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When the Duty to Provide a Reasonable Accommodation Seems Unreasonable: Accommodating and Managing Employees with Episodic Impairments or Impairments in Remission under the ADA Amendments Act of 2008

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ARTICLES

WHEN THE DUTY TO PROVIDE A REASONABLE ACCOMMODATION SEEMS UNREASONABLE: ACCOMMODATING AND MANAGING EMPLOYEES WITH EPISODIC IMPAIRMENTS OR IMPAIRMENTS IN REMISSION UNDER THE ADA AMENDMENTS ACT OF 2008

GINA M. COOK*

ABSTRACT

The ADA Amendments Act of 2008 (ADAAA)¹ attempts to clarify and refine the Americans with Disabilities Act (ADA)² and, in specific areas, to completely overturn several significant United States Supreme Court decisions interpreting the ADA.³ The purpose of this article is to summarize the history of the ADA, to examine the new provisions of the ADAAA and to offer practical advice on a problem created by one of those new provisions. One of the most significant problems created by the new provisions is how to accommodate and manage employees with episodic impairments and impairments in remission who are now considered disabled individuals under the ADAAA.

The United States Equal Employment Opportunity Commission (EEOC) will soon be preparing new ADA regulations on the ADAAA amendments.⁴ The text of the ADAAA, as well as its legislative history, provides little guidance to the EEOC or America's employers on how the provisions for individuals with episodic impairments and impairments in remission should be interpreted and

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1. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101-12213 (2009)).

2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2009).

3. See 42 U.S.C. §§ 12101-12213.

4. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

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applied.⁵ This article offers a recommendation on how this portion of the ADAAA should be interpreted and proposes suggestions on the accommodation and management of employees with such impairments.

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5. See 42 U.S.C. §§ 12101-12213.

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I. INTRODUCTION

In 1993, Cynthia Morrison suddenly developed strange symptoms.⁶ In a very short period of time, she gained 70 pounds on her petite frame.⁷ She also experienced extreme fatigue, rounding of her face, and developed red stretch marks on her stomach.⁸ Cynthia dieted and exercised endlessly but couldn't stop gaining weight.⁹ Her co-workers took notice of the physical changes and began teasing her if she ate in

6. Posting of Cynthia Morrison, to www.cushings-help.com, <http://www.cushings-help.com/cynthia.htm> (July 2009).

7. Morrison, *supra* note 6.

8. *Id.*

9. *Id.*

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their presence.¹⁰ Cynthia went from a self-described social butterfly to someone who never left the house anymore.¹¹

As suddenly as they came, Cynthia's symptoms went away — only to dramatically reappear and disappear for the next 16 years.¹² She gained and lost large amounts of weight in a matter of months.¹³ What was even more frightening was that she began to experience new symptoms — heart palpitations, insomnia and a strange hump growing at the base of her neck.¹⁴ Cynthia managed to continue working, but she feared her recurring absences due to her unexplained oscillating symptoms would cause her to lose her job.¹⁵

Finally, a doctor was able to identify Cynthia's problem, which was straight out of an episode of Discovery Health's *Mystery Diagnosis*.¹⁶ Cynthia had cyclical Cushing's Disease, a rare endocrine disorder caused by a tumor at the base of the brain.¹⁷ The tumor causes the adrenal glands to overproduce cortisol, the body's "fight or flight" response hormone.¹⁸ Overproduction of cortisol wreaks havoc on the body's tissues, organs and bones and, if left untreated, can eventually be fatal.¹⁹ Despite the severity of her diagnosis, Cynthia was thrilled to have finally discovered the reason behind her debilitating symptoms.²⁰

Around the time Cynthia first became sick, Congress passed the ADA, a law designed to prevent discrimination against disabled individuals.²¹ However, at the time Cynthia's symptoms began, it was unclear whether the ADA covered her condition because it was intermittent.²² This, among other numerous ambiguities in the ADA,

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Mystery Diagnosis tells the stories of people who experience medical mysteries and have ailments that go undiagnosed or misdiagnosed for years. Mystery Diagnosis, About the Show, <http://health.discovery.com/fansites/mystery-diagnosis/about.html> (last visited Oct. 27, 2009).

17. Morrison, *supra* note 6; Cushing's Support & Research Foundation, The Basics, http://www.csrff.net/page/the_basics.php (last visited Oct. 27, 2009).

18. American Academy of Family Physicians, Cushing's Syndrome and Cushing's Disease, <http://www.cushings-help.com/cushings-what1.htm> (last visited Oct. 27, 2009).

19. American Academy of Family Physicians, *supra* note 18.

20. Morrison, *supra* note 6.

21. 42 U.S.C. § 12101(b)(1) (1990).

22. The symptoms of her Cushing's Disease varied depending on whether Cynthia was experiencing high or normal cortisol levels. Morrison, *supra* note 6. See generally Dennis A. Velez et al., *Cyclic Cushing Syndrome: Definitions and Treatment Implications*, NEUROSURGICAL FOCUS, Sept. 2007, <http://thejns.org/doi/pdf/10.3171/foc.2007.23.3.5> (discussing the states of cyclical Cushing's Syndrome and intermittent Cushing's Syndrome conditions defined by either predictable or unpredictable periodic episodes of excessive and normal cortisol production).

left both employees and employers confused as to who was disabled under the ADA, what an ADA-qualifying disability was and to what lengths an employer was required to go to accommodate disabled employees.²³

The confusion created by the ADA's passage and subsequent federal court cases interpreting the Act spawned a significant ADA reform movement in the late 1990s and early 2000s.²⁴ By 2008, this movement garnered enough political support to persuade Congress to pass the ADAAA.²⁵ The ADAAA attempts to clarify and refine the ADA and, in specific areas, to completely overturn several significant Supreme Court cases interpreting the ADA.²⁶ Whether one believes the ADAAA brings the original intent back to the ADA, or considers it to go far beyond the intent of the original Act, it cannot be disputed that the ADAAA will change the manner in which employers accommodate and manage employees with disabilities.²⁷

The purpose of this article is to summarize the history of the ADA, to examine the ADAAA and to offer practical advice on a problem created by the new protections under the ADAAA – the accommodation and management of employees with episodic impairments and impairments in remission. Part II highlights the long-standing problems with the ADA and helps the reader to understand the goals of the ADA reform movement. Part III analyzes the ADAAA and discusses how the new amendments address some, but fail to cure, other criticisms of the ADA. Finally, Part IV evaluates the particular problems raised by the ADAAA's protection of episodic impairments and impairments in remission and, in the employment context, offers suggestions on the accommodation and management of employees with such impairments.

II. BACKGROUND ON THE AMERICANS WITH DISABILITIES ACT OF 1990

A. *The Purpose of the ADA and Who Is "Disabled" Under the Act*

After decades of fighting disability discrimination through litigation under Section 504 of the Rehabilitation Act²⁸ and various state laws,

23. See Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192 (2008).

24. See Feldblum *supra* note 23, at 190, 193.

25. *Id.* at 230, 239-40.

