



What Does it Mean to be “Regarded as Having an Impairment” under the Americans with Disabilities Amendments Act (ADAAA)?

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Introduction

Individuals with disabilities have historically faced significant societal stigma in the United States because of their perceived differences. Since the early 20th Century, Congress has taken several steps to address the systemic discrimination at a national level. Early efforts included funding programs that addressed the economic and health disparities among individuals with disabilities such as the Vocational Rehabilitation Act that provided rehabilitation and employment assistance to targeted groups.¹ Congress later attempted to address the discrimination more broadly through efforts to amend the Civil Rights Act of 1964 to include coverage for individuals with disabilities. Although those efforts failed, amendments were eventually made to the Vocational Rehabilitation Act that prohibited discrimination on the basis of disability in certain federally funded programs.² The amended vocational rehabilitation statute, renamed the Rehabilitation Act of 1973, introduced a three-prong definition of disability that defined who was eligible for protection under the law. However, the statute had minimal success at addressing the marginalization of individuals with disabilities in most aspects of society.³ When the Americans with Disabilities Act (ADA) became law in 1990, disability rights advocates were hopeful that the United States finally had a national law covering private and public entities that would end systemic discrimination against individuals with disabilities in this country.

Thirty years after the implementation of the ADA, there has been some improvement in the lives of individuals with disabilities in this country. However, many of the expectations of disability rights advocates have not been met and scholars have criticized the ADA in several areas including employment.⁴ While advocates continue to debate why the ADA has not been more successful at achieving its goals, the narrow judicial interpretations of the ADA by the United States Supreme Court in 1999 became a focus of concern.⁵ After intense advocacy, Congress amended the original ADA in 2008 to clarify legislative intent and to overrule the Court's earlier interpretations of key ADA components.⁶ This publication focuses on the

¹ Initially enacted as the Smith-Sears Veterans Rehabilitation Act of 1918 for returning soldiers and amended in 1920 to include disabled individuals of working age.

² Rehabilitation Act of 1973 (P.L. 93-112).

³ See Towards Independence (1986) and On the Threshold of Independence (1988) available on the National Council on Disability website. <https://www.ncd.gov/>

⁴ Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. Hum. Resources 887, 888, 909 (2004); Michelle Maroto and David Pettinicchio, *The Limitations of Disability Antidiscrimination Legislation: Policymaking and the Economic Well-being of People with Disabilities*, Law & Policy, Vol.36, No. 4 (Oct. 2014), 370-407.

⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

⁶ *ADA Amendment Act of 2008*, 42 U.S.C. §§12101-2.

changes regarding individuals who are “regarded as” having an impairment in the ADA Amendments Act (ADAAA). These changes are significant because they move the focus from the impairment to the discrimination the individual experiences.

The statutory changes to the “regarded as” prong of the ADAAA disability definition are applicable to all titles of the ADAAA. However, this document addresses the impact of those changes in employment related complaint activity under Title I of the ADAAA. Recent federal Circuit Court decisions regarding “regarded as” changes under Title I are summarized following a review of the statutory amendments and regulation changes. This document concludes with practice considerations for employers to ensure that individuals are protected from discrimination on the basis of disability in employment.

Defining the Protected Class under the ADAAA: Who is Disabled?

The Americans with Disabilities Act Amendments Act (ADAAA) of 2008 addressed the Supreme Court’s restrictions on the original statute in the hopes that the law would be more successful at addressing societal discrimination. The Congressional purpose in passing the ADAAA includes the following:

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.⁷

The focus of the amendments concerned the definition of “disability” in the law. Although the original ADA disability definition remained substantively the same in the 2008 amendments, Congress added language to clarify legislative intent in how to understand and apply the “regarded as” or third prong. The specific language is indicated in italics below:

(1) Disability—The term “disability” means, with respect to an individual—
(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or

⁷ 42 U.S.C. §12101(b)1.

(C) being regarded as having such an impairment (*as described in paragraph (3)*).⁸

The intent of Congress related to the “regarded as” prong definition in paragraph (3) is as follows:

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.⁹

Following the clarifications in the ADAAA, there is growing acknowledgment that the third prong disability definition is a compromise between the two commonly applied models of disability—i.e., the medical and the social models. Specifically, the first two prongs of the disability definition follow a medical model because of the focus on diagnosis, impairment and severity criteria—i.e., requiring a substantial limitation in a major life activity.¹⁰ The “regarded as” prong is arguably different because the focus is on discrimination and adverse treatment on the basis of difference. This definition is an attempt to minimize “society’s accumulated myths and fears about disability.”¹¹ The ADAAA changes brings the federal law closer in alignment to the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, gender, religion, and national origin.

