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## **SUMMERS V. ALTARUM: BROADENING THE DEFINITION OF “DISABILITY” UNDER THE ADA, AND THE IMPACT OF THE NEW DEFINITION ON EMPLOYERS**

SIDNEY MINTER\*

### I. INTRODUCTION

Title I of the Americans with Disabilities Act of 1990 (“ADA”) protects certain qualified individuals with disabilities from discrimination in a private workplace.<sup>1</sup> A qualified individual with a disability is someone who, “with or without reasonable accommodation, can perform the essential functions” of a job.<sup>2</sup> A person with a disability can include: (1) an individual with a physical or mental impairment that substantially limits one or more major life activities, (2) an individual with a record of such impairment, or (3) an individual who is perceived as having such an impairment.<sup>3</sup> An impairment falls under the purview of the ADA if it “substantially limits one or more major life activities.”<sup>4</sup> The ADA applies to employers with fifteen or more employees.<sup>5</sup>

In 2008, the ADA was substantively amended by the ADA Amendments Act of 2008 (“Amended Act”) which significantly changed the 1990 version of the law.<sup>6</sup> With this legislation, Congress substantially broadened the definition of “disability.”<sup>7</sup> This legislation has had a profound impact on the types of impairments included under the coverage of the ADA.<sup>8</sup> Congress made these changes in response to a series of Supreme Court decisions Congress believed improperly restricted the scope of the ADA.<sup>9</sup> The *Summers* Court was the first appellate body to apply the Amended Act’s ex-

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1. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

2. 42 U.S.C. § 12111(8) (2012).

3. 42 U.S.C. § 12102(1) (2012).

4. 42 U.S.C. § 12102(1) (2012).

5. 42 U.S.C. § 12111(5)(A) (2012).

6. ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

7. *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014).

8. See ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

9. *Id.*

panded definition of “disability.”<sup>10</sup> Before the enactment of the Amended Act and the subsequent *Summers* decision, an employee with an impairment that was considered to be temporary (lasting less than six months) would not be covered by the ADA.<sup>11</sup>

*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*<sup>12</sup> was likely the case that influenced Congress’s 2008 amendments.<sup>13</sup> Congress did not agree with the Supreme Court’s holding or analysis in *Toyota* with respect to defining disability.<sup>14</sup> In *Toyota*, the United States Supreme Court adopted a strict construction of the term “disability” and suggested that a temporary impairment could not qualify as a disability under the Act.<sup>15</sup> “Congress believed that *Toyota* set an ‘inappropriately high level of limitation necessary to obtain coverage under the ADA.’”<sup>16</sup> The passage of the Amended Act, which led to abrogation of the *Toyota* decision, redefined “disability” to apply to a broader range of individuals.<sup>17</sup>

Section II of this article will detail the *Summers* decision, and how this case has altered the way employers should handle future disability claims under the ADA. Section III will focus on the definition of “disability” prior to the Amended Act, including an in-depth analysis of *Toyota* and the relevance of its holding. Section IV will then discuss the impact that the Amended Act has had on the definition of “disability,” and the impact the *Summers* decision will have on injured workers’ claims of disability prospectively. Section V will present the issues of reasonable accommodations and undue hardship as they relate to disability claims under the ADA. Finally, Section VI of this article will discuss the practical impact the *Summers* decision will have on employers.

## II. THE CASE: *SUMMERS V. ALTARUM*

*Summers* arose from Carl Summers’ appeal from the dismissal of his complaint for failure to state a claim for which relief could be granted.<sup>18</sup> In July 2011, Summers began working as an analyst for Altarum Institute (“Altarum”), a government contractor with an office in Virginia.<sup>19</sup> His job required him to travel to different territories in order to conduct business.<sup>20</sup>

10. *Id.* at 330.

11. *Summers*, 740 F.3d at 331.

12. 534 U.S. 184 (2002).

13. *Summers*, at 329.

14. *Id.*

15. *Id.*

16. *Id.* (quoting Pub. L. No. 110–325, § 2(b)(5)).

17. *Id.* (citing 42 U.S.C. § 12102(4)(A) (2012)).

18. *Id.* at 327.