26. Margaret Hart Edwards & Patrick F. Martin, *Congress Tells Courts How to Interpret the ADA*, LITTLER MENDELSON, Sept. 2008, http://www.littler.com/PressPublications/Documents/2008_09_ASAP_CongressTells_courtsHowTo-InterpretADA.pdf.

27. See generally Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, 70 ALA. LAW. 38, 39 (2009) (discussing the amendments to the ADA).

28. 29 U.S.C. § 794 (2009).

the disability rights community turned to Congress and President George H.W. Bush for a national mandate to change the country's perception of persons with disabilities.²⁹ On July 26, 1990, two years after its initial draft was introduced to the House of Representatives, the ADA was enacted to prohibit discrimination against disabled individuals.³⁰ At the time of the passage of the ADA, Congress noted that some 43 million Americans had one or more physical or mental disabilities and society's severe and pervasive discrimination against such individuals necessitated federal intervention.³¹ The ADA defined as disabled, and therefore only provided protection to, the following categories of individuals:

- (1) Those with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"
- (2) Those with "a record of such an impairment;" or
- (3) Those being "regarded as having such an impairment."³²

B. Preventing Disability Discrimination in Employment

Title I of the ADA was specifically designed to address and cure discrimination encountered by disabled individuals in the employment context "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment."³³ Employers or entities covered by the Act³⁴ are not permitted to discriminate on the basis of a disability if a person is a "qualified individual with a disability." In other words, discrimination is not allowed against the individual if he or she is capable, either with or without a reasonable accommodation, of performing the essential functions of an employment position.³⁵ Although the ADA provides some limited defenses and exceptions for the duty to provide accommodations,³⁶ it otherwise requires employers and other covered entities to adapt a

29. Feldblum, *supra* note 23, at 187-88.

30. *Id.* at 188-91.

31. 42 U.S.C. § 12101 (a)(1) (1990).

32. *Id.* § 12102(2).

33. *Id.* § 12112(a).

34. A "covered entity" means an employer, an employment agency, labor organization or joint-labor management committee." 42 U.S.C. § 12111(2). An "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding year" *Id.* § 12111(5)(A).

35. *Id.* § 12111(8).

36. An employer or covered entity is not required to reasonably accommodate a qualified individual with a disability if the act would cause the employer or entity "undue hardship" (in terms of significant difficulty or expense) or the reasonable accommodation would not alleviate a significant health or safety risk to others caused by an individual's disability. *Id.* § 12111(3), (10)(A).

qualified individual's job site or job functions to enable him or her to enjoy equal employment opportunities.³⁷

C. *Confusion Arises as the ADA is Interpreted and Applied*

Initially, the ADA enjoyed overwhelming Congressional and public support because "everyone, it seemed, thought discriminating against people with physical or mental disabilities was a lousy idea."³⁸ However, there were those who harbored reservations, not about the intent of the law, but about its design. Like every federal law, the ADA was the product of negotiation among both parties in Congress, disability rights advocates and business and community groups.³⁹ Each group achieved, but also conceded, certain goals in the name of compromise.⁴⁰ Inevitably, there was criticism from the business community regarding the final content of the ADA.⁴¹ Upon signing the ADA into law, President George H.W. Bush commented:

I know there may have been concerns that the ADA may be too vague or too costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation; and we've been committed to containing the costs that may be incurred.⁴²

Uncertainty and confusion followed in the wake of criticism and included the following unanswered questions for employers:

- (1) So . . . who is disabled under the ADA?
- (2) How disabling must a disability be?
- (3) Are employees still disabled if they try to help themselves?
- (4) What is a "major life activity" and what does it mean anyway?
- (5) Are employees disabled if their condition comes and goes or is in remission?

Shortly after the ADA's enactment, the executive and judicial branches of the federal government set about defining the Act's finer points in an attempt to provide guidance on these unanswered ques-

37. Memorandum from the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignities of Persons with Disabilities, *The Concept of Reasonable Accommodation in Selected National Disability Legislation*, Dep't of Econ. & Soc. Affairs, United Nations, (2006), available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>.

38. Beth Potier, *Disabilities Act Goes Only So Far, Says HLS's Bagenstos*, HARV. GAZETTE, Feb. 26, 2004, available at <http://www.hno.harvard.edu/gazette/2004/02.26/09-bagenstos.html>.

39. Feldblum, *supra* note 23, at 190-91.

40. *Id.*

41. *Id.* at 190.

42. President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), (transcript available at <http://www.eeoc.gov/ada/bushspeech.html>).

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tions.⁴³ Unfortunately, at least in the employment context of the ADA, more definition and guidance from the United States Department of Justice (DOJ), the EEOC and the federal courts brought even greater uncertainty and confusion as the ADA was applied to America's workforce.⁴⁴

1. So . . . Who Is Disabled Under the ADA?

The biggest question left open by the ADA was who qualified as "disabled" under the Act. The ADA's definition of "disability" did not provide for a list that automatically qualified a condition as a disability.⁴⁵ Moreover, it did not give a clear roadmap for concluding that a person was disabled under the Act.⁴⁶ However, the Act did provide that whatever a disability was, it had to "substantially limit" a "major life activity."⁴⁷ Thus, the initial focus for determining what was an ADA-qualifying disability centered around determining the meaning of this language.

In 1991, in accordance with Congressional instruction, the DOJ and the EEOC issued regulations for the enforcement of the ADA.⁴⁸ Notably, the DOJ's regulations largely ignored the definition of "disability" while the EEOC's regulations more narrowly construed the meaning of "substantially limits" than the original Act.⁴⁹ While the ADA required only that an individual's physical or mental impairment substantially limit one or more of the major life activities, the EEOC's regulations essentially created a higher threshold by requiring instead that the impairment be a "significant restriction" on a major life activity.⁵⁰ Consequently, the EEOC's regulations created an alternative and more rigorous standard for proving a disability but provided little clarity or practical guidance for employers on how to maneuver through this process.⁵¹

2. How Disabling Must a Disability Be?

Another question left unanswered by the ADA was how much impact an individual's impairment needed to have on a major life activity

43. See generally Feldblum, *supra* note 23, at 187-95 (discussing the background of the ADA).

44. *Id.* at 191-94.

45. In fact, the ADA's definition of "disabled" was drawn from the "definition of 'handicap' in Section 504 of the Rehabilitation Act at the time because a new definition seemed both politically infeasible and legally unnecessary." See Feldblum, *supra* note 23, at 190.

46. *Id.*

47. 42 U.S.C. § 12102(1)(A) (1990).

