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ADA Amendments Act of 2008: New Hope for Individuals with Disabilities

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I. Introduction

The Americans with Disabilities Act² (ADA) was intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³ Based on the Rehabilitation Act of 1973 (Rehabilitation Act),⁴ the ADA promised to fix many of the loopholes found in the Rehabilitation Act, and to provide more protection to individuals with disabilities. Although the definition of disability under the ADA was borrowed from the Rehabilitation Act, many individuals protected under the Rehabilitation Act were not covered under the ADA. The Supreme Court frustrated the intent of Congress in several major cases, by restricting the scope of the ADA and implementing new standards to be covered. These new standards greatly protected employers and did not afford much protection to disabled individuals. To remedy this, the House of Representatives and the Senate passed the ADA Amendments Act of 2008 (Amendments Act) by an overwhelming majority.⁵ This bill was signed by President Bush on Sep 25, 2008 and went into effect on January 1, 2009.⁶

This article will focus on how the Supreme Court went beyond the scope of its granted power by ignoring the congressional intent of the ADA, specifically in the employment sector. It will provide an in-depth analysis of *Sutton v. United Air Lines*, *Albertson's, Inc. v. Kirkingburg*, *Murphy v. United Parcel Service*, *Toyota Motor Manufacturing, v. Williams* and *US Airways, Inc. v. Barnett*, showing how the Court interpreted the ADA in a manner that failed to follow the intent of Congress. This paper

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² 42 U.S.C. § 12101 (2006).

³ § 12101(b).

⁴ 29 U.S.C. § 794 (2006).

⁵ GovTrack.us. S. 3406--110th Congress (2008): ADA Amendments Act of 2008, *GovTrack.us (database of federal legislation)*, <http://www.govtrack.us/congress/bill.xpd?bill=s110-3406> (last visited Apr. 6, 2009).

⁶ *Id.* (follow “Full Text” hyperlink).

will also discuss the Amendments Act, specifically its goals, how it differs from the ADA, who it will protect, and its effect on employers nationwide.

II. The Supreme Court's recent shift towards limiting the ADA

Recently, the Supreme Court narrowly interpreted who is considered a qualified individual with a disability under the ADA.⁷ This made it difficult to bring suit under the ADA. "A 2006 study indicated that plaintiffs have lost more than 97% of ADA employment discrimination claims, more than under any other civil rights statute – and the majority of these cases are being lost because courts determine plaintiffs are not disabled."⁸ In a series of cases in the late 1990's, the Supreme Court redefined the ADA by going against Congress' original intent.⁹ The passage of the ADA was "intended to protect anyone who is treated less favorably because of a current, past, or perceived disability," however, this did not occur.¹⁰

A. *Sutton v. United Air Lines*

Sutton was the first Supreme Court case that greatly limited the scope of the ADA. In *Sutton*, the petitioners, twin sisters, both suffered from severe myopia.¹¹ However, with corrective lenses, their vision was "20/20 or better."¹² Petitioners applied to become commercial airline pilots, but "both were told during their interviews . . . [that they] did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better."¹³ The Supreme Court concluded that the sisters were not disabled under the ADA.¹⁴

In determining that the petitioners were not disabled under the ADA, the Court completely disregarded the ADA guidelines. "These guidelines specifically direct that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures."¹⁵ However, in circumventing that guideline, the Court found that since the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently -- not potentially or hypothetically -- substantially limited in order to demonstrate a disability."¹⁶ Thus, the Court concluded that "a person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."¹⁷

⁷ See *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

⁸ American Civil Liberties Union, *ADA Restoration Act (S. 1881/H.R. 3195) A Civil Rights Promise to Fulfill*, http://www.aclu.org/images/asset_upload_file833_33633.pdf.

⁹ *People Covered Under Section 504 of the Rehabilitation Act*, http://www.c-c-d.org/task_forces/rights/Rehab%20Act%20v%20%20ADA.pdf.

¹⁰ *The ADA Restoration Keeping the Promise to End Unfair Discrimination*, http://www.c-c-d.org/task_forces/rights/Overview%20of%20ADA%20Restoration.pdf.

¹¹ *Sutton v. United Air Lines*, 527 U.S. 471, 475 (1999).

¹² *Id.*

¹³ *Id.* at 476.