Statutory Amendments to the “Regarded as Having Impairment” Definition

The addition of paragraph (3) in the ADAAA clarified that an impairment that satisfies the description in the paragraph will be sufficient to meet the “regarded as” definition under the federal law. As Congress noted, “the third prong of the disability definition will 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.”¹² Paragraph (3) is as follows:

⁸ *Americans with Disabilities Act (ADA) of 1990*; 42 U.S.C. §12102(3)(1)A-C.

⁹ 42 U.S.C. §12101(b)(3). *School Board of Nassau County, Florida v. Arline* was decided under the Rehabilitation Act of 1973 which used the term “handicap.” The definition of “handicap” was adopted by the ADA but the term was changed to disability.

¹⁰ Although the statutory definition under prongs one and two have not changed under the ADAAA, Congress did clarify the legislative intent in defining “substantial limitation” and what constitutes a “major life activity.”

¹¹ *Sch. Bd. Of Nassau Cnty. v. Arline*, 480 U.S. 273 at 284 (1987).

¹² 154 Cong. Rec. S8346.

(3) Regarded as having such an impairment--For purposes of paragraph (1)(C):

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

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.¹³

As clearly stated in the statute, some impairments are not covered under the “regarded as” prong; those include impairments that are transitory and minor. Transitory is defined under (3)(B) as an impairment with an actual or expected duration of six months or less. The statute does not define minor.

The ADAAA also limits the rights available to an individual under the “regarded as having impairment” definition.¹⁴ Prior to the passage of the ADAAA, the federal courts did not consistently answer the question as to whether individuals who claimed protection under the “regarded as” prong had a right to reasonable accommodation.¹⁵ However, the ADAAA clarified that no reasonable accommodation was owed to those claiming protection under the third prong.¹⁶ Congress justified its decision to remove the right to reasonable accommodation under the “regarded as” prong with the following arguments: 1) the expected increase in number of complaints by individuals claiming protection under the third prong, and 2) the expectation that if an individual needed a reasonable accommodation, they would likely be able to meet the first prong definition of disability.¹⁷

The focus of the ADAAA was on the interpretation of disability under prongs one and two – i.e., which impairments rose to the level of substantially limiting, the role of mitigating measures in determining whether substantially limiting, and major life activities. Those issues are not relevant to coverage under prong three. Any impairment (unless transitory and minor) will be covered under prong three. The issue is not whether one is a member of a protected group but

¹³ 42 U.S.C. §12102(3)(A),(B).

¹⁴ 42 U.S.C. §12201(h).

¹⁵ No reasonable accommodation (Fifth, Sixth, Eighth and Ninth Circuits); reasonable accommodation allowed (First, Third, Tenth and Eleventh Circuits). As reported in Beforth, S. *Disability Discrimination after the ADA Amendments Act of 2008: Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” prong of the Statutory Definition of Disability*. 2010 Utah L. Rev. 993 at 1016.

¹⁶ 42 U.S.C. §12201(h).

¹⁷ 154 Cong. Rec S8344 and S8347.

whether adverse action was taken against the individual because of a perceived or actual impairment. The impairment-only status of the regarded as prong under the ADAAA means that the debate will only be whether prohibited action was taken because of the impairment (perceived or actual) as long as it is not transitory and minor. The assumption was, as stated above, that the changes in prong three will expand the number of individuals who, if they face adverse action because of an actual or perceived impairment, will have a cause of action for discrimination under the amended ADA even if they do not have a disability as defined under the first two prongs.

