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**Developments in  
Disability Discrimination Law  
2020 - 2021**

**JAMES H. KIZZIAR, JR.**

**AMBER K. DODDS**

**Bracewell LLP**

James H. Kizziar, Jr.  
Amber K. Dodds  
Bracewell LLP  
San Antonio, Texas

[Jim.Kizziar@bracewell.com](mailto:Jim.Kizziar@bracewell.com)  
[Amber.Dodds@bracewell.com](mailto:Amber.Dodds@bracewell.com)  
210-299-3526/210-299-3569

## TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. EEOC Regulations Implementing the ADAAA .....	1
A. Construction .....	1
B. Definition of Disability .....	2
C. Definition of Physical or Mental Impairment .....	2
D. Definition of Major Life Activities .....	2
E. Definition of “Substantially Limits” .....	3
F. Definition of Has a Record of an Impairment.....	4
G. Definition of Is Regarded as Having an Impairment .....	5
H. Definition of Qualified Person .....	5
I. Reasonable Accommodations .....	5
J. Prohibition Against Reverse Discrimination.....	5
K. Qualification Standards, Tests, and Other Selection Criteria.....	5
L. Defenses .....	6
M. Other Issues .....	6
N. Interpretive Guidance .....	6
III. The Ministerial Exception and the ADA .....	6
A. Supreme Court Affirms Application of Ministerial Exception to ADA Claims of Teacher and Confirms that Exception is Not Based on Rigid Criteria.....	6
B. Developing Circuit Split on Whether Ministerial Exception Applies to ADA Hostile Work Environment Claims .....	7
C. Supreme Court Holds that Ministerial Exception Applies to ADA Claims of Teacher Working for Ecclesiastical Corporation.....	9
D. Seventh Circuit Applies <i>Hosanna-Tabor</i> Test to Disability Claims of Teacher at Religious School.....	10
IV. Administrative and Legislative Developments.....	11
A. Notice of Proposed Rulemaking: Wellness Rules.....	11
B. EEOC Strategic Enforcement Plan .....	13
V. Impairments Under the ADA.....	13
A. Conditions Considered Impairments.....	13
B. Impairments Excluded from the ADA .....	14
1. Physical Characteristics .....	14
2. Personality Characteristics.....	14
3. Pregnancy.....	14
4. Illegal Use of Drugs.....	15
5. Sexual Conditions .....	16
6. Social Conditions.....	16
7. Obesity .....	16
8. Stress.....	18
9. Miscellaneous .....	19
C. Court Decisions on Impairments.....	19
1. Genetic Mutation May Constitute an Impairment if it Substantially Limits a Major Life Activity or Bodily Function .....	19
2. “Gender Dysphoria” Not Resulting from Physical Impairment is Excluded as a Disability Under the ADA .....	20

# TABLE OF CONTENTS

## (Continued)

	<u>Page</u>
3. State Court Allows Discrimination Suit by Medical Marijuana User .....	21
4. ADA Does Not Cover Potential Future Disabilities .....	22
VI. The Three-Part Definition of Disability .....	23
A. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities .....	23
B. Record of an Impairment .....	24
C. Regarded as Having an Impairment .....	25
D. Court Decisions on Regarded as Having an Impairment .....	25
1. Impairment that is Transitory <i>or</i> Minor May be the Basis for a Regarded As Claim .....	25
VII. Consideration of Mitigating Measures .....	26
VIII. Major Life Activities .....	27
A. Expansion of Major Life Activities .....	27
B. EEOC Standard for the Major Life Activity of Working .....	27
C. Court Decisions on Major Life Activities .....	27
1. Employee has the Burden to Demonstrate that He/She is Substantially Limited in Major Life Activities .....	27
2. Inability to Perform a Specific Job is Not a Substantial Limitation of the Major Life Activity of Working .....	28
IX. Substantial Limitations .....	29
A. Recent Court Decisions on the Substantial Limitation Standard .....	29
1. Employee Performance Deficiencies in Meeting Quality Control Standards Did Not Substantially Limit His Major Life Activities .....	29
2. Employee's Difficulties with Workplace Airborne Irritants Did Not Rise to Level of a Substantial Limitation .....	30
X. Qualified Individual .....	31
A. Definition .....	31
B. Recent Court Decisions on the Qualified Individual Standard .....	33
1. After-Acquired Evidence can be used to Demonstrate an Individual is Not Qualified .....	33
2. Employee Who Sought Accommodation that Burdened Other Workers Was Not Qualified .....	34
3. Sixth Circuit Holds that Work Restrictions Do Not Automatically Make an Employee Disabled .....	35
4. "Qualified Individual" Must Show They Can Perform Essential Functions of the Job with a <i>Reasonable</i> Accommodation .....	36
XI. Essential Job Functions .....	37
A. Recent Court Decisions on Essential Job Functions .....	38
1. Remote Work Which Requires Aid From Other Employees to Complete Essential Functions is Not a Reasonable Accommodation .....	38
2. Eighth Circuit Holds that Overtime Can Constitute Essential Function .....	39
3. Infrequent Tasks Can Still Be Essential Functions .....	40
4. Eighth Circuit Reaffirms that Regular and Reliable Job Attendance is Typically an Essential Function .....	41

