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Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?

Debbie N. Kaminer

MENTALLY ILL EMPLOYEES IN THE WORKPLACE: DOES THE ADA AMENDMENTS ACT PROVIDE ADEQUATE PROTECTION?

Debbie N. Kaminer†

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† Professor of Law, Zicklin School of Business, Baruch College. B.A. 1987 University of Pennsylvania, Political Science; J.D. 1991 Columbia University School of Law. I would like to thank Sandra Mullings for her comments on an earlier draft of this article and Sean Kannengieser for his research assistance.

I. INTRODUCTION

The Americans with Disabilities Act (ADA) was passed with bipartisan support in 1990 with the stated purpose of protecting individuals from disability based discrimination.[1] One of the specific goals of the ADA was to ensure economic self-sufficiency for disabled individuals, and Title I of the ADA prohibits employment discrimination against "qualified individuals with…disabilities."[2] Despite the initial high hopes of disability rights activists, as a result of restrictive court decisions, the ADA was largely unsuccessful in prohibiting discrimination against individuals with disabilities.[3]

On September 25, 2008, the Americans with Disabilities Act Amendments Act (ADAAA) was unanimously approved by both houses of Congress[4] and signed into law by President George W. Bush.[5] The ADAAA specifically overturned four Supreme Court decisions that had narrowly defined the term disability under the ADA. One of Congress' main objectives in enacting the ADAAA was to turn the focus of ADA cases away from the definition of disability and instead refocus these cases on the issue of discrimination.[6] The expanded definition of disability has led to this objective being met and courts in Title I cases are now more likely to grapple with the question of whether disabled employees are discriminated against in the workplace.

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1. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2012). *See also* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2027 (2013).

2. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job trainings, and other terms, conditions and privileges of employment."). *Id.* at § 12111 (2012) (stating that the ADA applies to private employers with 15 or more employees, employment agencies, labor organizations, and management committees).

3. *See* Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J.C.L. & C.R. 241, 242 n. 2 (2008) (noting the significant amount of literature "devoted to defending, criticizing, and analyzing the [ADA]"); *see also generally* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 110–16 (1999) (stating that contrary to popular belief the ADA has not created a windfall for plaintiffs).

4. 154 CONG. REC. S8342 (daily ed. Sept. 11, 2008); 154 CONG. REC. H8298 (daily ed. Sept. 17, 2008).

5. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, (122 Stat.) 3553 (2008).

6. Befort, *supra* note 1, at 2029.

The ADA and the ADAAA apply to both physical and mental illness and an identical framework is used in analyzing claims of disability discrimination in the workplace regardless of whether the employee has a physical or mental disability. However, there are a number of ways in which mental illness is generally different than physical illness, and there are a number of unique hurdles faced by mentally ill employees in ADA and ADAAA litigation. These hurdles stem both from actual limitations associated with mental illness as well as from stereotypes and stigmas that society has about mentally ill individuals.

This Article will examine how the ADAAA has impacted and will likely continue to impact employees with mental illness in the workplace. The Article will address both the ways in which the broadened definition of disability under the ADAAA has expanded protection for mentally ill employees in the workplace, as well as the hurdles that are still faced by employees who suffer from mental illness. While the expanded definition of disability under the ADAAA has removed one significant hurdle, the ADAAA failed to make other necessary statutory amendments and as a result, many mentally ill employees continue to have difficulty establishing a prima facie case of disability discrimination under the ADAAA.

Part II of the Article will provide a brief background on the ADA and discuss the Supreme Court decisions that narrowly interpreted the ADA. Part III of this Article will address the differences between mental illness and physical illness, highlighting some of the unique aspects of mental illness. This Part will also discuss the various stereotypes and stigmas surrounding mental illness. Part IV will examine the ways in which the ADAAA has expanded the definition of disability under the Act, and how the expanded definition has impacted mentally ill employees in the workplace. Part V will then address the hurdles that mentally ill employees still face under the ADAAA. The Article concludes that while the ADAAA's expanded definition of disability has helped mentally ill employees in the workplace, many employees still face difficulty in establishing a prima facie case of disability discrimination and demonstrating that they suffered discrimination because of their disability.

II. THE ADA

This Part provides a brief background on the history and terms of the original version of the ADA, which was passed by Congress in 1990. It also discusses the Supreme Court cases that narrowly interpreted the ADA and were the impetus for Congress unanimously passing the ADAAA in 2008. In doing so, this Part provides the background for why Congress enacted the ADAAA.

A. Overview of the ADA

The ADA was passed with bipartisan support in 1990, with the stated purpose of protecting individuals with disabilities from

disability based discrimination.[7] One of the specific goals of the ADA was to ensure economic self-sufficiency for disabled individuals and Title I of the ADA prohibits employment discrimination against "qualified individuals with…disabilities."[8] Despite initial high hopes of disability rights activists, the ADA was largely unsuccessful in prohibiting disability based discrimination.[9]

While the ADA is civil rights legislation that is aimed at protecting individuals with disabilities from discrimination in a manner similar to Title VII of the Civil Rights Act of 1964,[10] it also differs in two important ways from Title VII.[11] First, Title VII prohibits discrimination "because of" certain protected categories.[12] In other words, it protects all people from discrimination based on protected categories such as "sex" or "race," and plaintiffs do not need to prove that they have a "sex" or a "race." The ADA, on the other hand only protects individuals who meet the statutory definition of "disability" under the Act.

Second, the Civil Rights Act of 1964 in general only prohibits discrimination and does not affirmatively mandate accommodation.[13] The ADA, however, includes an affirmative requirement of accommodation and looks at whether an employee is qualified for the job either "with or without a reasonable accommodation."[14] Such accommodation is mandated under the ADA unless it would impose an "undue hardship" on the employer.[15] The ADA therefore treats disability differently than most protected categories under Title VII, but similarly to how Title VII treats religion, since reasonable

7. 42 U.S.C. § 12112 (2012). *See also* Befort, *supra* note 1; Lorraine Schmall, *One Step Closer to Mental Health Parity*, 9 NEV. L.J. 646, 649-50 (2009).

8. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job trainings, and other terms, conditions and privileges of employment.").

9. *See* Colker, *supra* note 3, at 160.

10. 42 U.S.C. § 2000e-2(a) (2012).

11. Befort *supra* note 1, at 2033.

12. Chai R. Feldblum, Kevin Berry & Emily A Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 187 (2008).

13. Befort, *supra* note 1, at 2033. *See also* Matthew Diller, *Judicial Backlash and the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 43 (2000).

14. Americans with Disabilities Act of 1990, 42 U.S.C. §12111(8) (2012).

15. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2012).

accommodation of religious employees is mandated by Title VII.[16]

In order to establish a prima facie case of disability discrimination under Title I of the ADA a plaintiff must show that he "(1) [is] a disabled person as defined by the ADA; (2) is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability."[17]

Prior to the passage of the ADAAA, the largest hurdle faced by plaintiffs in ADA cases was demonstrating that they met the first prong of the prima facie case, which is satisfying the statutory definition of disability. The ADA states that an individual is disabled if he has "(A) a physical or mental impairment that substantially limits one or more major life activities…; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment."[18] Courts had interpreted the term "disabled" so narrowly that the majority of plaintiffs were unable to show that they met the statutory definition of "disabled."[19] In most pre-ADAAA cases, the issue was not whether the plaintiff suffered from an impairment, but rather whether the impairment substantially limited a major life activity. In narrowly interpreting the ADA, lower courts found that plaintiffs who suffered from diseases including cancer, multiple dystrophy, epilepsy, and depression were not disabled.[20]

B. Supreme Court Decisions Narrowly Interpreting the ADA

Two Supreme Court cases in particular significantly narrowed the definition of disability and directly led to the eventual passage of the

16. Section 701(j) of the 1964 Civil Rights Act requires employers to "reasonably accommodate" an employee's religious beliefs and practices unless doing so would cause "undue hardship on the conduct of the employer's business."42 U.S.C. § 2000e (j) (2012). The United States Supreme Court has narrowly defined "undue hardship" as any cost greater than de minimis. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (the United States Supreme Court defined "undue hardship" as any cost greater than de minimis). However, despite this narrow interpretation there are lower courts that require a more meaningful level of accommodation. *See generally* Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 579 (2000).

17. E.E.O.C. v. Picture People, Inc., 684 F.3d 981, 985 (10th Cir. 2012).

18. 42 U.S.C. § 12102(1) (2012).

19. *See generally* Befort, *supra* note 1, at 2037-39; Schmall, *supra* note 7, at 650-51; James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 LAW & PSYCHOL. REV. 89, 99-103 (2012).

20. Schmall, *supra* note 7, at 650-51; Colker, *supra* note 3, at 110-16.

ADAAA.[21] In *Sutton v. United Air Lines, Inc.*, the Court affirmed the judgment of the Tenth Circuit and held that when making a determination as to whether an individual is disabled under the ADA, the individual's disability should be examined in its mitigated state.[22] The plaintiffs in *Sutton* were sisters who suffered from severe myopia, but had 20/20 vision with corrective lenses.[23] They were denied positions as pilots at United Airlines since the company required pilots to have uncorrected vision of at least 20/100.[24] The *Sutton* Court determined the plaintiffs were not "disabled" under the ADA, since their eyesight was normal in its mitigated state.[25]

The *Sutton* Court also held that the plaintiffs were not "regarded as" disabled under the third prong of the ADA's definition of disability since they were *only* unable to work in the specific job of airline pilot.[26] According to the Court, a plaintiff would need to show that her employer perceived her impairment as substantially limiting a major life activity. The plaintiffs in *Sutton* had argued that their employer regarded them as substantially limited in the major life activity of working. However, the Court dismissed this argument since the employees were not perceived as unable to work in a broad class of jobs but rather only in the specific job of airline pilot.

The Supreme Court further narrowed the definition of disabled in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*.[27] The plaintiff in this case was unable to do her assembly line job without an accommodation because she suffered from carpal tunnel syndrome. The *Toyota* Court narrowly defined both the terms "substantially limiting" and "major life activity," determining that these terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[28] The Court held that a "substantially limiting" impairment must "prevent or severely restrict"[29] an individual from doing an activity that is of "central importance to most people's daily lives."[30] A major life activity therefore was not

21. 42 U.S.C. § 12101(b)(3)-(4) (2012). *See also* Befort, *supra* note 1, at 2029.

22. Sutton v. United Air Lines, 527 US 471, 472 (1999).

23. *Id.* at 475.

24. *Id.* at 475-76.

25. *Id.*

26. *Id.* at 490-491.

27. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002).

28. *Id.* at 196-97.

29. *Id.* at 198.

30. *Id.*

what was important in a particular plaintiff's life but rather what was important in "most people's daily lives."[31] The Court determined that the plaintiff in *Toyota* was not disabled because, while she was unable to do the manual tasks necessary for an assembly line job, she was able to do manual tasks that were of "central importance"[32] in most people's daily lives. In the aftermath of *Sutton* and *Toyota*, the majority of plaintiffs were unable to meet the statutory definition of "disabled" under the ADA.

Under the *Sutton* and *Toyota* decisions, plaintiffs were often put in a catch-22 situation where they were too disabled to qualify for or keep the jobs that they wanted, but they were not disabled enough to merit protection under the ADA. As a result, plaintiffs in employment discrimination cases filed under the ADA had dismal win rates. One study found that plaintiffs in Title I ADA employment discrimination cases lost 97% of the time.[33]

Furthermore, as a result of the narrowing of the ADA's protected class under *Sutton* and *Toyota,* plaintiffs became significantly less likely to file discrimination charges under the ADA.[34] This is evident in an examination of both the EEOC's charge filing statistics and the number of federal court cases that were filed in the aftermath of these Supreme Court decisions.[35] Employees with impairments assumed that they would not be considered "disabled" under these restrictive decisions, and that it would therefore be futile to file a discrimination claim under the ADA.[36]

As this Part has explained, the Supreme Court's restrictive reading of the original ADA essentially negated Congressional intent and left employees who had faced disability based discrimination with little recourse. It is against this backdrop that Congress enacted the ADAAA. Before addressing the impact of the ADAAA on mentally ill employees in the workplace in Part IV, the next Part will address the differences between mental illness and physical illness and some of the unique hurdles faced by mentally ill employees.

III. WHAT IS MENTAL ILLNESS?

31. *Id.*

32. *Id.*

33. Amy L. Allbright, *2009 Employment Decisions Under the ADA Title I—Survey Update*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 339, 341 (2010). *See* Colker, *supra* note 3, at 108; Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?,* 59 ALAB. L. REV. 305, 308 (2008).

34. Befort, *supra* note 1, at 2037-38.

35. *Id.*

36. *Id.*

This Part will discuss the definition of mental illness, explain how this definition has changed over time, and describe how mental illness and physical illness differ. This Part will then address some of the reasons why mentally ill employees are less likely than physically ill employees to request accommodation in the workplace. Finally, this Part will discuss the most prevalent stereotypes and stigmas involving mental illness.