The ADA Amendments Act (ADAAA) Regulations Related to “Regarded As”

In the original ADA of 1990, Congress mandated that the Equal Employment Opportunity Commission (EEOC) issue regulations that would interpret and implement Title I of the law. Although not specifically directed to issue regulations related to introductory content applicable across all titles of the ADA, the EEOC chose to issue regulations and guidance related to the ADA definition of disability. The Supreme Court questioned the appropriateness of the EEOC issuing regulations and guidance outside the scope of Title I employment issues and refused to give its interpretation of disability deference in *Sutton v. United Airlines*.¹⁸ In the ADAAA, Congress corrected the Court’s concern by specifically giving the EEOC authority to issue regulations implementing the definition of disability for purposes of Title I employment.¹⁹

The third prong definitional changes in the EEOC Title I regulations mirrored the statutory clarification to “regarded as” as follows:

Disability means –

(iii) Being regarded as having such an impairment as described in paragraph (I) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”²⁰

¹⁸ 527 U.S. 471 at 479-80.

¹⁹ 42 U.S.C. §12205(a). Title V amended 501(2). NOTE: the ADAAA also issued authority to the Attorney General and Department of Transportation (DOT) to issue regulations relevant to Title II and III of the ADA respectively.

²⁰ 29 C.F.R. §1630.2(g)(1)(iii).

In additional guidance from the EEOC on the implementation of the ADAAA, the agency stated that the third prong was applicable “when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor.”²¹ This confirms that the focus is on the discriminatory response (action prohibited by the ADA) to an individual with an actual or perceived impairment that is more than both transitory and minor. The individual claiming discrimination under this prong does not have to show “substantial limitation” in a “major life activity.” Those phrases are not relevant if the individual is claiming coverage under the third prong.²²

Although which impairments meet the transitory and minor limitation is open to some interpretation, there is statutory and regulatory guidance on what is considered transitory. A transitory impairment is an impairment with an actual or expected duration of six months or less.²³ Congress did not provide a definition of minor in the ADAAA and the EEOC has not provided any substantive guidance. However, the EEOC has clarified that an impairment that may last for six months or less, but is not minor, is covered under prong three and an impairment that is minor, but will last for more than six months, is also covered. In addition, the EEOC has stated that decisions related to whether an impairment is minor and/or transitory must meet an objective standard. In other words, it is not enough for a covered entity to subjectively believe that an impairment is transitory and minor.²⁴ However, if an employer can show that an impairment is objectively both transitory and minor, the individual is not considered protected under ADAAA, and the employer has a defense to a claim of discrimination.²⁵

To reiterate, the focus of the third prong of disability in the ADAAA is on the adverse action taken by an employer. It should not be on what the employer may have believed about the nature of the person’s impairment.²⁶ If a covered entity takes an action “prohibited by the ADA” on the basis of an applicant’s, employee’s, or union member’s “physical or mental impairment” (and that impairment is not both transitory and minor), that action establishes coverage under the third prong. The employer is considered to “regard” the individual as having a disability when it takes prohibited action based on a belief that the individual has an actual or perceived impairment.

²¹ [Questions & Answers on the Final Rule Implementing the ADAAA](https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) at Q5. (hereafter EEOC Q&A) https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm

²² 29 C.F.R. §1630.2(j).

²³ 41 U.S.C. §12102(3)(B).

²⁴ 29 C.F.R. §1630.15(f)

²⁵ 29 C.F.R. §1630.15.

²⁶ Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA (hereafter EEOC Fact Sheet) https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

The prohibited adverse actions identified by the EEOC include the following:

- refusal to hire
- demotion
- placement on involuntary leave
- termination
- exclusion for failure to meet a qualification standard
- harassment
- denial of any other term, condition, or privilege of employment.²⁷

Although these prohibited actions are applicable to all three prongs of the disability definition, the EEOC has opined that an individual may find it easier to “claim coverage under the “regarded as” prong” when the actions identified above have occurred.²⁸

The third prong is applicable when an individual does not request or require a reasonable accommodation; reasonable accommodation is not available to the individual if the claim to discrimination is based only on the third prong. Some advocates have raised concerns that this may leave individuals who claim protection under the “regarded as” prong unprotected if their impairment is both minor and transitory (so the prong three definition is not relevant) but with reasonable accommodation they would be able to perform the essential functions of the job and therefore be qualified for the job.²⁹ It has been proposed that to ensure people do not fall through the cracks, administrative and judicial review should consider a two-step analysis. The first step would be to determine whether an individual meets the definition of prong one or two when reasonable accommodation is an issue. If reasonable accommodation is not an issue, then coverage under prong three would be considered.³⁰

When an employer takes an adverse action against an individual on the basis of an actual or perceived impairment (that is not both minor and transitory), the individual is covered by the ADAAA. However, the employer may still have a defense that legally justifies that adverse action. The employer’s defense is a separate determination on the liability involved in taking the prohibited action and the determination as to whether unlawful discrimination has occurred under the ADAAA.³¹ As stated by the EEOC:

For example, an individual still needs to be qualified for the job he or she holds or desires. Additionally, in some instances, a covered entity may have a defense to an action taken on the basis of an impairment, such as where a particular individual would

²⁷ 29 C.F.R. §1630.2(1)(1).