# TABLE OF CONTENTS (Continued)

	<u>Page</u>
5. In-Person Attendance is Not Always an “Essential Function” under the ADA .....	43
XII. Disability Discrimination.....	44
A. Agreed Voluntary Transfer is Not an Adverse Action, Resulting in No Discrimination .....	44
B. Decisions based on “Business Judgment” together with Evidence that Decision-Maker was Unaware of Disability Resulted in Finding of No Discrimination .....	45
C. Imputing Supervisor’s Knowledge to Management.....	47
XIII. Regarding Individuals as Disabled .....	49
A. Standard for Regarding Person as Disabled .....	49
B. Discrimination Claims under “Regarded As” Prong Require an ADA- Qualifying Physical Impairment .....	49
C. Accommodations Not Required For “Regarded As” Disability .....	50
D. Ninth Circuit Holds that “Regarded As” Disability Requires Subjective Belief of Impairment, Not Necessarily an Impairment of a Major Life Activity.....	50
XIV. Mental and Emotional Disabilities.....	51
A. Mental Impairment Must Substantially Limit a Major Life Activity.....	51
B. Individuals With Mental Impairment Must Be Otherwise Qualified.....	52
C. Regarding Employees with Mental Impairments as Disabled .....	52
D. Employees with Mental Impairments May - or May Not - be Required to Request Reasonable Accommodation .....	52
XV. Misconduct and Disabilities.....	52
A. Court Decisions on Misconduct and Disabilities .....	54
1. Termination for Employee’s Misconduct Upheld as Legitimate Non-Discriminatory Action, Even Though the Misconduct Arose from Disability.....	54
2. Termination During Leave for Misconduct was Not a Failure to Accommodate .....	55
XVI. Direct Threat to Health or Safety .....	56
A. Introduction .....	56
B. Court Decisions on Direct Threat.....	57
1. Considering Additional, Non-physician Information in Determining Direct Threat .....	57
XVII. The Interactive Process .....	58
A. Key Elements of Employer Actions and Procedures for Conducting the Interactive Process.....	59
B. Engaging in the Interactive Process .....	60
1. Interactive Process Requires Real Consideration of Plausible Reasonable Accommodations .....	60
2. No Separate Cause of Action Exists for Failure to Engage in the Interactive Process .....	61
XVIII. Reasonable Accommodation .....	62
A. Transfer to a Vacant Position as a Reasonable Accommodation.....	63

