

THE AMERICANS WITH DISABILITIES ACT: SHORT-TERM DISABILITIES, EXCEPTIONS, AND THE MEANING OF MINOR

Gordon Good¹

I. INTRODUCTION	100
II. BACKGROUND	102
A. “Disability” Under the Americans with Disabilities Act.....	103
B. Pre-Amendment “Disability”: Judicial Exclusion of Short-Term Disabilities	104
C. The Americans with Disabilities Act Amendments Act.....	107
D. Redefining “Disability”: Short-Term Disabilities Under the ADAAA.....	107
E. Unresolved Issues Regarding Short-Term Disabilities.....	108
F. The Equal Employment Opportunity Commission’s Position...	111
II. ANALYSIS	114
A. The Scope of the “Transitory and Minor” Exception within the ADA.....	114
B. Coverage under the “Transitory and Minor” Exception.....	119
C. Defining Terms: “Transitory” and “Minor”	121
III. SOLUTION	124
A. Keeping the “Transitory and Minor” Exception Exclusive to the “Regarded As” Prong	124
i. Statutory Structure	124
ii. Statutory Purpose.....	126
iii. Congressional Intent	128
B. Both But Not Either—Exclusion of Transitory AND Minor Impairments	129
i. Statutory Structure	129
ii. Statutory Purpose.....	130
iii. Congressional Intent	131
C. The Definition of “Minor”	133
i. Statutory Structure	133
ii. Statutory Purpose.....	134
iii. Congressional Intent	134
IV. CONCLUSION	136

¹ J.D. expected 2012, University of Dayton School of Law; B.A. 2009, University of Richmond. I would like to thank Professor Jeanette Cox, who served as an advisor and editor for this Comment. I would also like to thank my family for their love and support.

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (“ADA”) was created to provide civil rights protections to individuals with disabilities.² Its goal was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³ At its incorporation into law, Congress estimated that over forty-three million Americans suffered from some form of mental or physical disability.⁴ As such, the ADA was to guarantee these Americans equal opportunity in “public accommodations, employment, transportation, State and local government services, and telecommunications.”⁵ In fact, its protections were designed to mirror those previously granted to individuals based on sex, color, race, age, national origin, and religion.⁶ As a result, the ADA has been called the most significant civil rights legislation enacted since the Civil Rights Act of 1964.⁷

The ADA had a particularly expansive impact in regard to disability discrimination in employment practices.⁸ In fact, the ADA applies to all companies that employ over fifteen people and covers nearly all aspects of employment.⁹ Yet, despite its broad coverage, it has left unclear how short-term disabilities will be included under these protections.¹⁰ For instance, should a person who suffers an injury be covered if the injury only lasts one or two months? What about a year? Or, what if the impairment is extremely mild but lasts for a long time, or is extremely severe but lasts for only a few weeks? Considerations of duration and severity have not been fully addressed under the ADA.¹¹ This is true despite the new language

² *Americans with Disabilities Act Questions and Answers*, EQUAL EMP’T OPPORTUNITY COMM’N & CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, <http://www.ada.gov/q&aeng02.htm> (last updated Nov. 14, 2008) [hereinafter *ADA Questions and Answers*].

³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(b)(1) (2006)).

⁴ *Id.* § 2(a)(1), 104 Stat. at 328.

⁵ *ADA Questions and Answers*, *supra* note 2. The ADA covers a wide variety of subject matter, including employment, transportation, public accommodations, and services operated by both public and private entities. 42 U.S.C. §§ 12111–17, 131–34, 141–50, 161–65, 181–89 (2006) (Titles I, II, and III of the ADA as codified in the United States Code).

⁶ *ADA Questions and Answers*, *supra* note 2.

⁷ *Americans with Disabilities Act and ADA Civil Rights Summary*, AFFIRM ABLE ACTION ASSOCIATES, <http://www.disability-access.org/ada.php> (last visited Dec. 19, 2011).

⁸ See generally *A Guide to Disability Rights Law*, CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE (Sept. 2005), available at <http://www.ada.gov/cguide.pdf> (providing an overview of the major disability rights legislation in effect). While the Rehabilitative Act of 1964 prohibited disability discrimination in federal employment, federal contracts, or against those receiving Federal financial assistance, the ADA expands such anti-discriminatory policies to the private employment sector. Compare *id.* at 1, with 29 U.S.C. §§ 791, 793, 794 (2006).

⁹ 42 U.S.C. § 12111(5)(a) (2006). Employment practices include job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. *Id.* § 12112(a). Other practices include recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities. *ADA Questions and Answers*, *supra* note 2.

¹⁰ See 42 U.S.C. § 12102(2)(A). The ADA does not specifically identify all disabilities included under the Act. *Id.*

¹¹ *Id.*

added to the ADA under the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), requiring transitory impairments (lasting less than six months) to be excluded from certain protections.¹² Should this exclusion be limited to one portion of the ADA’s extensive definition of disability, or expanded to exclude short-term disabilities from the entire Act? And, what exactly does this exclusion cover?

This Comment will explore the relationship between short-term disabilities and the ADA as it was amended by the ADAAA. It will discuss how short-term disabilities under the ADA should be treated in light of the ADAAA’s purpose and statutory structure. Particularly, this Comment addresses whether the exclusion of short-term disabilities should be limited to a particular portion of the statute or included throughout the whole. Furthermore, this Comment investigates the exact types of short-term disabilities that will even qualify under the statute. Considering the statutory structure, congressional intent, and the purpose of the ADAAA, this Comment argues for the limitation of the short-term disability exclusion to the “regarded as” prong of the statute.¹³ This Comment also attempts to define short-term disabilities under the new statutory language, arguing that only impairments that are *both* transitory *and* minor should be excluded (rather than also excluding impairments that are only one or the other). Finally, this Comment attempts to define what constitutes a “minor” impairment under the exception in light of the ADA’s failure to clearly address this term.

Section II of this Comment will provide a brief overview of the protections afforded persons with disabilities over the last few decades and how short-term disabilities have fit into those protections. This section will describe the definition of “disability” under the ADA and specifically look at the “actual” and “regarded as” prongs under the definition. This section will then analyze how short-term disabilities have been treated under the ADA, and discuss the limitations the United States Supreme Court has placed on the statute since its enactment. A brief overview of the changes brought by the ADAAA will be provided, along with an examination of how they have affected short-term disabilities under the ADA. Next, this section will discuss particular portions of the ADAAA that stand to limit or expand coverage of short-term disabilities under the ADA. Particularly, this section will examine concerns over the inclusion of the “transitory and minor” exception to coverage under the “regarded as” prong of disability and the

¹² *Id.*; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3555. The ADA was amended in 2008 in an effort by Congress to provide more clarity to the language of the ADA and restore Congress’s original intent for the protections under the ADA. ADA Amendments Act of 2008, 122 Stat. at 3553.

¹³ The ADA defines “disability” in terms of three alternative definitions or prongs, intended to cover different scenarios in which disability discrimination may occur. *See infra* Part II.A. The three prongs of the definition are “actual,” “record of,” and “regarded as.” *Id.*; *see also* 42 U.S.C. § 12102(1).

effect this language has on both the “regarded as” prong and the statute as a whole. Finally, this section will describe the extent to which the Equal Employment Opportunity Commission (“EEOC”) has addressed these issues.¹⁴

Section III of this Comment will analyze the issues regarding short-term disabilities and the ADA, focusing on: (1) ambiguity in the scope of the “transitory and minor” exception within the statute; (2) questions concerning the coverage of the exception; and (3) the need for definitions. This section will discuss the application of the “transitory and minor” exception within the statutory scheme, assessing the arguments regarding whether the exception should extend to the entire statute or be restricted solely to the “regarded as” prong. This section will then analyze the coverage of the exception in light of the EEOC’s newly adopted position, which only excludes impairments that are both transitory and minor. Finally, this section considers the appropriate definition of what constitutes a “minor” disability under the exception, acknowledging a need for a standardized definition.

Section IV of this Comment offers a solution to the three major difficulties facing short-term disabilities. First, considering the statutory structure, Congressional intent, and the purpose of the ADAAA, this section will argue that the “transitory and minor” exception should be limited to the “regarded as” prong. Second, this section will argue to exclude only those disabilities that are *both* transitory and minor, while including either solely transitory or solely minor disabilities under ADA coverage. These arguments are again made considering statutory structure, Congressional intent, and the purpose of the ADAAA. Finally, this section will argue that the term “minor” under the ADA should be defined narrowly, excluding only those impairments synonymous to a hangnail, common cold, sprained joint, or stomach ache. This argument considers rules of statutory interpretation and Congressional intent.

II. BACKGROUND

Despite the lofty goals of the ADA, its reach in ending disability discrimination in employment has not always been as expansive as initially intended.¹⁵ Many identified the ADA as a mere regulatory issue affecting private businesses, rather than a civil rights issue, emphasizing the costs to society and the potential for abuse.¹⁶ In fact, the majority of the early

¹⁴ The ADA names the EEOC as the administrative agency delegated with the authority to implement, enforce, and promulgate rules under the statute. 42 U.S.C. § 12117(a).

¹⁵ See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1810–20 (2005) (discussing the failures of the ADA in light of poor employment statistics of people with disabilities following the ADA and low litigation success rates under Title I).

¹⁶ Janine Jackson, *A Right, Not a Favor: Coverage of Disability Act Misses Historical Shift*, FAIR: FAIRNESS & ACCURACY IN REPORTING (Dec. 2000), <http://www.fair.org/index.php?page=1048> (citing

scholarly writing focused on problems presented by Title I of the ADA, which covers employment discrimination and accommodation on the basis of disability.¹⁷ Most scholars took issue with the inappropriate narrowing of the interpretation of the ADA, particularly in terms of coverage under the definition of disability.¹⁸ While the ADAAA took steps to broaden the amount of disabilities included under the statute, it has still left unclear the degree to which short-term or minor impairments are included.

The evolution of short-term disabilities under the ADA has been viewed skeptically, especially considering how these disabilities have been granted (or denied) coverage in light of ADA's definition of disability. Despite the broad definition of disability under the Act, short-term disabilities were initially excluded as a result of judicial interpretation narrowing the scope of the ADA.¹⁹ While Congress attempted to reintroduce short-term disabilities to coverage under the ADAAA, the overall effect has been unclear.²⁰ Under the ADA, short-term disabilities have been specifically addressed in conjunction with minor impairments, and thus, the true nature of how they will be included has yet to be decided.²¹

A. "Disability" Under the Americans with Disabilities Act

The ADA defines "disability" using three prongs, where an individual is deemed to have a disability if they: (1) show an actual physical or mental impairment ("actual"); (2) have a record of such an impairment ("record of"); or (3) show that they have been regarded as having such an

various news outlets, such as the Chicago Tribune and USA Today, which highlighted the cost burden to employers of adding wheelchair ramps and accommodations for the disabled). While there are articles that celebrate the effect of the ADA, costs and abuse are the constant themes concerning the statute. *Id.*; see also, Steve Chapman, *The Other Side of the Disabled-Rights Law*, CHI. TRIB., July 30, 2000, at 15 (the ADA "forces employers to provide handicapped workers with the accommodations they need to do a job—and it sets no dollar limit on the obligation . . . Just installing a ramp for a wheelchair . . . can run as high as \$10,000."); Christopher J. Willis, Comment, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 772–30 (1994) (highlighting the costs of the ADA to employers as a major failure of the ADA).

¹⁷ Waterstone, *supra* note 15, at 1811–14.

¹⁸ *Id.* at 1813–18; see also, Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 536–68 (1997) (addressing various judicial misconstructions of the ADA's definition of disability). Issues with the narrowing in the interpretation of the ADA were mimicked by administrative agencies (the EEOC and the Department of Justice) that had to enforce the statute, which complained that such interpretation made it harder to enforce the ADA. Waterstone, *supra* note 15, at 1815–16 (citing Nat'l Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 7, The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities* 16 (Feb. 25, 2003), available at <http://www.ncd.gov/publications/2003/February252003> (follow "The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities" hyperlink)).

¹⁹ Burgdorf, *supra* note 18, at 482; see also *id.* at 482–88 (1997) (providing a survey of circuit court cases that served to exclude short-term disabilities under the ADA); *infra* Part II.B.

²⁰ See *infra* Part II.C.

²¹ 42 U.S.C. § 12102(3)(B) (2006) (" . . . shall not apply to impairments that are transitory and minor.").

impairment (“regarded as”).²² The “actual” prong of the definition refers to any disability that “substantially limits one or more [of the] major life activities of such individual.”²³ Meanwhile, “major life activities” include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, reading, and working, to name a few.²⁴ Following the ADAAA, the “substantially limits” requirement only applies to the “actual” and “record of” prongs of disability.²⁵ Meanwhile, the “regarded as” prong allows for an actual or perceived physical or mental impairment to be included as a disability regardless of whether or not the impairment limits (or is perceived to limit) a major life activity.²⁶ Together, the “actual” and “regarded as” prongs account for the clear majority of disability cases.²⁷ In fact, the “record of” prong has largely been ignored in practice and its function has been limited under the ADA.²⁸ Accordingly, this Comment focuses its discussion on the “actual” and “regarded as” prongs of disability and how they have affected the inclusion of short-term disabilities under the ADA.