²⁸ EEOC Q&A at Q6.

²⁹ *Id.* at Q16.

³⁰ *Id.*

³¹ EEOC Q&A at Qs 25 and 26

pose a direct threat or where the covered entity’s action was required by another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs.)³²

It has been over a decade since the ADAAA was implemented and the changes in the third prong “regarded as” definition of disability have been raised in EEOC complaints and court filings. However, the expected increase in litigation focused on the third prong has not occurred. In 2020, the EEOC reported that 11.9% of the complaints filed were based on the third prong definition of “regarded as” or 585 complaints. Prior to the ADAAA implementation the percentage of total complaint activity based on “regarded as” averaged higher than the 2018 data with the most reported in 2004 at 20.9% of the total EEOC complaint filings. The number began to drop in 2009.³³ This statistic disputes the expected increase in number of complaints filed under “regarded as” as anticipated by Congress.

Federal Circuit Court Decisions Under Title I

Title I litigation in the federal circuit courts related to the “regarded as” definition of disability since the amendments to the ADA in 2008 has focused on 1) whether possible or future impairments are covered by the ADA, 2) whether the employer regarded (or perceived) that the individual had an impairment that was not both transitory and minor, and 2) whether the employer had a defense to liability for taking the adverse action. Whether the perceived impairment substantially limits a major life activity, is not relevant to the analysis any longer although some of the early decisions continued to apply the pre-ADAAA standards.

As noted earlier, an impairment that is both transitory (lasting six months or less) and minor (as that term is generally understood) is the exception to coverage under the “regarded as” prong and an individual with such an impairment cannot claim protection under the ADAAA. The federal courts have determined that a variety of injuries are both transitory and minor. These include broken bones, other injuries that have healed within six months, and the flu.³⁴ If the impairment only satisfies one of the qualifiers—transitory or minor—the individual will be covered under the “regarded as” prong.³⁵

³² *Id* at Q 26

³³ EEOC Merit Factor Resolutions include settlements, withdrawals with benefits, successful and unsuccessful conciliations. NOTE: an individual may file under multiple categories.

³⁴ *Budun v. Reading Hosp. & Med. Ctr.*, 765 F3rd. 245 (3rd Cir. 2014); *Lewis v. Florida Default Law Group*, 2011 WL 4527456 (M.D. Fla. 2011).

³⁵ See *Davis v. NYC Dept. of Ed*, 2012 W.L. 139255 (E.D.N.Y. Jan. 18, 2012) and *Treynor v. Knoll, Inc.*, 2021 U.S. Dist. LEXIS 28206 (W.D. Mich. Feb. 16, 2021).

A selection of federal circuit court decisions regarding the third prong of the disability definition published between 2019 and the date of this publication are summarized below under a heading indicating the primary legal issue. For a good review of earlier court decisions, see ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association (Brief 38).³⁶

Possible or Future Impairments are Not Covered

Richardson v. Chicago Transit Authority (CTA), 926 F.3d 881 (7th Cir. 2019).

Mr. Richardson was a transit bus driver for the city of Chicago for many years. He was considered obese when he was hired, but not considered a safety risk until his hypertension and other health related conditions raised concerns and he was fired. Mr. Richardson argued that he was fired in violation of the ADAAA. Two arguments were presented to the court; 1) either he was fired because he actually had an impairment that met the prong one definition of disability or 2) he was perceived to have an impairment under prong three.

The Seventh Circuit Court of Appeals determined that he had not presented any evidence that he actually had a disability under prong one because he had not shown an underlying physiological disorder or condition that caused the obesity. The Court cited the EEOC regulations and guidance as well as three other Circuit Courts that required proof of an underlying disorder or condition for obesity to meet the actual impairment definition.³⁷ In addition, there was no evidence that the CTA perceived (regarded) him as having an impairment under prong three as defined under the ADAAA. Therefore, there was no evidence that the prohibited action taken by CTA was based on the belief that Mr. Richardson had or was perceived to have a covered impairment under the ADAAA. Therefore, he did not meet the definition of “disabled” under either prong one or three for purposes of protection under the disability law.