19. *Id.*

20. *Id.*

In October 2011, while exiting a commuter train, Summers fell and injured himself.<sup>21</sup> During the fall, he fractured his left leg and tore the meniscus tendon in his left knee.<sup>22</sup> He also fractured his right ankle and ruptured the quadriceps tendon in his right leg.<sup>23</sup> Summers' injuries were severe and required two surgeries.<sup>24</sup> His doctors restricted him from putting any weight on his left leg for six weeks and estimated that he would be unable to walk for at least seven months.<sup>25</sup> Without surgery, bed rest, or other conservative treatment, Summers alleged that he would likely have been unable to walk for more than one year following the accident.<sup>26</sup>

While hospitalized, Summers contacted Altarum to inquire about obtaining short-term disability benefits and developing a plan for gradually returning to work.<sup>27</sup> Summers suggested a plan in which he would receive short-term disability benefits, and then start working remotely from home on a part-time basis until he was ready to return on a full-time basis.<sup>28</sup> Altarum's insurance provider granted Summers' request for short-term disability benefits.<sup>29</sup> However, Altarum did not follow up with Summers regarding how he would return to work.<sup>30</sup> Altarum did not suggest reasonable accommodations, nor did it advise Summers that there was a problem with his proposed plan to return to work.<sup>31</sup> Instead, in November 2011, Altarum terminated Summers' employment and hired another analyst to replace him.<sup>32</sup>

Summers filed a complaint in the Eastern District of Virginia alleging two claims under the ADA.<sup>33</sup> In his first claim, Summers alleged that Altarum discriminated against him because of his disability and that he was wrongfully terminated.<sup>34</sup> In his second claim, Summers asserted that Altarum failed to accommodate his disability.<sup>35</sup> In response, Altarum filed a Rule 12(b)(6) motion to dismiss as to both of Summers' claims.<sup>36</sup> The district court granted Altarum's motion without prejudice.<sup>37</sup> A few months

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 328.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

later, Summers filed a new suit essentially making the same allegations against Altarum that he made in his first complaint.<sup>38</sup> The district court granted Altarum's motion to dismiss as to both claims, with prejudice.<sup>39</sup> Summers appealed, challenging the court's dismissal of his wrongful discharge claim.<sup>40</sup>

The Fourth Circuit analyzed Summers' contention that he was disabled as a result of the work-related incident.<sup>41</sup> Summers alleged that the incident left him unable to walk for seven months, and that without surgery, he would have been unable to walk for even longer.<sup>42</sup> The Court held that Summers' injury was "sufficiently severe" to qualify as a disability.<sup>43</sup> The Court ultimately held that a temporary impairment, when sufficiently severe, can constitute a disability for purposes of satisfying the ADA.<sup>44</sup>

### III. BACKGROUND

Before the Amended Act and the *Summers* decision, the term "disability" had very restrictive definition.<sup>45</sup> The Court in *Toyota* made clear that a person with a temporary impairment could not be a "qualified person" under the ADA.<sup>46</sup> This bright-line rule simplified the claims-handling process for employers.<sup>47</sup> A person with an impairment that is sufficiently severe to qualify for coverage under the ADA could include: (1) an individual with a physical or mental impairment, (2) an individual with a record of such impairment, or (3) an individual who is regarded as having such impairment.<sup>48</sup> Once a court determines that an employee is disabled, the court must then determine whether this impairment substantially limits one or more of the employee's major life activities.<sup>49</sup>

The phrase "substantially limits" was intended to be interpreted broadly, to encourage broad application of the ADA.<sup>50</sup> Before the enactment of the Amended Act, the term "major life activities" included certain activities such as walking, speaking, breathing, seeing, hearing, learning, and working.<sup>51</sup> The implementation of the Amended Act expanded the list to include

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 330.

42. *Id.*

43. *Id.*

44. *Id.* at 331.

45. *Id.* at 329.

46. *Id.*

47. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

48. 42 U.S.C. § 12101(1) (2012).

49. *Summers*, 740 F.3d at 331.

50. 29 C.F.R. § 1630.2(j) (2013).

51. 29 C.F.R. § 1630.2(i) (2009).

reading, bending, concentrating, and communicating, as well as the functioning of each of the systems of the body.<sup>52</sup>

In 2002, the Supreme Court decided *Toyota*, which interpreted the ADA rules regarding disability before the Amended Act was passed.<sup>53</sup> Ultimately, the Court held that a person with a temporary impairment could not receive coverage under the ADA.<sup>54</sup> The temporary impairment issue was the central issue in *Summers*,<sup>55</sup> and is likely to substantially impact employers going forward.<sup>56</sup>