48. See *id.* § 12116; See 29 C.F.R. § 1630 (2009); See also Feldblum, *supra* note 23, at 191.

49. Feldblum, *supra* note 23, at 191-92.

50. Compare 42 U.S.C. § 12102(2), and 29 C.F.R. § 1630.2(j)(ii).

51. See generally Feldblum, *supra* note 23, at 192 (discussing the background of the ADA).

in order to be substantially limiting. In 2002, the Supreme Court addressed this question in *Toyota Motor Mfg. v. Williams*.⁵² The Court's inquiry focused specifically on an assembly line worker's limitations in performing manual tasks.⁵³ The Court held that, in order for a person to be substantially limited in performing manual tasks, their limitations must "prevent or severely restrict" them in performing activities that are central to most people's daily lives.⁵⁴ Furthermore, the impairment's impact must be permanent or long term.⁵⁵ Accordingly, the Court's decision in *Toyota* raised the threshold for meeting the ADA standard of disability in two ways: (1) by providing yet another, stricter definition of "substantially limited," and (2) by narrowing the examination of the type of "major life activities" considered in a disability analysis.⁵⁶

3. Are Employees Still Disabled if They Try to Help Themselves?

In 1992, twin sisters Karen Sutton and Kimberly Hinton applied to United Air Lines for employment as commercial airline pilots.⁵⁷ The sisters met the airline's basic age, education, experience and Federal Aviation Administration certification qualifications.⁵⁸ However, they did not meet the airline's minimum vision qualifications, which required uncorrected visual acuity of 20/100 or better.⁵⁹ Although both sisters used corrective lenses to achieve 20/20 or better vision, they were not offered positions with the airline due to the severity of their uncorrected visual impairments.⁶⁰ The sisters filed suit under the ADA against United Air Lines alleging disability discrimination.⁶¹

The sisters' situation posed an interesting question - if an individual takes mitigating measures to reduce or correct an impairment, is he or she still disabled under the ADA? The Tenth Circuit Court of Appeals answered this question with a resounding no and dismissed the sisters' complaint.⁶² The Court reasoned that because they could fully correct their visual impairments, they were not substantially limited in

52. 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2009).

53. *Id.* at 190.

54. *Id.* at 198.

55. *Id.*

56. *See id.*

57. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999), *superseded by statute*, ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2009).

58. *Id.* at 476.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 476-77.

any major life activity; thus, they were not disabled under the ADA.⁶³ However, a number of other federal appellate courts reached the opposite conclusion, holding that the disability analysis should be conducted without considering mitigating measures.⁶⁴ The Supreme Court granted *certiorari* in *Sutton* in order to resolve this discrepancy amongst the circuits.⁶⁵ Ultimately, the Court concluded that the ADA's terms indeed required consideration of the effect of mitigating measures, whether positive or negative, when judging whether a person is "substantially limited" in a major life activity and thus "disabled" under the Act.⁶⁶

4. What Is a "Major Life Activity" and What Does It Mean Anyway?

Another term left undefined by the ADA was "major life activity." One cannot be disabled unless his or her limitations substantially limit such an activity.⁶⁷ However, the ADA failed to define what the phrase meant or provide examples.⁶⁸ There have only been limited opportunities for the Supreme Court to interpret the term.⁶⁹ Noting Congress's directive to provide at least as much protection as the implementing regulations of the Rehabilitation Act of 1973,⁷⁰ the Supreme Court, in *Bragdon v. Abbott*,⁷¹ looked to the Act's regulations for guidance on what constituted a major life activity under the ADA.⁷² Although the Rehabilitation Act fails to define "major life activity," it does offer a list of examples including "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁷³ The Court found this list to be illustrative rather than exhaustive, due to the use of the phrase "such as" to describe the list of example activities.⁷⁴ The Court also emphasized that the term "major" required that a life activity must have comparative importance or significance, and that the activity need not be universal (i.e., performed by all persons) in order to be

63. *Id.*

64. *Id.* at 477 (citing decisions from the First, Second, Third, Fifth and Seventh Circuit Courts of Appeals favoring an evaluation of an individual's impairment in an uncorrected state).

65. *Id.* at 482.

66. *Id.*

67. Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1000 (2004).

68. Hubbard, *supra* note 67.

69. *Id.*

70. 29 U.S.C. § 794.

71. *See generally* 524 U.S. 624 (1998) (examining the Rehabilitation Act of 1973).

72. *Id.* at 638-39.

73. *Id.*; *see also* 45 C.F.R. § 84.3(j)(2)(ii) (2009); 28 C.F.R. § 41.31(b)(2) (2009).

74. *Bragdon*, 524 U.S. at 639.

major.⁷⁵ Other than the Supreme Court's limited commentary on the phrase, the EEOC and the federal courts were left to their own devices to interpret the meaning of "major life activity."⁷⁶

5. Are Employees Disabled if their Impairment Is Episodic or Is in Remission?

The ADA also provided no guidance as to whether episodic impairments or impairments in remission were to be considered disabilities.⁷⁷ In *Sutton*, the Supreme Court pointed out that "substantially limits" appears in the Act in the present indicative verb form, and therefore, "the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."⁷⁸

The EEOC, however, addressed this matter somewhat differently when it issued its Enforcement Guidelines on the ADA (Guidelines).⁷⁹ Under the Guidelines, "chronic, episodic conditions may constitute [a disability] . . . if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms."⁸⁰ By way of a vague supporting example, the EEOC referenced the case of Virginia Bar applicant Julie Ann Clark. Clark suffered from recurrent episodes of major depression and was denied a bar license when she refused to answer questions regarding mental, emotional or nervous disorders on her application.⁸¹ After receiving a filing under seal, the U.S. District Court for the Eastern District of Virginia, without further explanation, vacated a prior ruling that Clark's bouts with episodic depression did not rise to a level of an ADA-qualifying disability.⁸² However, without more information, the Court's decision provided no insight as to when or why an episodic condition might or might not be a disability under the Act or EEOC regulations.⁸³

75. See *id.* at 638-39. See also *Toyota*, 534 U.S. at 192 (reiterating that "[m]ajor means important.").

76. See 29 C.F.R. § 1630.2 (defining "major life activity" under EEOC regulations).

77. 42 U.S.C. § 12101(4)(D) (1990).

78. *Sutton*, 527 U.S. at 482.

79. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, EEOC NOTICE NO. 915.002 (Mar. 25, 1997), available at <http://www.eeoc.gov/policy/docs/psych.html> [hereinafter 1997 EEOC ENFORCEMENT GUIDANCE ON THE ADA].

80. 1997 EEOC ENFORCEMENT GUIDANCE ON THE ADA, *supra* note 79.

81. *Clark v. Virginia Bd. of Bar Exam'rs*, 861 F. Supp. 512, 513-14 (E.D. Va. 1994) (vacating earlier ruling that plaintiff's recurrent major depression did not constitute a disability under the ADA).