**TABLE OF CONTENTS**  
**(Continued)**

	<u><b>Page</b></u>
1. Conflict in the Circuit Courts Remains Unresolved .....	63
2. Court Decisions on Transfer to a Vacant Position.....	65
B. Service Animals as an Accommodation.....	71
1. Animal Need Not be Formally Trained as a Service Animal for Presence in the Workplace to be a Reasonable Accommodation .....	74
C. Court Decisions on Reasonable Accommodation .....	75
1. Employers are not Required to Provide “All of the Accommodations an Employee Feels are Appropriate” .....	75
2. Seventh Circuit Reaffirms that Employees are Not Entitled to Choose Between Effective Reasonable Accommodations .....	76
3. Tenth Circuit Reaffirms that Reasonable Accommodation Requests do not Require “Magic Words” .....	77
4. Texas State Appellate Courts Disagree on Whether Request for Reasonable Accommodation is Protected Activity .....	78
D. Requests For Accommodation Found to be Unreasonable/Undue Hardship .....	80
1. Employee Class Claims Stricken in Reassignment as a Reasonable Accommodation Case .....	80
2. Lifting Restriction Which Shifts Essential Functions onto Other Staff is Not a Reasonable Accommodation .....	81
3. Considerations on Requirement for Employee Vaccination.....	82
E. Leave of Absence As a Reasonable Accommodation.....	84
1. Multiple Extensions May Be Reasonable Accommodations.....	84
2. A Prolonged Leave of Absence May Be an Undue Hardship .....	84
3. An Indefinite Leave of Absence Is Not a Reasonable Accommodation.....	85
4. Must An Employer Provide "Reinstatement Rights" During an Extension of Leave As a Reasonable Accommodation? .....	87
5. Intermittent Leave as a Reasonable Accommodation.....	89
XIX. The ADA and the Corona Virus Pandemic.....	91
A. EEOC Resources Regarding the Novel Coronavirus (COVID-19) .....	91
B. Vaccination for COVID-19 .....	92
C. Coronavirus as a “Direct Threat” .....	93
D. Medical Examinations and Disability Related Questions, Including Temperature Taking .....	93
E. COVID-19 Testing (Not Antibody Testing) .....	94
F. Genetic Information Nondiscrimination Act.....	94
G. Confidentiality of Medical Information .....	94
H. Teleworking as a Reasonable Accommodation .....	95
I. Personal Protective Equipment (“PPE”) as a Reasonable Accommodation .....	96
J. Providing Reasonable Accommodations at Home.....	96
K. The Interactive Process .....	96
L. Returning to Work.....	97
M. Future Changes in the Workplace .....	98

**TABLE OF CONTENTS**  
**(Continued)**

	<u><b>Page</b></u>
XX. Hostile Work Environment .....	98
A. Analysis .....	98
B. Case Authority on Hostile Work Environment .....	99
1. Second Circuit Joins the Tenth, Eighth, Fifth and Fourth Circuits in Holding that ADA Protects Employees from Hostile Work Environment based on Disability .....	99
XXI. Interference Claims .....	100
A. Court Decisions .....	101
1. Seventh Circuit Addresses Elements of ADA Interference Claim .....	101
XXII. Medical Examinations and Inquiries .....	101
A. Pre-Offer Medical Examinations and Inquiries .....	102
B. Post-Offer Medical Examinations and Inquiries .....	102
C. Medical Examinations and Inquiries Regarding Employees .....	102
D. Fitness for Duty Examinations .....	103
E. Periodic Medical Testing .....	103
F. Court Decisions on Medical Inquiries and Examinations .....	104
1. Test for Illegal Use of Drugs Not Automatically an ADA “Medical Examination” .....	104
G. Medical Marijuana .....	106
1. State Court Allows Discrimination Suit by Medical Marijuana User .....	106
H. Doctor’s Work Restrictions .....	106
1. Employer Can Follow Physicians Instructions Despite Employee’s Contradictory Assertions .....	106
XXIII. Discrimination Due to a Relationship or Association With a Disabled Person .....	107
XXIV. Procedural and Litigation Issues .....	108
A. Divided Tenth Circuit Holds En Banc that ADA Discrimination Lawsuits Need Not be Based on an Adverse Employment Action .....	108
B. Entity with Only “Constructive Knowledge” of Adverse Employment Action is not Vicariously Liable for Alleged Discrimination .....	109
C. Comparison to Only Disabled Employees Cannot Demonstrate Disparate Treatment .....	110
D. Ninth Circuit Affirms “But For” Standard in ADA Discrimination Analysis .....	111
E. Second Circuit Affirms that Rehabilitation Act Causation Standard is “But For” .....	112
F. No Direct Evidence of a Disability Where an Inference is Needed to Prove a Claim .....	113

## APPENDICES

APPENDIX A: ADA Charges Filed with EEOC FY 1992 - 2020

APPENDIX B: Impairments in ADA Charges, FY 2020

APPENDIX C: Mental Health Issues in ADA Charges Filed in FY 2020

APPENDIX D: Resolution of ADA Charges filed with EEOC in FY 2020

APPENDIX E: Map Regarding Federal Circuit Courts Positions on Mandatory Preference for Reassignment of Employees as a Reasonable Accommodation