Shell v. Burlington Northern Santa Fe Railway Co., 941 F.3d 331 (7th Cir. 2019).

The issue in a more recent Seventh Circuit decision also addressed impairments related to obesity under the “regarded as” prong of the ADAAA. In *Shell v. Burlington Northern Santa Fe Railway Co.*, the Seventh Circuit Court of Appeals was asked whether the refusal of the railway

³⁶ ADA Coverage Beyond Actual Disabilities: Regarded As, Record Of, and Association (Brief 38). Available at http://www.adagreatlakes.org/Publications/Legal_Briefs/Briefno38_Beyond_Disability_Association_Regarded_As_Record.pdf

³⁷ *Richardson v. Chicago Transit Authority*, 926 F.3d 881 at 882 (7th Cir. 2019).

company to hire an obese applicant based on the fear of future impairments (sleep apnea, diabetes, and heart disease) met the definition of the “regarded as” having impairment prong of the disability definition. The lower district court awarded summary judgment to Mr. Shell, which meant that it believed that based on the facts presented, Burlington Northern Santa Fe Railway Co. had regarded him as having an impairment under the ADA.

On appeal, the Seventh Circuit disagreed with the lower court’s interpretation of the “regarded as” prong and held that it covers current impairments only and not future ones. According to the Court, Mr. Shell did not have a current disability nor did the railway company regard him as having a current disability. Therefore, he was not protected under the ADA. The applicant had a high Body Mass Index (BMI) placing him at higher risk for sleep apnea, diabetes and heart disease in the future. Burlington Northern Santa Fe Railway Company argued that all these medical issues would create safety concerns in the position he sought. Based on those safety concerns, the railway company cited the business necessity defense in refusing to hire him. However, the Seventh Circuit did not consider that defense because it held Mr. Shell was not covered by the ADA and therefore had no claim to discrimination under the disability law and therefore no need for the employer to present a defense.

EEOC v. STME, LLC, 938 F.3d 1305 (11th Cir. 2019).

In the Eleventh Circuit Court of Appeals, the issue was whether an individual without a disability was covered by the ADA under the “regarded as” prong based on the fear that the individual might contract Ebola in the future. Ms. Kimberly Lowe was a massage therapist for Massage Envy in Florida. She was fired by her employer when she refused to change her vacation plans to visit her family in Ghana. The employer was worried that she might contract the disease while there and return to the United States with the disease based on reports of an Ebola epidemic in countries surrounding Ghana. Ms. Lowe argued that Massage Envy had violated her rights under the ADA by taking a prohibited action (firing her) because they regarded her as having disability based on their fears and beliefs about Ebola.

The EEOC sued on her behalf but lost in both federal district court and the Eleventh Circuit Court. Like the Seventh Circuit decision in *Shell v. Burlington Northern Santa Fe Railway Co.* summarized above, the Eleventh Circuit held that under the third prong, the plaintiff must show “an adverse action” was taken because “of an actual or perceived physical or mental impairment.” In this case, Massage Envy only perceived her as having the potential for future impairment and not an actual impairment and therefore Ms. Lowe was not considered covered under the third prong. Although the ADA also prohibits discrimination against an individual based on an association with a person with disability, the Court noted that there was no evidence in this case that the employer’s fear was based on an association with a particular individual with a disability.

Plaintiff Need Only Show “Perception” of Impairment

Harrison v. Soave Enterprise LLC, 826 Fed. Appx. 517 (6th Cir. 2020)

Ms. Harrison was a manager at Soave Enterprises and Parts Galore, a metal parts facility. With the arrival of a new regional manager, she was assigned additional tasks including visually checking underneath cars and trucks on the lot. This required her to kneel which was difficult due to an ACL injury she had incurred several years earlier. She requested an accommodation – a mirror – that allowed her to check under the vehicles without kneeling and hurting her knee. The employer provided the mirror but then terminated Ms. Harrison not long after. One reason given by the employer for the termination was that she was unable to do her job due to her torn ACL. Ms. Harrison sued under the ADAAA but was unsuccessful in the federal district court. The lower court granted summary judgment to Soave Enterprises, ruling that she was not actually disabled or regarded as disabled under the ADAA.