82. *Id.* at 519.

83. See generally *id.* at 517 (lacking discussion on reasons undermining Court's decision).

Finally, the federal courts came down on both sides of this issue, sometimes finding that episodic impairments or impairments in remission were disabilities, and at other times finding they were not.⁸⁴ For example, in a 1999 case, the District Court for the Southern District of New York found that an employee who suffered from episodic seizures was disabled because the medicine she used to treat her epilepsy⁸⁵ interfered with her ability to sleep.⁸⁶ However, in 2001 the Fourth Circuit Court of Appeals found that an employee's epilepsy was not an ADA-qualifying disability.⁸⁷ The Fourth Circuit determined that the ADA could not cover the "occasional manifestation of an illness" because doing so "would expand the contours of the ADA beyond all bounds."⁸⁸ Under the interpretations applied by the federal courts, it was essentially possible that two individuals suffering from the same condition could be denied ADA coverage based on a factor as small as the medicine prescribed to treat their condition.⁸⁹

III. THE ADA AMENDMENTS ACT OF 2008

A. *Criticism of the ADA*

Unfortunately for disability advocates, disabled Americans and employers, the early criticism of the ADA proved largely prophetic. The ADA, especially in the employment context, has been seen as a disappointment for its intended beneficiaries and an administrative nightmare for employers.⁹⁰ Additionally, the media has portrayed the ADA as a law that encourages trivial litigiousness and has painted disabled persons seeking their rights under the Act in a bad light.⁹¹ The ADA has been described as creating a "lifelong buffet of perks,

84. Compare *Franklin v. Consol. Edison Co. of N.Y.*, 1999 U.S. Dist. LEXIS 15582, at *30-33 (S.D.N.Y. Sept. 30, 1999) with *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).

85. Epilepsy, also referred to as a seizure disorder, is a medical condition that produces seizures affecting a variety of mental and physical functions. Following two or more unprovoked seizures, an individual is deemed have epilepsy. EpilepsyFoundations.org, About Epilepsy, <http://www.epilepsyfoundation.org/about/index.cfm> (last visited Oct. 24, 2009).

86. *Franklin*, 1999 U.S. Dist. LEXIS 15582, at *30-33. See also *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (an intermittent impairment that is a characteristic manifestation of an admitted disability is part of the underlying disability and a condition that the employer must accommodate).

87. See *Sara Lee Corp.*, 237 F.3d at 352.

88. *Id.*

89. Compare *Sara Lee Corp.*, 237 F.3d at 352 (denying employee with epilepsy to bring claim based on ADA), with *Franklin*, 1999 U.S. Dist. LEXIS 15582, at *34 (allowing epileptic employee to bring claim because defendant knew plaintiff was prone to seizures and taking medication to control the condition).

90. 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, 217 (2008).

91. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 (1999) (stating that plaintiffs "have used the ADA to trigger an avalanche of frivolous suits clogging the federal courts.").

special breaks and procedural protections” for people with questionable disabilities.⁹² The ADA has even been the focus of pop culture satire. It served as the basis of the “Americans with No Abilities Act” spoof featured by the satirical newspaper *The Onion* in 1998. It was also the plot of a 1995 episode of *The Simpsons* when Homer Simpson set a goal to become morbidly obese in order to be too disabled to perform his work responsibilities.⁹³

B. Movement for ADA Reform

Following the Supreme Court’s rulings in both *Sutton* and *Toyota*, disability advocacy groups such as the Epilepsy Foundation,⁹⁴ the American Diabetes Association⁹⁵ and the National Multiple Sclerosis Society⁹⁶ began taking affirmative measures to lobby Congress to revisit the ADA.⁹⁷ In 2002, the National Counsel on Disability⁹⁸ (NCD), conducted an investigation into the outcome of the Supreme Court’s decisions in ADA claims.⁹⁹ In 2004, the NCD published a report of its findings, “Righting the ADA,” outlining the various ways in which it believed the Supreme Court and lower federal courts had misinterpreted the ADA and, against Congress’s original intent, lim-

92. Colker, *supra* note 91.

93. *Congress Passes the Americans with No Abilities Act*, THE ONION, June 24, 1998, <http://www.theonion.com/content/node/28982>. See also Barry Hodge, *King-Size Homer: Ideology and Representation*, (1996), <http://www.snpp.com/other/papers/bh.paper.html>.

94. Established in 1967, the Epilepsy Foundation of America is a national voluntary agency dedicated to the welfare of the nearly 3 million Americans living with epilepsy and their families. “The organization works to ensure that people with seizures are able to participate in all life experiences; to improve how people with epilepsy are perceived, accepted and valued in society; and to promote research for a cure.” EpilepsyFoundation.org, About Us, <http://www.epilepsyfoundation.org/aboutus/index.cfm> (last visited Oct. 24, 2009).

95. Founded in 1940, the American Diabetes Association “funds research to prevent, cure and manage diabetes; delivers services to hundreds of communities; provides objective and credible information; and gives voice to those denied their rights because of diabetes.” Diabetes.org, About Us, http://www.diabetes.org/aboutus.jsp?WTLPromo=HEADER_aboutus&vms=309789184727 (last visited Oct. 24, 2009).

96. The National Multiple Sclerosis Society is organized by a 50-state network of chapters which seeks to help people affected by MS through “funding cutting-edge research, driving change through advocacy, facilitating professional education and providing programs and services that help people with MS and their families move their lives forward.” Nationalmssociety.org, About the Society, <http://www.nationalmssociety.org/about-the-society/index.aspx> (last visited Oct. 24, 2009).

97. Feldblum, *supra* note 23, at 193.

98. The National Council on Disability is an independent federal agency composed of members appointed by the President whose responsibility consists of providing advice and making recommendations to the President and Congress. NCD provides advice in order “to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.” National Council on Disability, <http://www.ncd.gov/> (last visited Oct. 27, 2009).

99. Feldblum, *supra* note 23, at 188, 194.

ited the terms of the original law.¹⁰⁰ The NCD's report sparked interest from both disability advocacy and business groups in amending the ADA.¹⁰¹

C. ADA Amendments Act of 2008

The interest in the NCD's report finally garnered Congressional interest when various versions of an "ADA Restoration Act" were introduced in both houses of Congress in 2006 and 2007.¹⁰² As support for some version of an ADA Restoration Act gained momentum, representatives of the disability and business communities met and negotiated acceptable compromise language of a bill that would satisfy both groups.¹⁰³ After 13 weeks of negotiation, the parties reached a final compromise on May 15, 2008.¹⁰⁴ On September 25, 2008, President George W. Bush signed the ADA Amendments Act of 2008 into law.¹⁰⁵ The intent of the ADAAA is clear – to change the definition of "disability," the definition of "major life activity," and how those who are "regarded as" being disabled are treated in their place of employment.¹⁰⁶ How the ADAAA effects these changes is the topic of discussion for the duration of this article.