**THIS OUTLINE IS INTENDED TO ASSIST PARTICIPANTS WITH A  
GENERAL UNDERSTANDING OF CURRENT DEVELOPMENTS IN THE LAW.  
IT IS NOT TO BE CONSIDERED LEGAL ADVICE.**

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**James H. Kizziar, Jr.**

Bracewell LLP

300 Convent Street, Suite 2700  
San Antonio, TX 78205

2001 M Street NW, Suite 900  
Washington, DC 20036

210-299-3526

[jim.kizziar@bracewell.com](mailto:jim.kizziar@bracewell.com)

**Practices**

Labor and Employment • Health Care

**Admitted**

State Bar of Texas • District of Columbia Bar

**Education**

J.D., Duke University School of Law, 1976

B.A., magna cum laude, Ohio Wesleyan University, 1973

**Court Admissions**

U.S. Court of Appeals, Fifth, and Eleventh, District of Columbia Circuits • U.S. District Courts Texas, Southern and Western Districts • U.S. District Court, District of Columbia • U.S. Supreme Court

**Board Certifications**

Board certified in labor and employment law by the Texas Board of Legal Specialization

**Experience**

For 45 years, Jim Kizziar has represented management in all aspects of labor and employment law before federal and state agencies and courts. His practice includes litigation and preventative counseling of management on issues such as discrimination, harassment, union organizing and wage-hour issues.

Mr. Kizziar is also a lecturer and prolific writer on labor law issues. He served on the editorial board of the Texas Labor Letter and co-authored a chapter entitled "Risk Management Issues in Employment" for the American Hospital Association's Risk Management Handbook for Health Care Facilities. He has also co-authored a resource guide entitled Human Resources Management: A Comprehensive Guide for Apartment Professionals for the National Apartment Association.

Mr. Kizziar has served as chairman of The University of Texas Law School Conferences on the Americans with Disabilities Act and chairman of The University of Texas Law School Conferences on Developments in Labor and Employment Law.

**Professional recognition**

- The Best Lawyers in America, labor and employment law 2003-2021
- Selected as the Best Management Labor and Employment Attorney in San Antonio, Texas for 2013, 2019 and 2020 by The Best Lawyers in America
- Texas Super Lawyer, labor and employment law, 2003-2021
- Scene in SA: San Antonio's Best Lawyers, labor and employment law, 2005-2009, 2013-2018
- Listed in Chambers USA: America's Leading Lawyers for Business, Labor & Employment, 2011-2013

**Community Involvement**

Mr. Kizziar served as chairman of the American Heart Association, San Antonio Division, 2003-2004, and 2013-16; he served on the organization's board of directors from 1991 to 2005 and from 2012 to 2017. In 2004, he received the Paul D. Apgar Award of Excellence from the American Heart Association. Mr. Kizziar served from 1982 to 1988 on the Board of Directors of the San Antonio YMCA. He also serves on the board of directors of the Canyon Lake Sailing Foundation.

**Affiliations**

Texas Bar Foundation, life fellow • Federal Bar Association, National Council, past member • Federal Bar Association, San Antonio Chapter, Past President • San Antonio Human Resources Management Association, past officer and board member



**Amber K. Dodds**  
Bracewell LLP  
300 Convent Street, Suite 2700  
San Antonio, TX 78205  
210-299-3569  
[amber.dodds@bracewell.com](mailto:amber.dodds@bracewell.com)

**Practices**

Labor and Employment

**Admitted**

State Bar of Texas

**Education**

The University of Texas School of Law, J.D., 2012 – *with honors*

Boston University, Master of Theological Studies, 2008 – *summa cum laude*

Trinity University, B.A., 2006 – *summa cum laude, Phi Beta Kappa*

**Court Admissions**

U.S. District Court Texas, Southern and Western Districts

**Board Certifications**

Board certified in Labor and Employment Law by the Texas Board of Legal Specialization

**Experience**

Amber Dodds counsels employers in all areas of employment law. Her advice includes analysis and direction on employment and benefits issues, such as leave administration, employee investigations, use of background checks and consumer reports, employee discipline and preventing harassment and retaliation claims. She drafts employment policies and employee handbooks specific to client industry and management needs. Amber also routinely advises on employee pay practices, such as compliance with overtime, per diem, pay deduction, and exemption classification requirements. She has experience advising clients on compliance with Occupational Safety and Health Act (OSHA) regulations, including the General Duty Clause, Process Safety Management, and a variety of industry or hazard-specific regulations.