In *Toyota*, Ella Williams worked for Toyota Motor Manufacturing (“Toyota”) in its automobile manufacturing plant in Kentucky.<sup>57</sup> Williams worked on an engine fabrication assembly line, where her duties included work with pneumatic tools.<sup>58</sup> Eventually, Williams began experiencing pain in her hands, wrists, and arms.<sup>59</sup> She sought treatment for her conditions in Toyota’s onsite medical facility and was ultimately diagnosed with carpal tunnel syndrome.<sup>60</sup> Williams’ treating physician assigned permanent work restrictions that precluded her from lifting more than twenty pounds.<sup>61</sup> In light of her restrictions, Toyota accommodated Williams by placing her in modified-duty positions over the next two years of her employment.<sup>62</sup>

Williams continued working for Toyota, but missed some time from work for medical leave, and eventually filed a workers’ compensation claim.<sup>63</sup> Williams settled her workers’ compensation claim and returned to work in a new department—Quality Control Inspections Operations (“Quality Control”).<sup>64</sup> In her new role, Williams was required to open and shut the doors, trunk, and hood of each passing car on an assembly line; she was also expected to wipe each car with a glove as it moved along the conveyor.<sup>65</sup> There was no dispute regarding the fact that Williams was able to per-

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52. 29 C.F.R. § 1630.2(i) (2013) (“Major life activities include, but are not limited to . . . [t]he operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operations of a major bodily function includes the operation of an individual organ within a body system.”)

53. *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184 (2002).

54. *Id.* at 198.

55. *See generally* *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014).

56. This article focuses solely on the Court’s analysis of the disability issue, not the wrongful termination issue.

57. *Toyota*, 534 U.S. at 187.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 188.

63. *Id.*

64. *Id.*

65. *Id.* at 188–89.

form these tasks in a satisfactory manner.<sup>66</sup> During the fall of 1996, Toyota announced that members of the Quality Control team would be required to apply oil to the hood, fender, doors, and trunk of passing cars at a rate of one car per minute.<sup>67</sup> This new position in Quality Control was the “shell body audit” job.<sup>68</sup> Shortly after Williams began working in this position, she began experiencing neck and shoulder pain.<sup>69</sup> She went to a doctor and was diagnosed with multiple ailments involving inflammation of the muscles and tendons around both her shoulder blades, and nerve pains in her upper extremities.<sup>70</sup>

There was then a factual dispute between Williams and Toyota regarding her employment status.<sup>71</sup> Williams argued that Toyota would not allow her to return to her original position in Quality Control, while Toyota contended that Williams began missing work on a regular basis.<sup>72</sup> On the last day Williams actively worked for Toyota, her physician placed her under a “no work” restriction.<sup>73</sup> Approximately one month later, Williams was terminated from employment with Toyota.<sup>74</sup>

Shortly thereafter, Williams filed a complaint against Toyota alleging that Toyota violated the ADA by failing to reasonably accommodate her restrictions and wrongfully terminating her employment.<sup>75</sup> Williams contended that she was disabled under the ADA because her physical impairment substantially limited her ability to perform major life functions.<sup>76</sup> The district court ruled against Williams, holding that she was not disabled.<sup>77</sup> She appealed to the Sixth Circuit Court of Appeals, which reversed the district court’s ruling in part, finding that Williams was disabled at the time she sought reasonable accommodations.<sup>78</sup> Williams appealed to the Supreme Court, which granted a writ of certiorari.<sup>79</sup>

The *Toyota* Court focused its analysis on the nature and severity of Williams’ impairment.<sup>80</sup> The Court reasoned that “[w]hile cases of severe car-

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66. *Id.* at 189.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 190.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 191 (The Sixth Circuit Court of Appeals affirmed the district court’s ruling on Williams’ wrongful termination claim.).

79. *Id.* at 192.

80. *Id.* at 196.

pal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling.”<sup>81</sup> The Court noted that “[s]tudies have further shown that, even without surgical treatment, one quarter of carpal tunnel cases resolve in one month, but that in [twenty-two] percent of cases, symptoms last for eight years or longer.”<sup>82</sup> The Court reasoned that given the wide disparity in the severity and duration of carpal tunnel syndrome, an individual’s diagnosis, standing alone, does not indicate whether a person is disabled.<sup>83</sup> The *Toyota* ruling established that short-term or temporary impairments were excluded from coverage under the ADA because such impairments did not substantially limit a major life activity.<sup>84</sup> This was the standing rule until the 2008 Amendments were implemented.<sup>85</sup>