B. Pre-Amendment “Disability”: Judicial Exclusion of Short-Term Disabilities

While the ADA was originally intended to provide clear, consistent, and enforceable standards in combating discrimination, many issues arose that served to limit the reach of “disability” under the statute.²⁹ Prior to the ADAAA, the “substantially limits” criterion, which is currently limited to the first two prongs of disability, also applied to the “regarded as” prong of

²² *Id.* § 12102(1). This three-part definition was designed to reflect the specific types of discrimination that disabled individuals experience, with the “actual” prong focusing on the disability of the individual and the “record of” and “regarded as” prongs focusing on the reactions of the employer. Arlene Mayerson, *Disability Rights Law: Roots, Present Challenges, and Future Collaboration*, 41 CLEARINGHOUSE REV. 265, 268 (2007), http://www.dredf.org/publications/DisRightsLaw-RootsPresentChallenges_10_07.pdf. Accordingly, it is significantly broader than the definition of disability given in other statutes. Compare 42 U.S.C. § 12102(1), with 42 U.S.C. § 423(d)(1)(A) (defining “disability” as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months”); see also *Index of State and Federal Statutory Interpretations of Disability*, GEORGETOWN LAW, <http://www.law.georgetown.edu/archiveada/documents/statebystatechart--updated.pdf> (last visited Feb. 7, 2011) (providing an index of statutory definitions of disability by jurisdiction, along with comments and current case law).

²³ 42 U.S.C. § 12102(1)(A).

²⁴ *Id.* § 12102(2)(A).

²⁵ See *id.* §§ 12102(1), 12102(3)(A) (specifying that an impairment may fall under the “regarded as” prong “whether or not the impairment limits or is perceived to limit a major life activity”). This was not how the Supreme Court initially interpreted the statute. See *infra* Part II.B.

²⁶ *Id.* § 12102(3)(A).

²⁷ Alex B. Long, (*Whatever Happened to*) the ADA’s “Record of” Prong(?), 81 WASH. L. REV. 669, 674–76 (2006). According to one survey between the years 2000–2005, disputes about a plaintiff’s eligibility under the “actual” or “regarded as” prongs were more than three times more common at the appellate level than under the “record of” prong. *Id.* at 673–74.

²⁸ See *id.* at 674–76 (discussing the underutilization of the “record of” prong in practice).

²⁹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(2), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(b)(2) (2006)).

the Act.³⁰ Specifically, a person was regarded as disabled if an employer mistakenly believed that the person's actual, non-limiting impairment substantially limited them in a major life activity.³¹ In fact, under the original interpretation of the ADA, all the prongs under disability used the term "impairment" as it was defined under the "actual" prong.³²

Accordingly, the Supreme Court consistently narrowed ADA coverage through its interpretations of the "substantially limiting" criterion under the "actual" prong.³³ For instance, in its case of first impression on the issue, the Court interpreted "substantially limiting" to require that, at a minimum, plaintiffs must allege that their impairment prohibited them from working in a broad class of jobs.³⁴ A few years later, the Court furthered this restrictive interpretation, specifically excluding all but the most severe injuries and short-term disabilities.³⁵ In *Toyota Motor Manufacturing of Kentucky v. Williams*, the Court held that to be considered substantially limiting, an impairment must prevent or severely restrict an individual from doing activities that were central in importance to most people's daily lives.³⁶ More importantly, the Court required the impairment be either permanent or at least long-term to qualify.³⁷ Naturally, these holdings had a negative impact on the inclusion of short-term disabilities under the ADA.³⁸ In fact, the Court seemed to champion this effect, stating that its goal was to ensure that the ADA was strictly interpreted to create "a demanding standard for qualifying as disabled."³⁹

The truly restrictive effect of the Court's interpretations on short-term disabilities became apparent as federal courts routinely held that temporary medical conditions were not included under the definition of

³⁰ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490–91 (1999).

³¹ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521–22 (1999).

³² See Americans with Disabilities Act of 1990 § 3(2), 104 Stat. at 329–30. "Such an impairment," as used under the "record of" and "regarded as" prongs, refers to impairment as defined under the preceding "actual" prong. *Id.*

³³ See *Sutton*, 527 U.S. at 490–91 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002). This judicial narrowing has often been referenced in terms of a judicial backlash against what the Supreme Court considered the overly broad coverage of the ADA. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000) (discussing the Supreme Court's resistance in terms of its failure to grasp or accept the true civil rights aspect of the ADA); see also Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1001–05 (2010) (providing an overview of the judicial backlash and the scholarly writing concerning the topic). But see Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 547–61 (2008) (discussing the limits of the judicial backlash theory in favor of predictability as a result of the statutory directive and governing social norms).

³⁴ *Sutton*, 527 U.S. at 491.

³⁵ *Toyota*, 534 U.S. at 198.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *infra* note 46 (asserting impairments of short duration clearly would not qualify—and indeed did not qualify—under the "permanent" or "long-term" requirements).

³⁹ *Toyota*, 534 U.S. at 197.

disability.⁴⁰ In federal courts, short-term disabilities were excluded from both the “actual” and “regarded as” prongs of the disability.⁴¹ Such exclusions are best reflected in *McIntosh v. Brookdale Hospital Medical Center*, where a plaintiff nurse, claiming that a hospital wrongfully terminated her employment due to her hypertension, was denied action as a result of the short duration of her ailment.⁴² The court held that a reasonable jury could not conclude that the plaintiff had more than a transitory impairment because the hypertension only lasted for a month.⁴³ Similarly, the court held that there was no indication that the employer regarded her condition as being anything more than transitory in nature.⁴⁴ Thus, the plaintiff had no claim under the “actual” or “regarded as” prongs of disability, since the condition could not have substantially limited her ability to work.⁴⁵

Under similar federal cases, short-term disabilities were defined as disabilities that lasted a few months *at the most*.⁴⁶ In fact, one court indicated that that the decisive weight of authority had held that an impairment lasting for a period of one month, and not expected to recur, did not constitute a disability under the ADA.⁴⁷ Similar interpretations were taken by the state courts, which followed the federal judicial precedent of excluding short-term disabilities.⁴⁸ For instance, in *Chatmon v. North*

⁴⁰ *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804 (M.D.N.C. 1999) (“[A] disabling, but transitory, physical or mental condition will not trigger the protections of the ADA.”) (internal quotations omitted); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997), *abrogated by* *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999) (“Based on the aforementioned factors, it is evident that the term ‘disability’ does not include temporary medical conditions.”); *McDonald v. Pa. Dep’t of Pub. Welfare*, 62 F.3d 92, 97 (3d Cir. 1995) (“The Rehabilitation Act and the Disabilities Act do not apply to the transient, nonpermanent condition that [the plaintiff] experienced.”); see *Burgdorf, supra* note 18, at 536–68 (addressing various other federal circuit cases narrowing the ADA’s definition of disability to exclude short-term disabilities); see also Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 450–51 (2011) (summarizing the limitations that duration brought to ADA coverage).

⁴¹ *E.g.*, *McIntosh v. Brookdale Hosp. Med. Ctr.*, 942 F. Supp. 813, 820–21 (E.D.N.Y. 1996), *aff’d*, 125 F.3d 844 (2d Cir. 1997).

⁴² *McIntosh*, 942 F. Supp. at 815 (finding that the plaintiff’s hypertension only lasted for a month and the plaintiff provided no indication that it would reoccur in the future).

⁴³ *Id.* at 821.

⁴⁴ *Id.* at 821–22.

⁴⁵ *Id.*

⁴⁶ David K. Fram, *The ADA Amendments Act: Dramatic Changes in Coverage*, 26 HOFSTRA LAB. & EMP. L.J. 193, 211 (2008); see also *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804–05 (M.D.N.C. 1999) (holding that inability to work for less than three months due to heart disease, diabetes, and hypertension did not constitute a disability); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 200 (4th Cir. 1997) (holding that a back injury lasting two months was not a disability); *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (holding that temporary psychological impairment lasting three and a half months was not sufficient to constitute a disability); *McDonald v. Pa. Dep’t of Pub. Welfare*, 62 F.3d 92, 95–96 (3d Cir. 1995) (holding that the inability to work for two months following abdominal surgery was not a disability).

⁴⁷ *McIntosh*, 942 F. Supp. at 820.

⁴⁸ See *Chatmon v. N. C. Dep’t of Health & Human Servs.*, 622 S.E.2d 684 (N.C. Ct. App. 2005), *overruled by* *Meza v. Div. of Soc. Servs.*, 692 S.E.2d 96 (2010); see also *Hallgren v. Integrated Fin. Corp.*, 679 N.E.2d 259, 261 (Mass. App. Ct. 1997) (holding that a disability lasting a month was too transient to be considered a disability under the ADA).

Carolina Department of Health and Human Services, a benefits recipient argued that her benefits were improperly reduced after she was unable to fulfill her required service hours due to diabetes.⁴⁹ Following the guidance of the federal courts, the court held that a “disabling, but transitory, physical or mental condition will not trigger the protections of the ADA.”⁵⁰

C. *The Americans with Disabilities Act Amendments Act*

As evidenced above, under the original scheme of the ADA, short-term disabilities were nearly eliminated from eligibility as a result of judicial interpretation. Such interpretations seemed contrary to the broad sweeping findings and intentions established in the original ADA.⁵¹ As a result of the Supreme Court’s restrictions, Congress decided to amend the ADA in 2008.⁵² On September 25, 2008, the ADAAA was signed into law with the intention of clarifying and reiterating who is covered by the ADA’s protections.⁵³ This included a reversal of many of the Supreme Court’s limiting decisions and a return to the broad scope and protections available under the statute.⁵⁴

D. *Redefining “Disability”: Short-Term Disabilities Under the ADAAA*

The ADAAA attempted to address many issues relating to the definition of disability, which was arguably the ADA’s biggest limitation at the time.⁵⁵ The ADAAA made several changes to the definition, including a reduction of the demanding eligibility standards, a broadening of the “substantially limits” coverage, and an expansion of the major life activities encompassed under the “actual” prong of disability.⁵⁶ However, the most pertinent changes affecting short-term disabilities were those made to the “regarded as” prong. As mentioned above, the ADAAA eliminated the “substantially limits” requirement under the “regarded as” prong in favor of

⁴⁹ *Chatmon*, 622 S.E.2d at 686–87.

⁵⁰ *Id.* at 690 (quoting *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804 (M.D.N.C. 1999)).

⁵¹ See *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, § 2(a)–(b), 104 Stat. 327, 328–29 (codified as amended at 42 U.S.C. § 12101 (2006)).

⁵² See *ADA Amendments Act of 2008*, Pub. L. No. 110-325, § 2(a)(1)(3)–(8), 122 Stat. 3553, 3553–54 (finding the need to overturn the previous findings of the United States Supreme Court in favor of broader coverage).

⁵³ *The ADA Amendments Act of 2008*, UNITED STATES ACCESS BOARD, <http://www.access-board.gov/about/laws/ada-amendments.htm> (last visited Mar. 13, 2011). In fact, the express purpose of the ADAAA was to restore the intent and protections of the original ADA. *ADA Amendments Act of 2008*, 122 Stat. at 3553.

⁵⁴ *ADA Amendments Act of 2008* § 2(b)(1)–(3), 122 Stat. at 3554.

⁵⁵ 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, 218 (2008).

⁵⁶ See *id.* (thoroughly assessing the changes made by the ADAAA and their implications). Many scholarly writers have tracked the changes made by the ADAAA. See, e.g., Befort, *supra* note 33, at 1013–20; see also Fram, *supra* note 46, at 194. For actual text showing the changes made by the ADAAA (with deleted language shown as strike through font, and new language in bold) see *Americans with Disabilities Act of 1990, As Amended*, <http://www.ada.gov/pubs/adastatute08mark.htm> (last updated June 15, 2009).

merely requiring that a plaintiff prove that the employer perceived an impairment existed.⁵⁷ Furthermore, and most importantly, the ADAAA excluded any injuries considered to be “transitory and minor” under the “regarded as” prong.⁵⁸ This language has the greatest potential for limiting the inclusion of short-term disabilities under the Act.

While the ADAAA states a purpose of eliminating the inappropriately high limitations placed on the definition of disability, it does not go as far as describing how transitory and minor disabilities should be covered under the “actual” or “record of” prongs.⁵⁹ While the “transitory and minor” exception is not found in the “actual” or “record of” prongs,⁶⁰ the ADA does not restrict or negate the use of such criteria when determining if a disability is eligible under these prongs.⁶¹ Thus, while the ADAAA appears to have overturned the Supreme Court’s requirement that impairments be permanent or long term,⁶² it does not expressly allow for short-term disabilities to be included in the “actual” or “record of” prongs.⁶³

E. Unresolved Issues Regarding Short-Term Disabilities

While the enactment of the ADAAA intended to rectify the narrowness of the Court’s definition of disability, the inclusion of the “transitory and minor” exception left many ambiguities and issues to be addressed regarding short-term disabilities.⁶⁴ In fact, concern over the implementation of the “transitory and minor” language originated well before the ADAAA was even passed.⁶⁵ For example, one concern, cited by the Office of Management and Budget (“OMB”),⁶⁶ was that because the ADAAA did not explicitly apply the “transitory and minor” exception to the general definition of disability, it “could lead to an unintended and

⁵⁷ ADA Amendments Act of 2008, sec. 4, § 3(3)(A), 122 Stat. at 3555; *see* 42 U.S.C. § 12102(3)(A) (2006) (providing the current language as amended).

⁵⁸ ADA Amendments Act of 2008, sec. 4, § 3(3)(B), 122 Stat. at 3555.

⁵⁹ *Id.* § 2(B)(4)–(5), 122 Stat. at 3554; *Id.* sec. 4, § 3, 122 Stat. at 3555.

⁶⁰ *See* 42 U.S.C. § 12102.