¹⁴ *Id.* at 488-89.

¹⁵ *Id.* at 481.

¹⁶ *Id.* at 482-83.

¹⁷ *Id.*

Taking mitigating measures into account when determining if a person is substantially disabled directly contradicts the Equal Employment Opportunity Commission (EEOC) guidelines, which require the “determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures.”¹⁸ Therefore, the Supreme Court narrowed the definition of a qualified individual with a disability under the ADA, while disregarding the guidelines of the agency charged with enforcing federal employment discrimination laws.

B. *Albertson’s, Inc. v. Kirkingburg*

In *Albertson’s, Inc.*, the plaintiff, Kirkingburg, was hired as a truck driver for a grocery store chain.¹⁹ In compliance with the Department of Transportation (DOT), Kirkingburg’s vision was tested to make sure it was at least 20/40 in each eye.²⁰ However, Kirkingburg suffered from amblyopia, which is “an uncorrectable condition that leaves him with 20/200 vision in his left eye and monocular vision in effect.”²¹ Despite his condition, the DOT made an error and certified that Kirkingburg met the qualifications.²²

After injured while working, Kirkingburg was required by Albertson’s to go for another physical.²³ This time the physician realized Kirkingburg’s vision did not pass the required department standards and suggested he obtain a waiver from the DOT.²⁴ Kirkingburg “applied for a waiver,” but was fired from Albertson’s “because he could not meet the basic DOT vision standard.”²⁵ Kirkingburg eventually received the waiver.²⁶

The Supreme Court, upon hearing the case, reiterated the *Sutton* holding, proclaiming that “mitigating measures must be taken into account in judging whether an individual possesses a disability.”²⁷ The Ninth Circuit determined that Kirkingburg’s “brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability.”²⁸ The Supreme Court found that there is “no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body’s own systems.”²⁹ Because Kirkingburg’s body was undertaking mitigating measures to compensate for his amblyopia, the Supreme Court found that Kirkingburg was not significantly restricted in seeing,³⁰ even though his condition was uncorrectable.³¹ This determination meant Kirkingburg failed to meet the criteria for a qualified individual with a disability, and was not protected under the ADA against employment discrimination.

¹⁸ *Id.* at 481 (citing to 29 C.F.R. pt. 1630, App. § 1630.2(j)).

¹⁹ *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 558 (1999).

²⁰ *Id.*

²¹ *Id.* at 559.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 560.

²⁶ *Id.*

²⁷ *Id.* at 565.

²⁸ *Kirkingburg v. Albertson’s, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998).

²⁹ *Albertson’s*, 527 U.S. at 566.

³⁰ *Id.* at 567.

³¹ *Id.* at 559.

C. *Murphy v. United Parcel Service*

*Murphy v. United Parcel Service*³² was another Supreme Court case that narrowly interpreted the ADA and limiting its application. Murphy suffered from hypertension, also known as high blood pressure.³³ He was hired as a mechanic and “had to satisfy certain health requirements imposed by the [DOT].”³⁴ Murphy’s “blood pressure was so high, measuring at 186/124, that he was not qualified for DOT health certification,” however, he “was erroneously granted certification, and he commenced work.”³⁵ Later, after reviewing Murphy’s files, the error was discovered and “respondent fired petitioner on the belief that his blood pressure exceeded the DOT’s requirements for drivers of commercial motor vehicles.”³⁶

Murphy brought suit under the ADA, claiming he was a qualified individual with a disability because his employer regarded him as disabled.³⁷ The Court found that “a person is ‘regarded as’ disabled within the meaning of the ADA if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities.”³⁸ Moreover, “to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job.”³⁹

Under this analysis, the “regarded as” prong is so narrowly construed by the courts that it does not further the ADA’s goal of ending discrimination. To further the goal of “elimination of discrimination against individuals with disabilities” it should be enough that a potential employee was not hired for a job because he was regarded as disabled.⁴⁰ He should not have to prove that he was viewed as incapable of doing more than one job. Additionally, “[t]he ‘regarded-as’ prong of the definition was intended to be a catch-all category covering those whose ability to work was not in fact substantially limited by an impairment . . . but who were nevertheless substantially limited by people’s negative views of their impairments.”⁴¹ Once again, the Supreme Court was limiting the reach of the ADA.