A. Issues with the Definition and Diagnosis of Mental Illness

According to the Centers for Disease Control and Prevention (CDC), mental illness is defined as "collectively all diagnosable mental disorders" or "health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning."[37] As one commentator explained, mental disorders always involve "some disturbance of mental functioning, be it intellectual capacities, thought processes, emotions, or underlying motivations."[38]

The primary reference for mental health disorders, which is relied on by mental health practitioners, courts and government agencies is the American Psychiatric Association's (APA) Diagnostic and Statistic Manual of Mental Disorders (DSM).[39] The DSM was first published in 1952 and has been updated four times over the previous six decades. The most recent version is DSM-5, which was released at the APA Annual Meeting in May 2013.[40] The DSM is often viewed as the "bible" of mental illness and carries the stamp of objective medical expertise. For example, some state statutes specifically reference DSM's definition of mental disorder.[41] However, as one commentator has explained, the DSM should not be viewed as a psychiatric "bible" but is rather "simply a consensus-built medical text with the attendant limits."[42]

37. *Mental Health Basics*, CENTER FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/mentalhealth/basics.htm (last visited Jan. 27, 2015).

38. Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J. L. REFORM 585, 594 (2003).

39. Douglas A. Hass, *Could the American Psychiatric Association Cause you Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 683 (2013).

40. *DSM-5 Overview,* AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/about/Pages/DSMVOverview.aspx (last visited Jan. 27, 2015).

41. Connecticut's statutes state that mental disorders are defined as what is in "the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders.'" CONN. GEN. STAT. § 38a-488a.

42. Hass, *supra* note 39, at 689.

Mental illness generally differs from physical illness in a number of ways that are important when addressing disability accommodation in the workplace under the ADAAA. The definition of mental illness is somewhat illusive and continually in flux.[43] Every version of the DSM includes different disorders, and what constitutes a mental disorder has evolved over time and is susceptible to cultural and societal norms.[44] For example, homosexuality was considered a mental disorder until pressure within the APA led to its removal from the DSM in 1980. In pointing out the fluidity of the definition of mental illness, one commentator stated, "Wouldn[']t [sic] it be nice if we could rally and lobby and get the medical profession to take a vote and eliminate cancer as a deadly disease."[45] Currently, there is a gendered pattern to mental illness and woman are significantly more likely to be diagnosed with common mental disorders including depression and anxiety.[46] Additionally, psychiatrists and psychologists may diagnose the same patient differently based on the particular clinician's views and background.

The general trend has been an increase in the number of diagnosable mental disorders in each successive version of the DSM.[47] DSM IV lists 297 mental disorders which is an increase of approximately 300% over the number of disorders listed in DSM-I which was published 42 years earlier.[48] The current version of the DSM, DSM-5, has been criticized for being both expansive and continuing the move "towards a spectrum model of mental illness."[49] In other words, DSM-5 captures subthreshold (e.g., mild depression, mild cognitive disorder) versions of existing disorders.[50]

The diagnosis of mental illness also tends to be significantly more subjective than the diagnosis of physical illness.[51] Many common

43. *See generally* Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and The Americans With Disabilities Act*, GEO. MASON U. C.R. L.J. 79, 98-100 (2006).

44. *See id.* at 90. *See also generally* Hass, *supra* note 39. This has led one historian of mental illness to conclude "It is not only cynics who claim that polito-cultural, racial, and gender prejudices still shape the diagnosis of what are purportedly objective disease syndromes." ROY PORTER, MADNESS: A BRIEF HISTORY 214 (2002).

45. Korn, *supra* note 38, at 624.

46. *See id.* at 596.

47. *See id.* at 624.

48. Hass, *supra* note 39, at 690.

49. *Id.* at 712-13.

50. *Id.* at 713.

51. Michelle Parikh, *Burning the Candle at Both Ends, and there is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to*

physical illnesses are diagnosed in an objective manner through the use of bloods tests, MRIs, x-rays, and electrocardiograms. There are a smaller number of physical illnesses that are diagnosed based on self-reporting of symptoms, such as chronic migraines[52] and fibromagylia.[53] Mental illness, on the other hand, is diagnosed primarily based on the self-reporting of symptoms and to a lesser extent on observations of a patient. There are also studies that indicate that in some cases mental illness can be objectively proven. [54] Additionally, mental health professionals can often determine when an individual is faking symptoms of mental illness.[55] However, in general, objective proof is more readily available in cases of physical illness than in cases of mental illness. Additionally, mental illness is often invisible. For example, a mentally ill individual will not have a seeing eye dog, use a wheel chair, or be missing a limb — and people tend to be skeptical of things that they cannot see.[56] These distinction have led skeptics to doubt that mental illness is real.[57]

Another factor that often distinguishes mental and physical illness is that mental illness tends to be episodic.[58] Various types of mental disorders, such as bipolar disorder and forms of depression may be chronic with acute episodes followed by a return to a normal level of

Persons with Mental Illness, 89 CORNELL L. REV. 721, 748-51 (2004). *See generally* Korn, *supra* note 38, at 622-27 (discussing the biological basis of mental illness).

52. *See, e.g.*, P.J. Goadsby, *Migraine: Diagnosis and Management*, 33 INTERNAL MED. J. 436 (2003).

53. *See, e.g.*, Robert S. Katz et al., *Fibromyalgia Diagnosis: A Comparison of Clinical, Survey and American College of Rheumatology Criteria*, 54 ARTHRITIS & RHEUMATISM 169 (2006).

54. *See, e.g.*, Elizabeth R. Sowell et al., *Brain Abnormalities Observed in Childhood-Onset Schizophrenia: A Review of the Structural Magnetic Resonance Imaging Literature*, 6 MENTAL RETARDATION & DEVELOPMENT DISABILITIES RES. REV. 180 (2000).

55. Douglas Starr, *Can You Fake Mental Illness? How Forensic Psychologists Can Tell Whether Someone is Malingering*, SLATE (Aug. 7,2012), http://www.slate.com/articles/health_and_science/science/2012/08/faking_insanity_forensic_psychologists_detect_signs_of_malingering_.html.

56. Korn, *supra* note 38, at 605-06.

57. *See infra* Part III.C.

58. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 281–82 (2000). There are also some physical disabilities that are episodic such as lupus, multiple sclerosis and epilepsy. *Id.* at 282.

functioning.[59] Since mental illness is episodic, recovery in mental illness often does not mean that the individual is cured. The chronic and episodic nature of mental illness makes it difficult to even define what constitutes recovery from a serious mental illness.[60]

B. Issues Affecting Requests for Accommodation

Mentally ill employees are often less likely than physically ill employees to ask for accommodation in the workplace. This may leave a mentally ill employee unprotected, since employers are only liable for discrimination under the ADA once they are made aware of the employee's disability and need for accommodation.[61] One reason that mentally ill employees do not ask for workplace accommodation is that they may simply not realize that they are ill. If an employee is in a manic, delusional or psychotic state, he may not recognize that he is suffering from an illness and needs to request protection under the ADA.[62]

The second reason that mentally ill employees do not ask for accommodation under the ADA is because they are actively hiding their disorder as a result of the stigma associated with mental illness. Employees who are aware that they are suffering from a mental disorder are often wary of letting their employer know they are ill because that disclosure could negatively impact their careers and potentially get them fired. Employees with psychiatric disabilities often correctly assume that they will get greater protection by hiding their disability than from the ADA.

C. Stereotypes and Stigmas Involving Mental Illness

Individuals who suffer from both physical and mental disabilities have historically been stigmatized and subjected to discrimination.[63]

59. *See* Breanne M. Sheetz, *The Choice to Limit Choice: Using Psychiatric Advance Directives to Manage the Effects of Mental Illness and Support Self-Responsibility*, 40 U. MICH. J.L. REFORM 401, 404 (2007).

60. Larry Davidson et al., *Recovery in Serious Mental Illness: A New Wine or Just a New Bottle?* 36 PROF. PSYCHOL. RES. & PRAC. 480 (2005) (discussing the lack of consensus as to what constitutes recovery in mental illness and the various definitions of recovery); Larry Davidson and David Roe, *Recovery from Versus Recovery in Serious Mental Illness: One Strategy for Lessening Confusion Plaguing Recovery*, 16 J. MENTAL HEALTH 459, 460 (2007) (discussing the various meanings of recovery in mental illness).

61. Stefan, *supra* note 58, at 289-90.

62. *Id.* at 401-03.

63. Patrick W. Corrigan & David L. Penn, *Lessons from Social Psychology on Discrediting Psychiatric Stigma*, 54 AM. PSYCHOL. 765 (1999). *See also* Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 50-51 (2005); Stefan, *supra* note 58, at 273-74; Korn, *supra* note 38, at 605-09.

However, the stigma associated with mental illness is both greater and more pervasive than the stigma associated with physical illness.[64] The public is less likely to rent a house to a mentally ill individual and less likely to socialize with someone suffering from mental illness.[65] Employers are often reluctant to hire individuals with mental illness, which leads to both unemployment and underemployment.[66] Studies have also shown that it is specifically the stigma of mental illness—and not only the functional limitations associated with mental illness—that have led to lower mean wages for those who suffer from mental illness in comparison to those who do not.[67] This subpart will look at some of the negative stereotypes associated with mental illness.

1. Not a Real Disease; Just a Character Defect

One of the most prevalent stereotypes is that mental illness is not a real disease.[68] This stereotype stems from the fact that mental illness is often invisible and cannot be objectively proven.[69] Cynics and skeptics may therefore doubt it is real. It is interesting to note that individuals who suffer from a physical disability along with a mental disability do better in the workforce than individuals suffering only from mental illness.[70] In other words, having a "real" physical illness makes the accompanying mental illness more believable. For example, if someone has cancer, it would make sense that the individual might also suffer from depression and anxiety.[71]

This skepticism and doubt that mental illness is "real" tends to

64. Hensel & Jones, *supra* note 63, at 51. *See also* Bethany A. Teachman et al., *Implicit and Explicit Stigma of Mental Illness in Diagnosed and Healthy Samples,* 25 J. SOC. & CLINICAL PSYCHOL. 75, 76 (2006) (discussing differing attitudes towards mental illness and physical illness).

65. Patrick W. Corrigan et al., *Challenging Two Mental Illness Stigmas: Personal Responsibility and Dangerousness*, 28 SCHIZOPHRENIA BULL. 293, 293-95 (2002).

66. *See* Cressida Manning & Peter D. White, *Attitudes of Employers to the Mentally Ill*, 19 PSYCHIATRIC BULL. 541 (1995).

67. *See* Marjorie L. Baldwin & Steven C. Marcus, *Perceived and Measured Stigma Among Workers with Serious Mental Illness*, 57 PSYCHIATRIC SERVICES 388, 391 (2006).

68. Terry Krupa et al., *Understanding the Stigma of Mental Illness in Employment*, 33 WORK 413, 419 (2009).

69. *See supra* Part III.A.

70. Edward H. Yelin & Miriam G. Cisternas, *Employment Patterns among People with and without Mental Conditions*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 25, 35 (Richard J. Bonnie & John Monahan eds., 1997).

71. Korn, *supra* note 38, at 607-08.

lead to one of two conclusions. First, some believe that mental illness is nothing more than a character defect or a personality flaw. Second, others believe that individuals claiming to be "mentally ill" are just malingerers looking to take advantage of their employer.

Historically, mental illness has been associated with undesirable personality characteristics and personal shortcomings. Mentally ill individuals are often viewed as weak, unstable and unable to deal with the stress of everyday life.[72] According to this line of reasoning, individuals who claim to be mentally ill simply need to "buck up" and behave in a more appropriate and desirable manner. Proponents of this view believe that everyone has to deal with difficult situations and occasionally feels anxious or sad, and individuals who claim to be mentally ill simply need to try harder.

This stereotype of mental illness as a character flaw was evident in comments made by senators during the Congressional debates regarding passage of the ADA. For example, Sen. William L. Armstrong (R-CO) stated that he thought that the purpose of the legislation was to protect the handicapped and people in wheelchairs and he could not imagine giving "protected status" to disabilities that "might have a moral content to them."[73] Sen. Jesse Helms (R-GA) was concerned about the impact on an employer's ability to maintain moral standards if coverage extended to employees who were manic depressives and schizophrenics.[74] Even one of the co-sponsors of the ADA, Sen. Warren Rudman (R-NH), expressed concern with including mental illness since it "is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis…[W]e are talking about behavior that is immoral, improper or illegal and which individuals are engaging in of their own volition."[75] It is noteworthy that mental illness was the only type of disability that was specifically attacked during the Congressional debates on the ADA.[76]

The idea that mental illness is not a real disease has also lead to the conclusion that mentally ill individuals are malingerers who are actively faking symptoms to deceive others and get some type of

72. *See id.* at 605-06.

73. 135 CONG. REC. S10753 (daily ed. Sep. 7, 1989) (statement of Sen. Armstrong).

74. 135 CONG. REC. S10765 (daily ed. Sep. 7, 1989) (statement of Sen. Helms).

75. *Id.* at S10796 (statement of Sen. Rudman).

76. SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 6 (Allison Risko & Amy J. Clarke eds. 2001).

preferential treatment. [77] This stereotype is evident in the popular press, scholarly literature, and court opinions.[78] It encompasses individuals who may either be fully faking their "illness" as well as those who are exaggerating their illness for personal benefit. This concern that individuals could fake mental disorders has been raised in a different context at the United States Supreme Court.[79]

Perhaps nobody embodies this stereotype better than Vincent Gigante—one of the most powerful Mafia leaders in the United States who did fake his mental illness for decades in an effort to hide his Mafia position and avoid prison time.[80] He was often seen wandering around Greenwich Village in New York City in his bathrobe and slippers mumbling to himself. After his conviction, a prison psychologist grudgingly complimented the "sophistication of his malingering attempt."[81] Unfortunately for individuals who really do suffer from mental illness, the stereotype of the mentally ill as malingerers remains prevalent in society.[82]

2. The Stereotype of the Mentally Ill as Violent

Another stereotype involving mental illness is that mentally ill individuals are more dangerous and violent than the general population, and that mental illness is actually a specific type of character flaw.[83] This view of the mentally ill as violent has been perpetuated by the media and is seen in both movies and television programs where mentally ill individuals are often portrayed as psychotic killers and evil people.[84] Additionally, when horrific crimes are committed, the media often focuses on the role played by mental

77. Hensel & Jones, *supra* note 63, at 55-56.

78. *Id.*

79. In a death penalty case involving an intellectually disabled/mentally retarded defendant, Justice Scalia expressed concern that "the symptoms of this condition can readily be feigned." Atkins v. Virginia, 536 U.S. 304, 353 (2006) (Scalia, J., dissenting).

80. Selwyn Raab, *Vincent Gigante, Mob Boss Who Feigned Incompetence to Avoid Jail, Dies at 77*, N.Y. TIMES (Dec. 20, 2005), http://www.nytimes.com/2005/12/20/obituaries/vincent-gigante-mob-boss-who-feigned-incompetence-to-avoid-jail-dies-at-77.html.

81. Larry McShane, *Vincent Gigante (Vinny the Chin) Never Abandoned Demented Alter Ego In Prison*, N.Y. DAILY NEWS (Dec. 3, 2007), http://www.nydailynews.com/news/crime/vincent-gigante-vinny-chin-abandoned-demented-alter-ego-prison-article-1.271384.

82. *See* Starr, *supra* note 55 (Gigante only admitted his ruse in exchange for a plea deal).

83. *See* Ann Hubbard, *The ADA, The Workplace and the Myth of the Dangerous Mentally Ill*, 34 U.C. DAVIS L. REV. 849, 850–51 (2001).

84. Korn, *supra* note 38, at 608.

illness in the commission of the crime, further perpetuating the stereotype that mental illness makes people violent. One recent example is focus on the perpetrator's mental illness in coverage of the 2012 school shooting at the Sandy Hook Elementary School in Newton, Connecticut, where 20 children and 6 adult staff members were killed by a gunman.[85] The view that mentally ill individuals are violent and dangerous has become embedded in American culture.[86]

While the research is somewhat mixed as to whether mentally ill individuals are more violent than the general population, any correlation that exists is both small and overly exaggerated in the public's mind. Some studies have found that mentally ill individuals are not more likely to be violent.[87] Other studies have found that while there is a small correlation between violence and mental illness, this correlation is primarily caused by other comorbid factors.[88] The author of one meta-analysis explained that "mental disorders are neither necessary nor sufficient causes of violence."[89] The major determinants of propensity toward violence are being young, male and from a lower socio-economic status.[90] Other determinants of violence include marital status and education.[91] Substance abuse is also a significant determinant of violence, and a meta-analysis found that most of the excess risk of violence in individuals with psychosis is caused by substance abuse and not the psychosis.[92] Mentally ill individuals are far more likely to be the victim of violence than they are to engage in violent behavior.[93]

The stereotype of mentally ill individuals as dangerous is

85. Sydney Lupkin, *Newton Shooting Put Spotlight on U.S. Mental Health Care – Again,* ABCNEWS.COM, http://abcnews.go.com/Health/newtown-shootings-put-spotlight-mental-health-care/story?id=18001556 (last visited Jan. 27, 2015).

86. Korn, *supra* note 38, at 608.

87. Paul S. Appelbaum et al., *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study*, 157 AM. J. PSYCHIATRY 566, 566–72 (2000) (finding that delusions were not associated with a higher risk of violent behavior).

88. Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 123 (2003); Fazel Seena et. al., *Schizophrenics and Violence: Systematic Review and Meta-Analysis*, 6 PLoS 1, 5 (2009).

89. Stuart, *supra* note 88, at 123.

90. *Id.*

91. Korn, *supra* note 38, at 613.

92. Seena et al., *supra* note 88, at 7 (explaining that substance abusers without psychosis are just as likely to be violent as substance abusers who do suffer from psychosis).

93. Stuart, *supra* note 88, at 123.

responsible for a significant portion of employment discrimination against the mentally ill.[94] Employers, concerned with both violence in the workplace generally as well as their potential liability for hiring violent individuals, are often reluctant to hire mentally ill individuals.[95] Unfortunately, it is often very difficult to predict violent behavior, regardless of whether or not an individual suffers from mental illness.[96] While the public may assume that workplace violence is preventable and predictable, most experts disagree, and even trained psychiatrists have difficulty accurately predicting workplace violence.[97] While it is not possible to entirely eliminate the risk of workplace violence, employers can still take reasonable steps to minimize the risk, such as reviewing their hiring process, conducting thorough background checks, and keeping their security measures and disciplinary policies up to date.[98] Unfortunately, though, the inability to accurately predict violent behavior along with the stereotype that mentally ill individuals are violent continues to lead to discrimination against the mentally ill.

3. The Stereotype of the Mentally Ill as Incompetent

Another stereotype is that mentally ill individuals are incompetent and have difficulty functioning as capable adults.[99] While some individuals with psychiatric disorders may in fact be found to be legally incompetent or "mentally incapacitated," many mentally ill individuals are not. Since mental illness is often episodic, individuals may go through periods when they are incompetent followed by long periods of high functioning. However, the stereotype persists and results in the paternalistic view that mentally ill individuals generally need others to care for them. This concern was raised during the Congressional debates on the ADA.[100] This stereotype is particularly harmful to mentally ill individuals in the

94. John Monahan et. al., *Developing a Clinically Useful Actuarial Tool for Assessing Violence Risk*, 176 BRIT. J. PSYCHIATRY 312 (2000) (discussing the effect of stereotypes on the mentally ill).

95. Korn, *supra* note 38, at 613-14.

96. *Id.* at 614.

97. *See* Richard A. Friedman, *Why Can't Doctors Identify Killers?*, N.Y. TIMES (May 27, 2014), http://www.nytimes.com/2014/05/28/opinion/why-cant-doctors-identify-killers.html?_r=0; David Brown, *Predicting Violence is a Work in Progress*, WASH. POST (Jan. 3, 2013), https://www.washingtonpost.com/national/health-science/predicting-violence-is-a-work-in-progress/2013/01/03/2e8955b8-5371-11e2-a613-ec8d394535c6_story.html.

98. Korn, *supra* note 38, at 614-15.

99. Krupa et al., *supra* note 68, at 418-19; Hensel & Jones, *supra* note 63.

100. Concannon, *supra* note 19, at 82.

workplace, since few employers would want to hire an incompetent employee. Employees who suffer from mental illness are also less likely to have opportunities for training and promotion since their employers tend to focus on their deficits rather than their strengths.[101]

As this Part explained, there are some important ways in which mental illness and physical illness differ, and there are numerous stereotypes and stigmas associated with mental illness. Additionally, mentally ill employees may be less likely than physically ill employees to request workplace accommodation. The next Part will focus on how the ADAAA impacts mentally ill employees in the workplace.

IV. THE IMPACT OF THE ADAAA'S EXPANDED DEFINITION OF "DISABILITY" ON MENTALLY ILL EMPLOYEES

This Part discusses the impact that the ADAAA has had on mentally ill employees in the workplace. It specifically addresses how the ADAAA overturned the Supreme Court's restrictive decisions and broadened the definition of disability. In doing so, this Part explores the impact that the expanded definition of disability has had on mentally ill employees and the ways in which it has increased protection for these employees. The focus of this Part will be on federal court decisions.

A. Generally Broadening the Term "Disability"

The purpose of the ADAAA was to broaden the term disability and overrule the Supreme Court's decisions in *Sutton* and *Toyota*, and not surprisingly, under the ADAAA courts have interpreted "disability" in a significantly more expansive manner than they did in the pre-ADAAA cases.[102]

Despite its expressly stated purpose of expanding the interpretation of "disability," the ADAAA did not actually change the language defining "disabled" from what was included in the original language of the ADA.[103] As a result of political compromise aimed at increasing the likelihood of passage of the ADAAA, the definition of disabled remained identical to the definition that the *Toyota* Court had narrowly interpreted.[104] Instead, the ADAAA made smaller

101. Krupa et al., *supra* note 68, at 419.

102. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325 § 2(b)(2)-(5), (122 Stat.) 3553, 3554 (2008). *See also generally* Kevin M. Barry, *Exactly What Congress Intended?* 17 EMP. RTS. & EMP. POL'Y J. 5, 19-20 (2013) (discussing the broadened definition of disability under the ADAAA).

103. Kate Webber, *Correcting the Supreme Court—Will it Listen? Using the Models of Judicial Decision-Making to Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L.J. 305, 320-21 (2014).

104. *Id.* For a general discussion of the history of passage of the ADAAA, *see* Barry, *supra* note 102; Kevin Barry, *Toward Universalism*: *What the*

changes to the ADA including instructional amendments which provide direction on how courts should interpret the ADAAA.[105] The Statement of Purpose of the ADAAA states that "the primary object of attention in cases brought under the ADAAA should be whether entities covered under the ADA have complied with their obligations and…the question of whether an individual's impairment is a disability under the ADAAA should not demand extensive analysis."[106] The new Rules of Construction of the ADAAA also require a more expansive interpretation of the term disability stating that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under the Act."[107] In addition to generally broadening the term disability, the ADAAA also specifically expands the term disability in a manner that is applicable to mental illness which will be discussed in the following four Subparts.[108]

Cases interpreting the term disability under the ADAAA have begun to work their way through the courts. While the ADAAA was passed in 2008 and became effective on January 1, 2009, it does not apply retroactively to cases that were pending prior to its effective date.[109] In post-ADAAA decisions, courts are granting significantly fewer summary judgment rulings to employers based on disability status alone.[110] This is an important change, since in the aftermath of the *Sutton* decision and prior to the enactment of the ADAAA, plaintiffs in employment discrimination cases filed under the ADA had dismal win rates, with many courts granting summary judgment for the employer based on a determination that the plaintiff did not meet the statutory definition of disabled.[111] Furthermore, as a result of the narrowing of the ADA's protected class under *Sutton* and *Toyota,* plaintiffs were unlikely to even file discrimination charges since they assumed that they would lose based on disability status

ADA Amendments Act of 2008 Can and Can't do for Disability Rights, 31 BERKELEY J. EMP. & LAB. L. 203, 278 (2010).

105. Webber, *supra* note 103, at 321-22.

106. ADAAA § 2(b)(5), 42 U.S.C. § 12101 (2008).

107. 42 U.S.C. § 12102 (2012).

108. Befort, *supra* note 1, at 2043-44.

109. *Id.* at 2031.

110. *Id.* at 2031-32. *See also* ROBERT L. BURGDORF JR., NATIONAL COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 8 (2013). *But see* Webber, *supra* note 103, at 347-49.

111. Befort, *supra* note 1, at 2038; Colker, *supra* note 3, at 107-16; Schmall, *supra* note 7, at 652-53; Hoffman, *supra* note 33, at 308-11.

alone.[112]

While the generally expanded definition of disabled is a positive development for both physically and mentally disabled employees, it appears to be more helpful to physically disabled employees. As explained in Part II, a plaintiff must both be "disabled" and also be "qualified" to establish class membership under Title I of the ADA. One 2005 study of three circuit courts found that physically and mentally impaired plaintiffs had similar levels of difficulty establishing class membership under the ADA.[113] However, there were important differences in why plaintiffs failed to establish class membership. Approximately two-thirds of plaintiffs suffering from a physical illness were found to lack protected class status under the ADA because they were not "disabled" within the meaning of the statute. On the other hand, two-thirds of mentally ill employees were found to lack protected class status because they were "unqualified" under the terms of the ADA.[114]

Therefore, while both physically and mentally ill employees were often unable to establish class membership post-*Sutton* and pre-ADAAA, the biggest hurdle faced by physically ill employees was the definition of disabled and the biggest hurdle faced by mentally ill employees was the definition of qualified. While the ADAAA expands the definition of "disability," no significant changes were made to the definition of "qualified."[115] As a result, while the expanded definition of disability has already and likely will continue to increase class membership for both physically and mentally disabled employees, the increase will be more pronounced for employees with physical disabilities.[116]

Another recent study looked at federal court decisions between January 2010 and April 2013 and compared cases that were decided under the pre-amendment standards with those decided under the post-amendment standard.[117] Like the 2005 study, this study—which

112. Befort, *supra* note 1, at 2037-38.

113. Hensel & Jones, *supra* note 63, at 65-69 (indicating that while plaintiffs with mental disabilities were slightly less likely to establish class membership than plaintiffs with physical disabilities, the difference was not statistically significant).