1. The ADAAA Specifically Overrules *Sutton* and *Toyota*

The ADAAA retains the basic three-prong definition of disability included in the original ADA. However, it includes important revisions to the definition of disability such as instructions to the courts on how this definition should be interpreted and applied.¹⁰⁷

a. No Regard to Mitigating Measures

The ADAAA specifically rejects the consideration of "mitigating measures" as adopted by the Supreme Court in *Sutton* and its companion cases.¹⁰⁸ Previously, when determining whether an individual was disabled under the ADA, any mitigating or corrective measures

100. *Id.* at 194.

101. *Id.* at 195.

102. *Id.* at 197-98.

103. *Id.* at 229-30.

104. *Id.*

105. *Id.* at 230, 240.

106. Reiss, *supra* note 27, at 39.

107. See Long, *supra* note 90.

108. See *Sutton*, 527 U.S. at 482. See also *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516, 520-21 (1999) (determining that employee's high blood pressure, controlled by medication, did not substantially limit a major life activity and plaintiff was not disabled under the ADA); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999) (finding that an individual's learned or natural ability to compensate for the effects of an impairment could be a mitigating measure considered in assessing whether that individual is disabled under the ADA).

had to be taken into account when analyzing the impacts of an impairment.¹⁰⁹ Under the ADAAA, the determination of whether an individual is disabled must be made “without regard to the ameliorative effects of mitigating measures,” including medication, artificial aids, assistive technology, reasonable accommodations and any learned behaviors, adaptations or neurological modifications.¹¹⁰

It is easy to see how this new standard increases the number of individuals who will be protected by the ADAAA. For example, under the ADA, a driver was not permitted to pursue a disability claim against his employer based on his high blood pressure, which was controlled through medication.¹¹¹ Now, in determining whether an employee is protected by the ADAAA, he or she must be evaluated as if his or her condition is untreated.¹¹²

b. New Analysis for “Regarded As” Claims and Resolution of Whether Those Who Are “Regarded As” Disabled Must Be Reasonably Accommodated

In *Sutton*, the Supreme Court determined that individuals could only pursue “regarded as” disability claims if their perceived impairment, like an actual impairment, substantially limited a major life activity.¹¹³ Thus, it was not enough that an adverse decision was made based on misconceptions about a plaintiff’s condition. The plaintiff had to show that the defendant mistakenly believed that the plaintiff’s condition substantially limited a major life activity.¹¹⁴ The ADAAA changes this by expanding the definition of disability to include those who have been discriminated against due to an actual or perceived impairment, regardless of whether the impairment actually limits or is perceived to limit a major life activity.¹¹⁵

While the ADAAA makes litigating a “regarded as” disability claim much easier, it also restricts the application of “regarded as” claims to those which will not be “transitory” or “minor.”¹¹⁶ Transitory limitations are those with an actual or expected duration of six

109. See *Sutton*, 527 U.S. at 481-82.

110. However, as Long notes, eyeglasses and contact lenses are exempted from the new rules. Thus, an employer is free to consider vision correction devices when determining whether an individual is disabled. Furthermore, if a vision qualification standard is applied to employees’ or applicants’ uncorrected vision, the standard must be job-related and consistent with business necessity. Long, *supra* note 90, at 220-21.

111. Murphy, 527 U.S. at 520.

112. Long, *supra* note 90, at 220-21.

113. Edwards, *supra* note 26.

114. Long, *supra* note 90, at 223.

115. Edwards, *supra* note 26.

116. Long, *supra* note 90, at 224.

months or less.¹¹⁷ Unfortunately, the ADAAA fails to define what it considers to be “minor” impairments.¹¹⁸ On the other hand, the ADAAA does clarify that employers have no duty to reasonably accommodate those individuals who bring “regarded as” discrimination claims.¹¹⁹

c. “Substantially Limits” Should Be Construed to Broaden ADA Coverage

The ADAAA specifically rejects the Supreme Court’s definition of substantially limits in *Toyota*, as well as the EEOC’s interpretation.¹²⁰ However, the Act does not provide us with a new definition.¹²¹ Instead, it instructs the EEOC to revise the portion of its regulations defining “substantially limits” to be consistent with the ADAAA.¹²² Considering the crusade for broader protection that led to the ADAAA, as well as the other specific instructions found in the Findings and Purposes section preceding the ADAAA, it is probably safe to presume that the new definition of “substantially limits” will be broader than its previous interpretations.¹²³

2. The ADAAA Expands “Major Life Activities”

Despite the Supreme Court’s broad guidelines on what constitutes a major life activity, the lower federal courts have taken a more restrictive view as to whether an activity is significant enough to be a major life activity.¹²⁴ This opinion clearly won out during the drafting of the ADAAA, which rejects the Supreme Court’s interpretation of “major life activity” in *Toyota*.¹²⁵ While the ADAAA does not give us a replacement definition, it offers a non-exhaustive list of major life activities.¹²⁶ The terms added to those major life activities already promulgated by EEOC regulations are: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating.¹²⁷ Furthermore, major life activities now also include “major bodily functions,” which are also illustrated through a non-exhaustive list, in-

117. 42 U.S.C. § 12102(3)(B).

118. Long, *supra* note 90, at 224.

119. 42 U.S.C. § 12201(h).

120. Edwards, *supra* note 26.

121. *Id.*

122. *Id.*

123. Long, *supra* note 90, at 219-20.

124. Hubbard, *supra* note 67, at 1004.

125. Edwards, *supra* note 26.

126. 42 U.S.C. § 12102(2)(A).

127. *Id.*; see also 29 C.F.R. § 1630.2.

cluding but not limited to, digestive, bowel and bladder, neurological and endocrine functions.¹²⁸

3. Episodic Impairments and Impairments in Remission

Finally, the ADAAA includes a subtle but dramatic change for those individuals suffering from episodic impairments or impairments in remission.¹²⁹ The ADAAA states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”¹³⁰ In short, this change protects individuals suffering from episodic impairments or impairments in remission even when those impairments are inactive, causing unique concerns for employers.¹³¹

IV. PROBLEMS RAISED BY THE ADAAA’S PROTECTION OF EPISODIC IMPAIRMENTS AND IMPAIRMENTS IN REMISSION: A DISCUSSION AND SUGGESTED SOLUTIONS FOR EMPLOYERS

A. “Work With What You Know” – Former Supreme Court Standard

The federal courts formerly struggled to agree on how to apply the ADA to episodic impairments and impairments in remission.¹³² The Supreme Court eventually determined that, when analyzing whether a person is disabled, the focus should be on the individual’s current limitations and not hypothetical possibilities.¹³³ This standard caused significant difficulties for persons suffering from impairments with variable presentations, such as asthma,¹³⁴ epilepsy and mental illnesses like bi-polar disorder¹³⁵ (also known as manic depressive illness).¹³⁶ However, the Supreme Court’s “work with what you know” standard was much easier for employers to apply. If an employee’s

128. 42 U.S.C. § 12102(2)(B).