⁶¹ *Id.*

⁶² ADA Amendments Act of 2008, § 2(b)(4)–(5), 122 Stat. at 3554.

⁶³ *See* ADA Amendments Act of 2008, sec. 4, § 3, 122 Stat. at 3555.

⁶⁴ *See, e.g., The ADA Amendments Act: An Overview and Analysis*, COUNCIL ON LAW IN HIGHER EDUC., 3 (Sept. 2008), available at <http://www.clhe.org/clhe/wp-content/uploads/2009/01/eiada2008.pdf> [hereinafter COUNCIL ON LAW IN HIGHER EDUC.]. For a thorough analysis of the perceived shortcomings of the ADAAA in general, *see* Kate S. Arduini, *Why the Americans with Disabilities Act Amendments Act Is Destined to Fail: Lack of Protection for the “Truly” Disabled, Impracticability of Employer Compliance, and the Negative Impact It Will Have on Our Already Struggling Economy*, 2 DREXEL L. REV. 161, 180–89 (2009).

⁶⁵ COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3.

⁶⁶ The Office of Management and Budget is the largest component of the Executive Office of the President, and is responsible for creating the budget and overseeing the management of all executive agencies. *The Mission and Structure of the Office of Management and Budget*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission/ (last visited Dec. 23, 2011).

undesirable interpretation of the definition.”⁶⁷ Specifically, it could mean that some transitory and minor impairments would be covered as “actual” disabilities.⁶⁸ It was also unclear how the “transitory and minor” exception would mesh with the regulation guidelines provided by the EEOC, which applied a factor test for determining whether an individual is substantially limited in major life activities.⁶⁹ This test considers the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.⁷⁰ Allowing transitory and minor conditions would essentially undermine all three of the factors it considers; however, applying the rigid standard would make these factors essentially unnecessary.

Another concern that has arisen in relation to the “transitory and minor” exception is that it is ambiguous about what disabilities qualify under the exception.⁷¹ Under the express language of the ADAAA, only disabilities that are both transitory and minor are excluded from the “regarded as” prong.⁷² This would essentially leave those impairments that are one or the other covered under the prong.⁷³ Concern over this issue was again noted by the OMB, indicating that the ADAAA should exclude impairments that are either transitory or minor, since strictly requiring both had the potential of extending coverage to a mild seasonal allergy or a short but severe bout with the flu.⁷⁴ Nevertheless, it is possible for a plaintiff to argue under the ADA that an ailment that is really bad and lasts for two weeks should be qualified under the “regarded as” prong.⁷⁵ Such an interpretation would not be an oversight.⁷⁶ Instead, this interpretation is said to be something disability rights groups wanted to include in the ADAAA and won.⁷⁷

Finally, there is uncertainty concerning how to define the term “minor” under the “transitory and minor” exception.⁷⁸ The ADAAA (and

⁶⁷ COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3 (quoting *Statement of Administration Policy: H.R. 3195*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT (June 24, 2008), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=77541#axzz1klnByq7L>).

⁶⁸ *Id.*

⁶⁹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195–96 (2002).

⁷⁰ *See id.* (citing 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (2001)).

⁷¹ *See, e.g.*, Befort, *supra* note 33, at 1027 (identifying the potential problems involved in the application of the “transitory and minor” exception).

⁷² *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3, 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(3)(B)).

⁷³ *Id.*

⁷⁴ COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3.

⁷⁵ Michael O’Brien & Melissa Turley, *ADA Amendments Act Passes*, HUMAN RES. EXEC. ONLINE (Nov. 1, 2008), <http://hre.lrp.com/HRE/story.jsp?storyId=142318897> (quoting David Fram, National Employment Law Institutes ADA Expert); *see also* Befort, *supra* note 33, at 1028 n.247 (citing other instances where a court has been willing to twist interpretation of statutory text between “or” and “and”).

⁷⁶ O’Brien & Turley, *supra* note 75.

⁷⁷ *Id.*

⁷⁸ COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3; Befort, *supra* note 33, at 1027.

now the ADA) expressly defines “transitory” to mean impairments that have an actual or expected duration of six months or less.⁷⁹ However, both the ADAAA and ADA are silent concerning the definition of “minor.”⁸⁰ While it is possible that minor injuries could be determined in light of the substantially limiting requirement, the ADA makes no connection between the two definitions.⁸¹ Thus, even when a disability is long-term in nature, it is unclear what would constitute a disability severe enough to avoid the “transitory and minor” exception.

The implications of these concerns on short-term disabilities are still unclear, especially considering that the ADAAA only recently became effective on January 1, 2009.⁸² At least one federal court has applied the “transitory and minor” exception under the ADA, though it provides little guidance or indication of how courts are likely to rule in regard to these concerns.⁸³ In *Emmons v. City University of New York*, the plaintiff became sick and was placed on disability for a one-week period, and was later injured in a car accident and placed on indefinite disability until about two months later.⁸⁴ The court dismissed the plaintiff’s ADA claim, holding that the plaintiff’s injuries failed under the “regarded as” prong because they were both transitory (lasting less than three months) and minor (the employer did not perceive the plaintiff’s injuries as more than “minor” and believed the plaintiff was simply at home relaxing).⁸⁵ Thus, aside from providing an example of a transitory and minor impairment, typically none of the actual issues discussed are formally addressed.⁸⁶ Nevertheless, it is expected that these ambiguities in interpretation, combined with the intended broad coverage of the ADAAA, will mean an increase in lawsuits while at the same time making it harder for employers to defend against a growing number of disability claims.⁸⁷

⁷⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3(3)(B), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102(3)(B) (2006)).

⁸⁰ See ADA Amendments Act of 2008, 122 Stat. at 3553; 42 U.S.C. § 12102.

⁸¹ See 42 U.S.C. § 12102.

⁸² ADA Amendments Act of 2008, sec. 8, 122 Stat. at 3557 (codified as amended at 29 U.S.C. § 705).

⁸³ See *Emmons v. City Univ. of New York*, 715 F. Supp. 2d 394 (E.D.N.Y. 2010), *modified* (July 2, 2010).

⁸⁴ *Emmons*, 715 F. Supp. 2d at 403–04.

⁸⁵ *Id.* at 409.

⁸⁶ See, e.g., *Chamberlain v. Valley Health Sys., Inc.*, 781 F. Supp. 2d 305, 310–311 (W.D. Va. 2011). Recently, one court has mentioned that the issue of whether an impairment is “both transitory and minor” is one for the jury to decide. *Id.* at 311 (refusing to hold that both transitory and minor are required, or expounding on the issue, but providing some indication of how a court will likely hold on the issue).

⁸⁷ Frank C. Morris, Jr., *Dealing with Workplace Disabilities*, SR037 ALI-ABA 557, 611 (2010). *But see* Michael O’Brien & Melissa Turley, *supra* note 75 (citing Lawrence Lorber, a partner with Proskauer Rose in Washington and counsel to the U.S. Chamber of Commerce who was heavily involved in the drafting of the ADAAA, as stating that he does not envision a significant or long-lasting increase in the number of lawsuits filed as a result of the ADAAA, because most companies already have broad disability policies in place).

F. *The Equal Employment Opportunity Commission's Position*

Under the ADA, the EEOC is given authority to implement and enforce all provisions preventing employment discrimination under Title I of the statute.⁸⁸ Accordingly, courts have often looked to the EEOC when considering how to interpret “disability” under the act.⁸⁹ In response to the concerns over the implementation and scope of the “transitory and minor” exception, the EEOC took a formal position in September 2009, when it proposed several rules regarding the interpretation of the ADA following the ADAAA.⁹⁰ After considering public opinion on these regulations, the EEOC adopted and published its final version on March 25, 2011.⁹¹ In these regulations, the EEOC expressly states that the “transitory and minor” exception does not apply to the definition of disability under the “actual” or “record of” prongs.⁹² Accordingly, it is clear that the EEOC believes the “transitory and minor” exception should be limited as a defense to claims under the “regarded as” prong.⁹³ The EEOC has also taken a position on what disabilities are excluded under the exception itself. Specifically, the EEOC states that in order to be excluded under the “transitory and minor”

⁸⁸ 42 U.S.C. § 12117(a) (2006). The EEOC is the federal government’s only agency with the sole focus of eradicating employment discrimination. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 53 (1995).

⁸⁹ See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490–94 (1999) (using the EEOC guidelines for substantially limiting to decide that poor eyesight is not a “substantially limiting” impairment under the ADA).

⁹⁰ See 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). Under the Administrative Procedure Act, a government agency is required to notify the public of any changes made to its regulations and provide the public with an opportunity to comment on them. See 5 U.S.C. §§ 553–57 (2006). For more information on the EEOC’s regulations and its authority to promulgate them, see EEOC, *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act Amendments Act*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=3046-AA85> (last visited Dec. 23, 2011).

⁹¹ See Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011) (codified as amended at 29 C.F.R. pt. 1630) (publishing and explaining the changes made to the EEOC’s regulations under the ADAAA). The Notice of Final Rulemaking describes the process by which the EEOC regulations were made, including any changes between the proposed and final regulations, providing the EEOC’s reasons behind the change. See *id.* The final regulations are codified as amended throughout part 1630 of title 29 of the Code of Federal Rules. See 29 C.F.R. pt. 1630 (2011). While substantially similar to the proposed regulations, there were some alterations after public comment. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. at 16,981. The EEOC accepted over six hundred public submissions as well held several town hall meetings to determine public concern or support for the regulations. *Id.* at 16,979; see also *id.* at 16,987 n.1 (describing the EEOC’s public comment process).

⁹² 29 C.F.R. § 1630.2(j)(1)(ix).

⁹³ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. at 17,011. The EEOC acknowledged this position by explaining: “The regulations include a clear statement that the definition of an impairment as transitory . . . only applies to the ‘regarded as’ (third) prong of the definition of ‘disability’ as part of the ‘transitory and minor’ defense to ‘regarded as’ coverage.” *Id.*

exception, the impairment has to be “both ‘transitory and minor.’”⁹⁴ In support of these interpretations, the EEOC has provided an appendix to its final regulations, which had limited legislative support.⁹⁵ However, these interpretive guidelines focus primarily on the purpose and scope of the “regarded as” prong itself, rather than specific interpretation of the “transitory and minor” exception.⁹⁶ While these interpretive guidelines provide an excellent starting point for interpretation, they do not provide enough specificity and depth to conclusively address concerns regarding judicial interpretation of the exception.⁹⁷

Further, the EEOC has not expressly taken a position on how to define the term “minor.”⁹⁸ Originally, the EEOC had included examples of impairments to guide interpretations of transitory and minor:

Example 1: An individual who is not hired for a data entry position because he will be unable to type for three weeks due to a sprained wrist is not regarded as disabled, because a sprained wrist is transitory and minor.

Example 2: An individual who is placed on involuntary leave because of a broken leg that is expected to heal normally is not regarded as disabled, because the broken leg is transitory and minor.

Example 3: An individual who is not hired for an assembly line job by an employer who believes she has carpal tunnel syndrome would be regarded as disabled, because carpal tunnel syndrome is not transitory and minor.

Example 4: An individual who is fired from a food service job because the employer believes he has Hepatitis C is regarded as disabled, because Hepatitis C is not transitory and minor.

Example 5: An individual who is terminated because an employer believes that symptoms attributable to a mild intestinal virus are actually symptoms of heart disease is regarded as disabled, because heart disease--the impairment

⁹⁴ 29 C.F.R. § 1630.2(g)(1)(iii); *see also* 29 C.F.R. § 1630.15(f) (“impairment is both ‘transitory’ and ‘minor’”). The EEOC maintained this position from its proposed rule, where it originally stated that an impairment must be “*both transitory and minor.*” Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48,449 (emphasis in original).

⁹⁵ *See* 29 C.F.R. pt. 1630 app.

⁹⁶ *See id.* (providing only a cursory interpretation of the exception at 29 C.F.R. pt. 1630 app. secs. 1630.2(j)(1)(ix)), 1630.2(l).

⁹⁷ *See, e.g.,* Befort, *supra* note 33, at 1027 (voicing concerns despite acknowledging the EEOC’s interpretive guidelines).

⁹⁸ *See* 29 C.F.R. § 1630.2 (lacking any clear definition of the term).

the employer believes the individual has--is not transitory and minor.⁹⁹

While these examples include impairments that may be considered minor, *i.e.* a sprained wrist or broken leg, the problem (one that was not addressed in the final regulations) is that they do not provide enough guidance on interpreting what impairments are *solely* transitory or minor.¹⁰⁰ In fact, all of the examples of impairments that would be considered transitory and minor do *not* identify whether the impairment failed because it was not transitory or because it would not be considered minor. The EEOC had also considered implementing a list of ailments that usually do not count as disabilities in its proposed regulations, including the common cold, seasonal influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone expected to heal completely.¹⁰¹ However, while this list would have provided some guidance for what may be considered a “minor” impairment, it is important to note that the general exclusion of these impairments would only have applied to disabilities under the “actual” and “record of” prongs.¹⁰² In fact, under the proposed regulations, similar impairments may still have qualified under the “regarded as” prong. Meanwhile, the final regulations are equally cryptic, offering the example of “a *minor* back injury” as the type of injury that would be considered “minor.”¹⁰³ As such, there still remains no conclusive definition or guidance to date.¹⁰⁴

Under the ADA, the Department of Justice (“DOJ”) is authorized to file lawsuits in federal court to enforce the statute, and courts have been given the authority to order compensatory damages and back pay to remedy discrimination if the DOJ prevails.¹⁰⁵ Despite the EEOC’s interpretations of the ADAAA, courts will not necessarily be bound to follow them.¹⁰⁶ Further, the Supreme Court has already shown its willingness to reject the

⁹⁹ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48,443.