D. *Toyota Motor Manufacturing v. Williams*

In *Toyota Motor Manufacturing v. Williams*,⁴² Supreme Court once again limited the ADA by applying a harder standard than the Act requires. The Supreme Court determined that the need to interpret certain terms in the ADA “strictly to create a demanding standard for qualifying as disabled

³² 527 U.S. 516 (1999).

³³ *Id.* at 519.

³⁴ *Id.*

³⁵ *Id.* at 519-20.

³⁶ *Id.* at 520.

³⁷ *See id.* at 521-22.

³⁸ *Id.*

³⁹ *Id.* at 523.

⁴⁰ 42 U.S.C. § 12101 (2006); see also Consortium for Citizens with Disabilities, *How the Courts Shrank Coverage Under the ADA*, http://www.c-c-d.org/task_forces/rights/ada/shrunk.pdf.

⁴¹ Consortium for Citizens with Disabilities, *How the Courts Shrank Coverage Under the ADA*, http://www.c-c-d.org/task_forces/rights/ada/shrunk.pdf.

⁴² *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).

is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act.⁴³ However, nowhere in the legislative findings does it say that the ADA should be interpreted strictly. The purpose of the ADA was to help individuals with disabilities by protecting them from discrimination.⁴⁴ Additionally, the ADA was created to expand the protection afforded under the Rehabilitation Act, not limit it.⁴⁵ Thus, interpreting the ADA “to create a demanding standard for qualifying as disabled” was not what Congress intended.⁴⁶

As defined by the statute, a disability is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”⁴⁷ In limiting the ADA, the Supreme Court changed the definition of disability by requiring that the major life activity be one “of central importance to most people's daily lives.”⁴⁸ However, the statute only requires the major life activity be of central importance to the individual's life, not to “most people's daily lives.”⁴⁹ Lastly, in limiting the ADA, the Supreme Court held that “the impairment's impact must also be permanent or long-term.”⁵⁰ Yet this requirement cannot be found in the Act. The Supreme Court cited to the Code of Federal Regulations, but the regulations only require “the permanent or long term impact”⁵¹ to “be considered in determining whether an individual is substantially limited in a major life activity.”⁵²

E. *US Airways, Inc. v. Barnett*

The Supreme Court also shrunk the requirements for what an employer must do to reasonably accommodate an individual with a disability under the ADA. In *US Airways, Inc. v. Barnett*, Barnett injured his back while working as a cargo-handler with US Airways.⁵³ As per US Airways' seniority system, Barnett “invoked seniority rights and transferred to a less physically demanding mailroom position.”⁵⁴ However, under this system “that position, like others, periodically became open to seniority-based employee bidding” and in 1992, “Barnett learned that at least two employees senior to him intended to bid for the mailroom job.”⁵⁵ As a result, “he asked US Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom.”⁵⁶ US Airways evaluated the circumstances for five months, but ultimately rejected Barnett's request and he lost his job.⁵⁷ Consequently, Barnett filed a claim

⁴³ *Id.* at 197.

⁴⁴ See 42 U.S.C. § 12101(b)(1) (2006).

⁴⁵ See Jeffrey Koziar, *Judicial Estoppel and the Americans with Disabilities Act: Should the Courts Defer to the EEOC?*, 50 RUTGERS L. REV. 2259 (1998).

⁴⁶ *Toyota Motor Mfg.*, 534 U.S. at 197.

⁴⁷ § 12102.

⁴⁸ *Toyota Motor Mfg.*, 534 U.S. at 198.

⁴⁹ See § 12102(1)(A).

⁵⁰ *Toyota Motor Mfg.*, 534 U.S. at 198.

⁵¹ 29 C.F.R. § 1630.2(j)(2)(iii) (2008).

⁵² 29 C.F.R. § 1630.2(j)(2) (2008).