114. *Id.*

115. American with Disabilities Act of 1990, 42 U.S.C. § 12111 (1990) (amended 2008).

116. Concannon, *supra* note 19, at 113.

117. *See generally* Befort, *supra* note 1. Since the ADAAA does not apply retroactively to cases that were pending prior to the date it went into effect courts were deciding cases under both the pre-ADAAA and post-ADAAA standards during this time period. *Id.* at 2031.

analyzed a different set of cases—also found that the narrow pre-ADAAA definition of disability was a bigger hurdle for physically disabled individuals than for mentally disabled individuals. Summary judgment was granted to the employer in 78.3% of pre-amendment cases involving a physical disability but only 60% of the pre-amendment cases involving a mental disability based on "disability status."[118] While post-amendment, the likelihood of surviving summary judgment increased for both physically and mentally ill employees in cases involving "disability status," the increase was much greater for employees who suffered from a physical disability.[119] Post amendment summary judgment was granted to the employer in 20.7% of cases involving physical illness and 40% of cases involving mental illness.[120] In other words, the summary judgment win rate for employers based on disability status dropped from 78.3% to 20.7% in cases involving a physical disability and dropped from 60% to 40% in cases involving a mental disability.[121]

It appears that the expanded definition of disability has helped both physically and mentally disabled employees, but the impact has been greater on employees with a physical disability. The following four Subparts will discuss some of the specific ways in which the expanded definition of disability applies to mentally ill employees in the workplace.

B. Mitigating Measures

As explained in the previous subpart, the ADAAA does not change the statutory language defining disabled, but rather explains that the purpose of the Act is to expand how the definition of disability is interpreted. In doing so, the Act explicitly rejects the *Sutton* Court's holding that an employee's disability should be considered in its mitigated state. Rather, under the ADAAA "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."[122] The ADAAA does recognize as an exception that the "ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."[123] The 2011 EEOC Regulations paraphrase the ADAAA's language on

118. *Id.* at 2053.

119. *Id.*

120. *Id.*

121. *Id.* at 2054.

122. 42 U.S.C. § 12102(4)(E)(i).

123. *Id.* at § 12102(4)(E)(ii).

mitigating measures.[124]

The amendment to the ADAAA regarding mitigating measures has been consistently applied by the courts and has expanded the definition of disability for both physically and mentally disabled employees.[125] One report explained that this is not surprising since the change to the statutory language regarding mitigating factors is "unequivocal and not particularly complicated, and in fact, represented a return to a widely accepted analytical premise abruptly discarded by the Supreme Court."[126] Another scholar explained that a "court would be hard-pressed…to consider mitigating measures in contravention of such direct language."[127]

Since medication and therapy are commonly used to control mental illness and both medication and therapy are also explicitly listed by the ADAAA as a mitigating measure,[128] this provision of the ADAAA will increase the number of mentally ill employees who have standing under the Act. In pre-ADAAA cases, mentally ill employees who were able to control diseases such as bipolar disorder,[129] schizophrenia[130] and depression through the use of mitigating measures would not have met the statutory definition of disability. Post-ADAAA, these individuals will have their mental impairment considered in its unmitigated state.

The amendment regarding mitigating measures will likely have a noticeable impact with regard to clinically depressed employees because depression is both a common disorder, and a disorder that

124. 20 C.F.R § 1630.2(j)(1)(vi) (2012).

125. *See, e.g.*, Orne v. Christie, No. 3:12-CV-00290-JAG, 2013 WL 85171, at *3 (E.D. Va. Jan. 7, 2013) (finding plaintiff with sleep apnea was disabled despite mitigating measures); Harty v. City of Sanford, 2012 WL3243282 (M.D. Fla. Aug. 8, 2012) (denying summary judgment for employer after determining that an employee's disability should be examined in unmitigated state); O'Donnell v. Colonial Intermediate Unit 20, 2013 WL 1234813 (E.D. Pa. Mar. 27, 2013) (determining that impairments should be examined in unmitigated state in case involving several mental health conditions, but ultimately dismissing the plaintiff's claim on other grounds).

126. Burgdorf, *supra* note 110, at 65.

127. Webber, *supra* note 103, at 344.

128. 42 U.S.C. § 12102(4)(E)(i)(I)-(IV). *See also* 29 C.F.R. § 1630.2(j)(5)(v) (2012) (listing "psychotherapy" and "behavioral therapy" as mitigating measures).

129. Barry, *supra* note 102, at 227-28; Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW U. L. REV. COLLOQUY 217, 220 (2008).

130. Concannon, *supra* note 19, at 111.

can be helped with mitigating measures. Clinical depression is one of the most prevalent diseases in the United States and antidepressants are one of the most commonly prescribed medications for working age Americans.[131] According to the Center for Disease Control and Prevention (CDC), approximately 1 in 10 Americans suffer from depression and the age group most likely to suffer are 45-64 year olds.[132] Antidepressants are the most commonly used medication for all individuals in the United States aged 18-44.[133] Certain groups have particularly high rates of use of antidepressants. 15.9% of people aged 40-59 in the United States take antidepressants and 23% of women aged 40-59 take anti-depressants.[134] While the majority of individuals take antidepressants to treat depression, they are also used to treat other diseases such as anxiety disorders.[135]

Like other mental disorders, prior to ADAAA, if an employee's depression was successfully treated with antidepressants, she would not meet the statutory definition of disability under the ADA.[136] This meant that she was not entitled to any protection under the Act, and could be terminated because of her mental illness. In post-ADAAA cases involving depression, courts must examine the employee's disability in its unmitigated state and plaintiffs are more likely to meet the statutory definition of disabled.[137] However, the employee is

131. Elisa Y. Lee, *An American Way of Life: Prescription Drug Use in the Modern ADA Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 309 (2011).

132. *An Estimated 1 in 10 U.S. Adults Report Depression*, CENTER FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/features/dsdepression (last visited Jan. 27, 2015).

133. Laura A. Pratt et al., *Antidepressant Use in Persons Aged 12 and Over: United States, 2005-2008*, NAT'L CTR. FOR HEALTH STAT. (October 2011), http://www.cdc.gov/nchs/data/databriefs/db76.htm.

134. *Id.*

135. *Id.*

136. *See* Befort, *supra* note 1, at 2039; Parikh, *supra* note 51, at 740 (explaining that mitigating measures would include psychotropic medications). *See also, e.g.*, Allen v. Bellwouth Telecommunications Inc., F. App'x 197, 200 (6th Cir. 2012); Spades v. City of Walnut Ridge, 186 F.3d 897, 900 (8th Cir. 1999) (holding plaintiff was not disabled within meaning of the ADA because his depression was treated with medication and counseling); McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1288-9 (D. Wyo. 2004) (determining plaintiff whose clinical depression was treated with medication was not disabled under the ADA).

137. *See, e.g.*, Bracken v. DASKO Home Med. Equip., Inc., No. 1:12–CV–892, 2014 WL 4388261, at *11 (S.D. Ohio Sept. 5, 2014) (holding that the ameliorative effect of medication on employee with depression should not be considered).

still required to demonstrate that the impairment in its unmitigated state meets the statutory definition of disability.[138]

C. Episodic Disorders

The ADAAA specifically extends the protection of the ADA to individuals with disabilities that are episodic in nature, stating that an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[139] The 2011 EEOC regulations both paraphrase the ADAAA and provide additional guidance regarding this expanded definition.[140] While prior to passage of the ADAAA some courts had determined that impairments that were episodic would meet the statutory definition of disability,[141] many held that episodic illnesses were not disabilities.[142] The Supreme Court's decision in *Sutton* seemed to support the more restrictive reading with the Court stating that an individual must be "presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[143] This provision of the ADAAA has expanded the definition of disability in cases involving both physical and mental ill employees.[144]

Extending the protection of the ADA to individuals whose impairments are episodic in nature is likely to be particularly beneficially to mentally disabled individuals, since mental illness is often episodic.[145] Prior to passage of the ADAAA, the episodic nature of mental illness meant that mentally ill individuals in remission

138. *See*, *e.g.*, O'Donnell v. Colonial Intermediate Unit 20, 2013 WL 1234813 (E.D. Pa.) (holding that plaintiff did not demonstrate that mental impairment in its unmitigated state substantially limited a major life activity).

139. 42 U.S.C. §12102(4)(D).

140. *See* 29 C.F.R. § 1630.2(j)(1)(vii) (2012).

141. *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1999) (holding that an "intermittent impairment" disability is entitled to protection of ADA and must be reasonably accommodated). *See also* Concannon, *supra* note 19, at 103-04.

142. *See, e.g.*, Garrett v. Univ. of Ala. at Birmingham Bd. of Tr., 507 F.3d 1306, 1315 (11th Cir. 2007) (noting that plaintiff with cancer did not meet statutory definition of disabled because of episodic nature of disease). *See also* Todd v. Academy Corp., 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999) (finding plaintiff with epilepsy not disabled because of episodic nature of disease).

143. Sutton v. United Airlines, Inc., 527 U.S. 471, 482-83 (1999) (noting that the Court was not specifically considering the issue of episodic impairments). *See also* Concannon, *supra* note 19, at 104.

144. Befort, *supra*, note 1 at 259-60.

145. *See* Stefan, *supra* note 58, at 281–82.

might not be protected by the ADA.[146] However, in post-ADAAA cases, courts have extended the statute's protection to cover mentally ill individuals whose diseases are episodic.[147] In listing examples of impairments that are episodic in nature, it is noteworthy that the EEOC Guidelines specifically list a number of mental disorders including major depressive disorder, bipolar disorder, schizophrenia and post-traumatic stress disorder.[148]

D. Defining "Substantially Limits" and "Major Life Activity"

The ADAAA leaves in place the terms "substantially limits" and "major life activity" but clarifies that these terms should be interpreted more broadly.[149] The purpose section of the ADAAA specifically rejects that Supreme Court's decision in *Toyota* that the terms "'substantially' and 'major' in the definition of disability should be interpreted strictly to create a demanding standard for qualifying as 'disabled.'"[150] The purpose section further rejects *Toyota's* standard that to be "substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'"[151] While the statute rejects *Toyota's* interpretation of "substantially limits," it is noteworthy that it fails to provide a new definition for that term.[152] The ADAAA does more specifically define "major life activity" by including an illustrative list of "major life activities"[153] and specifying

146. *See, e.g.*, Soileau v. Gulford of Me., Inc., 105 F.3d 12, 16 (1st Cir. 1997) (noting that an employee with dysthymia, a chronic depressive disorder characterized by intermittent bouts of depression, was not disabled under the terms of the ADA because of the episodic nature of the disease).

147. *See, e.g.*, Estate of Murray v. UHS of Fairmount, Inc., No. 10-2561, 2011 WL 5449364, at *6 (E.D. Pa. Nov. 10, 2011) (finding that an employee whose depression was episodic was disabled under the ADAAA, since her disease, when active, substantially limited her ability to think, eat, and sleep); *see also* Kinney v. Century Servs. Corp. II, No. 10-787, 2011 WL 3476569, at *8 (S.D. Ind. Aug. 9, 2011) (finding that an employee was disabled under the ADAAA despite episodic nature of her depression).

148. *See* 29 C.F.R. § 1630.2(j)(1)(vii) (2012).

149. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 201-02 (2010).

150. ADAAA § 2(b)(4), 42 U.S.C. § 12101 (2008); Concannon, *supra* note 19, at 102-03.

151. ADAAA § 2(b)(4), 42 U.S.C. 12101 (2008).

152. Webber, *supra* note 103, at 322.

153. 42 § U.S.C. 12102(2)(A) (stating that major life activities "include, but are not limited to caring for oneself, performing manual tasks, seeing,

that major life activities include the operation of major bodily function.[154] The 2011 EEOC Guidelines both paraphrase and give further examples of what constitutes a substantial limitation and a major life activity.[155]

While the majority of courts in pre-ADAAA cases strictly construed the term "major life activity,"[156] there was also a lack of consensus regarding the definition of this term. [157] Courts struggled with the question of when limitations typically associated with mental illness constituted a substantial limitation on a major life activity,[158] and were often unsympathetic to mentally ill employees in these cases.[159] For example, pre-ADAAA cases questioned whether interacting and getting along with others,[160] or concentrating were

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hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working"); *see also* Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667, 675 (2010).

154. 42 § U.S.C. 12102(2)(B) ("[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

155. 29 C.F.R. § 1630.2(h-j) (2011).

156. Stefan, *supra* note 58, at 311 (discussing how "severe, chronic illnesses, including cancer, are not disabilities under the ADA because they do not constitute substantial limitations on major life activities").

157. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WILLIAM & MARY L. REV. 1483, 1491 (2011) (discussing the lack of clarity in pre-ADAAA jurisprudence regarding when a disability substantially limits a major life activity); Korn, *supra* note 38, at 640 (discussing the difficulty courts have in determining what constitutes a major life activity); Concannon, *supra* note 19, at 94 (discussing the meaning of "substantially limits" and "major life activity").

158. Korn, *supra* note 38, at 640-41.

159. *See id.* at 598-99, 640-41; Parikh, *supra* note 51, at 749-50 and n. 181. Additionally, the pre-ADAAA EEOC Interpretive Guidelines focused on activities that are typically associated with physical illness and not on activities that are typically associated with mental illness. *See, e.g.*, Korn, *supra* note 38, at 598; and Stefan, *supra* note 58, at 282-83.