The 2008 amendments abrogated the ruling in *Toyota*.<sup>86</sup> By passing the amendments, “Congress directed the Equal Employment Opportunity Commission (“EEOC”) to revise its regulations defining the term ‘substantially limits’ to render them consistent with the broadened scope of the [Amended Act].”<sup>87</sup> The EEOC issued regulations to clarify that the term “substantially limits” was intended to be a lax standard that facilitated expansive protection for injured workers.<sup>88</sup> The most important part of the Amended Act, as it relates to defining “disability,” is the EEOC’s regulation providing that “effects of an impairment *lasting or expected to last fewer than six months* can be ‘substantially limiting’ for purposes of proving an actual disability.”<sup>89</sup> “According to the appendix to the EEOC regulations, the ‘duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity.’”<sup>90</sup> “Although ‘[i]mpairments that last only for a short period of time are typically not covered,’ they *may be* covered if they are ‘sufficiently severe.’”<sup>91</sup>

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81. *Id.* at 199.

82. *Id.*

83. *Id.*

84. *Id.* at 198.

85. *See, e.g.,* Sullivan v. Neiman Marcus Grp., Inc., 358 F.3d 110 (1st Cir. 2004).

86. Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014).

87. *Id.*

88. *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(i) (2013)).

89. *Id.* (emphasis in original) (quoting 29 C.F.R. § 1630.2(j)(1)(ix) (2013)).

90. *Id.* (quoting 29 C.F.R. app. § 1630.2(j)(1)(ix) (2013)).

91. *Id.* (emphasis in original) (quoting 29 C.F.R. app. § 1630.2(j)(1)(ix) (2013)).

## IV. ANALYSIS

The *Summers* Court went to great lengths to justify its holding regarding the expanded definition of the term “disability.” The Court found that the district court erred by holding that Summers’ temporary injury could not constitute a disability as a matter of law.<sup>92</sup> The Fourth Circuit noted that the district court erred by relying on cases decided prior to the implementation of the Amended Act and misapplying the Amended Act’s disability analysis.<sup>93</sup> “The [district] court reasoned that because Summers could have worked with a wheelchair, he must not have been disabled under the Amended Act.”<sup>94</sup> The district court inverted the appropriate inquiry by examining whether Summers could have worked if he was allowed to use a wheelchair, before determining whether there was in fact a “substantially limiting impairment.”<sup>95</sup> The determination of whether Summers could have worked with the assistance of a wheelchair was important, but applied to a different issue — whether reasonable accommodations were appropriate — which was not the focus of the disability analysis the court was purporting to address.<sup>96</sup>

By prematurely considering whether Summers could have worked with reasonable accommodations, the district court erroneously made a determination as a matter of law that Summers’ temporary injuries could not constitute a disability.<sup>97</sup> The decision as to whether an impairment is substantially limiting “shall be made without regard to the ameliorative effects of . . . reasonable accommodations.”<sup>98</sup> In other words, the courts must conclude whether a person is disabled before deciding whether reasonable accommodations are appropriate. If the employee is not disabled, the ADA does not apply, and the legal analysis ends there.

The *Summers* Court decided that adopting the district court’s disability analysis would, in effect, eviscerate the ADA.<sup>99</sup> Adopting this analysis would place employers in an unfair position each time an employee — whether disabled or not — claimed to be disabled for purposes of the ADA. Under the district court’s analysis, employers would be forced to search for reasonable accommodations for every worker who claims to be disabled. The district court’s analysis raised many questions regarding the application

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92. *Id.* at 330.

93. *Id.*

94. *Id.* at 330–31.

95. *Id.* at 331.

96. *Id.*

97. *Id.* at 330–31.

98. *Id.* at 330 (quoting 42 U.S.C. § 12101 (4)(E)(i)(III) (2012)).

99. *Id.* (“If the fact that a person could work with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated.”)

and workability of the standard for disability. Would employers be able to avail themselves of defenses such as undue burden? What about the unnecessary costs employers would sustain while developing appropriate “reasonable accommodations” for employees who might not even be disabled?