The Sixth Circuit Court of Appeals accepted the case on appeal and reviewed the changes under the ADAAA as to the “regarded as” prong of the disability definition. It then ruled that Ms. Harrison had provided sufficient evidence for a jury to find that she had meet the “regarded as” standards. The fact that 1) she had asked and been granted an accommodation and 2) the employer “knew of her knee injury” as referenced during her firing, were enough for the Sixth Circuit to suggest that the employer perceived her as disabled. The case was remanded back to the district court to schedule a trial date.³⁸

Nunies v. HIE Holdings, Inc., 908 F.3d 428 (9th Cir. 2019)

Mr. Nunies worked as a full-time delivery driver for his employer, HIE Holdings, Inc. His job included delivering water bottles to residential and commercial sites. He was required to lift and carry a minimum of 50 pounds and perform other physical tasks. Mr. Nunies requested a transfer to a part-time warehouse job because of shoulder pain related to the repetitive physical tasks of the delivery job. He successfully found another employee to switch jobs with him and the transfer went through although his supervisor was skeptical that the shoulder pain was the actual reason for the transfer. Very shortly after the transfer, he reported that his shoulder was again causing him pain. The employer then told him that his job was eliminated because of budget cuts although soon after a new job posting was released. Mr. Nunies sued under the ADAAA for disability discrimination. The lower court ruled that he did not have a disability under any of the prongs of the definition including the third prong because he put forward no evidence that HIE Holdings believed that he was substantially limited in a major life

³⁸ NOTE: the court stated that the opinion was NOT RECOMMENDED FOR FULL-TEXT PUBLICATION.

activity. HIE Holdings was granted summary judgment by the court and Mr. Nunies appealed.

The Ninth Circuit Court overruled the lower court's summary judgment for HIE Holdings and clarified the ADAAA changes to the third prong of the disability definition. The court held that ADAAA did not require the plaintiff to prove that HIE subjectively believed that Mr. Nunies was substantially limited in a major life activity.³⁹ It acknowledged that transitory and minor impairments are excluded under the third prong amendments; however, that is an affirmative defense and it is not the plaintiff's responsibility (burden of proof) to provide evidence that his injuries were transitory and minor. All the evidence presented convinced the court that Mr. Nunies had been forced to resign once he informed the employer of his shoulder pain. That evidence was sufficient to present a *prima facie*⁴⁰ case of a prohibited ADA action taken by the employer on the basis of regarding the employee as having an impairment.

The court made a final observation that is worth noting. It ruled that there was a question as to whether Mr. Nunies' shoulder injury was in fact substantially limiting in a major life activity. If it was substantially limiting, this impairment would have met the prong one definition of disability under the less strenuous definition of disability in the ADAAA. Therefore, the Ninth Circuit court also held that it was inappropriate for the lower court to issue summary judgment for the employer when there was no discussion of this issue.

***Babb v. Maryville Anesthesiology P.C.*, 942 F.3d 308 (6th Cir 2019).**

Ms. Babb was a Certified Registered Nurse Anesthetist (CRNA). She sued her employer, Maryville Anesthesiology, under the ADAAA for firing her because it erroneously believed that she was visually impaired. Maryville Anesthesiology argued that Ms. Babb was fired because she had committed two clinical errors that placed patients at "grave risk of injury." The issue for the federal district court on the employer's motion for summary judgment was to determine the motivation behind the adverse action—i.e., the termination. The district court determined that Maryville Anesthesiology had legitimately fired Ms. Babb for the clinical errors and awarded the employer summary judgment. Ms. Babb appealed that decision and the Sixth Circuit Court of Appeals overruled the lower court.

The Sixth Circuit held that there were genuine disputes of material fact related to the employer's perception of Ms. Babb's disability under prong three of the ADAAA that could not be adequately determined without a full trial and, therefore, remanded it back to the lower court for additional fact finding. In addition, the appellate court stated that there were genuine

³⁹ *Nunies v. HIE Holdings, Inc.*, 908 F.3d 418 at 434 (9th Cir 2019).