In addition to regulatory and employment-law compliance, Amber represents employers in pre-litigation administrative investigation and hearings, settlement negotiations, and federal and state court litigation. Her litigation matters have included a variety of employment-law claims, such as retaliation, wrongful termination, discrimination, harassment, and wage and hour issues, as well as general civil litigation matters in the public, private and religious organization employer context. Amber is also experienced in Fair Labor Standards Act (FLSA) collective action litigation, including class certification and notice issues.

Amber served as an intern in the United States District Court for the Western District of Texas with the Honorable Lee Yeakel and the Texas First Court of Appeals with Justice Evelyn V. Keyes.

**Noteworthy**

U.S. District Court for the Western District of Texas, Intern

Texas First Court of Appeals, Intern

The University of Texas School of Law, *Texas International Law Journal*, Article and Notes Editor

The University of Texas School of Law, Dean's Achievement Award, Outstanding Performance in Business Associations

**Community Involvement**

YWCA San Antonio, Board of Directors; 2014-2019

Concordia University, Nebraska, Personnel Committee

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>AARP v. EEOC</i> , 2017 WL 6542014 (D.D.C. Dec. 20, 2017) .....	12
<i>AARP v. EEOC</i> , 267 F. Supp. 3d 14 (D.D.C. 2017) .....	12
<i>Abouhamad v. Bank of Am., Corp.</i> , 2012 WL 4023579 (D. Mass. 2012).....	58
<i>Adam v. Maricopa County</i> , 2:19-cv-05253 (D. Ariz. Oct. 30, 2020).....	54
<i>Aka v. Washington Hosp. Ctr.</i> , 156 F.3d 1284 (D.C. Cir. 1998) .....	64
<i>Alexander v. Northland Inn</i> , 321 F.3d 723 (8th Cir. 2003).....	107
<i>Alicea-Hernandez v. Catholic Bishop of Chi.</i> , 320 F.3d 698 (7th Cir. 2003).....	8
<i>Anthony v. Trax International Corp</i> , No. 18-15662 (9th Cir. Apr. 17, 2020).....	33
<i>Arias v. McHugh</i> , No. 2:09-690 WBS GGH, 2010 U.S. Dist. LEXIS 60814 (E.D. Cal. 2010).....	18
<i>Arrieta-Colon v. Wal-Mart Puerto Rico Inc.</i> , 434 F.3d 75 (1st Cir. 2006) .....	99
<i>Aubrey v. Koppes</i> , 975 F.3d 995 (10th Cir. Sept. 18, 2020).....	60
<i>Barlow v. Walgreen Co.</i> , 2012 U.S. Dist. LEXIS 34026 (M.D. Fla. 2012).....	24
<i>Battle v. Mineta</i> , 387 F. Supp. 2d 4 (D.D.C. 2005) .....	2
<i>Blatt v. Cabela’s Retail, Inc.</i> , No. 5:14-cv-04822 (E.D. Pa. May 18, 2017) .....	16

<i>BNSF Railway Co. v. Feit</i> , 663 Fed. App’x 504 (9th Cir. 2016).....	17, 18
<i>Brader v. Biogen Inc.</i> , No. 19-01268 (1st Cir. Dec. 18, 2020).....	45
<i>Brunckhorst v. City of Oak Park Heights</i> , 914 F.3d 1177 (8th Cir. 2019), <i>reh'g denied</i> (Mar. 21, 2019).....	38, 88
<i>Budde v. Kane Cnty. Forest Pres.</i> , 597 F.3d 860 (7th Cir. 2010).....	52
<i>Campbell v. Wal-Mart Stores, Inc.</i> , 272 F. Supp. 2d 1276 (N.D. Okla. 2003) .....	63
<i>Cannata v. Catholic Diocese of Austin</i> , 700 F.3d 169 (5th Cir. 2012).....	10
<i>Christopher Fox v. Costco Wholesale Corp.</i> , 918 F.3d 65 (2d Cir. Mar. 6, 2019) .....	99
<i>Cisneros v. Wilson</i> , 226 F.3d 1113 (10th Cir. 2000), <i>overruled on other grounds by Bd. of Trustees of</i> <i>Univ. of Ala. v. Garrett</i> , 531 U.S. 356 (2001) .....	86
<i>Clark v. Champion Nat’l Sec.</i> , Inc., No. 18-11613 (5th Cir. 2020).....	113
<i>Conlon v. InterVarsity Christian Fellowship</i> , 777 F.3d 829 (6th Cir. 2015).....	10
<i>Cook v. R.I. Dep’t of Mental Health</i> , 10 F.3d 17 (1st Cir. 1993) .....	17
<i>D’Angelo v. Conagra Foods</i> , 422 F.3d 1200 (11th Cir. 2005).....	50
<i>D’Onofrio v. Costco Wholesale Corporation</i> , No. 19-10663 (11th Cir. July 6, 2020) .....	75
<i>Darby v. Childvine, Inc., et al.</i> , No. 19-4214 (6th Cir. June 30, 2020) .....	19
<i>Daugherty v. City of El Paso</i> , 56 F.3d 695 (5th Cir. 1995).....	64
<i>Davis v. NYC Dept. of Educ.</i> , 2012 U.S. Dist. LEXIS 5633 (E.D.N.Y. 2012) .....	49