¹⁰⁰ *Id.*; *see, e.g.*, Transcript of US Equal Emp’t Opportunity Comm’n and Dep’t of Justice Civil Rights Div. Town Hall Listening Session on the ADAAA Proposed Regulations, in Oakland, Cal., at 45 (Oct. 26, 2009), *available at* <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0122> (asking for more clarity on the exception); *see also* 29 C.F.R. pt. 1630 app.

¹⁰¹ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48,443.

¹⁰² *Id.* at 48,441 (“[T]hese impairments . . . will consistently result in a determination that the person is substantially limited in a major life activity.”); *id.* at 48,443 (“[These impairments] usually will not substantially limit a major life activity.”).

¹⁰³ 29 C.F.R. pt. 1630 app. sec. 1630.15(f) (emphasis added).

¹⁰⁴ *See generally* 29 C.F.R. § 1630.2 (“Definitions” section promulgated by the EEOC lacks any formal definition for “minor”).

¹⁰⁵ *ADA Enforcement*, U.S. DEP’T OF JUSTICE, <http://www.ada.gov/enforce.htm> (last updated Dec. 8, 2011).

¹⁰⁶ The United States Supreme Court has neither directly incorporated any of the EEOC’s proposed positions, nor formally addressed the new language under the “regarded as” prong to date. *See generally* Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000).

EEOC's interpretative guidance in deciding cases involving the ADA.¹⁰⁷ In fact, the Court has specifically stated that the EEOC guidelines generally are "not controlling upon the courts by reason of their authority."¹⁰⁸ However, the Court has also conceded that the regulations "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁰⁹ Nevertheless, while the Court has historically referenced the EEOC guidelines in defining "disability" under the ADA, it has been extremely reluctant to grant them much validity.¹¹⁰ Since the scope of the "transitory and minor" exception and the types of disabilities it excludes have yet to be determined, these issues must be analyzed so that they can be addressed in the most compelling and practical manner.¹¹¹

II. ANALYSIS

As a result of the ambiguities regarding the "transitory and minor" exception, the future of short-term disabilities under the ADA is unclear. Depending on judicial interpretation, the ADA as amended could be just as restricting to short-term disabilities as the original statute. In light of these observations and the uncertainty that accompanies judicial acceptance of the EEOC's guidelines, the following issues must be addressed: (1) ambiguity in the scope of the "transitory and minor" exception within the ADA; (2) questions concerning the coverage of the exception; and (3) the need for an adequate definition of minor impairments.

A. *The Scope of the "Transitory and Minor" Exception within the ADA*

The broadest consideration regarding how the "transitory and minor" exception will affect short-term disabilities is how (or if) it will be applied throughout the statute.¹¹² Of the three ambiguities, most of the arguments put forward have addressed this issue.¹¹³ Particularly, concern

¹⁰⁷ See Befort, *supra* note 33, at 1005–08 (discussing how the Court undermined the EEOC authority in its earlier treatment of "disability" under the ADA).

¹⁰⁸ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976)).

¹⁰⁹ *Id.* At least one court has referenced the Court's statements in interpreting the EEOC's ADA guidelines. See Halperin v. Abacus Tech. Corp., 128 F.3d 191, 202 n.12 (4th Cir. 1997).

¹¹⁰ Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006). Much has been written on the Supreme Court's refusal to defer to the EEOC when deciding cases under the ADA. See *id.*; Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 177 (2004) (discussing how the Supreme Court has limited the applicability of the EEOC's disability guidelines in federal court); White, *supra* note 106, at 555–69 (reviewing the history of the Court's refusal to defer to the EEOC guidelines under the ADA). It has also been discussed whether the EEOC was even given the authority to define "disability" under the ADA in the first place. *Id.* at 578–86.

¹¹¹ Hickox, *supra* note 40, at 422–23. Concern has already been offered regarding judicial interpretation and the lack of specificity in both the ADAAA and the EEOC's interpretive guidelines. *Id.*

¹¹² See *supra* Part II.E.

¹¹³ In considering the EEOC's proposed regulations, the EEOC and DOJ Civil Rights Division held a series of joint town hall listening sessions on the substance of the regulations. Regulations To Implement

centers around whether the exception can (and should) be extended beyond the “regarded as” prong of the definition of disability under the ADA.¹¹⁴ Such consideration focuses less on the meaning of the exception and more on its proper application within the statutory framework.

On its face, it would seem that the exception was meant to be limited only to the “regarded as” prong. The relevant language of the statute is as follows:

(1) Disability

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3))

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C): . . .

- (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.¹¹⁵

The language immediately preceding the exception clearly states that it is “for the purposes of paragraph (1)(C),” which is the paragraph containing the “regarded as” prong.¹¹⁶ Further, the language of the exception specifies paragraph (1)(C) as the portion of the statute the

the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,979 (Mar. 25, 2011) (codified as amended at 29 C.F.R. pt. 1630). Four joint sessions were “held throughout the country to obtain direct input from the business/employer communities and the disability and disability advocacy communities on the proposed regulations.” Public Town Hall Listening Sessions on EEOC’s Proposed Regulations Under the ADA Amendments Act of 2008, 74 Fed. Reg. 54,565, 54,565 (Oct. 22, 2009). While the scope of the exception was only brought up in one of four listening sessions, the majority of public submissions to the EEOC have called for greater clarification on the scope of the exception under the three prongs of disability. *See* Transcript of Equal Emp’t Opportunity Comm’n and Dep’t of Justice Civil Rights Division Town Hall Listening Session on the ADAAA Proposed Regulations, in Chicago, Ill., at 15 (Nov. 17, 2009) available at <http://www.regulations.gov/#!documentDetailID=EEOC-2009-0012-0674> (follow the “pdf” hyperlink) [hereinafter “Chicago Listening Session”]; *Docket Folder Summary for Comments Pursuant to The ADA Amendments Act Notice of Proposed Rule Making*, <http://www.regulations.gov/#!docketDetail;dt=PS+PR;rpp=10;so=DESC;sb=postedDate;po=0;s=transitory+and+minor;D=EEOC-2009-0012> (last visited Sept. 12, 2011) (for a listing of submissions relating to the transitory and minor language).

¹¹⁴ *See, e.g.*, COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3 (“[T]he bill does not explicitly apply the ‘transitory and minor’ exception to the definition of disability in general. This means that some transitory and minor impairments could be covered as actual disabilities.” (quoting Statement of Administration Policy: H.R. 3195, Office of Mgmt. & Budget, Exec. Office of the President (June 24, 2008))).

¹¹⁵ 42 U.S.C. §§ 12102(1), 12102(3)(B) (2006).

¹¹⁶ *Id.* § 12102(3).

exception intends to cover.¹¹⁷ In this context, it is debatable whether any ambiguity even exists regarding the scope of the exception. Thus, a judge may not even consider alternative reasons for extending the exception beyond the “regarded as” prong.¹¹⁸ However, some judges are more willing to find ambiguity.¹¹⁹ Thus, the statutory language is not conclusive evidence that the exception will be limited to the “regarded as” prong. While the exception is found under the “regarded as” prong, there is nothing in the definition indicating that application beyond the prong would be inappropriate.¹²⁰

Many of the arguments concerning the scope of the “regarded as” prong were flushed out in response to the EEOC’s proposed regulations.¹²¹ The EEOC’s proposed rule, which was substantially similar to the final rule, included a provision that expressly supported restricting the exception to the “regarded as” prong.¹²² This provision was placed in the regulations specifically in anticipation of confusion over the application of the “transitory and minor” exception.¹²³ However, this confusion has primarily

¹¹⁷ *Id.* § 12102(3)(B).

¹¹⁸ YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf> (“When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))); *id.* at 40 (“[W]e do not resort to legislative history to cloud a statutory text that is clear.” (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994))).

¹¹⁹ *Id.* at 40 (“When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” (quoting *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543–44 (1940))).

¹²⁰ See 42 U.S.C. § 12102. Nowhere in the definition of disability does the statute negate the fact that the “transitory and minor” exception may be construed in light of the other prongs. *Id.*

¹²¹ See *Docket Folder Summary for Comments Pursuant to The ADA Amendments Act Notice of Proposed Rule Making*, <http://www.regulations.gov/#1docketDetail;dct=N+PS;rpp=10;so=ASC;sb=organization;po=0;s=transitory+and+minor;D=EEOC-2009-0012> (last visited Aug. 1, 2011) (providing a database of all submissions mentioning “transitory and minor”). Of the hundreds of public submissions accepted by the EEOC, approximately thirty-three express issues with the “transitory and minor” exception in some capacity. *Id.*

¹²² The EEOC’s final position states:

The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

29 C.F.R. § 1630.2(j)(1)(ix) (2011). Meanwhile, the EEOC originally proposed the following language:

The “transitory and minor” exception in § 1630.2(l) of this part (the “regarded as” prong of the definition of “disability”) does not establish a durational minimum for the definition of “disability” under § 1630.2(g)(1) (actual disability) or § 1630.2(g)(2) (record of a disability). An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.

Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,440 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

¹²³ See Transcript of US Equal Emp’t Opportunity Comm’n Meeting on the Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, (June 17, 2009), available at <http://www.eeoc.gov/eeoc/meetings/6-17-09/transcript.cfm#notice>. Just prior to passing the proposed rule, Christopher Kuczynski, Assistant Legal Counsel to

come in the form of disputes between disabilities advocates and those representing the employers who ultimately have to comply with the amended statute.¹²⁴ In this respect, the EEOC's position limiting the scope of the exception to the "regarded as" prong has met some resistance.¹²⁵

Most who disagree with the regulation state that a durational minimum should be extended to the first two prongs of the statute.¹²⁶ Specifically, it was recommended that the EEOC alter the regulations to expressly exclude all impairments that are transitory and minor from the definition of disability.¹²⁷ This argument, predominately made on the part of employers, is offered in connection to the fact that traditionally under the first two prongs, temporary, non-chronic conditions of short duration have not been considered an impairment or disability in the first place.¹²⁸ Since all three prongs apply the same basic standards, it would save employers a lot of confusion to apply a single criterion for eliminating coverage of short-term disabilities under the ADA.¹²⁹ Limiting the exception to the "regarded

the EEOC, stated that "in response to an anticipated confusion over the application of the transitory and minor exception to the 'regarded as' definition of disability, the Proposed Rule includes a fifth rule of construction which makes it clear that impairments that last for fewer than six months, may still be substantially limiting." *Id.*

¹²⁴ Compare Nat'l Disabilities Rights Network, *Comments on Regulations to Implement the Americans with Disabilities Act, as Amended*, 12 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0565.1> (supporting the EEOC regulation as the correct interpretation of the statute), with Ass'n of Corporate Counsel, *Comments on the Proposed Regulations Implementing the Americans with Disabilities Act Amendments Act of 2008*, 8 (Nov. 20, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0513.1> (advocating expansion of the exception to the entire definition). In general, public submissions were evenly split between civil rights and disability groups and employer associations and industry groups. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,979 (Mar. 25, 2011) (codified at 29 C.F.R. pt. 1630).

¹²⁵ See, e.g., U. S. Chamber of Commerce, *Comments on Proposed Amendments to Regulations Implementing the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 27 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0561.1> ("The Commission's language in this section creates an inference that impairments lasting longer than six months will be considered disabilities under the first prong regardless of whether they are substantially limiting."); see also Chicago Listening Session, *supra* note 113, at 15 (concerning the confusion created by applying the "transitory and minor" exception rigidly in the "regarded as" prong, but not in the "actual" and "record of" prongs).

¹²⁶ See, e.g., Int'l Franchise Ass'n, *Comments on Proposed Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 4 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0560.1> (asking that the EEOC delete the provision and include regulations specifying that "substantially limiting" precludes finding a disability of six months or less a disability under the ADA); see also Ill. Credit Union League, *Comments on Proposed Regulations to Implement the Equal Employment Provisions of the Amendments to the Americans with Disabilities Act*, 2 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0495.1> (arguing that the regulations should extend to all prongs of the statute).

¹²⁷ Ass'n of Corporate Counsel, *supra* note 124, at 8.

¹²⁸ Int'l Franchise Ass'n, *supra* note 126, at 4; see also Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,448 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630); 154 Cong. Rec. H6074 (June 25, 2008) (statements of Rep. Nadler and Rep. Smith); H.R. REP. NO. 110-730, pt. 2, at 30 (2008). This corresponds with the Supreme Court's traditional view that impairments must be of long duration to be applicable to the first two prongs of disability. See *supra* Part II.B.

¹²⁹ Int'l Franchise Ass'n, *supra* note 126, at 4.

as” prong would not allow employers to analyze short-term disabilities under the same criteria as the exception.¹³⁰ This would force employers to forgo the ultimate goal of avoiding unnecessary litigation and increased compliance costs as a result of short-term disability claims under the statute.¹³¹

However, others (mainly disabilities rights advocates) who support the EEOC’s position argue that it is consistent with the express language of the ADAAA and Congressional intent.¹³² Those who support the provision indicate that it demonstrates Congress’s willingness to apply a rigid standard when intended.¹³³ They argue that limiting the exception to the “regarded as” prong appropriately reflects Congress’s understanding that an impairment that lasts six months or less may still be “substantially limiting” to an individual, and is therefore covered under the statute.¹³⁴ Further, it has also been argued that the silence on any durational limit in the language of the first and second prongs reinforces this assertion.¹³⁵ In light of these arguments, the EEOC itself has provided some legislative history supporting its position.¹³⁶

In this case, there is no real middle ground for interpreting the scope of the exception under the ADA—either the exception applies throughout, or it does not. Importantly, while the EEOC has provided guidance on this issue, courts will not necessarily abide by it.¹³⁷ Furthermore, any regulation made by the EEOC must be consistent with the express language and purpose of the statute.¹³⁸ Thus, while application of the exception outside the “regarded as” prong may provide greater clarity for employers, it may not be allowable under the language of the statute. Ultimately, in deciding

¹³⁰ Am. Pub. Transp. Ass’n, *Comments on Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 2 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0486.1>.