160. *See* Deidre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. CIV. RTS. L.J. 79 (2006) (discussing the problems with differentiating between mental illness and disfavored personality); *See generally* Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139 (2002) (arguing that interacting with others should constitute a major life activity). *See generally* Mark DeLoach, Note, *Can't We All*

major life activities.[161] Courts were also generally unsympathetic to mentally ill employees who claimed that they were substantially limited in the major life activity of working.[162] Additional cases held that an employee who suffered from a panic disorder was not substantially limited in the major life activity of everyday mobility[163] and a depressed employee with a sleep disturbance was not substantially limited in a major life activity.[164]

Under the ADAAA's more expansive definitions of "substantially limits" and "major life activity," impairments associated with mental illness are now more likely to be considered disabilities. The ADAAA's illustrative list of major life activities includes "concentrating, thinking, communicating and working"[165] which are activities commonly associated with mental illness. Further, the statute's list of major bodily functions includes neurological and brain

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Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities, 57 VAND. L. REV. 1313, 1331-35 (2004) (discussing the difficulty plaintiffs face in cases where they claim a substantial limitation in the ability to get along with others). *See also, e.g.*, Soileau v. Gulford of Me., Inc., 105 F.3d 12, 15 (1st Cir. 1997) (holding that the ability to get along with others is not a major life activity). Davis v. Univ. of N.C., 263 F.3d 95, 101-02 (4th Cir. 2001) (expressing in footnote 4 doubt as to whether the ability to get along with others was a major life activity). *But see* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 160 (E.D.N.Y. 2002) (determining that getting along with others is a major life activity).

161. *See, e.g.*, Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) *cert. denied*, 528 U.S. 811 (1999) (holding that concentrating is not a major life activity); Korn, *supra* note 38, at 599 n. 95.

162. *See, e.g.*, Jerina v. Richardson Auto., Inc., 960 F. Supp 106, 108-09 (N.D.Tex. 1997) (explaining that plaintiff who suffered from a number of mental disorders including depression and panic disorder was not substantially limited in his ability to work); Johnson v. N.Y. Med. Coll., 1997 WL 580708 at *7 (S.D.NY. 1997) (describing an employee who was hospitalized for depression was not substantially limited in her ability to work). Prior to passage of the ADAAA the Supreme Court expressed skepticism as to whether work could be a major life activity, and stated that a plaintiff would need to be substantially limited in a broad class of jobs and not simply the particular job he or she applied for or currently held. *See* Sutton v. United Airlines, Inc., 119 S.Ct. 2139, 2148 (1999).

163. *See* Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144, 149 -51 (2d Cir. 1998). For a discussion of this case *see* Parikh, *supra* note 51, at 746-47.

164. Smoke v. Wal-Mart Stores, Inc., No. 98-1370, 200 WL 192806 at *2 (10th Cir. Feb. 17, 2000).

165. 42 § U.S.C. 12102(2)(A).

function.[166] The 2011 EEOC Guidelines further clarify that the term mental impairment should be interpreted broadly.[167] Post-ADAAA cases have generally found that mentally ill employees have at least raised a genuine issue of material fact as whether they are substantially limited in a major life activity.[168]

E. "Regarded As" Prong

The ADAAA also broadened coverage under the ADA's "regarded as" prong.[169] Prior to passage of the ADAAA, a plaintiff could only meet the "regarded as" standard if he could show that his employer

166. 42 U.S.C. § 12102(2)(B). The EEOC Guidelines specifically list "major depressive disorder, bipolar disorder, post-traumatic disorder, obsessive-compulsive disorder and schizophrenia" as examples of disorders that would substantially limit brain function. 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

167. 29 C.F.R. § 1630.2(h)(2) (2012) (stating that a mental impairment means "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities.").

168. *See, e.g.*, Glaser v. Gap, 994 F. Supp.2d 569, 575-76 (S.D.N.Y 2014) (determining that employee raised a genuine issue of material fact as to whether autism substantially limited a major life activity); Santee v. Lehigh Valley Health Network Inc., 2013 WL 6697865 at *4–5 (E.D. Pa. Dec. 19, 2013) (holding that plaintiff who suffered from depression was disabled because of her substantial limitation in the major life activity of concentrating); Bracken v. DASKO Home Med. Equip., Inc., No. 1:12–CV–892, 2014 WL 4388261 at *9-10 (S.D. Ohio, Sep. 5, 2014) (determining that plaintiff who suffered from depression, anxiety and possible bipolar disorder was substantially limited in the major life activities of sleeping and eating); *Beair v. Summit Polymers*, No. 5:11-420-KKC, 2013 WL 4099196 (E.D. Ky., Aug. 13, 2013) (determining that plaintiff with major depressive disorder and PTSD had substantial limitations in brain function); Naber v. Dover Healthcare Associates, Inc., 765 F. Supp. 2d 622, 646 (D. Del. 2011) (holding that depression substantially limited the major life activity of sleeping); Holland v. Shinseki, No. 3:10-CV-0908-B, 2012 WL 162333, at 6 (N.D. Tex. Jan. 18, 2012) (genuine issue of material fact existed as to whether employee whose suffered from a number of mental disorders including depression, anxiety and acute stress and was unable to sleep more than an hour a night was substantially limited in a major life activity). *But see* Blackard v. Livingston Parish Sewer District, No. 12-704-SDD-RLB, 2014 WL 199629 (M.D. La., Jan. 15, 2014) (holding that plaintiff who suffered from bipolar disorder, depression, anxiety and ADHD did not demonstrate that she was substantially limited in a major life activity).

169. *See* Hoffman, *supra* note 157, at 1496 ("The revised 'regarded as' prong of the disability definition is likely to be the most transformative improvement for ADA plaintiffs."). For a general discussion of the ADAAA's broad coverage under the regarded as prong *see* Diller, *supra* note 13, at 223-27.

believed that he had an impairment that substantially limited a major life activity.[170] In other words, it was not enough for an employee to show that his employer viewed him as impaired but rather the employee had to prove that the employer specifically believed that the impairment substantially limited a major life activity. Employees were therefore required to "get inside the head" of the employer and prove the employer's motivation.[171] Additionally, employees were not protected in cases of "pure" discrimination or animus-based discrimination where the employer's actions were taken "out of deep antipathy for the diagnosed condition rather than any mistaken perception of its effects on an individual's ability to work."[172] In other words, it was OK for an employer to fire an employee with bipolar disorder because he did not like people with bipolar disorder. Both physically and mentally disabled plaintiffs fared poorly under the "regarded as" prong in pre-ADAAA cases.[173]

The ADAAA significantly expands the "regarded as" prong of the definition of disabled.[174] Under the ADAAA, an individual is regarded as disabled "if the individual established that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[175] Employees therefore no longer need to show that their employer viewed them as functionally limited in performing a major life activity.[176] The legislative history further clarifies that Congress

170. Concannon, *supra* note 19, at 104.

171. *Id.* at 95.

172. Stefan, *supra* note 58, at 298–99.

173. For example, in pre-ADAAA cases employees with cosmetic disfigurement were often denied protection under the ADA since they were not substantially limited in a major life activity, while in post-ADAAA cases they would generally be regarded as disabled. Hoffman, *supra* note 157, at 1496–97. Similarly, in pre-ADAAA cases, a number of courts held that employees who suffered from anxiety and depression were not "regarded as" disabled since they were unable to show that their employer believed they were substantially limited in a major life activity. *See, e.g.*, Parikh, *supra* note 51, at 753-56; Concannon, *supra* note 19, at 112; Stefan, *supra* note 58, at 276; Schwartz v. Comex, No. 96 CIV. 3386 LAP, 1997 WL 187353, at 2 (S.D.N.Y. Apr. 15, 1997).

174. Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limit" Mean?*, 76 MO. L. REV. 43, 68 (2011).

175. 42 U.S.C. § 12102(3)(A); 29 C.F.R. § 1630.2(n)(3) (stating that evidence that an employer believed the individual was limited in any major life activity is not required).

176. *See* Befort, *supra* note 1, at 2044. *See also* 154 CONG. REC. S8342-46 (daily ed. Sept. 11, 2008) (Explaining that the "regarded as" prong "will

intended for the ADAAA to cover animus based types of discrimination.[177] Congress did include two important statutory limitations as a compromise for this broad coverage.[178] First, the "regarded as" prong "does not apply to impairments that are transitory and minor."[179] Second, employers do not need to reasonably accommodate employees who are regarded as disabled, but only need to accommodate employees who have an actual impairment that substantially limits a major life activity.[180]

The expectation was that the expanded "regarded as" prong would lead to a "greater prevalence of prong three claims following the effective date of the ADAAA."[181] However, according to one study, this has not occurred and the author of the study hypothesized two possible reasons for this surprising finding.[182] First, it is possible that employers are not challenging plaintiff's coverage under this prong since it is unlikely the challenge will be successful. Another possibility is that plaintiffs who need an accommodation do not assert coverage under the "regarded as" prong since employers are not required to reasonably accommodate an employee under this prong.

While there may not be a greater prevalence of claims under the "regarded as" prong, courts that have addressed this prong have applied it in a relatively clear and consistent manner.[183] The expanded prong is likely to have a positive impact on mentally ill employees due to the pervasiveness of negative stereotypes and stigmas commonly associated with mental illness.[184] Mentally ill

apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity.").

177. Stefan, *supra* note 58, at 304–06; Diller, *supra* note 13, at 272-75.

178. Befort, *supra* note 1, at 2044.

179. 42 U.S.C. § 12102(3)(B) (Under the terms of the Act a "transitory impairment" is "an impairment with an actual or expected duration of 6 months or less.").

180. 42 U.S.C. § 12201(h). This statutory limitation makes sense since employees who are regarded as disabled – but do not actually have a disability – are unlikely to need an accommodation.

181. *See* Befort, *supra* note 1, at 2052. This study examined summary judgment decisions addressing whether the employee was "disabled" as well as whether the employee was "qualified for the job" over a 40 month period from January 1, 2010 to April 30, 2013.

182. *Id.* at 2063-64.

183. As one scholar explained, "[P]erhaps because the revision replaced a thorny and complicated determination with a more straightforward one, the courts seem to have absorbed and applied it rather smoothly." Burgdorf, *supra* note 110, at 78.

184. *See infra* Part III.B.

plaintiffs are now able to at least raise a genuine issue of material fact as to whether they were "regarded as" disabled by their employer in many of these cases.[185] However, employees still must show "causation" or that they were subjected to an adverse action "because of" the perceived impairment,[186] and in some cases mentally ill plaintiffs have been unable to meet this burden.[187]

As this Part has explained, the ADAAA both generally states that the term disability should be broadly construed and also specifically expands and clarifies the term. As a result, this expanded definition of disability has increased the likelihood that mentally ill employees will have standing under the ADA. However, there are a number of remaining hurdles that disabled employees—and particularly mentally ill employees—still face under the statute that will be discussed in the next Part.

V. LIMITATIONS OF THE ADAAA

As explained in the previous Part, the ADAAA's broadened definition of disability has expanded coverage for employees with impairments, including mentally ill employees. In post-ADAAA decisions, courts are granting significantly fewer summary judgment rulings to employers based on disability status alone.[188] As a result,

185. *See, e.g.*, Becker v. Elmwood Local School District, 2012 WL 13569, at *10 (N.D. Ohio Jan. 4, 2012) (holding that there was a factual dispute as to whether the employer perceived an employee with OCD as disabled); Bracken v. DASKO Home Med. Equip., Inc., No. 1:12–CV–892, 2014 WL 4388261 at *12 (S.D. Ohio, Sep. 5, 2014) (holding that there are genuine issues of material fact as to whether employer regarded employee as disabled since employer was aware of employee's mental impairment and symptoms of impairment); McCracken v. Carlton College, 969 F. Supp. 2d 1118, 1130 (D. Minn. 2013) (holding that employee who suffered from anxiety and depression met the "minimal burden of establishing that he was regarded as disabled"); Nelson v. City of New York, 2013 No. 11 Civ. 2732(JPO), WL 4437224 at *6 (S.D.N.Y.) (holding that employee who suffered from depression and anxiety raised an issue of fact as to her employer regarding her as disabled); Stranzl v. Delaware County, No. 13-1393, 2014 WL 3418996, at *7 (E.D.Pa.) (holding that employer regarded employee with anxiety attacks, panic attacks and depression as disabled). *But* see McNally v. Aztar Indiana Gaming Co., LLC, No. 3:12-CV-00063-TWP, 2014 WL 300433, at 3 (S.D. Ind. Jan. 28, 2014) (determining that even though employer suggested counseling for employee's personal problems, this did not show that employer regarded him as having a mental disability).

186. 29 C.F.R. 1630.2(j)(3)(ii).

187. Banaszack v. Ten Sixteen Recovery Network, No. 12-12433, 2013 WL 2623882, at *6 (E.D. Mich. 2013) (holding that mentally ill employee failed to demonstrate that her perceived impairment was a "but-for cause" of why she was fired).

188. Befort, *supra* note 1, at 2031-32.

courts are now grappling with the question of whether these disabled employees were discriminated against in the workplace. As explained in Part II, in order to establish a prima facie case of disability discrimination under Title I of the ADA a plaintiff must show that he is "(1) a disabled person as defined by the ADA; (2) is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability."[189] Since courts are less likely to grant summary judgment to the employer on the issue of disability status alone, more courts are addressing the second and third prongs of the prima facie case. This Part will examine some of the hurdles employees face under the second and third prong.