⁵³ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

under the ADA, alleging that US Airways failed to reasonably accommodate his disability.⁵⁸ The Supreme Court, again narrowing the ADA, concluded that “a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer”⁵⁹ This shifts the burden back to the employee to show that “there is more. The plaintiff must present evidence of that ‘more,’ namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.”⁶⁰

This limits the application of the ADA because “in most ADA cases, the existence of a seniority system would entitle an employer to summary judgment in its favor.”⁶¹ This will allow employers to easily insulate themselves from litigation involving discrimination and ADA violations, by simply employing a seniority system. With a seniority system in place, a person who is a qualified individual with a disability can be discriminated against with little recourse. This was not what Congress had in mind when it enacted the ADA. Additionally, as “[t]he dissent by Justice Souter, joined by Justice Ginsberg” points out, “nothing in the ADA insulated seniority rules from a reasonable accommodation requirement and that the legislative history of the ADA clearly indicated congressional intent that seniority systems be a factor in reasonable accommodations determinations but not the major factor.”⁶² Thus, the Supreme Court once again insulated employers from lawsuits by limiting the ADA’s reach. The Court allowed employers to have their accommodations deemed reasonable by simply implementing a seniority system, whereas Congress intended the presence of a seniority system to be just one of many factors considered.

As a result of the Supreme Court’s recent holdings, a “Catch-22” has been created. This occurs “by allowing employers to say a person is ‘too disabled’ to do the job but not ‘disabled enough’ to be protected by the law. The case is thrown out of court and the individual is never given the chance to do the job.”⁶³ For example, “people with conditions like epilepsy, diabetes, HIV, cancer, hearing loss, and mental illness who manage their disabilities with medication, prosthetics, hearing aids, etc. – or ‘mitigating measures’ – are viewed as ‘too functional’ to have a disability and are denied the ADA’s protection from employment discrimination.”⁶⁴ Similarly, “people denied a job or fired because an employer mistakenly believes they cannot perform the job – or because the employer does not want ‘people like that’ in the workplace – are also denied the ADA’s protection from employment discrimination.”⁶⁵ Thus, due to the constraints placed on the ADA by the Supreme Court, Congress enacted the Amendments Act to realign the law with its original intent.

⁵⁸ *Id.* at 394-95.

⁵⁹ *Id.* at 406.

⁶⁰ *Id.*

⁶¹ Nancy Lee Jones, *The Americans with Disabilities Act: Statutory Language and Recent Issues*, ALMANAC OF POLICY ISSUES, Aug. 1, 2001 (citing to *U.S. Airways*, 535 U.S. at 404), available at http://www.policyalmanac.org/social_welfare/archive/crs_ada.shtml.

⁶² *Id.*

⁶³ Consortium for Citizens with Disabilities, *Support ADA Restoration (H.R. 3195/S. 1881) Keep the Promise to End Unfair Employment Discrimination*, http://www.c-c-d.org/task_forces/rights/TPs_FINAL_bill.pdf.

⁶⁴ *Id.*

⁶⁵ *Id.*

III. The ADA Amendments Act of 2008

The goal of the Amendments Act is “to restore the intent and protections of the Americans with Disabilities Act of 1990.”⁶⁶ The ADA was passed because Congress wanted “to stop employers from making decisions based on disability.”⁶⁷ However, this goal was not achieved, as “the employment rate of people with disabilities has not improved[,] two-thirds of people with disabilities who do not have a job indicate they would work if they could find employment” and “[c]ourts decide against people who challenge disability discrimination 97% of the time, often before the person has even had a chance to show that the employer treated them unfairly.”⁶⁸

This Act “amends the definition of disability so that individuals whom Congress originally intended to protect from discrimination are covered under the ADA”⁶⁹ It is important to note that the bill makes only minor changes to the definition of disability in order to help clarify who the Act intends to protect. Disability under the Amendments Act is defined as “(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.”⁷⁰

The Amendments Act also adds a rule of construction that will help ensure the Act is consistently and fairly applied.⁷¹ It mandates that “the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”⁷² This Act increases the number of individuals protected by the ADA by requiring that courts not consider mitigating measures when determining if an individual is a qualified individual with a disability.⁷³

In determining whether a person is a qualified individual with a disability, the Amendments Act states “an impairment that is episodic or in remission is a disability” so long as “it would substantially limit a major life activity when active.”⁷⁴ To avoid inconsistent application, the Amendments Act gives a non-exhaustive list of major life activities.⁷⁵ Additionally, the Amendments Act states that “the current Equal Employment Opportunity Commission ADA regulations” which defines “the term 'substantially limits' as 'significantly restricted'” is “inconsistent with congressional intent by expressing too high a standard.”⁷⁶ The Amendments Act requires the EEOC to “revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act.”⁷⁷ Lastly, the Amendment Act “provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived

⁶⁶ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

⁶⁷ Consortium for Citizens with Disabilities, *supra* note 63. The ADA Amendment Act of 2008 was formally the *ADA Restoration of 2007*.

