C. § 794.

[4]42 Fed. Reg. 22,676 (1977); Chai R. Feldblum, *Employment Protections*, *in* The Americans with Disabilities Act: From Policy to Practice 83 (Jane West ed., 1991).

[5]480 U.S. 273 (1987).

[6]*Id.* at 281.

[7]*Id.* at 279.

[8]*See* S. Rep. No. 101-116 (1989), *available at* transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1387.pdf ("The definition of the term 'disability' included in the bill is comparable to the definition of the term 'individual with handicaps' in Section 7(8)(B) of the Rehabilitation Act of 1973 and Section 802(h) of the Fair Housing Act. It is the Committee's intent that the analysis of the term 'individual with handicaps' by the Department of Health, Education, and Welfare of the regulations implementing Section 504 (42 Fed. Reg. 22685 et. seq. (May 4, 1977)) and the analysis by the Department of Housing and Urban Development of the regulations implementing the Fair Housing Amendments Act of 1988 apply to the definition of the term "disability" included in this legislation.").

[9]527 U.S. 471 (1999).

[10]534 U.S. 184 (2002).

[11]Georgetown Federal Legislation Clinic, Fact Sheet on People Covered Under Section 504 of the Rehabilitation Act and People Not Covered by the ADA (Nov. 15, 2007), *available at* www.law.georgetown.edu/archiveada/documents/Appendix_A_000.pdf.

[12]Pub. L. No. 110-325 (2008), 122 Stat. 3553 (codified at 42 U.S.C. § 12101).

[13]Equal Employment Opportunity Commission, 76 Fed. Reg. 16,977 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630 *et seq.*).

[14]29 C.F.R. § 1630.2(j)(1)(i)-(ix) (2012) (emphasis added). The EEOC also included rules noting that the term "substantially limits" is to be construed broadly, that impairments that substantially limit one major life activity do not need to limit others in order to be substantially limiting, and that impairments that are episodic or in remission qualify as disabilities. *Id.* § 1630.2(j)(1)(i), (viii), (vii).

[15]Working has long been included as an example of a major life activity. 42 Fed. Reg. 22,678 (May 4, 1977); 29 C.F.R. § 1630(j)(3) (1998); 42 U.S.C. §1202(2)(a). The term reflects the divide between the original definition of disability under the Rehabilitation Act of 1973, Pub. L. No. 93-112, which had focused solely on impairments that limited employment, and the amended definition, Pub. L. No. 93-156 (1973), which sought to cover any impairment that limited one or more of a range of life activities. The regulations implementing this legislation retained "working" as an example of a major life activity in order to ensure that the narrow range of disabilities that only impacted employment were still captured. *See* 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, 133-38, 141-47 (2000).

[16]*See* Feldblum, *supra* note 15, at 137-38.

[17]H.R. Rep. No. 101-485(III), at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

[18]*Id.*

[19]*Id.*

[20]29 C.F.R. pt. 1630 App.

[21]Many of the recent ADAAA decisions cited in this article were found through the EEOC Office of Legal Counsel's Summary of Title VII, ADEA, ADA, GINA, and EPA Case Law prepared for and distributed exclusively at the EEOC's annual Fair Employment Practices Agency (FEPA) Conference. Jeanne Goldberg, Senior Attorney-Advisor in the Office of Legal Counsel, deserves particular mention for her work in tracking the ADAAA cases.

[22]Kevin Barry, *Exactly What Congress Intended, Chief Justice Roberts*, Emp. Rts. & Emp. Pol'y J. (forthcoming 2013).

[23]*Id.*

[24]*See, e.g., Mazzeo v. Color Resolutions Int'l, Inc.*, No. 3:10-cv-1108-J-37JRK (M.D. Fla. Dec. 15, 2011), *appeal docketed*, No. 12-10250 (11th Cir. Mar. 12, 2012) (PACER, M.D. Fla.) (herniated disk found to be not substantially limiting); *Frantz v. Shinseki*, No. 1:10CV275, 2012 WL 259980 (M.D.N.C. Jan. 27, 2012) (anxiety disorder and PTSD found to be not substantially limiting); *Neumann v. Plastipak Packaging Inc.*, No. 1:11-CV-522, 2011 WL 5360705 (N.D. Ohio Oct. 31, 2011) (back injury found to be not substantially limiting); *McElwee v. County of Orange*, 2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011) (Asperger's syndrome found to be not substantially limiting); *Brandon v. O'Mara*, No. 10 Civ. 5174, 2011 WL 4478492 (S.D.N.Y. Sept. 28, 2011) (cancer found to be not substantially limiting).

[25]455 Fed. Appx. 827 (10th Cir. 2011).

[26]*Id.* at 831-32 (emphasis added).

[27]No. 2:09-CV-01071, 2012 WL 1439060 (D. Nev. Apr. 25, 2012).

[28]*Id.*

[29]*Baldwin v. Duke*, 2012 WL 3564021 (W.D.N.C. July 13, 2012).

[30]*See, e.g.*, *Kauffman v. Petersen Health Care VII LLC*, No. 12-2079, 2012 WL 2905262, at *4 (C.D. Ill. June 22, 2012).

[31]*See, e.g., Wright v. Hyundai Motor Mfg.*, 2012 WL 2814153, at *8 (M.D. Ala. July 10, 2012).

[32]42 U.S.C. § 12201(h).

[33]*See, e.g.*, *White v. Interstate Distrib. Co.*, No. 11-5063, 2011 WL 3677976 (6th Cir. Aug. 23, 2011); *Hobenstein v. City of Glenpool*, No. 11-CV-0559, 2012 WL 1886510 (N.D. Okla. May 23, 2012); *Dugay v. Complete Skycap Services Inc.*, No. CV-10-2404, 2011 WL 3159171 (D. Ariz. July 26, 2011); *George v. TJX Cos.*, No. 1:cv-00275, 2009 WL 4718840 (E.D.N.Y. Dec. 9, 2009).

[34]455 Fed. Appx. 827 (10th Cir. 2011).

[35]Job Accommodation Network, Accommodation and Compliance Series: Employees with Migraine Headaches, askjan.org/media/Migraine.html.

[36]2011 WL 4576123 (S.D.N.Y. Sept. 30, 2011).

[37]29 U.S.C. § 1630.2(j)(3)(iii) ("autism substantially limits brain function").

[38]The EEOC recently created a new e-mail address, Amicus@EEOC.gov, for amicus suggestions.

[39]Brian East, *Pleading Disability Under the ADAAA* (on file with author).