⁴⁰ To succeed in an ADAAA claim, the individual must present a *prima facie* case. Under Title I, this requires the plaintiff to show that 1) he or she is covered under the ADAAA; 2) has an impairment, history of or is regarded as having a disability; 3) the individual is qualified to perform the essential functions of the job in question with or without reasonable accommodation; and 4) he or she suffered adverse action on the basis of the impairment.

issues that needed to be investigated concerning whether the firing was in fact a pretext for discrimination on the basis of the perception of impairment.

***Lewis v. City of Union City*, 934 F.3d 1169 (11th Cir. 2019).**

Ms. Jacqueline Lewis was a police detective in Georgia when she had a heart attack. She was cleared to return to work with no limitations following her medical leave and continued to work for the police department. After her return to duty, the department issued new rules related to the use of tasers and pepper spray, and Ms. Lewis consulted her physician as to whether these interventions might be harmful to her heart. The physician believed they could and recommended that she not use either. The police department determined that with those restrictions, Ms. Lewis could not perform the duties of her job and was not qualified until she was cleared by the physician to use tasers and pepper spray. She was then placed on indefinite leave until the medical limitations were lifted by her physician. The facts are disputed as to whether the leave was exhausted or not, but ultimately, she was fired because she was absent without leave according to her employer. Ms. Lewis sued for disability and/or racial or gender discrimination. The City of Union City, representing the police department, was awarded summary judgment by the federal district court at which time, Ms. Lewis appealed to the Eleventh Circuit Court of Appeals. The procedural history in this case is very complicated but ultimately the Circuit Court heard the ADA complaint and issued summary judgment to the City of Union City.

The Eleventh Circuit held that Ms. Lewis had presented sufficient evidence to raise a genuine issue of fact as to whether she was “regarded as” disabled by the police department. The lower district court had also agreed that she had presented sufficient evidence that the police department regarded her heart condition as a physical impairment and took adverse action – placing her on leave—because of that impairment.⁴¹ The district court also determined that the evidence presented by the police that the physician’s letter implied that it was dangerous for Ms. Lewis to be in an environment (at work) where tasers or pepper spray might be deployed. However, the Eleventh Circuit was not convinced that the “danger to self or others” defense to taking an adverse action was applicable in the case. In the opinion, the justices referenced the “interpretive guidance” from the EEOC stating:

An employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or to others if he were suddenly to lose consciousness, has regarded the individual as disabled.⁴²

⁴¹ *Lewis v. City of Union City*, 934 F.3d 1169 at 1181 (11th Cir. 2019).

⁴² *Id.* citing 29 C.F.R. §Pt. 1630, App.

The Circuit Court held that whether the employee is qualified for the job and/or the employer has a legitimate, nondiscriminatory defense—i.e., risk to self or others—are separate issues from an initial determination as to whether an individual is covered under the ADAAA definition of disability. The Eleventh Circuit Court remanded the case to allow a jury to determine whether Ms. Lewis was in fact regarded as having a disability. The Circuit Court did agree with the lower court determination that Ms. Lewis had not presented evidence that she meet the definition of disability under prong one or two, nor did they determine whether the essential functions of the job required the ability to be exposed to tasers and pepper spray.

***Camoia v. City of NY et al.* 787 Fed. Appx. 55 (2nd Cir. 2019).**

The Second Circuit Court heard an appeal by Ms. Camoia, a New York police officer who lost her ADAAA complaint at the district court level. In the lower court, Ms. Camoia had argued a violation of her rights under the federal law when the New York Police Department (NYPD) fired her based on the perception that she had bipolar disorder after they learned of her history of anxiety and panic attacks that NYPD had not known earlier. Based on the new information, the department determined she was not qualified to be a police officer. The district court determined that Ms. Camoia had not presented sufficient evidence that a jury could conclude that NYPD regarded her as having an impairment, specifically bipolar disorder, under the third prong.

On appeal, Ms. Camoia tried to raise an alternative argument that she was discriminated against on the basis of her history of impairment under the second prong disability definition. The Second Circuit concurred that the firing was on the basis of her history of impairment, specifically anxiety and panic attacks. Nonetheless, because Ms. Camoia had not raised that issue in the earlier complaint, she could not raise it at the appellate level in opposition to the NYPD motion for summary judgment.