<i>Demkovich v. St. Andrew the Apostle Parish</i> , 973 F.3d 718 (7th Cir. Aug. 31, 2020) .....	7
<i>Denson v. Steak'n Shake, Inc.</i> , 910 F.3d 368 (8th Cir. 2018).....	106, 107
<i>Doe v. Northrop Grumman Systems Corp.</i> , 2019 WL 5390953 (N.D. Alabama, 2019).....	20
<i>Dube v. Texas Health and Human Services Comm'n</i> , 2011 U.S. Dist. LEXIS 99680 (W.D. Tex. 2011) .....	49
<i>Duckett v. Dunlop Tire Corp.</i> , 120 F.3d 1222 (11th Cir. 1997).....	84
<i>EEOC v. Chevron Phillips Chem. Co.</i> , 570 F.3d 606 (5th Cir. 2009).....	58
<i>EEOC v. Hosanna-Tabor Evangelical Lutheran Church &amp; Sch.</i> , 132 S. Ct. 694 (Jan. 11, 2012).....	7, 9, 10, 11
<i>EEOC v. Humiston-Keeling, Inc.</i> 227 F.3d 1024 (7th Cir. 2000).....	65
<i>EEOC v. Methodist Hosps. of Dall.</i> , No. 3:15-cv-03104, 2016 WL 6565949 (N.D. Tex. Nov. 4, 2016).....	69
<i>EEOC v. Methodist Hosps. of Dall.</i> , No. 3:15-cv-03104 (N.D. Tex. Mar. 2017) .....	64
<i>EEOC v. Sara Lee Corp.</i> , 237 F.3d 349 (4th Cir. 2001).....	64
<i>EEOC v. St. Joseph's Hosp. Inc.</i> , 842 F.3d 1333 (11th Cir. 2016).....	64, 70
<i>EEOC v. U.S. Steel Corp.</i> , 2013 WL 625315 (W.D. Pa. 2013) .....	104
<i>EEOC v. United Airlines, Inc.</i> , 693 F.3d 760 (7th Cir. 2012), cert. den'd, 133 S.Ct. 2734 (May 28, 2013) .....	63, 65
<i>EEOC v. Watkins Motor Lines</i> , 463 F.3d 436 (6th Cir. 2006).....	16
<i>Elledge v. Lowe's Home Cntrs., LLC</i> , 979 F.3d 1004 (4th Cir. Nov. 18, 2020).....	64, 66