¹³¹ *Id.*; Associated Builders and Contractors, Inc. and Indep. Elec. Contractors, Inc., *Comments on Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 4 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0487.1> (“The confusion and ambiguity the NPRM creates over this issue invites unnecessary litigation, abuse of ADA protections and complicates disability determinations.”).

¹³² See, e.g., Nat’l Disabilities Rights Network, *supra* note 124, at 12; Nat’l Emp’t Lawyers Ass’n, *Comments by the Nat’l Emp’t Lawyers Ass’n on the U.S. Equal Emp’t Opportunities Comm’n’s Notice of Proposed Rulemaking – Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 13 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0586.2>; see also Fram, *supra* note 46, at 212.

¹³³ Nat’l Emp’t Lawyers Ass’n., *supra* note 132, at 13.

¹³⁴ Compare, U.S. Chamber of Commerce, *supra* note 125, at 27, with Nat’l Disabilities Rights Network, *supra* note 124, at 12.

¹³⁵ Nat’l Disabilities Rights Network, *supra* note 124, at 12.

¹³⁶ See Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,011 (Mar. 25, 2011) (codified as amended at 29 C.F.R. pt. 1630) (quoting Joint Hoyer-Sensenbrenner Statement); see also 29 C.F.R. pt. 1630 app sec.1630.2(j) (2011) (quoting the Senate Statement of Managers).

¹³⁷ See *supra* notes 106–10 and accompanying text.

¹³⁸ 5 U.S.C. § 706(1)(C) (2006). Under the Administrative Procedure Act, a court may hold unlawful any administrative regulation made in excess of its statutory authority. *Id.*

the scope of the exception, the language of the statute, Congressional intent, and the purpose behind the statute control.

B. Coverage under the “Transitory and Minor” Exception:

Regardless of whether the “transitory and minor” exception is included in the “actual” and “record of” prongs, the overall coverage of the exception under the “regarded as” prong is equally important to the inclusion of short-term disabilities under the ADA. Specifically, it must be determined whether the exception covers only impairments that are *both* transitory *and* minor, or impairments that are *either* transitory *or* minor.¹³⁹ While this issue has received some notoriety, concern again derives less from a lack of clarity in the text of the statute and more from tensions between disabilities advocates and employers.¹⁴⁰ In fact, arguments primarily came in the form of disabilities groups arguing for more express clarification that both requirements are necessary for the exception to apply.¹⁴¹

The plain text of the amended ADA reads that the “regarded as” prong of disability “shall not apply to impairments that are transitory and minor.”¹⁴² On its face, the text seems unambiguous, indicating that the only impairments covered under this exception are those that are *both* transitory and minor. In fact, the majority of arguments supporting this position have simply cited the use of “and” in the statutory language.¹⁴³ Ordinarily, the use of the term “and” in a list means that all of the items in that list are required.¹⁴⁴ Likewise, the term “or” is to be accepted for its disjunctive connotation, and not interchangeable with “and.”¹⁴⁵ Since the exception applies to impairments that are transitory and minor, it implies that both requirements must be met.

¹³⁹ See *supra* Part II.E.

¹⁴⁰ See, e.g., Transcript of US Equal Emp’t Opportunity Comm’n and Dep’t of Justice Civil Rights Div. Town Hall Listening Session on the ADAAA Proposed Regulations, in Philadelphia, Pa., at 17, 34–35 (Oct. 30, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0123> (follow the “pdf” hyperlink) [hereinafter “Philadelphia Listening Session”] (expressing that concern over the coverage of the exception centers around the potential for over-inclusion under the ADA).

¹⁴¹ See, e.g., United Spinal Ass’n, *Comments on Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended; Notice of Proposed Rule Making*, 9 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0544.1> (association dedicated to improving the life of American’s with spinal cord injuries arguing for *both* “transitory and minor”); Nat’l Disability Rights Network, *supra* note 124, at 11.

¹⁴² 42 U.S.C. § 12102(3)(B) (2006); see *supra* note 115 and accompanying text.

¹⁴³ Ky. Prot. and Advocacy, *Comments on Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 11 (Nov. 23, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0549.1> (“The ‘regarded as’ prong of the definition of disability does not include impairments that are transitory *and* minor.” (emphasis in original)); Nat’l Disability Rights Network, *supra* note 124, at 11 (“The ‘regarded as’ prong of the definition of disability does not include impairments that are transitory *and* minor.” (emphasis in original)).

¹⁴⁴ KIM, *supra* note 118, at 8 (citing, e.g., *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D.N.M. 1996), *aff’d*, 104 F.3d 1546 (10th Cir. 1997)).

¹⁴⁵ See, e.g., *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979).

However, not everyone has interpreted the language in the same manner.¹⁴⁶ Instead, it has been argued that the exception would appropriately exclude transitory impairments, minor impairments, and impairments that have both features under the “regarded as” prong.¹⁴⁷ Such an interpretation reflects concern that to include either type of impairment under the “regarded as” prong would be interpreting the ADA too broadly.¹⁴⁸ Concern again stems from contentions that limiting the exception to only impairments that are both transitory and minor would place an unnecessarily large burden on employers.¹⁴⁹ Under the language of the statute, it is arguable that if Congress intended to exclude only impairments that are both transitory and minor, it should have expressly stated so within the language of the statute (e.g. including the term “both,” using the language “transitory, minor impairments”).¹⁵⁰ Because Congress failed to do so, interpretation of the exception is susceptible to the alternative interpretation.

In light of judicial precedent, a court could be tempted to interpret the statute in a way that would continue to keep a “disabling, but transitory, physical or mental condition” from triggering the protections of the ADA.¹⁵¹ Indeed, coverage under this interpretation would have an extremely negative impact on short-term disabilities under the ADA. Basically, separating transitory and minor within the exception would eliminate all impairments lasting six months or less from the “regarded as” prong of disability. Not all courts will strictly apply canons of construction regarding the use of “and” and “or.”¹⁵² In fact, the application of both “and” and “or” is said to be context-dependent.¹⁵³ Specifically, courts have altered the definition of “and” and “or” where “a strict grammatical construction will frustrate legislative intent.”¹⁵⁴ In practice, many courts have construed the term

¹⁴⁶ See Kevin M. Mosher, *Hot Topic: New Amendments to the ADA - Effective January 1, 2009*, WESSELS SHERMAN, <http://www.w-p.com/CM/Articles/New-Amendments-to-the-ADA.asp> (last visited Dec. 30, 2011) (interpreting the exception to exclude impairments that are transitory or minor); see also *House Passes ADA Expansion*, PARKER POE, <http://www.parkerpoe.com/news/house-passes-ada-expansion/> (last visited Dec. 30 2011) (newly passed legislation excludes transitory or minor impairments).

¹⁴⁷ Philadelphia Listening Session, *supra* note 140, at 17.

¹⁴⁸ *Id.*

¹⁴⁹ COUNCIL ON LAW IN HIGHER EDUC., *supra* note 64, at 3 (citing Letter from ACT, AAMC, et al. to Senate leaders).

¹⁵⁰ See KIM., *supra* note 118, at 15. This argument being that since Congress knows how to create a clear exception, but chose the more ambiguous language, the interpretation could be made in favor of excluding either transitory or minor impairments. *Id.* But see *id.* (“To say that Congress did not use the clearest language, however, does not necessarily aid the court in determining what the less precise language means in its statutory context.”)

¹⁵¹ *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 804 (M.D.N.C. 1999) (internal quotations omitted); see also Befort, *supra* note 33, at 1028 (indicating that it is not inconceivable for hostile courts to interpret the exception in the disjunctive).

¹⁵² KIM, *supra* note 118, at 8.

¹⁵³ *Id.* at n.35 (citing Lawrence E. Filson, THE LEGISLATIVE DRAFTER’S DESK REFERENCE § 21.10 (1992)).

¹⁵⁴ *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979).

“and” as “or” when such an interpretation would best effectuate legislative intent.¹⁵⁵ Thus, theoretically it is possible to construe the “transitory and minor” exception to actually mean transitory *or* minor. While the EEOC has taken the position of limiting the exception to impairments that are both transitory and minor, the possibility is still open to judicial interpretation to the contrary.¹⁵⁶ In the event that a court differs to the EEOC, the regulations provide clear indication that impairments that are either transitory or minor should be included.¹⁵⁷ However, the EEOC does not provide concrete examples to clear up situations where an injury is solely transitory or solely minor.¹⁵⁸ Thus, it seems that while the EEOC would require exclusion of both transitory and minor conditions, it does little to indicate the standard for deciding what impairments would fall under this criterion.

C. Defining Terms: “Transitory” and “Minor”

Of all the ambiguities in the “transitory and minor” exception, the lack of an adequate definition for what disabilities might be considered minor stands to be the most prohibitive to short-term disabilities. The definition of “transitory” is clear from the language of the ADAAA, which states that a transitory impairment is any impairment “with an actual or expected duration of 6 months or less.”¹⁵⁹ This language, which the EEOC has incorporated into its guidelines, is unambiguous.¹⁶⁰ On the other hand, neither the EEOC, nor the language of the amended ADA, has defined what the term “minor” means within the context of the “regarded as” prong.¹⁶¹ Since the exception seems to combine short-term disabilities with ones that are minor, an adequate definition is essential for determining how short-term disabilities are covered under the ADA.

The lack of any definition for “minor” within the ADAAA has been acknowledged by both disability advocates and employers.¹⁶² However,

¹⁵⁵ *Union Cent. Life Ins. Co. v. Skipper*, 115 F. 69, 72 (8th Cir. 1902); *United States v. Cumbee*, 84 F. Supp. 390, 391 (D. Minn. 1949); *United States v. Mullendore*, 30 F. Supp. 13, 15 (N.D. Okla. 1939) (construing “and” as “or”); see also *Moore*, 613 F.2d at 1040 n.85 (construing “and” as “or”).

¹⁵⁶ See *supra* notes 106–10 and accompanying text.

¹⁵⁷ 29 C.F.R. § 1630.2(g)(1)(iii) (2011).

¹⁵⁸ See *id.* pt. 1630 app. sec. 1630.15(f) (merely providing instances of bipolar disorder and “minor back injury” as examples). Even the examples in EEOC’s proposed rule do not adequately address this issue, as each either completely fits the definition (being both transitory and minor) or completely misses it (being long-term and major). *Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 74 Fed. Reg. 48,431-01, 48,443 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630); see *supra* note 99 and accompanying text. This concern was commonly expressed during the EEOC’s town hall listening sessions regarding its Proposed Rules. See, e.g., Chicago Listening Session, *supra* note 113, at 25.

¹⁵⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4, § 3(3)(B), 122 Stat. 3553, 3555 (codified as amended at 42 U.S.C. § 12102).

¹⁶⁰ 29 C.F.R. §§ 1630.15(f), 1630.2(j)(1)(ix).

¹⁶¹ See *id.* §§ 1630.15(f), 1630.2(j)(1)(ix), pt. 1630 app. sec. 1630.15(f); 42 U.S.C. § 12102(3) (2006).

¹⁶² Nat’l Retail Fed’n, *Comments on Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 5–6 (Nov. 23, 2008), available at

neither side has proposed a workable definition under which the statute may operate.¹⁶³ Considering the judiciary's tendency to restrict coverage under the ADA, leaving "minor" as an open-ended term could allow a court to expand the coverage of the exception and exclude short-term disabilities under the ADA.¹⁶⁴ While this would be a benefit for employers, it may lead to the same tensions between the judiciary and the legislature that culminated in the ADAAA in the first place. Arguably, it is this issue that stands to generate the most uncertainty and litigation.¹⁶⁵

Prior to the ADAAA, the term "minor" has only been used by the Supreme Court in the context of whether an impairment is substantially limiting under the "actual" prong of disability.¹⁶⁶ Particularly, the Court held that the substantially limiting requirement precluded impairments that interfered in a minor way with the performance of manual tasks, rejecting that a "mere difference" in lifestyle caused by the impairment was significant enough.¹⁶⁷ However, such terminology is unhelpful within the context of the "regarded as" prong because the substantially limiting requirement no longer applies to that prong under the amended ADA.¹⁶⁸ Furthermore, the *Toyota* case was one of the restrictive Court cases that the ADAAA specifically intended to reject.¹⁶⁹ Since the enactment of the ADAAA, there has been no clear judicial ruling on the meaning of the term within the context of the "transitory and minor" exception.

In the absence of judicial interpretation, courts often interpret statutory language by considering the entire statute, other similar statutes, and the purpose of each provision within it.¹⁷⁰ However, even this approach fails to offer guidance in defining a minor impairment. In adopting the language of the "regarded as" prong in the ADAAA, Congress used

<http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0526.1>; Transcript of US Equal Emp't Opportunity Comm'n and Dep't of Justice Civil Rights Div. Town Hall Listening Session on the ADAAA Proposed Regulations, in Oakland, Cal., at 45 (Oct. 26, 2009), available at <http://www.regulations.gov/#!documentDetail;D=EEOC-2009-0012-0122> (offering concerns stated by a representative of the epilepsy foundation).