129. Long, *supra* note 90, at 221.

130. 42 U.S.C. § 12102(4)(D).

131. See Long, *supra* note 90, at 221.

132. See Long *supra* note 90; Colker *supra* note 91.

133. See, e.g., Toyota, 534 U.S. at 198.

134. Asthma is a disease that affects the lungs. It causes repeated episodes of wheezing, breathlessness, chest tightness, and nighttime or early morning coughing. Asthma can be controlled by taking medicine and avoiding the triggers that can cause an attack. Centers for Disease Control and Prevention, Basic Information, <http://www.cdc.gov/asthma/faqs.htm> (last visited Oct. 26, 2009).

135. Bipolar disorder is a brain disorder that causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks. National Institute of Mental Health, Bipolar Disorder, <http://www.nimh.nih.gov/health/publications/bipolar-disorder/complete-index.shtml> (last visited Oct. 26, 2009).

136. See Sara Lee Corp., 237 F.3d at 353.

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condition overall was not substantially limiting, he or she was not disabled under the ADA and not entitled to a reasonable accommodation.¹³⁷

B. Out with the Old and in with the Unknown? The ADAAA Now Protects Even Inactive Limitations

Those in support of ADA reform were strongly opposed to the notion that individuals with episodic impairments or impairments in remission were excluded from the ADA's protection merely because their limitations were not constant, consistent or predictable in nature.¹³⁸ Consequently, the ADAAA now includes episodic impairments or impairments in remission if they would "substantially limit a major life activity when active."¹³⁹ In other words, in determining whether an individual has an ADA-qualifying disability, there should be no consideration of the individual's state when the impairment is *inactive*. Some commentators have suggested that the ADAAA's new protections now allow the courts to move away from the "work with what you know" standard and "to engage in this once – prohibited – type of hypothetical inquiry" as to the possible severity of an individual's impairment.¹⁴⁰ Other commentators also have suggested that those with episodic impairments or impairments in remission may be "forever disabled" and that no employee is ever "cured" under the ADAAA.¹⁴¹ Employers, however, do not have the luxury of endless exercises in conjecture or the capability to cater to each and every desire of employees who may arguably be "forever disabled." Nevertheless, despite how unreasonable it may seem, the ADAAA still requires employers to provide a reasonable accommodation in such circumstances.¹⁴² Therefore, employers should take the following approach to provide reasonable accommodations in compliance with the ADAAA and to successfully manage employees with episodic limitations and limitations in remission.

137. See, e.g., *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (finding that employee was not disabled because panic disorder did not usually limit her activities and did not substantially limit her ability to work).

138. Stephen C. Orr, R.Ph., Statement Before the U.S. Senate Comm. on Health, Educ., Labor and Pensions (Nov. 15, 2007) (transcript available at http://www.c-c-d.org/task_forces/rights/tf-rights-ada.htm).

139. 42 U.S.C. § 12102(4)(D).

140. Long, *supra* note 90, at 221. See also Michael A. Gamboli & Alicia J. Byrd, *The "New" Americans With Disabilities Act: What the Employee-Friendly Revisions to the ADA Mean for Employers*, PARTRIDGE SNOW & HAHN, Oct. 2008, <http://www.psh.com/the-new-americans-with-disabilities-act>.

141. Barbara E. Hoey, *ADA Amendments Broaden Protection for Employees*, N.Y.L.J. Mar. 23, 2009, <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202429209626&slreturn=1>.

142. See Hoey, *supra* note 141.

C. *What Is an Employer to Do With Employees with Episodic Impairments and Impairments in Remission?*

For employers to successfully accommodate and manage episodic impairments and impairments in remission, they must first understand these types of impairments. Unfortunately, the final codified version of the ADAAA neither defines nor gives examples of episodic impairments or impairments in remission.¹⁴³ While the legislative history of the Act offers some examples, these examples were not referenced in the final version of the Act.¹⁴⁴ Furthermore, the EEOC has not yet updated its ADA regulations to reflect the changes in the ADAAA.¹⁴⁵ There is also no indication that the regulations will go any further than adopting the ADAAA language and therefore it is unlikely the regulations will provide additional insight into the meaning of the terms “episodic” and “remission.”¹⁴⁶ In such situations, it is not uncommon for courts to turn to the medical definitions of statutory terms for interpretive guidance.¹⁴⁷ Therefore, the medical meaning of “episodic” and “remission” must be examined so that employers can anticipate how these terms may be interpreted. Employers also must have an understanding of the medical presentation of such impairments so they can appropriately accommodate and manage employees with such impairments.¹⁴⁸

143. *Contra* H.R. REP. NO. 110-730, pt. 2, at 19 (2008), available at <http://www.law.georgetown.edu/archiveada/documents/HRRep110-730Part2.pdf> (providing examples of episodic impairments or impairments in remission, i.e., epilepsy, multiple sclerosis and cancer).

144. 42 U.S.C. §§ 12101-12213.

145. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, NOTICE CONCERNING THE AMERICANS WITH DISABILITIES ACT (ADA) AMENDMENTS ACT OF 2008 (2009), available at http://www.eeoc.gov/ada/amendments_notice.html.

146. *EEOC One Step Closer to Issuing Proposed Regulations Under the ADAAA*, DUANE MORRIS July 2009, http://www.martindale.com/labor-employment-law/article_Duane-Morris-LLP_740838.htm.

147. *See* *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (referencing medical definitions to assist in interpretation of terms in state statute).

148. To understand and properly accommodate and manage employees with chronic episodic impairments or impairments in remission, there is merit in examining the emotional and psychological phases of coping with a long-term illness. While a thorough examination of the psychological impact of a chronic illness is outside the immediate subject area of this article, the following four phase approach is offered for an employer’s consideration:

- (1) Phase 1: Crisis – the individual copes with the emergency and trauma following the onset of an illness.
- (2) Phase 2: Stabilization – the individual engages in life restructuring after he or she discovers failure, sometimes repeatedly, in attempting to return to normal behaviors or activities.
- (3) Phase 3: Resolution – the individual recognizes his or her old life may never return and must struggle, often times while experiencing despair, to establish a new self.
- (4) Phase 4: Integration – the individual defines a new self where his or her illness is an important factor but not the defining or primary factor in his or her life and the individual is able to integrate his or her illness into a meaningful life.