A. Formal Equality and the Courts' General Discomfort with Accommodation

Accommodation requirements under the ADA should be examined within the general framework of antidiscrimination law in the United States. While a full discussion of the theories of equality is beyond the scope of this paper, it is important to understand that "formal equality" is the underlying principle of antidiscrimination law in the United States.[190] As one commentator explained, "The canonical idea of 'antidiscrimination' in the United States condemns the differential treatment of similarly situated individuals" on the basis of protected categories.[191] Under both the United States Constitution and Title VII of the 1964 Civil Right Act, the guiding principle of antidiscrimination law is that "like individuals" should be treated in a similar manner. Courts tend to generally view employment discrimination statutes as requiring little more than formal equality or neutrality and are hesitant to require what they consider to be

189. E.E.O.C. v. Picture People, Inc., 684 F.3d 981, 985 (10th Cir. 2012).

190. For a general discussion of theories of equality *see* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 962 (2012) (arguing that employment discrimination statutes have recently focused more strongly on anticlassification principles); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (discussing how "antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories, despite the frequent claims of commentators to the contrary"); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1724-25 (2012) (comparing the legal culture of equality in the United States with the legal culture of equality in other constitutional democracies).

191. Jolls, *supra* note 190, at 643.

differential or preferential treatment of employees.[192] There are exceptions where statutes[193] or court decisions[194] mandate accommodation or "differential" treatment of individuals. However, courts are generally more comfortable prohibiting discrimination than they are in mandating accommodation and as a result employees tend to fare poorly in accommodation cases.[195]

The statute addressing "differential" treatment that is most similar to the ADA is §701(j) of Title VII of the 1964 Civil Rights Act which mandates religious accommodation in the workplace. Under §701(j), an employer must "reasonably accommodate an employee's or prospective employee's religious observance or practice" if accommodation can be done without "undue hardship." Decisions interpreting §701(j) illustrate the courts' general discomfort with accommodation.[196] While religion is defined broadly under §701(j), the United States Supreme Court has twice addressed the scope of §701(j) and has both times narrowly defined an employer's obligation to accommodate a religious employee.[197] In narrowly interpreting §701(j), the Court specifically defined undue hardship as any cost greater than "de minimis."[198] When Congress enacted the ADA, it explicitly rejected 701(j)'s "de minimis" standard, determining instead that "undue hardship" is an "action requiring significant difficulty or

192. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997) ("Title VII's prohibition of discrimination has generally been read as requiring that employers apply workplace requirements and regulations 'neutrally.'").

193. For example, the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§2612) mandates unpaid medical and family leave in certain circumstances and §701(j) of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000(e)(j)) requires that employers "reasonably accommodate" an employee's religious observance when such accommodation can be done without "undue hardship."

194. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003) (upholding an affirmative action policy and holding that public universities could consider race as a factor in admissions) (distinguishing that this was an equal protection case and not an employment discrimination case).

195. *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1819-20 (2005) (explaining that courts dislike accommodation since they view it as an "unwelcome species of affirmative action").

196. *See generally* Jamie Darin Prenkert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 473-86 (2006); Kaminer, *supra* note 16, at 578-79; Engel, *supra* note 192.

197. *See* TWA, Inc. v. Hardison, 432 U.S. 63, at 73-74, 79-81 (1977); Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 69 (1986).

198. *TWA, Inc.*, 432 U.S. at 84.

expense."[199] However, as will be explained in the next subpart, courts have nonetheless failed to require significant accommodation of employees in ADAAA cases.

In addition to being uncomfortable with accommodation generally, courts explicitly distinguish between mutable and immutable traits in the workplace and generally do not mandate accommodation of mutable traits.[200] Employees therefore fare particularly poorly in cases where courts consider the characteristic at issue to simply be a matter of personal choice. For example, plaintiffs regularly lose in cases where an employer's dress or grooming requirements are challenged under Title VII's prohibition on sex[201] or race[202] discrimination. Courts have also held that "English only" rules are not national origin discrimination since employees can choose what language to speak.[203] Commentators have criticized the mutable/immutable distinction opining not only that some mutable traits should be protected but additionally that some traits that courts have determined are mutable are in fact immutable.[204] Yet

199. H.R. Rep. No. 101-485, pt. 2, at 68 (1990) ("The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under Title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison.*").

200. *See generally* Hoffman, *supra* note 157; Engel, *supra* note 192, at 408; Roberto Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2199 (2003); Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. OF SOC. POL'Y & L. 453, 454 (2010).

201. *See generally* Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality*, 92 MICH. L. REV. 2451, n. 196 (1994); Engle, *supra* note 192, at 340-53.

202. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981).

203. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).

204. *See* Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287 (2009) (criticizing courts for their overemphasis on the immutability standard); Tristan K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contract Hypothesis*, 86 N.C. L. REV. 379 (2008) (discussing how the debate on workplace equality should be reframed to include the goal of social equality); Susan Sturm, *Second Generation*

despite these critiques, courts tend to regularly hold that immutable traits are not entitled to accommodation.[205]

Requests for accommodation under the ADAAA must be examined within this general framework of antidiscrimination law in the United States. First, courts are generally unsympathetic to an employee's requests for "differential treatment" or accommodation, and this is a hurdle that will be faced by employees who request accommodation under the ADAAA.[206] Second, one of the stereotypes involving mental illness is that it is not a real disease but rather a somewhat mutable characteristic.[207] Mentally ill individuals are often stigmatized as choosing to behave in an undesirable manner. Additionally, there is the stereotype that mentally ill individuals are simply malingerers, actively choosing to deceive others.[208] Finally, the definition of what constitutes a mental illness is somewhat illusive and continually in flux, which further contributes to the view that mental illness is mutable.[209] According to this line of reasoning, it is not only patients who could "choose" to behave in a more desirable manner, but also the doctors who get to "choose" how to define mental illness.[210]

B. When is a Mentally Ill Individual "Qualified?"

This Part will discuss both the definition of "qualified" and the specific application of "qualified" status to mentally ill employees. Under the ADA both physically and mentally ill employees must be "qualified" for the job in question. However, mentally ill employees face unique hurdles in proving "qualified" status and are more likely than physically ill employees to have their ADA claim fail because they are not deemed "qualified."

1. Definition of Qualified Individual

In post-ADAAA cases, courts are significantly more likely to find that an employee meets the statutory definition of disabled and therefore more likely to address the second prong of the prima facie case, which is whether the employee "is qualified, with or without a

Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 462-63 (2001) (proposing a structural approach to the problem of second generation employment discrimination).

205. *See supra* note 198.

206. *See* Waterstone, *supra* note 195, at 1819-20 (explaining that courts dislike accommodation since they view it as an "unwelcome species of affirmative action").

207. *See infra* Part III.C.1.

208. *Id.*

209. *See infra* Part III.A.

210. *Id.*

reasonable accommodation, to perform the essential functions of the job."[211] One recent study found that "district court summary judgment rulings based on qualified status as compared to all district court summary judgment rulings" went from 28% in pre-ADAAA cases to 47% in post-ADAAA cases.[212] In addition to more courts reaching the issue of qualified status, courts are also more likely to find that employees are unqualified in the post-ADAAA cases.[213] While summary judgment was granted to the employer in 47.9% of cases that ruled on the qualified issue in pre-ADAAA cases, this number increased to a 69.7% employer win rate in post-ADAAA cases that ruled on the qualified issue.[214] Therefore, while plaintiffs are now more likely to have "disability" standing, they are also more likely to lose at the summary judgment stage based on "qualified status." As the author of the study opined, as a result of the shift in focus to "qualified" status, "the more plaintiff-friendly outcomes engineered by the ADAAA with respect to disability status are being partially offset by more employer-friendly outcomes with respect to qualified status."[215]

In defining *essential functions*, the ADA specifically states that "consideration shall be given to the employer's judgment as to what functions of the job are essential,"[216] and courts tend to give deference to an employer's determination.[217] The EEOC regulations both reiterate that the term does not include "marginal" functions of the job and also provide a non-exclusive list of factors employers should consider in determining if a function is essential.[218] However, it is somewhat unclear when something rises to the level of being an "essential function." For example, while many courts have held that regular attendance is always an essential job function, some have taken a more fact specific approach.[219]

Closely related to the definition of the term "essential functions"

211. E.E.O.C. v. Picture People, Inc., 684 F.3d 981, 985 (10th Cir. 2012).

212. Befort, *supra* note 1, at 2054-55.

213. *Id.* at 2025.

214. *Id.*

215. *Id.* at 2071.

216. Americans with Disabilities Act of 1990, 42 § U.S.C. 12111(8) (2012).

217. Ward v. Mass. Health Research Inst. Inc., 209 F.3d 29, 34 (1st Cir. 2000); Mason v. Avaya Commc'ns Inc., 357 F.3d 1114, 1119 (10th Cir. 2004); Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006).

218. 29 C.F.R. 1630.2(n)(3).

219. Concannon, *supra* note 19, at 97.

is the definition of the term "reasonable accommodation,"[220] and as explained in the previous subpart, courts tend to be uncomfortable with preferences or statutory mandates of accommodation. Under the ADA, an employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."[221] The ADA does not define "reasonable accommodation," but instead gives examples of possible accommodations which include "job restructuring, part-time or modified work schedules, reassignment to a vacant position [and] acquisition or modification of equipment or devices."[222] Undue hardship is defined as "an action requiring significant difficulty or expense."[223] The EEOC regulations provide further examples of possible accommodations as well as when accommodations would constitute an undue hardship.[224]

The reasonable accommodation provision of the ADA has not been interpreted by the courts in a clear and consistent manner.[225] *U.S. Airways, Inc. v. Barnett*, the only Supreme Court case that has interpreted this provision, held that an accommodation that violates a seniority system would generally not be considered reasonable.[226]

220. *See generally* Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 57 (2013) (discussing how the framework used by the Supreme Court in *PGA Tour Inc. v. Martin* can be used to develop a coherent framework for deciding Title I ADA cases); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1133 (2010) (discussing how reasonable accommodation and undue hardship are "two sides of the same coin"); *see* Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 974 (2004).

221. Americans with Disabilities Act of 1990, 42 U.S.C § 12112(b)(5)(A) (2012).

222. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(9) (2012).

223. Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(10)(A) (2012).

224. 29 C.F.R. § 1630.2(o)-(p). For a detailed discussion of the legislative history and EEOC interpretation of the terms "reasonable accommodation" and "undue hardship" *see* Weber, *supra* note 220, at 1131-42.

225. One commentator referred to it as "the chaos of the interpretation of the reasonable accommodation provision." *See* Porter, *supra* note 220, at 543.

226. U.S Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002). The Court did state that under "special circumstances" an accommodation that violates a seniority system might be reasonable. *Id.*

Most lower courts have found that employers do not need to create positions for disabled employees, provide accommodations of a personal nature such as medications or hearing aids, or monitor an employee's health needs.[227] However, it is unclear whether other accommodations would be unreasonable.[228] For example, the lower courts are split on the questions of whether an employer needs to provide an employee with work-related transportation[229] and whether an employer must consider an employee's request to work from home.[230] Courts are also split on the question of whether an employer must reassign an employee to a vacant position if there are other more qualified employees available for the position,[231] and whether accommodations that burden other employees should be required.[232] Courts have not consistently required a high level of accommodation of disabled employees.

2. Application of "Qualified" Status to Mentally Ill Employees

The shift in focus from "disability status" to "qualified status" is likely to have a larger impact on mentally disabled employees than on physically disabled employees. As previously explained, one study found that both physically and mentally disabled plaintiffs in pre-ADAAA cases had a similar level of difficulty establishing class

227. *See* Porter, *supra* note 220, at 546–47 (citing cases).

228. For a discussion of lower court cases interpreting the accommodation provision of the ADA *see id.* at 543–58; Weber, *supra* note 220, at 1152-60.

229. *Compare* Wade v. Gen. Motors Corp., 165 F.3d 29, at 2 (6th Cir. 1998) (employer is not obligated to provide accommodation so that employee is able to work night shifts), *with* Lyons v. Legal Aid Society, 68 F.3d 1512, 1517 (2d Cir. 1995) (holding that an employer could be obligated to accommodate an employee with difficulty getting to work).

230. *Compare* Mobley v. Allstate Ins. Co., 531 F.3d 539, 547-48 (7th Cir. 2008) (holding that working at home is generally not a reasonable accommodation), *with* Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1061 (D.C. Cir. 1992) (analyzing whether it would be possible for disabled employee to work at home since her OCD only made it difficult for her to leave the house and did not affect her ability to do her work).

231. *Compare* Smith v. Midland Brake Inc., 180 F.3d 1154, 1154 (10th Cir. 1999) (disabled employee should be transferred to a vacant position even if more qualified employees apply), *with* Huber v. Walmart Stores, Inc., 486 F.3d 480, 480 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074 (2007), *cert. dismissed*, 522 U.S. 1136 (2008) (employer did not need to transfer employee to vacant position if more qualified employees applied for the position). *See also* Porter, *supra*, note 220, at 540-41.