After establishing that a temporary impairment can qualify as a disability, the *Summers* Court then focused its attention on whether the EEOC’s interpretation of “disability” was reasonable.<sup>100</sup> The Court stated that the EEOC’s decision to include “severe temporary impairments” in the definition of “disability” “advances [the] goal” of the Amended Act to expand the scope of protection available under the ADA.<sup>101</sup> “Furthermore, the EEOC, pursuant to its delegated authority to construe ‘disability’ more generously, adopted new regulations providing that an impairment lasting less than six months can constitute a disability.”<sup>102</sup> The Court noted that short-term impairments only qualify as disabilities if they are “sufficiently severe.”<sup>103</sup> The Court reasoned that the Amended Act’s inclusion of temporary disabilities advanced the goal of expanding protection under the ADA.<sup>104</sup> The Court discussed the burden on employers, and determined that the burden would endure only as long as the disability endures because “[t]emporary disabilities require only temporary accommodations.”<sup>105</sup> Ultimately, the Court held that Summers’ injury fell “comfortably within” the purview of the broadened definition of “disability.”<sup>106</sup> The Court held that “because Summers allege[d] a severe injury that prevented him from walking for at least seven months, he ha[d] stated a claim that his impairment ‘substantially limited’ his ability to walk,” which is a major life activity.<sup>107</sup>

## V. REASONABLE ACCOMMODATIONS AND UNDUE BURDEN

One of the stated purposes of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>108</sup> The term “discriminate” under the ADA encompasses “not making reasonable accommodations to known physical or mental limitations of an otherwise qualified individual with a disability.”<sup>109</sup> It is generally the disabled individual’s responsibility to inform the

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100. *Id.* at 332.

101. *Id.*

102. *Id.* at 330 (citing 29 C.F.R. § 1630.2(j)(1)(ix) (2013)).

103. *Id.* (citing 29 C.F.R. app. § 1630.2(j)(1)(ix) (2013)).

104. *Id.* at 332.

105. *Id.*

106. *Id.* at 333.

107. *Id.*

108. 42 U.S.C. § 12101(b)(1) (2012).

109. 42 U.S.C. § 12112(b)(5)(A) (2012).

employer of his need for an accommodation.<sup>110</sup> When requesting an accommodation, an individual may use plain English and need not mention the ADA or use the phrase “reasonable accommodation.”<sup>111</sup>

Once an employee makes a request for a reasonable accommodation, the employer is expected to respond as quickly as possible.<sup>112</sup> The regulations anticipate that a request will trigger “an informal, interactive process with the qualified individual with a disability in need of the accommodation.”<sup>113</sup> This procedure is designed to give the employee and employer an opportunity to sit down and communicate regarding the request for reasonable accommodations.<sup>114</sup> “This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>115</sup> This is a two-way interactive process; thus, the employee “must participate in order to retain the ADA’s protections.”<sup>116</sup>

An employer does not need to provide a reasonable accommodation to an employee if doing so would result in an undue hardship to the employer.<sup>117</sup> An undue hardship is defined as “significant difficulty or expense” incurred by the employer, when considered in light of several statutory factors.<sup>118</sup> Those factors include:

- (i) the nature and cost of the accommodation requested;
- (ii) the overall financial resources of the employer involved in the provision of the reasonable accommodation; the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of employees, the number, type and location of its facilities; and

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110. 29 C.F.R. app. § 1630.9 (2013).

111. *See, e.g.,* Schmidt v. Safeway Inc., 864 F.Supp. 991, 997 (D. Or. 1994) (“The [ADA] does not require the plaintiff to speak any magic words before he is subject to its protections. The employee need not mention the ADA or even the term ‘accommodation.’”)

112. Frederick M. Thurman, Jr., FMLA/ADA: The Basics 16 (June 7, 2013) (unpublished manuscript) (on file with the North Carolina Bar Association Continuing Legal Education Department).

113. 29 C.F.R. § 1630.2(o)(3) (2013).

114. Robin Shea, *11 Employer FAQs: (No. 1) What Exactly is this “Interactive Process” We Hear so Much About?*, EMPLOYMENT AND LABOR INSIDER (Aug. 26, 2011), <http://www.employmentandlaborinsider.com/americans-with-disabilities-act/11-employer-faqs-no-1-what-exactly-is-this-interactive-process-we-hear-so-much-about/>.

115. 29 C.F.R. § 1630.2(o)(3) (2013).

116. *See* Thurman, Jr., *supra* note 112 (manuscript at 16).

117. 42 U.S.C. § 12112(b)(5)(A) (2012).

118. 42 U.S.C. § 12111(10) (2012).