⁶⁸ *Id.*

⁶⁹ American Civil Liberties Union, *supra* note 8.

⁷⁰ ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor."⁷⁸

IV. The Effect on Employers

The ADA affects "all employers, including State and local government employers, with 15 or more employees after July 26, 1994" and includes "private employers, state and local governments, employment agencies, labor organizations, and labor-management committees."⁷⁹ The Amendment Act requires "[t]he definition of disability in this Act" to "be construed in favor of broad coverage of individuals."⁸⁰ "[T]his means that more ADA cases are going to pass initial threshold tests. Prior to these amendments, courts dismissed many cases on the grounds that the individuals are not 'disabled'. Employers should now assume that more employees are going to be covered by the ADA"⁸¹

The ADA Amendment Act of 2008 may cost employers more money. "Though some believe that the ADA will not cause an increase in litigation" others "believe that there will be a rise in the number of cases filed because the bill will make it easier to state a claim and because people initially will seek to test the new provisions."⁸² Since it may be easier to state a claim, some suggest that there will be "a rise in jury trials as it becomes more difficult for employers to win at the summary judgment stage."⁸³ Only time will tell how the public reacts and the courts interpret the new and improved Americans with Disabilities Act. Even if the Act costs employers money, it is fair and necessary, as it "strikes the right balance between protections for individuals with disabilities and the obligations and requirements of employers."⁸⁴

V. Conclusion

In conclusion, the American with Disabilities Act was modeled after the Rehabilitation Act of 1973, and was meant to fix most, if not all, of the gaps in the earlier legislation. The ADA was not read as broadly as Congress intended, and soon after the ADA was passed, the Supreme Court started to limit its scope and application. The Supreme Court limited the ADA in a string of major cases, by denying individuals with disabilities protection from discrimination.

In order to fix the problems with the ADA, Congress passed the ADA Amendments Act of 2008. Soon after, President Bush signed it into law, with the goal of restoring Congress' original

⁷⁸ The U.S. Equal Employment Opportunity Comm'n, *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act Of 2008*, http://www.eeoc.gov/ada/amendments_notice.html (last visited Feb. 27, 2009).

⁷⁹ The U.S. Equal Employment Opportunity Commission, *The ADA: Your Responsibilities as an Employer*, <http://www.eeoc.gov/facts/ada17.html> (last visited Feb. 27, 2009).

⁸⁰ ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008).

⁸¹ Daniel Schwartz, *What Employers Need to Know About the ADA Amendments Act of 2008*, CONNECTICUT EMPLOYMENT LAW BLOG, Sept. 19, 2008, <http://www.ctemploymentlawblog.com/2008/09/articles/laws-and-regulations/what-employers-need-to-know-about-the-ada-amendments-act-of-2008> (last visited Apr. 6, 2009).

⁸² Christy Pate, *ADA Amendments Act Passed by House and Senate; President Expected to Sign Bill*, EMPLOYER LAW REPORT, Sept. 19, 2008, available at, <http://www.employerlawreport.com/2008/09/articles/eeo/ada-amendments-act-passed-by-house-and-senate-president-expected-to-sign-bill/> (last visited Feb. 27, 2009).

⁸³ *Id.*

⁸⁴ Ass'n of Univ. Ctrs. on Disabilities, *Securing the Promise of the Americans with Disabilities Act*, <http://www.aucd.org/docs/Talking%20Points%20on%20ADA%20Amendments%20Act%2080608.pdf>.

intent to the ADA's application. The Amendments Act gives the courts more guidance on how to apply its terms, preventing the exclusion of individuals who need protection.

By executing the Amendments Act as Congress anticipates and following its broader rule of construction, the ADA will hopefully serve its original purpose and protect qualified individuals with a disability from the discrimination they face. Some suggest that the broad coverage provided for by the ADA Amendments Act will lead to an increase in litigation for employers. On the other hand, the manner in which the Supreme Court interpreted the original ADA was unduly restrictive. Only time will tell as to how individuals and the courts will react to the ADA Amendments Act.