232. *Id.* at 552 (citing cases).

membership.[233] However, individuals with mental impairments were more likely to fail because they were not deemed "qualified" while individuals with physical disabilities were more likely to fail because they were not deemed "disabled."[234] A second study involving a different set of cases also found that mentally impaired individuals fared worse than physically impaired individuals in pre-ADAAA cases based on qualified status.[235] This study found that in post-ADAAA cases physically and mentally ill employees fare equally poorly, but the author cautioned that it involved a much smaller sample of cases.[236] In other words, the biggest hurdle to mentally ill employees had been "qualified status," and this hurdle remains unchanged.

In many cases, the question of whether a mentally ill employee is qualified hinges on whether the employee is able to perform the job with a reasonable accommodation. A preliminary issue with reasonable accommodation is that the employer must be aware of the employee's disability and need for accommodation. As explained in Part III, mentally ill employees are less likely to request an accommodation than physically disabled employees either because they are unaware that they are ill or because they are actively hiding their disorder as a result of the stigma associated with mental illness.[237]

One accommodation issue that has come up in a number of both pre-ADAAA and post-ADAAA cases involving mentally ill employees is the employees' difficulty getting along with others.[238] This often occurs in cases where an employee suffers from depression and anxiety.[239] A common accommodation requested by employees who

233. Hensel & Jones, *supra* note 63, at 65-69 (indicating that while plaintiffs with mental disabilities were slightly less likely to establish class membership than plaintiffs with physical disabilities, the difference was not statistically significant).

234. *See supra* notes 113-119 and accompanying text.

235. Befort, *supra* note 1, at 2056.

236. *Id.*

237. *See supra* Part III.B.

238. *See supra* Part IV.D (explaining how in pre-ADAAA cases, courts struggled with whether the ability to get along with others was a major life activity and often found that it was not. In post-ADAAA cases these employees are more likely to be found to be disabled).

239. *See, e.g.*, Palmerini v. Fidelity Brokerage Servs. LLC, No. 12-CV-505-JD, 2014 WL 3401826, at *3 (D.N.H. Jul. 9, 2014) (employee suffered from post-traumatic stress disorder, a form of anxiety and depression); Beair v. Summit Polymers, No. 5:11-420-KKC, 2013 WL 4099196 (E.D. Ky., Aug. 13, 2013) (employee suffered from anxiety and depression); Schwarzkopf v. Brunswick Corp., 833 F. Supp.2d 1106, 1109 (D. Minn. 2011) (employee suffered from depression and general anxiety disorder);

have difficulty getting along with others is a transfer away from the colleague they are having a conflict with, since psychiatric disabilities can be exacerbated by environmental stressors. Courts tend to be very unsympathetic to these requests and routinely hold that transferring an employee away form a manager or coworker who is causing stress or conflict is not a reasonable accommodation.[240] As courts have explained, nothing in the ADA gives an employee the right to demand a "work environment without aggravation"[241] or to control who he works with.[242] Employees who are having trouble getting along with their colleagues or supervisors also sometimes request that the employer instruct other employees to modify their behavior. Courts routinely hold that it not reasonable for an employee to demand that an employer instruct coworkers or managers to change their behavior.[243]

Employees who suffer from mental illness also commonly request a modified work schedule because their current work schedule is

Prichard v. Dominguez, 2006 No. 3:05cv40 WL 1836017 at *13 (N.D. Fla. June 29, 2006) (employee suffered from dysthymia, a form of depression); Gaul v. Lucent Tech., Inc., 134 F.3d 576, 577 (3rd Cir. 1998) (employee suffered from depression and anxiety related disorders).

240. *See, e.g.*, Whalen v. City of Syracuse, No. 5:11-CV-0794, 2014 WL 3529976, slip op. at 7, (N.D.N.Y. Jul. 15, 2014) (holding that it is not a reasonable accommodation to guarantee that plaintiff with depression and anxiety will never have contact with colleague who triggers these conditions); *Palmerini*, 2014 WL 3401826, at *8 (holding that it is not reasonable for an employee to ask for multiple reassignments based on his inability to get along with his managers); *Beair*, 2013 WL 4099196 (holding that it is not reasonable accommodation to transfer an employee to a position so she will be subject to less supervision); Schwarzkopf v. Brunswick Corp., 833 F. Supp.2d 1106, 1123 (D. Minn. 2011) (stating that it is not reasonable for an employee to ask for a transfer because of difficulty getting along with other coworkers); Prichard v. Dominguez, 2006 WL 1836017 at *13 (N.D.. Fla. June 29, 2006) (discussing the "overwhelming unanimity of opinions in courts" that under the ADA it is unreasonable to request a transfer away from an undesirable boss); *Gaul*, 134 F.3d at 579 (holding that it is unreasonable for an employee to ask for a transfer away from coworkers and colleagues who cause him stress).

241. *Palmerini*, 2014 WL 3401826 at *7.

242. *Prichard*, 2006 WL 1836017 at *13.

243. *See, e.g.*, Tomlinson v. Wiggins, No. 12–CV–1050, 2013 WL 2151537 (W.D. Ark. May 16, 2013) (holding that it is not a reasonable accommodation for employee to request that his boss change his "harsh management style" since employee is not entitled to a stress-free environment); Schwarzkopf v. Brunswick Corp., 833 F. Supp.2d 1106 (D. Minn. 2011) (stating that it is unreasonable for a mentally ill employee to request that his boss and colleagues be instructed not to yell at him).

unfeasible as a result of their illness. This is an issue in both pre-ADAAA and post-ADAAA cases and may include a request for reassignment to another position or permission to work from home. The lower courts have generally agreed that employers do not need to create positions for disabled employees, and mentally ill employees tend to lose in cases where they request a shortened or part-time work week and no part-time positions are available.[244] Courts have also routinely held that regular attendance at work is an essential job function and employers are not required to accommodate an employee's inability to consistently arrive at work on time as a result of mental illness.[245] It is unclear whether an employer needs to reassign a mentally ill employee to a vacant position if there are other more qualified employees available for the position.[246] It is also unclear if a court would require an employer to consider a mentally ill employee's request to work at home.[247]

Another issue that arises more often with mentally ill employees than with physically ill employees is employee misconduct or inappropriate behavior since mental illness is more likely than physical illness to manifest itself in the form of conduct.[248] Courts in

244. *See* Treanor v. MCI Telecomms. Corp., 200 F.3d 570, 575 (8th Cir. 2000) (holding that ADA did not require employer to create a part-time position for employee who suffered from depression); Lamb v. Qualex, Inc., 28 F. Supp. 2d 374, 379 (W.D. Va. 1998) (holding that ADA did not require employer to create a part-time position for employee suffering from depression).

245. Dorgan v. Suffolk Community College, 2014 WL 3858395 (E.D.N.Y. August 4, 2014) (holding that employer does not need to further accommodate employee with bipolar disorder who was unable to arrive at work on time despite modifications to her schedule); *Blackard*, 2014 WL 199619 at 6 (holding that employer did not need to switch an employee who suffered from bipolar disorder, depression, anxiety and ADHD to the day shift since employee would be unable to consistently arrive to work on time even with the accommodation).

246. *Compare* Smith v. Midland Brake Inc., 180 F.3d 1154, 1154 (10th Cir. 1999) (disabled employee should be transferred to a vacant position even if more qualified employees apply), *with* Huber v. Walmart Stores, Inc., 486 F.3d 480, 480 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074 (2007), *cert. dismissed*, 522 U.S. 1136 (2008) (employer did not need to transfer employee to vacant position if more qualified employees applied for the position). *See also* Porter, *supra* note 220, at 540-41.

247. *See, e.g.*, Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1061 (D.C. Cir. 1992) (analyzing whether it would be possible for disabled employee to work at home since her OCD only made it difficult for her to leave the house but did not affect her ability to do her work).

248. Karen Dill Danforth, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Illness Following Palmer*, 85 VA. L. REV. 661, 677-78 (1999).

both pre-ADAAA and post-ADAAA cases are generally unsympathetic to these employees and routinely hold that employers need not accommodate employee misconduct in the workplace even if the conduct stems from mental illness.[249] In one recent case, an employee who suffered from bipolar disorder entered the store where he worked after closing hours, disarmed the alarm, locked himself in the building, entered the safe, played on computers, and texted the Regional Manager about where he was and what he was doing.[250] After he refused to cooperate with an investigation into his behavior, he was fired for this conduct by a decision-maker who was unaware he suffered from bipolar disorder. The court held that since the employee was fired because of his conduct, the ADA was not violated.[251] The court emphasized that ignoring or excusing employee misconduct—even if caused by an underlying illness—is not a reasonable accommodation.[252]

However, another recent decision was more sympathetic to an autistic employee's inappropriate behavior.[253] The court denied the employer's motion for summary judgment since the employer did not demonstrate that the employee violated company policy. While the autistic employee had temporarily blocked an employee in her cubicle, he moved when she indicated that she needed to leave the cubicle and the court concluded that the behavior "did not have the type of sexual undertone that would bring it within the ambit of" the company's sexual harassment policy.[254] The court essentially held that an autistic employee's conduct must be viewed based on his social limitations.

Perhaps the most serious type of inappropriate conduct in the workplace involves violence or threats of violence. Courts, in both pre-ADAAA and post-ADAAA cases have consistently held that employers do not need to tolerate an employee's violence or threats of violence in the workplace and can terminate employees who violate nondiscriminatory workplace policies.[255] As the Second Circuit stated,

249. *See id.* at 679-80 (citing cases); Korn, *supra* note 38, at 643-46.

250. Yarberry v. Gregg Appliances, Inc., No. 1:12–cv–611–HJW, 2014 WL 4639149 at *1 (S.D. Ohio Sep. 16, 2014).

251. *Id.*

252. *Id.* at *5.

253. *See* Glaser v. Gap Inc., 994 F. Supp. 2d 569, 577 (S.D.N.Y 2014) (explaining that autism often manifests itself with unusual behavior and difficulty communicating and socializing).

254. *Id.* at 579.

255. *See, e.g.*, Snider v. United States Steel-Fairfield Works Med. Dep't, 25 F.3d 1361, 1368 (N.D. Ala. 2014); Pabon v. New York City Transit Authority, 703 F. Supp. 2d 188, 202 (E.D.N.Y 2010); Glaser v. Sista v.

an "employer may discipline or terminate an individual who, because of a disability, makes a threat against other employees if the same discipline would be imposed on a non-disabled employee engaged in the same conduct."[256] Mentally ill employees who engage in such conduct are not protected by the ADA, even if their actions are caused by the illness. As the First Circuit explained, "[T]he ADA does not require an employee whose unacceptable behavior threatens the safety of others to be retained, even if the behavior stems from a mental disability."[257]

The fact that courts consistently reach this holding is not surprising since courts are generally unsympathetic to employee misconduct and workplace violence is a serious concern in the United States today. However, as explained in Part III, mentally ill employees are often stigmatized as violent and it is therefore important that only those employees who actually threaten or engage in violence are found to be "unqualified" and rules really are applied in a "legitimate and nondiscriminatory manner." Additionally, as explained in Part III it is often difficult to predict which employees—regardless of whether they made threats—will actually engage in violent behavior in the workplace.

Related to and sometimes confused with the concept of employee misconduct is the "direct threat" provision of the ADA. The ADA specifically states that employees who pose "a direct threat to the health or safety of other individuals in the workplace"[258] do not meet the qualification standards of the ADA. The EEOC Regulations define a direct threat as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[259] While the direct threat definition was adopted from a case under the Rehabilitation Act[260] that involved an employee with tuberculosis, the legislative history of the ADA makes clear that this defense covers mental illness as well.[261]

While there is some case law that confuses the two concepts, the direct threat defense is distinct from and not meant to be applied in

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CDC IXIS North America, Inc., 445 F.3d 161, 171 (2d Cir. April 13, 2006); Glaser v. Sista v. CDC IXIS North America, Inc., 445 F.3d 161, 171 (2d Cir. 2006); Williams v. Motorola Inc., 303 F.3d 1284, 1291 (11th Cir. 2002).

256. *Sista*, 445 F.3d at 171.

257. *Calef*, 322 F.3d at 87.

258. 42 U.S.C. § 12113b (2009).

259. 29 C.F.R. § 1630.2 (r).

260. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 286 n.14 (1987).

261. *See* H.R. Rep. No. 101-485, pt. 3, at 485 (1990).

cases where an employee engages in threatening behavior.[262] Rather, the direct threat defense is meant to be applied in cases involving "discriminatory application of qualification standards" that "screen out" disabled individuals.[263] As one Court of Appeals explained, this distinction between posing a threat and engaging in threatening behavior "maintains the necessary balance between 'protecting disabled individuals from discrimination based on prejudice stereotypes or unfounded fear'…and permitting employers to protect themselves and their employees and customers from potentially violent employees."[264] In "direct threat" cases, courts are required to make an individualized assessment of whether the disabled employee is "qualified."[265] In enacting the direct threat defense, and emphasizing the need for an individualized assessment, legislators had expressed concern that employers would discriminate against mentally ill employees and assume that they posed a "direct threat" based on the negative stereotypes of the mentally ill.[266]

For example, in a recent federal district court case involving a police officer who suffered from major depression, anxiety and personality disorders, the court denied summary judgment for the employer based on the "direct threat" defense since the court could not "definitely conclude" that the plaintiff was not qualified.[267] The plaintiff had been on disability leave and applied for reinstatement which was denied based on her "extensive psychological history" and "concerns about compromised stress tolerance."[268] This case involved the "direct threat defense" since the plaintiff had not engaged in any threatening behavior but rather the employer had determined that she did not meet the qualification standards for the job. It is

262. *See* Danforth, *supra* note 248, at 686 ("The Seventh Circuit, in Palmer v. Circuit Court, blurred the distinctions between firing an employee solely for misconduct that violates a nondiscriminatory workplace policy and deeming an employee 'not otherwise qualified' when he poses a direct threat."). *See also Sista*, 445 F.3d at 170-73 (discussing the difference between an employee's threatening behavior and an employee constituting a "direct threat").