- (iv) the type of operation of the covered entity, including the composition, structure, and functions of the workforce of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>119</sup>

## VI. PRACTICAL IMPACT

After *Summers*, employers should consider making serious changes to their claims-handling protocol. In *Summers*, the Fourth Circuit was clear in broadening the definition of disability; however, the Court was not clear with respect to defining what constitutes a “sufficiently severe” impairment.<sup>120</sup> This uncertainty raises questions about how the broadened definition of “disability” affects the reality of running a business or being a part of the workforce. What kind of temporary impairments will be “sufficiently severe” to qualify for ADA coverage? How temporary can the condition be? Can a severe condition of only a few days qualify? Logically, it is reasonable for each district court to decide this issue on a case-by-case basis because the analysis is fact-specific.

From a claims-handling perspective, *Summers* will make it increasingly difficult for employers to refute an employee’s contention that he or she is disabled — even if the condition is temporary. To avoid costly penalties, employers will need to treat employees with temporary conditions as qualified individuals receiving ADA protection.<sup>121</sup> This will significantly increase the number of employees who are considered disabled under the ADA. Employers will need to shift their focus away from deciding whether an employee is disabled in order to establish methods for reasonably accommodating these individuals.<sup>122</sup> Employers should focus on developing protocols for providing reasonable accommodations and medical leaves of absence.<sup>123</sup> If nothing else, employers must remember that engaging in an interactive process with the employee is very important. In fact, it is so important, that in certain jurisdictions, failure to do so is considered a violation of the ADA.<sup>124</sup>

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119. *Id.*

120. *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014).

121. Robin Shea, *5 Employer Lessons from ADAAA “Temporary Injury” Decision*, EMPLOYMENT AND LABOR INSIDER, (Jan. 29, 2014), <http://www.employmentandlaborinsider.com/americans-with-disabilities-act/we-told-you-so-adaaa-protects-even-temporary-injuries/>.

122. *Id.*

123. *Id.*

124. See Shea, *supra* note 121.

The Court's decision in *Summers* reinforces the individual and fact-specific nature of assessing whether an employee has a disability.<sup>125</sup> "Factors that employers should consider in making such a determination include:

- How difficult it is for the individual to perform the major life activity?
- How much time does it take the individual to perform the major life activity?
- Does the individual experience pain when performing the major life activity?
- For what time period can the individual perform the major life activity?
- How does the impairment affect the operation of a major bodily function?
- Does the individual experience negative side effects of medication taken for the impairment?
- Is the treatment regimen required for the impairment burdensome?<sup>126</sup>

This process can be difficult and may require consultation with legal counsel.<sup>127</sup>

Although the *Summers* decision will likely have a major impact on the employers' claim-handling processes, there is still hope that employers will be able to avoid costly penalties. These penalties can include compensatory and punitive damages, as well as equitable relief.<sup>128</sup> *Summers* broadens the definition of disability in cases where an employee claims that he has an "actual disability."<sup>129</sup> Conversely, an impairment that is "transitory," "minor," and lasts less than six months is not protected under the ADA if an employee alleges that he is "regarded as" having a disability.<sup>130</sup> That said, if an employee contends that he has an "actual disability," employers should treat his claim — temporary or otherwise — as they would a permanent disability claim, if it satisfies the "actual disability" prong of the ADA. Handling claims in this manner should help employers avoid costly penalties imposed by the EEOC.

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125. Katie Goetzl, *Fourth Circuit Rules of Temporary Impairment May Be a Disability Under the ADAAA*, ASAP (Jan. 28, 2014), [http://www.littler.com/files/press/pdf/2014\\_1\\_ASAP\\_Fourth\\_Circuit\\_Rules\\_Temporary\\_Impairment\\_May\\_be\\_Disability\\_Under\\_ADAAA.pdf](http://www.littler.com/files/press/pdf/2014_1_ASAP_Fourth_Circuit_Rules_Temporary_Impairment_May_be_Disability_Under_ADAAA.pdf).

126. *Id.*

127. *Id.*

128. *Remedies For Employment Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/employers/remedies.cfm> (last visited Oct. 25, 2014).

129. William Goren, *Temporary Disabilities and the ADA* (Feb. 11, 2014), <http://www.williamgoren.com/blog/2014/02/11/temporary-disabilities-ada/>.

130. *Id.*

VII. CONCLUSION

*Summers* is a landmark decision that has changed the landscape of disability claims. The broadened scope of what constitutes a disability will change how employers handle claims, as well as increase the number of claims filed. The practical impact of this decision will become clearer as the case law continues to develop. Although there is no way to know how the case law will develop, employers should take proactive steps to ensure that they are best protecting themselves from a broader base of potential claims under the ADA.