<i>Eshleman v. Patrick Industries Inc,</i> No. 19-1403 (3rd Cir. May 29, 2020) .....	25
<i>Exby-Stolley v. Bd. of Cnty Commissioners, Weld Cnty, CO,</i> No. 16-01412 (Tenth Cir. Oct. 28, 2020).....	108
<i>Faidley v. United Parcel Service of America, Inc.,</i> 889 F.3d 933 (8th Cir. 2018).....	39
<i>Fisher v. Nissan North America, Inc,</i> No. 18-5847 (6th Cir. Feb. 27, 2020).....	65
<i>Flowers v. So. Reg'l Physician Serv.,</i> 247 F.3d 229 (5th Cir. 2001).....	99
<i>Fox v. Gen. Motors Corp.,</i> 247 F.3d 169 (4th Cir. 2001).....	98, 99
<i>France v. Johnson,</i> 795 F.3d 1170 (9th Cir. 2015).....	48
<i>Francis v. City of Meriden,</i> 129 F.3d 281 (2d Cir. 1997).....	16, 50
<i>Frankes v. Peoria School District No. 150,</i> No. 15-3091 (7th Cir. Sept. 26, 2017).....	41, 101
<i>Fratello v. Archdiocese of N.Y.,</i> 863 F.3d 190 (2d Cir. 2017).....	10
<i>Fricke v. E.I. Dupont Co.,</i> No. 05-6521, 2007 U.S. App. LEXIS 2425 (6th Cir. 2007) .....	18
<i>Fulp v. Columbiana Hi Tech, LLC,</i> No. 116-1169, 2018 WL 1027159 (M.D.N.C. Feb. 21, 2018).....	29
<i>Funmilayo Adetimehin v. Healix Infusion Therapy, Inc.,</i> No. 4:14-cv-00334 (S.D. Tex. 2015) .....	28
<i>Gambini v. Total Renal Care,</i> 486 F.3d 1087 (9th Cir. 2007).....	53
<i>Garity v. APWU Nat'l Labor Org.,</i> No. 18-15633 (9th Cir. Dec. 24, 2020) .....	109
<i>Garner v. Chevron Phillips Chem. Co. L.P.,</i> 834 F.Supp.2d 528 (S.D. Tex. 2011) .....	59

<i>Gaul v. Lucent Tech., Inc.</i> , 134 F.3d 576 (3d Cir. 1998).....	19
<i>Graves v. Finch Pruyn</i> , 18 AD Cas. (BNA) 193, 196 (2d Cir. 2006) .....	88
<i>Grussgott v. Milwaukee Jewish Day Sch., Inc.</i> , 882 F.3d 655 (7th Cir. 2018), cert. denied, 139 S. Ct. 456 (2018) .....	10
<i>Hargett v. Fl. Atlantic Univ. Bd. of Trustees</i> , No. 15-cv-80349 (S.D. Fla. 2016).....	19
<i>Harrison v. Proctor &amp; Gamble Distributing, LLC</i> , No. 1:15-cv-00514 (S.D. Ohio, Nov. 17, 2017).....	68
<i>Harty v. City of Sanford</i> , 2012 U.S. Dist. LEXIS 111121 (M.D. Fla. 2012).....	26
<i>Haschmann v. Time Warner Entm't</i> , 151 F.3d 591 (7th Cir. 1998).....	84
<i>Hedrick v. W. Reserve Care Sys.</i> , 355 F.3d 444 (6th Cir. 2004).....	64
<i>Hernandez-Gil v. Dental Dreams, LLC</i> , No. 13-1141 (D. N.M. Mar. 28, 2018).....	74
<i>Huber v. Wal-Mart Stores</i> , 486 F.3d 480 (8th Cir. 2007).....	64, 65
<i>Hudson v. MCI Telecomm. Corp.</i> , 87 F.3d 1167 (10th Cir. 1996).....	85, 86
<i>Hummel v. County of Saginaw</i> , 118 F. Supp. 2d 811 (E.D. Mich. 2000), <i>aff'd</i> , 2002 U.S. App. LEXIS 14684 (6th Cir. 2002) .....	86
<i>Hustvet v. Allina Health Sys.</i> , 910 F.3d 399 (8th Cir. 2018).....	82, 83
<i>Jackson v. Oil-Dri Corp. of Am.</i> , No. 3:16-CV-189-DMB-RP, 2018 WL 1996474 (N.D. Miss. Apr. 27, 2018) .....	30
<i>Jon Higgins v. Union Pacific Railroad Co.</i> , 931 F.3d 664 (8th Cir. July 24, 2019) .....	41
<i>Jose DeFreitas v. United Airlines, Inc.</i> , No. 19-C-3397 (N.D. Ill. Feb. 11, 2020).....	80