263. *Sista*, 445 F.3d at 171.

264. *Id.* at 172.

265. *Id.*

266. *See* H.R. REP. NO. 101-485, at 485 ("Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case. For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others.").

267. *Nelson*, 2013 WL 4437224, at *13 (S.D.N.Y).

268. *Id.* at *4.

noteworthy that the court did not grant summary judgment to the City based on the "direct threat" defense because courts are more likely to defer to employers in cases involving public safety. In fact, the court noted that the demands placed on police officers are "unique and extreme" and that lapses in judgment could result in "injury or death" but nonetheless concluded that the employer failed to meet its burden.[269]

C. Adverse Action

In addition to being "disabled" and "qualified," a claimant must also meet the third prong of a prima facie case of discrimination under the ADA, and show that he suffered an adverse action because of his disability.[270] Since claimants are more likely to be found to be "disabled" in post-ADAAA cases, courts are now more likely to address the question of whether an employee suffered an adverse action because of his disability. Employees face a number of hurdles under this third prong of the prima facie case.

Prior to passage of the ADAAA, employees were often unsuccessful in cases that addressed this third prong of the ADA.[271] A number of cases determined that actions taken by the employer did not rise to the level of constituting an adverse action. For example, at least two circuit courts held that requiring a mentally disabled employee to undergo a psychiatric evaluation was not an adverse employment action.[272]

A number of post-ADAAA cases have similarly found that the complained of incident did not rise to the level of being an adverse action. One recent district court decision found that a number of incidents that were alleged by a disabled employee—including being transferred to a different office, failing to have her computer files transferred, and failing to receive responses to questions regarding issues with her pay check—did not alone or in aggregate rise to the level of being an adverse action.[273] In another recent case, an employee who resigned from his position as a teacher—after being told that he would receive a "non-renewal recommendation" if he did not resign

269. *Id.* at *11.

270. E.E.O.C. v. Picture People, Inc., 684 F.3d 981, 985 (10th Cir. 2012).

271. *See* Stefan, *supra* note 58, at 291.

272. Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist., 133 F.3d 1054, 1056, 1060-61 (7th Cir. 1998) (While finding that the plaintiff in this case suffered an adverse action, court also implied that school district had been wise in mandating psychiatric evaluations); Sullivan v. River Valley Sch. Dist., 197 F.3d 804 (6th Cir. 1999).

273. *Stranzl*, 2014 WL 3418996 at *9–10 (E.D. Pa., July 2014).

the same day—was not constructively discharged.[274] The teacher believed that he had no choice but to resign since having "his contact non-renewed…would result in a great inability to get another teacher's job."[275]

One of the biggest hurdles faced by disabled employees is the unresolved issue of whether a claimant can bring a "mixed motive" claim under the ADA, or if instead a claimant is required to show that the adverse action occurred solely or exclusively because of the disability.[276] Courts that have addressed this issue have relied on the Supreme Court's interpretation of other civil rights statutes with similar language. The Supreme Court has held that under the Age Discrimination in Employment Act (ADEA) a plaintiff must prove that age was the "but for" cause of the challenged adverse employment action and not simply that "age was one motivating factor."[277] Similarly, in retaliation claims brought under Title VII of the 1964 Civil Rights Act, the Supreme Court has held that a plaintiff must prove that the unlawful retaliation "was a 'but-for' cause of the adverse action, and not simply a 'substantial' or 'motivating' factor in the employer's decision."[278] The Court reached the conclusion that the "but-for" standard was appropriate in both of these cases, based in part on the fact that the anti-retaliation provision of Title VII and ADEA both make it unlawful to discriminate "because" of certain criteria. On the other hand, the "mixed motive" standard applies to claims of discrimination brought under Title VII since Title VII specifically prohibits discrimination based on protected classes "even though other factors also motivated" the discrimination.[279] In other words, in discrimination claims brought under Title VII, the discriminatory action does not need to be based solely or exclusively on a protected category. It has not been fully resolved whether the appropriate standard under the ADAAA is the "mixed motive" standard of discrimination claims under Title VII or the "but-for" standard of both the ADEA and the anti-retaliation provision of Title VII.

The majority of cases tend to hold that the appropriate standard under the ADAAA is the stricter "but-for" standard. In *Serwatka v.*

274. Becker v. Elmwood Local Sch. Dist., 2012 WL 13569 at *7-8 (N.D. Ohio Jan. 4, 2012).

275. *Id.* at *7.

276. Miller, *supra* note 174, at 71-72.

277. Gross v. FBL Fin. Services, Inc., 557 U.S. 167, 180 (2009).

278. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013).

279. 42 U.S.C. § 2000e-2(m) (2012).

Rockwell Automation,[280] a case that was decided after enactment of the ADAAA but applied the pre-ADAAA version of the statute since the statute is not retroactive, the Seventh Circuit applied the "but for" standard. The Seventh Circuit explained that "but for" was the appropriate standard since the ADA prohibited discrimination "because of" a disability and the Supreme Court had interpreted similar "because of" language in ADEA as requiring but-for causation.[281] The court specifically noted that the post-ADAAA version of the statute prohibits discrimination "on the basis" of a disability and not "because of" a disability and it was unclear whether "this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA."[282] However, in a later case, the Seventh Circuit found that the "because of" and "on the basis of" language had the same meaning.[283] Furthermore, district courts in the Seventh Circuit have relied on *Serwatka* in applying the stricter but-for standard in post-ADAAA cases.[284] Therefore, the "but-for" standard seems to apply in the Seventh Circuit.

The Sixth Circuit similarly applied the "but-for" standard in a case involving the pre-ADAAA version of the statute.[285] In a later case, the Sixth Circuit noted that its reasoning was the same under either the "because of" or "on the basis of"[286] language. District courts in the Sixth Circuit, relying on these cases, have applied the "but-for" standard in post-ADAAA cases.[287] At least one district court in the Fifth Circuit also applied the "but for" standard under the

280. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 958, 961 (7th Cir. 2010).

281. *Id.* at 961-62.

282. *Id.* at 962 n. 1.

283. Fleishman v. Cont'l Cas. Co., 698 F.3d 598, 603-4 (7th Cir. 2012).

284. *See, e.g.*, EEOC v. Staffmark Inv. LLC, 67 F.3d. 885, 894 (N.D. Ill. 2014; Digiosia v. Aurora Health Care, Inc., 48 F. Supp. 3d 1211, 1220-21 (E.D. Wis. 2014).

285. Lewis v. Humboldt Acquisition Corp. Inc., 681 F.3d 312, 321 (6th Cir. 2012).

286. Nilles v. Givaudan Flavors Corp., 521 Fed.Appx. 364, 368 n. 3 (6th Cir. 2013).

287. Notarnicola v. Johnson Controls, 2014 WL 1304591 at *4 (E.D. Mich. 2014). *But see* Hilderbrand v. Dollar General Corp., 2013 WL 3761291 (M.D. Tenn. 2013) at *5 (while assuming that the "but for" causation standard applied since the issue was not in dispute, "the court expressly [did] not address whether there [was] any meaningful distinction between the pre-and post-amendment language.")

ADAAA.[288] Similarly, district courts in the Second Circuit stated in dicta that "but-for" was likely the appropriate standards in ADAAA cases, but ultimately determined that they did not need to resolve the issue.[289]

While the appropriate causation standard is therefore not fully resolved, the majority of courts seem to apply the stricter but-for standard, and hold that the "on the basis of" language of the ADAAA is similar to the "because of" language of ADEA and the pre-ADAAA version of the ADA. One commentator had opined that the appropriate standard is unclear and that courts might apply the more lenient "mixed-motive" standard based on the Congressional declaration that the ADAAA be interpreted broadly.[290] However, this author believes that is unlikely since, as previously mentioned, the ADAAA's language is similar to the language in ADEA. Furthermore, the ADAAA, unlike the anti-discrimination provision of Title VII, does not contain language that mandates the "mixed motive" standard. Courts will therefore in all probability continue to resolve the ambiguity in favor of the stricter but-for standard which will make it difficult for disabled employees—including mentally ill employees—to establish a prima facie case of discrimination under the ADAAA.

One recent district court decision from the Seventh Circuit addressed the application of the "but-for" standard in a case involving a mentally ill employee.[291] The court held that the plaintiff, who suffered from bipolar disorder, was not fired as a result of her disability because the majority of the management committee that ultimately terminated her employment did not know that she had bipolar disorder. As a result, the employee's disability could not possibly have been the "but-for" cause of the termination.[292] Interestingly, the court went out of its way to emphasize that there

288. Johnson v. Benton County Sch. Dist., 926 F. Supp. 2d 899, 904 (N.D. Miss. 2013).

289. *See, e.g.*, Sherman v. County of Suffolk, 31 F. Supp. 3d 332, 348 (E.D.N.Y. 2014) (stating that the similarity between the because of language in ADEA and the anti-retaliation provision of Title VII "lends support to idea that a higher court would apply 'but for' causation to ADA claims"). For a summary of district court decisions in the Second Circuit that addressed this issue, *see id.* at *13.

290. Miller, *supra* note 174, at 72 ("Whether the ADAAA's general declaration that Congress intended broad protection for disability claims will be sufficient to withstand narrow judicial construction is another ambiguity for future interpretation").

291. *Digiosa*, 48 F. Supp. 3d at 1221.

292. *Id.* at 1221-22.

was no "discriminatory animus."[293] For example, the court found that a colleague's negative comments that the plaintiff had "gone manic" or was "too manic" did not show requisite causation and were not discriminatory.[294] Since the court could have simply resolved the causation issue based on the fact that most of the management committee did not know she was bipolar, it is interesting that the court chose to emphasize that these possibly derogatory references were not bias.

D. Summary of the Second and Third Prongs of a Prima Facie Case of Discrimination

Since employees are more likely to be found to be "disabled" under the first prong of the prima-facie case in post-ADAAA cases, courts are increasingly grappling with whether the employee faced discrimination under the second and third prongs of the prima facie case. Employees do not consistently fare well under the second prong, which requires that an employee "is qualified, with or without a reasonable accommodation, to perform the essential functions of the job."[295] Courts often determine that employers are not required to accommodate disabled employees in the workplace.[296] One reason for this is that "formal equality" is the underlying principle of employment discrimination law in the United States, and courts are often reluctant to mandate accommodation, or differential treatment, of employees. Additionally, courts are particularly reluctant to require the types of accommodation that mentally ill employees may need, such as a modified work schedule or a transfer away from a colleague who exacerbates their illness.[297] The stereotype of mentally ill individuals as violent may also lead courts to determine that accommodation is not required.

Mentally ill employees also do not consistently fare well under the "adverse action" or third prong of the prima facie case. Some post-ADAAA cases have determined that the complained of incident does not rise to the level of being an adverse action. Additionally, the majority of courts have held that a claimant cannot bring a "mixed motive" claim under the ADA, but rather must show that their disability was the "but-for" cause of discrimination.[298] This makes it difficult for mentally ill employees to establish a prima facie case of discrimination under the ADAAA.

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293. *Id.* at 1220-21.

294. *Id.*

295. EEOC v. Picture People, Inc., 684 F.3d 981, 985.

296. *See supra* Part V.B.

297. *See supra* Part V.B.2.

298. *See supra* Part V.C.

VI. CONCLUSION

The ADAAA specifically overturned four Supreme Court decisions and broadened the ADA's definition of disability. In doing so, the ADAAA succeeded in refocusing Title I employment cases away from the question of whether an employee is disabled to instead address the question of whether the disabled employee suffered discrimination. The expanded definition of disability has therefore removed one significant hurdle and has greatly increased the likelihood that mentally ill employees will have disability standing under the ADA. However, this increase has had a larger impact on physically disabled employees than on mentally disabled employees.

Additionally, the ADAAA failed to make other necessary statutory amendments and many mentally ill employees continue to have difficulty establishing a prima facie case of disability discrimination under the ADA. Employees do not consistently fare well under the second prong of the prima facie case of disability discrimination with courts often finding that mentally ill employees are not qualified and that the employer is not required to accommodate them. Mentally ill employees also do not consistently fare well under the adverse action or third prong of the prima facie case both because courts may determine that the complained of incident does not rise to the level of being an adverse action and because the majority of courts have held that a claimant cannot bring a "mixed motive" claim under the ADA.

The ADAAA does not apply retroactively to incidents that occurred before 2009, and as a result, the case law is still developing. However, based on the current case law, it appears that while the ADAAA is a positive step for mentally ill employees, these employees still face hurdles in establishing a prima facie case of discrimination under the ADA.