¹⁶³ See *Docket Folder Summary for Comments Pursuant to The ADA Amendments Act Notice of Proposed Rule Making*, available at <http://www.regulations.gov/#!docketDetail;dct=PS+PR;rpp=10;so=DESC;sb=postedDate;po=0;s=transitory+and+minor;D=EEOC-2009-0012> (last visited Dec. 30, 2011). No definition has been proposed in any public submission to the EEOC. See generally *id.*

¹⁶⁴ See *supra* Part II.B. Naturally, the more impairments are included as "minor" means a larger number of impairments are not covered under the "regarded as" prong as a result of the "transitory and minor" exception. *Id.*

¹⁶⁵ Belford, *supra* note 33, at 1027.

¹⁶⁶ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

¹⁶⁷ *Id.* (citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999)).

¹⁶⁸ 42 U.S.C. § 12102(3)(A) (2006); see *supra* note 57 and accompanying text.

¹⁶⁹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. § 12101).

¹⁷⁰ See *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); KIM, *supra* note 118, at 2 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988))).

language that was substantially similar to regulations implemented by the DOJ and the Department of Transportation.¹⁷¹ Yet, the inclusion of the “transitory and minor” exception under the ADAAA is unique to the EEOC’s regulations.¹⁷² Thus, while these regulations are similar, they do not mention “minor” under their respective definitions of “regarded as.”¹⁷³ Furthermore, no other section within the amended ADA defines the term.¹⁷⁴

Without guidance from the statute or the courts, it is equally difficult to create a workable definition for interpreting the exception. The Supreme Court has regularly held that in the absence of a statutory definition, courts construe a term in accordance with its ordinary or natural meaning as defined in a dictionary.¹⁷⁵ “Minor” ordinarily means “inferior in importance, size, or degree: comparatively unimportant.”¹⁷⁶ Yet, this definition of “minor” is equally unworkable because it essentially replaces an imprecise term (minor) with another equally imprecise term (inferior). Meanwhile, an alternative definition defines “minor” as “not serious or involving risk to life.”¹⁷⁷ This again fails to lead to a conclusive and applicable definition of “minor,” because it merely limits the ambiguous term “minor” to the equal ambiguity of “not serious.” Under both definitions, the ordinary meaning of “minor” is one of comparative degree. Furthermore, some impairments that may be considered serious enough to meet the definition of disability under the “substantially limits” test may not necessarily be considered serious or life threatening, including dyslexia and learning disorders.¹⁷⁸ Accordingly, it seems the term “minor” cannot be defined in a way that makes the application of the “minor” requirement a mechanical exercise.¹⁷⁹

¹⁷¹ 3 AMS. WITH DISAB.: PRACT. & COMPLIANCE MANUAL § 12A:11 (2010). Compare, e.g., 28 C.F.R. § 35.104(4) (2010) (defining “regarded as” under the DOJ’s Regulations), with ADA Amendments Act of 2008, sec. 4, § 3(a)(3)(A), 122 Stat. at 3555 (defining “regarded as” under the ADAAA).

¹⁷² Compare 28 C.F.R. §§ 35.104, 36.104 (2010); 49 C.F.R. § 37.3 (2010) (defining disability under the DOJ and U.S. Department of Transportation to not include the “transitory and minor” exception), with 29 C.F.R. § 1630.2(g) (2011) (defining disability under the EEOC to include the “transitory and minor” exception).

¹⁷³ See 28 C.F.R. §§ 35.104, 36.104; 49 C.F.R. § 37.3.

¹⁷⁴ See ADA Amendments Act of 2008 § 2(b)(4), 122 Stat. at 3553–54. The amended ADA is very extensive; however, no section addresses the issue of how a minor impairment should be defined. *Id.*

¹⁷⁵ *KIM*, *supra* note 118, at 6 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)); see also *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2350 (2009) (using multiple dictionaries in interpreting the meaning of “because of”).

¹⁷⁶ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 742 (10th ed. 1993).

¹⁷⁷ *Id.*

¹⁷⁸ See 29 C.F.R. §§ 1630.2(j)(4)(iii), pt. 1630 app. sec. 1630.2(j)(4).

¹⁷⁹ The Supreme Court has run into similar problems in other cases. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing words such as “distinct and palpable” and “fairly” as words not susceptible to a precise definition).

III. SOLUTION

While the EEOC regulations regarding the scope of the “transitory and minor” exception have not been formally adopted by courts, they represent the correct position. Limiting the exception to the “regarded as” prong is the most accurate interpretation of the statute considering its structure, purpose, and Congressional intent. Additionally, the “transitory and minor” exception should only apply to those injuries that are *both* transitory *and* minor, allowing disabilities that are transitory and severe or long-term and minor to be covered. Again, such an interpretation is appropriate in light of Congressional intent and the statute’s structure and purpose. Finally, the term “minor” should be defined giving consideration to the statutory context of the “transitory and minor” exception, the Congressional intent, and the purpose of the ADAAA to provide broad coverage under the statute.

A. Keeping the “Transitory and Minor” Exception Exclusive to the “Regarded As” Prong

Considering the factual arguments at hand, the “transitory and minor” exception should be limited to the “regarded as” prong in accordance to the EEOC regulations. This interpretation is correct because it best corresponds to statutory structure, the purpose of the “regarded as” prong, and Congressional intent.

i. Statutory Structure

In conducting statutory interpretation, the starting point is always the language of the statute itself.¹⁸⁰ In this case, the express language of the statute provides the most compelling reason for restricting the “transitory and minor” exception to the “regarded as” prong. Simply put, since the exception is only found within the definition referenced within the “regarded as” prong, it should be restricted *solely* to that prong.¹⁸¹ Generally, “where Congress includes particular language in one section of a statute but omits it in another . . . , it is [generally] presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.”¹⁸² Nowhere else in the statute, including the “actual” and “record of” prongs, does the exception appear, and therefore the language should strictly apply where it is written. Thus, the fact that Congress chose to add a different, more specific, restriction to the “regarded as” prong

¹⁸⁰ KIM, *supra* note 118, at 2 (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

¹⁸¹ See *supra* Part III.A.; see 42 U.S.C. § 12102(3) (2006).

¹⁸² KIM, *supra* note 118, at 14 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Indeed Congress did act intentionally in adding the exception exclusively under the “regarded as” prong. See *infra* Part III.A.iii.

indicates that Congress intended it to operate specifically within that prong.¹⁸³ It is simply implausible that the lack of any express language limiting the exception to the “regarded as” prong provides evidence that it may apply to the other prongs. In fact, the current language provides greater support for the inference that the exception was not to be used anywhere outside the “regarded as” prong.

Exclusion of the “transitory and minor” exception from the first two prongs is further supported by express provisions within the ADA that dictate how the statute is to be construed. Under the ADA, the definition of “disability” is to be “construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of this chapter.”¹⁸⁴ At least one court has shown its willingness to accept the broad coverage of disability intended under the ADAAA, indicating this provision as a clear representation of Congressional intent.¹⁸⁵ Accordingly, limiting the scope of the exception would best comply with this instruction, as it would limit the express exclusion of transitory and minor impairments to only one section of the statute.

In addition to the statute’s text, courts often consider the history of the legislative process to determine appropriate meaning.¹⁸⁶ The first version of the ADAAA, known as the Americans with Disabilities Restoration Act did not contain the “transitory and minor” exception under the “regarded as” prong.¹⁸⁷ In fact, it was very different from the later adopted version of the ADAAA in that it provided a virtually unlimited class by eliminating the requirement of substantial limitation from the definition of disability.¹⁸⁸ As a result of heavy pressure from the business community, legislators were forced to adopt a compromise definition that limited its scope under the Act.¹⁸⁹ The compromise bill contained both the substantial limitation requirement for the first two prongs as well as the “transitory and minor” exception for the “regarded as” prong.¹⁹⁰

¹⁸³ This corresponds with the additional argument that the ADA’s silence on a durational limitation in the other prongs of disability indicates that the exception should not apply. *See supra* notes 133–34 and accompanying text.

¹⁸⁴ 42 U.S.C. § 12102(4)(A); *see also* 29 C.F.R. §§ 1630.1(c), 1630.2(g) (2011) (reviewing the legislative history supporting broad coverage).

¹⁸⁵ *Menchaca v. Maricopa Cmty. Coll. Dist.*, 595 F. Supp. 2d 1063, 1068 (D. Ariz. 2009).

¹⁸⁶ *KIM, supra* note 118, at 42 (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

¹⁸⁷ *See* S. Res. 1881, 110th Cong. § 4 (2007); H.R. Res. 3195, 110th Cong. § 4 (2007).

¹⁸⁸ Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1270 (2009).

¹⁸⁹ *Id.* at 1271. For a strong critique on the open-ended definition of disability under the Restoration Act see Andrew M. Grossman & James Sherk, *The ADA Restoration Act: Defining Disability Down*, THE HERITAGE FOUNDATION (July 2, 2008), available at <http://www.heritage.org/Research/Reports/2008/07/The-ADA-Restoration-Act-Defining-Disability-Down>.

¹⁹⁰ Compare H.R. Res. 3195, 110th Cong. § 4 (2007), with H.R. Res. 3195, 110th Cong. § 4 (2008) (enacted).

From this initial inclusion of the “transitory and minor” exception in H.R. 3195 and S. 3406, the exception has exclusively been contained within the “regarded as” prong.¹⁹¹ At no point during its passage through the House or the Senate was the exception contained in any other portion of the ADAAA.¹⁹² Importantly, the Supreme Court has held that “[n]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently . . . were being considered simultaneously when the language raising the implication was inserted.”¹⁹³ In this case, the language of all three prongs must have been discussed simultaneously as Congress amended the ADA’s definition of disability, because all three prongs were amended by the ADAAA. This strongly supports an inference that the varying language should be applied separately under each prong of disability.

ii. Statutory Purpose

Restriction of the “transitory and minor” exception to the “regarded as” prong is also appropriate in light of its purpose in the statutory scheme.¹⁹⁴ In fact, the role of the “regarded as” prong, as altered under the ADAAA, is so unique and expansive that there has been a great amount of scholarly writing on its scope and the Congressional intent behind it.¹⁹⁵ Unlike the first two prongs of disability, the “regarded as” prong was meant as a catch-all for people discriminated against solely on the basis of the myths, fears, and stereotypes associated with disabilities.¹⁹⁶ In passing the original ADA, Congress intended that the mere fact that an individual was discriminated against due to a perceived or actual impairment would be sufficient to be covered under the prong.¹⁹⁷ Such intention was exhibited and reiterated by the House Committee on the Judiciary (“Judiciary

¹⁹¹ See H.R. 3195; see also S. 3406, 110th Cong. § 2 (2008).

¹⁹² *Id.*

¹⁹³ KIM, *supra* note 118, at 14 (quoting *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)); see also *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 (2009).

¹⁹⁴ KIM, *supra* note 118, *summary* (“In analyzing a statute’s text, the Court is guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of interpretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.”).

¹⁹⁵ See, e.g., Befort, *supra* note 33, at 1016–17; Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disabilities Rights*, 31 *BERKELEY J. EMP. & LAB. L.* 203, 272–73 (2010); see also 29 C.F.R. pt. 1630 app. sec. 1630.2(l) (2011) (summarizing the legislative history behind this expansive view).

¹⁹⁶ See *Policy Brief Series: Righting the Americans with Disabilities Act—No. 15, The Supreme Court’s Decisions Discussing the “Regarded As” Prong of the Americans with Disabilities Act Definition of Disability*, NATIONAL COUNCIL ON DISABILITY, (May 21, 2003) <http://www.ncd.gov/publications/2003/May212003> (describing the original intentions of Congress in forming the “regarded as” prong). The first two prongs serve the alternative purpose of ensuring that when a person *actually* has a disability that is substantially limiting to a major life activity or a record of that disability the employer accommodates it and does not discriminate against the person on that basis. See 42 U.S.C. §§ 12102(1)–(3), 12112(a)–(b) (2006).

¹⁹⁷ H.R. REP. NO. 110-730, pt. 1, at 13 (2008); H.R. REP. NO. 110-730, pt. 2, at 15 (2008).

Committee”), both at the time of the original ADA and during the passage of the ADAAA.¹⁹⁸ The committee stated that if a person is disqualified due to an actual or perceived condition, and the employer cannot articulate a legitimate reason for the rejection, “a perceived concern about employment of persons with disabilities could be inferred and the plaintiff would qualify for coverage under the ‘regarded as’ test.”¹⁹⁹ This interpretation was made to indicate that the “‘regarded as’ prong was meant to express Congress’s understanding that unfounded concerns, mistaken beliefs, fear, or prejudice about disabilities are often just as disabling as actual impairments.”²⁰⁰

This more expansive purpose indicates that it requires a more restrictive exception—one that would not be appropriately applied under the “actual” and “record of” prongs. Specifically, as a result of its distinct purpose, the “regarded as” prong has two functional differences that oppose expanding the “transitory and minor” exception to the remaining prongs. First, the “regarded as” prong is intended to cover a broader category of disabilities.²⁰¹ Under the ADAAA, the “actual” and “record of” prongs of disability are intended to cover disabilities that are substantially limiting to the major life activities of the individuals who possess the disability.²⁰² Meanwhile, the “regarded as” prong contains no such requirement.²⁰³ Instead, it merely requires the employer to not discriminate as a result of any actual *or perceived* impairment.²⁰⁴ Thus, not only does the “regarded as” prong lack the “substantially limiting” requirement, but it greatly expands the type of impairments covered. As a result, inclusion of the “transitory and minor” exception was an effort to compensate for this expansion in definition.²⁰⁵ Further, the ease of which a claim may be brought under the “regarded as” prong suggests that the prong requires a more concrete exception to its coverage.