1. Accommodating and Managing Employees with Episodic Impairments

The medical definition of “episodic” is “an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series[;] . . . an occurrence of a usually recurrent pathological abnormal condition.”¹⁴⁹ Consequently, it can be assumed that the ADAAA is concerned with chronic, rather than acute, impairments of an episodic nature.¹⁵⁰ In other words, the ADAAA only protects episodic impairments that are customarily part of a recurring condition.

a. Employees Who Have Experienced One Episode of an Impairment that Substantially Limits a Major Life Activity

The ADAAA makes reference to a six-month timeframe when defining a *transitory*, not episodic, impairment.¹⁵¹ An episodic impairment must not present itself every six months in order to qualify as a disability.¹⁵² The ADAAA places no timetable requirements on episodic impairments and does not even require an employee to experience more than one impairing episode in order to be disabled.¹⁵³ This is because the medical definition of “episodic” encompasses even just one incident that is *customarily* part of a recurring condition.¹⁵⁴

Therefore, it would not be recommended to deny a reasonable accommodation to an employee just because he or she has only experienced one episode of what is usually a recurring, substantially limiting impairment or the impairing episode has not repeated itself within six months of its initial occurrence. For example, it would be improper to deny a reasonable accommodation to an employee who has been diagnosed with epilepsy, but has only experienced one debilitating seizure. Although the employee’s impairment has only occurred one time, it is

See Patricia A. Fennell, MSW, LCSW-R, *Managing Chronic Illness: Using the Four-Phase Approach* (Wiley 2003). By understanding the different phases of chronic illness and using a reasonable accommodation to help an employee move through and establish self-realization in each phase, an employer can assist an employee in coping with a chronic illness.

149. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 765 (2002).

150. See 29 C.F.R. § 1630.2(j) (“temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.”). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, SECTION 902 DEFINITION OF THE TERM DISABILITY (2009), available at <http://www.eeoc.gov/policy/docs/902cm.html> (explaining that an impairment which substantially limits or is expected to substantially limit a major life activity and whose “duration is indefinite and unknowable or is expected to be at least several months” qualifies as a disability under the ADA).

151. 42 U.S.C. § 12102(3).

152. 42 U.S.C. § 12102(4)(D).

153. *Id.*

154. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 149.

an impairment that is expected to happen again because recurring seizures usually characterize epilepsy.¹⁵⁵

If an employee has experienced one episode of an impairment that is customarily part of a recurring condition, the employer should work with the employee and document the interactive process to determine a reasonable accommodation to address:

- (1) The impairments encountered by the employee during the single episode he or she has already experienced;
- (2) The severity and frequency of the employee's known impairment based on his or her physician's assessment of the employee's single episode and possibility of future episodes; and
- (3) Any additional impairments the employee's physician anticipates will develop based on the known association of those impairments with what is believed will be the employee's recurring condition.

By assessing what has already happened, along with an informed opinion about what may happen in the future, the employer can take the guesswork out of developing a reasonable accommodation for both the known and anticipated consequences of the employee's impairment.

Shortly after implementing a reasonable accommodation for a single episode of an impairment that is customarily part of a recurring condition, the employer should do and document the following:

- (1) Follow-up with the employee to determine if the reasonable accommodation is meeting the employee's needs;
- (2) Maintain an open dialogue with the employee so he or she feels free to bring any issues regarding his or her impairment or reasonable accommodation to the employer's attention; and
- (3) Depending on the nature of the employee's recurring condition, confirm an employee's safety in the case of a second impairing episode at work and verify that the employee has no additional needs other than those already being met by the current reasonable accommodation.

Again, the employer should not suspend or deny a reasonable accommodation if an employee's episodic impairment does not recur within six months. However, the employer can require the employee to provide reasonable updates to the medical certification of his or her continuing need for accommodation of their episodic impairment. By consistently applying this requirement to all employees receiving a reasonable accommodation, an employer can:

- (1) Ensure that it is meeting its duties in regard to providing appropriate accommodations to disabled employees;

155. Alexander J. Brooke, *Dual Agency Flat Rate: Inadequate, Inefficient and Legally Suspect: Government Sacrifices the Needs of the State's Most Vulnerable Population in the Name of Administrative Ease and Cost-Savings*, 18 S. CAL. REV. L. & SOCIAL JUSTICE 153, 206 n.125 (2008).

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- (2) Ensure that employees who have experienced a single episode of an impairment that is customarily part of a recurring condition are treated the same as all other employees receiving reasonable accommodations; and
- (3) Simultaneously confirm that employees being accommodated after a single impairing episode continue to be considered by a physician as having a recurring, chronic condition causing episodic impairments and that the condition has not been cured or reassessed as a transitory condition not eligible for accommodation under the ADA.

b. **Employees Who Have Had More than One Episode of an Impairment that Substantially Limits a Major Life Activity**

Logic would seem to dictate that, if an employer could pick and choose its disabled employees, it would prefer to have those who have only suffered a single instance of what is customarily part of a recurring condition. However, employees who have had more than one episode of a substantially limiting impairment may be easier to accommodate and manage. From an employee relations standpoint, it is easier for co-workers to understand accommodations provided to someone who has had more than one episode of a substantially limiting impairment. Additionally, repeated impairing episodes are more indicative that the employee is suffering from an episodic impairment that could be covered by the ADA; therefore, the employer can focus less on deciding whether or not the employee is actually disabled and entitled to a reasonable accommodation. Furthermore, the more often an employee experiences an impairing episode, the more opportunities an employee has to develop expectations regarding his or her impairment. More frequent experiences of the impairing episode may also reveal a pattern of presentation, triggering factors and best practices for preventative or coping mechanisms. Thus, an employee who suffers from a repeated episodic impairment may be better able to assist his or her employer in tailoring a reasonable accommodation to his or her individual needs.

If an employee suffers from repeated episodes of an impairment that substantially limits a major life activity, the employer should work with the employee and document the process to determine a reasonable accommodation to address:

- (1) The impairments encountered by the employee in the recurring episodes he or she has already experienced;
- (2) The severity and frequency of the employee's known impairment based on his or her own experiences with recurring episodes and his or her physician's assessment of the employee's recurring episodes and possibility of future episodes;

- (3) Any additional impairments the employee's physician anticipates will develop based on the known association of those impairments with what has been established as the employee's recurring condition.

During the interactive accommodation process, an employer and employee also should consider information the employee has learned from his or her recurring episodes, such as a pattern of presentation, triggering factors and preventative or coping mechanisms. By incorporating the employee's experience with his or her own recurring impairing episodes, the employer can better tailor a reasonable accommodation to anticipate future occurrences of the employee's impairment. An applicable, but tailored reasonable accommodation, in turn, maximizes the employee's value and minimizes the impact of the employee's condition on the employer's business.

Shortly after implementing a reasonable accommodation for recurring episodes of a substantially limiting impairment, the employer should follow the procedures outlined above for accommodation: (1) follow-up, (2) open door communications and (3) confirming employee safety where needed.