The procedural issues presented in the case clearly illustrate the importance of careful consideration of how to approach the requirement that an individual meet the definition of disability under the ADAAA. The case is also significant for calling attention to the need to present sufficient evidence that the employer does indeed regard an individual as having an impairment although, as clarified in the regulations, the impairment may or may not exist.

Practice Considerations

The “regarded as” definition under the ADAAA is to be interpreted very broadly and is not focused on the severity criteria of the physical or mental impairment. The determinations of whether the impairment is “substantially limiting” or involves a “major life activity” are not relevant to the regarded as prong. The focus is instead on whether the action taken by the

employer in response to the perceived or actual impairment of the individual is prohibited. Prohibited actions are those that have an adverse impact on the individual such as being fired from a job or denied a promotion.

It is important that employers understand the changes in the third prong definition of disability to support Congressional intent to address the conscious and unconscious bias against individuals with actual or perceived impairments. The following holdings from numerous federal circuit courts and the EEOC resources provide guidance for employers in developing disability discrimination training for staff related to the “regarded as” impairment definition.

1. An employee does not need to present evidence that the employer believed that he/she was substantially limited in major life activity. All that is necessary is to show that the employer fired the employee “because of” his or her knowledge of the employee’s injury regardless of whether the employer only perceived that the injury was an impairment or the injury was in fact an impairment.⁴³
2. The transitory and minor exception to coverage under the third prong is an affirmative defense with the burden of proof on the defendant not the plaintiff. It is the employer, not the employee, who must present evidence that the injury or impairment at issue is both transitory and minor.
3. If the impairment is only transitory or minor, the impairment will be covered under the third prong and sufficient for coverage under the ADAAA. This means both qualifiers (transitory and minor) must be satisfied for an individual to be excluded from protection under prong three. The ADAAA has clearly defined transitory as an impairment lasting less than six months. No definition of minor was included in the law although courts have considered certain impairments as being minor as described in the previous section.

A person may be disabled if he or she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he or she does not have such an impairment).⁴⁴

4. Any adverse action against an employee must be based on nondiscriminatory, legitimate and non-retaliatory reasons. Examples of such reasons include 1) the individual is not qualified for the job, 2) the individual is a direct threat to others in the workplace, or 3) the job has in fact been eliminated. There can be other legitimate and nondiscriminatory reasons an employer takes adverse action such as failure to pass a

⁴³ As the Ninth Circuit explained in *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428 (9th Cir. 2019) and First, Fifth, Sixth and Tenth Circuits agreed.

⁴⁴ <https://www.eeoc.gov/laws/types/disability.cfm>

legitimate drug test.⁴⁵

5. Reasonable accommodation is not a right of individuals claiming coverage under the “regarded as” prong of disability. However, individuals can claim coverage under multiple prongs of the disability definition and if an individual needs reasonable accommodation to be qualified, consideration should be given as to whether the individual meets the first or second definition of disability. Reasonable accommodation would be available to an individual under those prongs of the disability definition.
6. Employers, employment agencies, and unions should focus first on questions of qualification and reasonable accommodation, rather than focus on whether an individual meets the definition of disability.
7. The EEOC has issued numerous documents on implementation of the ADAAA and the impact on employers covered under ADA Title I. The following resources are specific to employment related issues:
 - [Questions & Answers on the Final Rule Implementing the ADAAA](https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm)
 - https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm
 - [Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008](#)
 - [Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA](#)
 - [EEOC Enforcement and Litigation Statistics \(ADA\)](#)

Conclusion

Societies around the world continue to limit full citizenship to individuals considered less valuable or less capable because of physical or mental differences. Some of this societal response to difference is undoubtedly based on fear or ignorance but whatever the cause, the result has been systemic and entrenched discrimination towards individuals with disabilities.

Early attempts to address this discrimination in the United States were largely focused on improving the economic status and physical access for individuals with disabilities. Efforts were not based on addressing and eliminating the conscious and unconscious bias against individuals with disabilities. The ADA amendments to the “regarded as having impairment” disability definition address stigma and bias directly by focusing on the adverse action taken against the individual. This is a significant difference from the earlier approach taken in the disability rights law in this country and the hope is that the changes will help eliminate discriminatory practices.

⁴⁵ See e.g., *Turner v. Phillips 66 Co.*, 791 Fed. Appx. 699 (10th Cir. 2019).

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