Second, while reasonable accommodations are required under the “actual” and “record of” prongs of disability, the ADAAA makes it clear that employers do not need to provide them to individuals falling solely under the “regarded as” prong.²⁰⁶ While it could be argued that expanding the exception into the “actual” and “record of” prongs would serve as a

¹⁹⁸ H.R. REP. NO. 110-730, pt. 2, at 12–13 (citing H.R. REP. NO. 101-485, pt. 3, at 30–31(1990)).

¹⁹⁹ H.R. REP. NO. 101-485, pt. 3, at 30–31.

²⁰⁰ H.R. REP. NO. 110-730, pt. 1, at 14; H.R. REP. NO. 110-730, pt. 2, at 14; 154 CONG. REC. S8436 (daily ed. Sept. 11, 2008) (Statement of Managers).

²⁰¹ See Barry, *supra* note 195, at 278–81 (arguing that the “regarded as” prong represents a “universal” approach to nondiscrimination under the ADAAA).

²⁰² 42 U.S.C. § 12102(1)(A)–(B) (2006).

²⁰³ *Id.* § 12102(3)(A).

²⁰⁴ *Id.* (emphasis added); Befort, *supra* note 33, at 1017–18.

²⁰⁵ Long, *supra* note 55, at 220; Befort, *supra* note 33, at 1017.

²⁰⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6a(1)(h), 112 Stat. 3553, 3557 (codified as amended at 42 U.S.C. § 12201(h)); 42 U.S.C. § 12201 (Supp. II 2009) (“A covered entity . . . need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in Section 12102(1) of this title *solely under subparagraph (C) of such section.*” (emphasis added)).

barrier against providing accommodations to those who do not need them, it is not a significant enough contention to justify betraying the express language of the statute. As the EEOC has pointed out, the rigidity of the “transitory and minor” exception is unnecessary under these two prongs, because not every disabled individual who requests accommodation will automatically be entitled to one under the ADA.²⁰⁷ For instance, an employer could deny an accommodation if the individual “do[es] not need the accommodation requested, there is no reasonable accommodation that can be provided absent undue hardship, or they would not be ‘qualified’ or would pose a ‘direct threat to safety, even with an accommodation.’”²⁰⁸ In this light, businesses are already provided with protection against unnecessarily providing accommodations. It is arguable that restricting the exception to the “regarded as” prong indicates the understanding that some impairments may require accommodation even though they last less than six months—an interpretation that was already acknowledged by the EEOC.²⁰⁹

iii. Congressional Intent

The legislative history of the ADAAA also supports the fact that Congress intended to limit the “transitory and minor” exception to the “regarded as” prong.²¹⁰ According to the Senate Statement of Managers, the reason the exception was included under the “regarded as” prong is because “individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition.”²¹¹ Meanwhile, both the Labor & Education Committee and Judiciary Committee stated that the exception merely clarifies the fact that an individual who is regarded as having an impairment does not need to meet the functional limitation, or severity, requirement that is contained in the first and second prongs of disability.²¹² Thus, it seems clear that Congress

²⁰⁷ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,433 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

²⁰⁸ *Id.*; see 29 C.F.R. § 1630.15(d) (2011) (providing undue hardship as a potential defense).

²⁰⁹ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. at 48,447; 29 C.F.R. pt 1630 app. sec. 1630.2(j)(1)(ix); see also Transcript of US Equal Emp’t Opportunity Comm’n Meeting on the Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 17, 2009), <http://www.eeoc.gov/eeoc/meetings/6-17-09/transcript.cfm#notice> (“[T]he Proposed Rule includes a fifth rule of construction which makes it clear that impairments that last for fewer than six months, may still be substantially limiting.”).

²¹⁰ For a thorough analysis of the legislative history of the ADAAA, see Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 200–40 (2008). Many proponents of limiting the scope of the exception, including the EEOC, have cited some aspect of the legislative history to support their assertion. See, e.g., Hickcox, *supra* note 40, at 455–57; see also 29 C.F.R. pt. 1630 app. sec. 1630.2(j)(1)(ix).

²¹¹ 154 CONG. REC. S8842 (daily ed. Sept. 16, 2008). Similar language was included by the House Committee on the Judiciary and the Labor and Education Committee Reports. See H.R. REP. NO. 110-730, pt. 1, at 15 (2008); H.R. REP. NO. 110-730, pt. 2, at 14, 16 (2008).

²¹² H.R. REP. NO. 110-730, pt. 1, at 15; H.R. REP. NO. 110-730, pt. 2, at 14.

added the exception to accommodate the fact that the “substantially limiting” requirement did not apply under the “regarded as” prong. Because the “substantially limiting” requirement already serves as the limiting test for the first two prongs, nearly all of the relevant legislative history agrees that “[a] similar exception for the first two prongs of the definition is unnecessary.”²¹³ Thus, the legislative history provides a strong indication that Congress did not intend the exception to apply beyond the “regarded as” prong.

However, while the legislative history supports limiting the scope of the “transitory and minor” exception, not all judges will consider it when interpreting a statute.²¹⁴ In fact, the Judiciary Committee even acknowledged the “expectation that courts will focus on the statutory text of the legislation, not the language placed in committee reports, when interpreting this legislation.”²¹⁵ To make this point clear, in *Sutton*, the Court interpreted the ADA looking only at the statute as a whole, finding “no reason to consider the ADA’s legislative history.”²¹⁶ Still, considering the plain language of the statute and the purpose of the “regarded as” prong within the statutory scheme, restricting the scope of the “transitory and minor” exception to the “regarded as” prong remains the best alternative.

B. Both But Not Either—Exclusion of Transitory AND Minor Impairments

In considering the coverage of the “transitory and minor” exception, the exception should be limited to impairments that are *both* transitory *and* minor—not merely one or the other. As in the previous analysis, this interpretation corresponds best with the statutory structure, the purpose of the statute, and Congressional intent.

i. Statutory Structure

In conformity with the analysis above, the starting point of judicial interpretation is the language of the statute.²¹⁷ In this case, the plain meaning of the statute indicates that the exception should only include impairments that are both transitory and minor.²¹⁸ It is unconvincing to argue that Congress did not intend both adjectives to apply to the same impairment when it used the conjunctive term “and.” While it is arguable

²¹³ 154 CONG. REC. S8436 (daily ed. Sept. 11, 2008) (Statement of Managers); H.R. REP. NO. 110-730, pt. 1, at 15; H.R. REP. NO. 110-730, pt. 2, at 16. *But see* Associated Builders and Contractors, Inc., *supra* note 131, at 4 (arguing that the fact that it was “unnecessary” means that the exception already functionally applies within the first two prongs).

²¹⁴ *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (thoroughly stating the case against the use of legislative history).

²¹⁵ H.R. REP. NO. 110-730, pt. 2, at 30.

²¹⁶ *Id.* at n.1 (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999)).

²¹⁷ *See* KIM, *supra* note 118, at 2 (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

²¹⁸ *See supra* Part. II.B.

that Congress could have been clearer, it is doubtful that anyone considered the language of the statute insufficient. In fact, in light of the statutory text alone, little resistance has been offered to interpreting the language of the statute to require both criteria.²¹⁹ Specifically, there was not a single public submission to the EEOC arguing that the language of the statute should be interpreted to mean that either transitory or minor conditions should be included under the EEOC regulations interpreting the “transitory and minor” exception.²²⁰

Meanwhile, the broad coverage required in construing the language of the ADAAA further supports limiting the exclusion solely to disabilities that are both transitory and minor.²²¹ Excluding either transitory or minor injuries would decrease the amount of disabilities covered under the “regarded as” prong by increasing the amount of disabilities excluded. Thus, it would be extremely difficult for a court to reconcile excluding either transitory or minor impairments while at the same time adhering to the statutory order to broadly construe the definition of disability “to the maximum extent permitted.”²²²

ii. Statutory Purpose

The broad purpose of the “regarded as” prong also limits the necessity of interpreting the exception to exclude a greater number of impairments. As previously mentioned, the ultimate goal of the “regarded as” prong is to ensure that even where an impairment is not substantially limiting, it cannot become the sole basis for an employer’s action.²²³ Accordingly, including impairments that are “transitory but severe” or “long-term but minor” would best serve the purpose of preventing an employer from taking discriminatory action on account of such impairments. This reduces the risk, for example, that an excruciating impairment of short duration is not the sole cause for discrimination or termination. Meanwhile, it is difficult to argue that a person who is fired solely for having a cold for eight months should not have a claim under the “regarded as” prong if they are able to accomplish their job requirements.

Further, interpreting the exception to require both terms would not overburden employers. In fact, employers should easily be able to avoid violating the “regarded as” prong by offering any other justifiable motive for

²¹⁹ See *Docket Folder Summary for Comments Pursuant to The ADA Amendments Act Notice of Proposed Rule Making*, available at <http://www.regulations.gov/#!docketDetail; dct=PS+PR; rpp=10; so=DESC; sb=postedDate; po=0; s=transitory+and+minor; D=EEOC-2009-0012> (last visited Dec. 30, 2011) (listing the submitted comments to the EEOC).

²²⁰ *Id.*

²²¹ See *supra* notes 184–85 and accompanying text.

²²² 42 U.S.C. § 12102(4)(a) (2006).

²²³ See *supra* notes 196–200 and accompanying text.

taking action against the employee.²²⁴ This is especially true considering a recent court holding stating that employees whose employers have mixed motives for taking adverse job actions against them have no recourse under the ADA.²²⁵ Further, while inclusion of either impairments (transitory or minor) may allow for more lawsuits under the “regarded as” prong, each complaint must still be justifiable. As the EEOC has indicated, an individual whose impairment falls under the “regarded as” prong still needs to be “qualified” for the job they hold or desire.²²⁶ Thus, the “regarded as” prong does not give employees a blanket justification for suing their employer. In fact, under the “regarded as” prong, an employer can hold such a person to the same standards as the other workers.²²⁷ Meanwhile, an employer may also defend against claims under the “regarded as” prong by showing that a particular individual would pose a direct threat to others or that their action was taken based on another federal law.²²⁸

Furthermore, because the “regarded as” prong does not require accommodations for disabilities, there is little-to-no risk that unnecessary costs will be spent on someone with solely minor or transitory illnesses under the prong.²²⁹ Thus, while the “regarded as” prong provides for expansive coverage under the ADA, it does not expand the amount of accommodations that an employer is required to provide. As part of this important compromise with the business community, accommodations would only be provided under the first two prongs if the condition was significant enough to qualify as “substantially limiting.”²³⁰

iii. Congressional Intent

The legislative history further supports interpreting the exception to only include impairments that are transitory *and* minor. While nothing in the legislative history is directly on point to how Congress intended the language to be interpreted,²³¹ it is possible to decipher some meaning from

²²⁴ 29 C.F.R. § 1630.15(b)(1) (2011).

²²⁵ Cristin Schmitz, *ADA Plaintiffs Must Prove Disability is Sole Cause of Adverse Action*, INSIDECOUNSEL, (May 2010), <http://www.insidecounsel.com/Issues/2010/May-2010/Pages/ADA-Plaintiffs-Must-Prove-Disability-.aspx?k=robert+duffy>.

²²⁶ *Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Dec. 30, 2011); see also 29 C.F.R. pt. 1630 app. sec. 1630.2(l) (“Establishing that an individual is ‘regarded as having such an impairment’ does not, by itself, establish liability. Liability is established . . . only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.”).

²²⁷ See 42 U.S.C. § 12112(a). As long as the employer refrains from discriminating against the employee on the basis of disability, the provisions of the ADA do not restrain the employer’s actions. *Id.*

²²⁸ 29 C.F.R. §§ 1630.15(b)(2), 1630.15(e), 1630.15(g).

²²⁹ See *supra* note 206 and accompanying text.

²³⁰ See Befort, *supra* note 33, at 1017; see 42 U.S.C. §§ 12102(1), 12102(3)(b).

²³¹ See H.R. REP. NO. 110-730, pt. 1 (2008); H.R. REP. NO. 110-730, pt. 2 (2008); see generally 154 CONG. REC. H6058–82 (daily ed. June 25, 2008).

House Committee Reports and from the Congressional Record.²³² For instance, in the Joint Statement of Representatives Hoyer and Sensenbrenner (the original sponsors of the ADAAA), the representatives referred to the exception as requiring impairments to be “both transitory and minor.”²³³ Meanwhile, both the Judiciary Committee and Education & Labor Committee presented the exception in terms of a single impairment that was both transitory and minor.²³⁴ In its section-by-section analysis of the later adopted version of the ADAAA, the Judiciary Committee stated that the “regarded as” prong was not available for “a transitory and minor impairment.”²³⁵ Similarly, the Education & Labor Committee stated that an impairment would fall under the “regarded as” prong “as long as *an* individual’s impairment is not transitory and minor.”²³⁶ All of these statements indicate the intention that only impairments that are both transitory and minor should be included.²³⁷ While it is arguable that the committees and representatives did not actually intend for their language to be interpreted with such rigor, nothing in the legislative history even suggests that transitory or minor impairments should individually be included within the exception.²³⁸

Furthermore, the legislative history indicates that Congress considered the needs of the business community when it determined the language of the exception.²³⁹ In fact, it specifically states that the exception was included to respond to the business community’s concerns regarding potential abuse of the ADA and the resulting misapplication of resources on individuals with minor ailments lasting only a short period of time.²⁴⁰ Such exceptions were intended to prevent litigation over minor illnesses and

²³² 154 CONG. REC. H6067 (joint statement of Rep. Hoyer and Rep. Sensenbrenner); H.R. REP. NO. 110-730, pt. 1, at 15; H.R. REP. NO. 110-730, pt. 2, at 16.