An employer also can require an employee to provide reasonable updates to the medical certification of his or her continuing need for accommodation, even if it is clear the employee has a recurring episodic impairment.¹⁵⁶ As discussed above, the consistent application of this requirement to all employees receiving a reasonable accommodation is a risk-reducing measure for an employer. Furthermore, an employer can use this requirement to confirm that an employee's recurring episodic impairment continues to be a part of a chronic condition that has not been cured or reassessed as a transitory condition not eligible for accommodation under the ADA.¹⁵⁷

2. Accommodating and Managing Employees with Impairments in Remission

Remission is "a state or period during which the symptoms of a disease are abated."¹⁵⁸ Like the medical definition of "episodic," there is more to the medical term "remission" than is clear from Congress's use of the word in the ADAAA. Remission comes in two dif-

156. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), EEOC NOTICE NO. 915.002 (July 27, 2000), *available at* <http://www.eeoc.gov/policy/docs/guidance-inquiries.html#6> [hereinafter 2000 EEOC ENFORCEMENT GUIDANCE ON THE ADA].

157. *Id.*

158. MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/medical/remission>, (last visited Oct. 26, 2009).

ferent medically recognized states: (1) “complete remission,” which is a “complete disappearance of the clinical and subjective characteristics of a chronic or malignant disease;”¹⁵⁹ or (2) “partial remission,” where a disease is significantly improved “but residual traces of the disease are still present.”¹⁶⁰

a. Employees with Impairments in Partial Remission

It will be somewhat easier for employers to recognize the possible need to accommodate employees whose impairments are in partial remission. In this kind of remission, an employee still has active impairments, but perhaps a fewer number or to a lesser extent than he or she may have experienced in the past.¹⁶¹ Nevertheless, that does not mean the impairments partially in remission should be disregarded. The ADAAA makes clear that impairments in remission are still disabilities if they would substantially limit a major life activity when active.¹⁶² Therefore, an employer should continue to accommodate any substantially limiting impairments that are not in remission as well as those that are in partial remission.

b. Employees with Impairments in Complete Remission

Employees enjoying complete remission of an impairment may be the most difficult to recognize as possibly disabled. After all, it seems illogical to provide an accommodation to a person who is not actively experiencing a substantially limiting impairment. However, employers should note there is a difference between “complete remission” and a “cure.” A cure occurs where a disease has been eliminated or ended, whereas remission, even if complete, means only that the characteristics of the disease are gone, but not necessarily the disease itself.¹⁶³ This important distinction is likely the reason Congress deemed impairments in remission worthy of protection. For example, individuals diagnosed with a recurrence of cancer can experience symptoms of their cancer before its reappearance can be confirmed. Thus, an employer should continue to accommodate any substantially limiting impairments that are in complete remission.

159. FREE DICTIONARY, <http://medical-dictionary.thefreedictionary.com/remission>, (last visited Oct. 26, 2009).

160. *Id.*

161. 1997 EEOC Enforcement Guidance on the ADA, *supra* note 79.

162. 42 U.S.C. § 12102 (4)(D).

163. FREE DICTIONARY, <http://www.thefreedictionary.com/cure> (last visited Oct. 26, 2009); Cancer: Cure vs. Remission, <http://www.everydayhealth.com/blog/zimney-health-and-medical-news-you-can-use/cancer-cure-vs-remission/> (May 17, 2006) (discussing the difference in the context of cancer between a “cure” and “remission”).

3. Can an Employee Be “Forever Disabled” and Entitled to a Never-Ending Reasonable Accommodation Under the ADAAA?

The ADAAA’s protections for episodic impairments and impairments in remission raise a special question for employees who experience only one episode of a substantially limiting impairment or who have a substantially limiting impairment in complete remission. It is possible to have an employee in one of these situations who may never again actively experience a substantially limiting impairment.¹⁶⁴ In light of this, will such employees be considered “forever disabled” and, therefore, entitled to a reasonable accommodation?¹⁶⁵ Under the current terms of the ADAAA, and for the medical reasons discussed above, it appears the answer to this question is “yes.” Employees who experience only one episode of a substantially limiting impairment will be protected because the impairing episode is, by definition, expected to be customarily part of a recurring condition.¹⁶⁶ Employees whose substantially limiting impairments are in complete remission are protected because, by definition, the underlying disease causing the impairments has not necessarily been eliminated and may cause a recurrence of the impairments at any time and even before a reappearance of the underlying disease can be confirmed.¹⁶⁷ It is likely the commonality of their unpredictable natures that merited Congressional protection of both the episodic and remission states.

While it appears employees suffering from either an apparently episodic impairment or impairment in complete remission may be “forever disabled,” this does not mean such employees will be free to exploit their employers’ legal duty to accommodate their disability. As discussed previously, an employer can reduce its risk of exploitation and other legal liabilities by consistently requiring all employees receiving an accommodation to provide reasonable updates to the medical certification of his or her continuing need for an accommodation.¹⁶⁸ In regard to employees receiving accommodations after a single episode of a substantially limiting impairment, requiring updates to a medical certification can confirm the employee’s impairing episode is still believed to be a part of a recurring chronic condition and has not been cured or reassessed as a transitory condition.¹⁶⁹ Likewise, such updates for employees in complete remission can confirm whether the employee remains in remission, is suffering a recurrence

164. See Hoey, *supra* note 141.

165. *Id.*

166. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 149.

167. See FREE DICTIONARY, *supra* note 159.

168. See 29 C.F.R. § 1630.14.

169. See *id.*

or is considered to have achieved a cure.¹⁷⁰ Medical certification updates will allow employers to make adjustments to continuing reasonable accommodations even if the employee is “forever disabled.”¹⁷¹

V. CONCLUSION

While the ADAAA addresses some problems with the original ADA raised by the reform movement by intentionally broadening the coverage of the Act, it simultaneously creates new problems and more burdensome duties for employers. In fact, the protections now clearly provided to employees with episodic impairments and impairments in remission raise some difficult management issues. However, employers are not without techniques to accommodate and manage employees with episodic impairments or impairments in remission. Employers must understand these types of impairments and engage in open dialogue with their employees to appreciate their unique impact on each individual. Once employers understand the impairments and communicate with their employees they can work together to develop tailored reasonable accommodations. Employers will also be able to keep those accommodations in check by consistently requiring reasonable updates to an employee’s medical certification. By using these techniques, employers can ensure they are complying with the new terms of the ADA, utilizing accommodated employees to maximize their value to an employer’s business and preventing management’s exploitation by employees who may qualify as “forever disabled” under the new ADA.

170. *See id.*

171. *See* Business Management Daily, *Make Your Return-to-Work Requirements Reasonable* (2007), <http://www.businessmanagementdaily.com/articles/4184/1/Make-Your-Return-to-Work-Requirements-Reasonable/Page1.html#postedcomment>.