²³³ 154 CONG. REC. H6067 (joint statement of Rep. Hoyer and Rep. Sensenbrenner). Similar language was used in the Senate Statement of the Managers. 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (Statement of Managers accompanying the Senate’s adopted version of the Act).

²³⁴ H.R. REP. NO. 110-730, pt. 1, at 14 (stating that the exception is relevant where “*the* impairment that *an* individual is regarded as having is *a* transitory and minor impairment[.]” (emphasis added)); H.R. REP. NO. 110-730, pt. 2., at 18 (including the same language). Both of these committees were referred the original version of ADAAA by Congress with the express task of restoring the original intent of the ADA, and recommended it to the House in its now adopted form. H.R. REP. NO. 110-730, pt. 1, at 1; H.R. REP. NO. 110-730, pt. 2, at 1.

²³⁵ H.R. REP. NO. 110-730, pt. 1, at 14 (emphasis added).

²³⁶ *Id.*

²³⁷ See also Fram, *supra* note 46, at 219 (citing the Senate Statement of Managers as further evidence of the requirement that an impairment be both transitory and minor).

²³⁸ See generally H.R. REP. NO. 110-730, pt. 1; see generally H.R. REP. NO. 110-730, pt. 2; see generally 110 CONG. REC. H6058-82 (daily ed. June 25, 2008). A court may be reluctant to place significant weight on the “excerpts” of legislative history unless they are directly related to giving meaning to an enacted statute and the interpretation is one the text can actually bear. KIM, *supra* note 118, at 43, n.245 (citing Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501(1988)).

²³⁹ Anderson, *supra* note 188, at 1271.

²⁴⁰ H.R. REP. NO. 110-730, pt. 1, at 15; H.R. REP. NO. 110-730, pt. 2, at 16; 154 CONG. REC. S8436 (daily ed. Sept. 11, 2008) (Statement of Managers accompanying the Senate’s adopted version of the Act).

injuries that were never meant to be covered by the ADA.²⁴¹ Consequently, it is apparent that both Congress and businesses analyzed the language in light of these considerations and concluded that it did not need to be clearer.

C. The Definition of “Minor”:

Finally, under the “transitory and minor” exception, courts should construe the term “minor” very narrowly, applying it to impairments that are synonymous to a hangnail, common cold, sprained joint, or stomach ache. This interpretation is appropriate because it best corresponds with the rules of statutory structure, Congressional intent, and the purpose of the exception under the “regarded as” prong.

i. Statutory Structure

General rules of statutory construction support a narrow interpretation of “minor” under the exception. First, the amended ADA specifically requires the definition of disability be construed in favor of broad coverage.²⁴² This is consistent with the rule of statutory interpretation requiring that terms in remedial statutes be construed to broadly effectuate their purpose.²⁴³ “[T]he ADA is a remedial statute [because its purpose is] to eliminate discrimination against the disabled in all facets of society.”²⁴⁴ Thus, the term “minor” should be construed to broadly effectuate this purpose.²⁴⁵ This would mean interpreting “minor” narrowly to include the maximum amount of disabilities permissible under the statute. Second, the language of exemptions to any statute, known as provisos, is to be narrowly and strictly construed.²⁴⁶ Therefore, as an exception to the “regarded as” prong, little leeway should be afforded to the scope of what impairments are considered “minor.” Moreover, due to the greater compromise found in the ADAAA and Congress’s clear message that courts misinterpreted the statute, it is argued that courts will be less willing to narrow coverage under the ADA.²⁴⁷

²⁴¹ 154 CONG. REC. H6067 (joint statement of Rep. Hoyer and Rep. Sensenbrenner).

²⁴² 42 U.S.C. § 12102(4)(A) (Supp. III 2009); *see also supra* note 184 and accompanying text.

²⁴³ 29 C.F.R. pt. 1630 app. sec. 1630.1(c) (2011); *see, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also* *Cooper v. Fed. Aviation Admin.*, 622 F.3d 1016, 1021 (9th Cir. 2010).

²⁴⁴ *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) (quoting *Kinney v. Yerusalim*, 812 F. Supp. 547, 551 (E.D. Pa. 1993)).

²⁴⁵ *See id.*; *see also* *Lincoln Cercpac v. Health & Hosps. Corp.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (“The ADA must be broadly construed to effectuate its remedial purpose.”).

²⁴⁶ *E.g.*, *Coral Cadillac, Inc. v. Stephens*, 867 So. 2d 556, 559 (Fla. Dist. Ct. App. 2004) (“It is also a basic tenet of statutory construction that exceptions or provisos should be narrowly and strictly construed.”); 29 C.F.R. pt. 1630 app. sec. 1630.2(l).

²⁴⁷ *Anderson, supra* note 188, at 1312–24.

ii. Statutory Purpose

The purpose of the “regarded as” prong further supports a narrow construction of “minor.” Again, the “regarded as” prong was primarily included as a catch-all to ensure that any individual with a disability is not discriminated against solely due to their disability.²⁴⁸ Accordingly, the standard was never intended to be a difficult one to meet.²⁴⁹ In reality, limiting the exception (and accordingly, the interpretation of “minor”) will simply allow individuals with any type of impairment to overcome the initial obstacle of establishing a valid claim under the ADA.

Further, while a narrow interpretation of “minor” increases the potential claims under the ADA, it would not place an incredible burden on employers. As emphasized above, businesses will still be protected by the fact that employees falling solely under the “regarded as” prong must still be qualified for the job they hold or desire.²⁵⁰ This, coupled with the fact that courts may be willing to protect employers who have mixed motives for taking adverse actions from recourse under the ADA, provides a standard that employers should easily be able to meet.²⁵¹

Further still, employers will not have to worry about providing accommodations for employees with “minor” injuries under the “regarded as” prong.²⁵² In fact, since reasonable accommodations are no longer required under the “regarded as” prong, arguably judges and employers no longer need to worry about giving an impaired, but not disabled, person a “windfall [due to an] employer’s erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation.”²⁵³

iii. Congressional Intent

The narrow interpretation of the term “minor” is directly supported by the legislative history. In fact, many have provided the legislative history of the ADAAA to demonstrate that Congress intended the “transitory and minor” exception to be extremely limited.²⁵⁴ Reports by both the Judiciary Committee and the Education & Labor Committee on the now adopted version of the ADAAA stated that the exception was only intended for claims lying at the lowest end of the spectrum of severity.²⁵⁵ As the Judiciary Report noted, all revisions to coverage under the ADA were made

²⁴⁸ See *supra* notes 197–202 and accompanying text.

²⁴⁹ See *id.*; 29 C.F.R. pt. 1630 app. sec. 1630.2(l).

²⁵⁰ See *supra* notes 226–27 and accompanying text.

²⁵¹ See *supra* note 225 and accompanying text.

²⁵² See *supra* note, 207–08 and accompanying text.

²⁵³ *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999); see also *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003); Anderson, *supra* note 188, at 1297–98.

²⁵⁴ See, e.g., Barry *supra* note 195, at 274.

²⁵⁵ H.R. REP. NO. 110-730, pt. 1, at 15 (2008); H.R. REP. NO. 110-730, pt. 2, at 16 (2008).

to restore its original vision, citing the legislative history of the original act where both the Education & Labor Committee and Senate committees reported that “persons with *minor, trivial impairments* such as a simple infected finger are not impaired in a major life activity.”²⁵⁶ This emphasis on exclusion of only the most minor and trivial impairments was reiterated on the House floor by several representatives.²⁵⁷

In accordance with the rule of statutory interpretation, both the Judiciary Committee and Labor & Education Committee stated that as an exception to the generally broad coverage of the “regarded as” prong, the limitation on coverage should be construed narrowly.²⁵⁸ Furthermore, both committees indicated that the exception was intended to be considered in light of the business community’s concerns regarding potential abuse of the ADA and the resulting misapplication of resources on individuals with minor ailments lasting only a short period of time.²⁵⁹ Accordingly, the legislative history indicates that the definition of “minor” was intended to be very exacting, including only very trivial impairments.

The legislative history is also helpful in supplying specific examples of ailments that should be considered “minor.” Both the Judiciary Committee and Labor & Education Committee stated that absent the “transitory and minor” exception, the “regarded as” prong would have “covered individuals who are regarded as having common ailments like the cold or flu.”²⁶⁰ In addition, ailments such as stomach aches, mild seasonal allergies, and even hangnails were addressed on the House floor as ailments expected to be excluded under the exception.²⁶¹ These ailments were reiterated by the Judiciary Committee, emphasizing that if Congress’s intended interpretation were inappropriately broadened by the judiciary, there would be an “obligation to accommodate people with stomach aches, a common cold, mild seasonal allergies, or even a hangnail.”²⁶² Thus, in light of the legislative history, ailments that would likely be considered minor would be the common cold or flu, stomach ache, mild allergies, infected fingers, or a hangnail. These ailments are certainly in line with the narrow interpretation intended for the exception.

²⁵⁶ H.R. REP. NO. 110-730, pt. 2, at 30 (emphasis added) (quoting S. REP. NO. 101-116, pt. 1, at 23 (1989)); H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

²⁵⁷ 154 CONG. REC. H6074 (daily ed. June 25, 2008) (statements by Rep. Nadler and Rep. Smith).

²⁵⁸ H.R. REP. NO. 110-730, pt. 1, at 15; H.R. REP. NO. 110-730, pt. 2, at 16; *see also* 29 C.F.R. pt. 1630 app. sec.1630.2(l) (2011).

²⁵⁹ *Id.* This contention was reiterated before the Senate in the Statement of Managers. *See* 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (Statement of Managers accompanying the Senate’s adopted version of the Act).

²⁶⁰ H.R. REP. NO. 110-730, pt. 1, at 14; H.R. REP. NO. 110-730, pt. 2, at 18. Exclusion of such illnesses was reiterated on the House floor following the passage of the House version of the bill. 154 CONG. REC. H6067 (joint statement of Rep. Hoyer and Rep. Sensenbrenner).

²⁶¹ 154 CONG. REC. H6074 (statements by Rep. Nadler and Rep. Smith).

²⁶² *Id.*

All of the preceding sources indicate that the “transitory and minor” exception should be interpreted narrowly and strictly applied. Thus, in construing the definition of “minor,” the term must be applied in its narrowest meaning. While “minor” is not a word that is constrained to a single definition, considering the purpose of the statute and Congressional intent, only those impairments synonymous to a hangnail, common cold, sprained joint, or stomach ache should be included under its meaning.

IV. CONCLUSION

This Comment has sought to iron out some of the more controversial ambiguities regarding short-term disabilities under the newly amended ADA. Overwhelmingly, the ADAAA championed broader coverage of disabilities under the ADA and accordingly most of the more accurate interpretations have come out in favor of such. In sum, this Comment has advocated: (1) limiting the “transitory and minor” exception to the “regarded as” prong; (2) limiting coverage of the exception to those injuries that are *both* transitory and minor; and (3) defining the term “minor” under a narrow definition that includes only impairments synonymous with a hangnail, common cold, sprained joint, or stomach ache under its meaning. All of these positions are strongly supported by the rules of statutory structure, the purpose of the statute, and Congressional intent, and also have justifiably been adopted by the EEOC in some degree.

Generally, analysis of the ADA’s language has pit disability activists against employers. As each anticipates adjustments they will need to make under the amended statute. However, narrowing the scope and coverage of the “transitory and minor” exception does not necessarily mean overburdening employers. The ADA still dictates that a person will *not* have an impairment adequate enough for coverage under the first two prongs of disability unless their impairment *substantially limits* their ability to perform a major life activity compared to the general population.²⁶³ Thus, impairments that are transitory and minor might naturally fail to succeed under these two prongs. Further, employers are offered a number of defenses against ADA claims and do not have to accommodate employees under the “regarded as” prong.²⁶⁴ Practically speaking, it is possible for one to have an ailment that is excruciating but transitory, or a minor impairment that is long-lasting. The ADA simply asks that employers refrain from taking adverse action against an individual because of such impairments.

In light of all of the technical arguments that can be made in relation to the statute, it is important to remember the most general principle behind the ADAAA is to broaden coverage of Americans with disabilities under the

²⁶³ 42 U.S.C. § 12102(4)(B) (2006).

²⁶⁴ See *supra* notes 206, 224–28 and accompanying text.

Act. While short-term disabilities were largely excluded under the original ADA, the ADAAA brought new hope that such disabilities will receive wider coverage in the future. This is not to say that all short-term disabilities are now included under the statute, but merely the ones that are unnecessarily used by employers as a basis for discrimination. Indeed, “the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis[.]”²⁶⁵ Instead, impairment should simply be interpreted to extend the common protection afforded to similar civil rights in today's society—a protection that courts were historically unwilling to afford and Congress specifically made a point to reinstate.

²⁶⁵ *Menchaca v. Maricopa Cmty. Coll. Dist.*, 595 F. Supp. 2d 1063, 1068 (D. Ariz. 2009) (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101)).