<i>Justin Wild v. Carriage Funeral Holdings, Inc.,</i> (A-91-18) (082836), Mar. 10, 2020 .....	21, 106
<i>Katz v. Adecco USA, Inc.,</i> 845 F.Supp.2d 539 (S.D.N.Y. 2012) .....	23
<i>Laird v. Fairfax County,</i> 18-2511 (4th Cir. Oct. 23, 2020) .....	44
<i>Lanman v. Johnson Cnty.,</i> 393 F.3d 1151 (10th Cir. 2004) .....	98
<i>Larson v. Oregonian Publ'g Co. LLC,</i> 3:17-CV-01040-AC, 2018 WL 3849789 (D. Or. Aug. 13, 2018) .....	47
<i>Lewis v. City of Union City,</i> 918 F.3d 1213 (11th Cir. 2019) .....	111
<i>Lincoln v. BNSF Railway Co.,</i> 900 F.3d 1166 (10th Cir. 2018) .....	64
<i>Lumar v. Monsanto Co.,</i> No. 19-30561 (5th Cir. Feb. 27, 2020) .....	18
<i>Maddox v. University of Tenn.,</i> 62 F.3d 843 (6th Cir. 1995) .....	52
<i>Maggio v. Konica-Minolta Bus. Solutions,</i> 578 F. Supp. 2d 969 (N.D. Ill. 2008) .....	99
<i>Mauerhan v. Wagner Corp.,</i> No. 09-4179, 2011 U.S. App. LEXIS 7952 (10th Cir. 2011) .....	15
<i>Mayorga v. Alorica, Inc.,</i> 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. 2012) .....	14
<i>McAllister v. Innovation Ventures, LLC,</i> No. 20-1779 (7th Cir. Dec. 30, 2020) .....	86
<i>Mestas v. Town of Evansville, Wy.,</i> 786 F.App'x 153 (10th Cir. Sept. 6, 2019) .....	77
<i>Micari v. Trans World Airlines,</i> 43 F. Supp. 2d 275 (E.D.N.Y. 1999), <i>aff'd mem.</i> , 205 F.3d 1323 (2d Cir. 1999) .....	84
<i>Michael Booth v. Nissan North Am., Inc.,</i> No. 18-5985 (6th Cir. Jun. 7, 2019) .....	35

<i>Michael Murry v. Mayo Clinic,</i> 934 F.3d 1101 (9th Cir. Aug. 20, 2019) <i>cert. denied</i> .....	111
<i>Mielnicki v. Wal-Mart Stores, Inc.,</i> 738 Fed. Appx. 947 (10th Cir. 2018) .....	40
<i>Mitchell v. Pilgrim’s Pride Corp.,</i> 817 Fed.App’x 701 (June 1, 2020).....	110
<i>Mitchell v. United States Postal Service, et al.,</i> 738 Fed. Appx. 838 (6th Cir. 2018) .....	57
<i>Molina v. DSI Renal, Inc.,</i> 840 F. Supp. 2d 984 (W.D. Tex. 2012) .....	24
<i>Morriss v. BNSF Railway Co.,</i> 817 F.3d 1104 (8th Cir. 2016), <i>cert. den’d</i> 137 S.Ct. 256 (Oct. 3, 2016) .....	17, 23
<i>Mundo v. Sanus Health Plan,</i> 966 F. Supp. 171 (E.D.N.Y. 1997).....	18
<i>Munoz v. Selig,</i> 1:16-cv-03924 (11th Cir. Dec 04, 2020) .....	27
<i>Myers v. Hose,</i> 50 F.3d 278 (4th Cir. 1995).....	85
<i>Natofsky v. City of N.Y.,</i> 921 F.3d 337 (2d. Cir. Apr. 18, 2019) <i>cert. denied</i> .....	112
<i>Norton v. Assisted Living Concepts, Inc.,</i> 786 F. Supp. 2d 1173 (E.D. Tex. 2011) .....	24
<i>Nowak v. St. Rita High Sch.,</i> 142 F.3d 999 (7th Cir. 1998).....	85
<i>Nunies v. HIE Holdings, Inc.,</i> 908 F.3d 428 (9th Cir. 2018).....	50
<i>Ostrosky v. Department of Rehabilitation,</i> No. CIV S-07-0987 EFB PS, 2009 WL 3011578 (E.D. Cal. 2009).....	99
<i>Our Lady of Guadalupe School v. Morrissey-Berru,</i> No. 19-267 (July 8, 2020) .....	6
<i>Parker v. Columbia Pictures,</i> 204 F.3d 326 (2d Cir. 2000).....	88



<i>Parker v. Crete Carrier Corp.</i> , 158 F.Supp.3d 813 (D. Neb. 2016) .....	104
<i>Parker v. Crete Carrier Corp.</i> , 839 F.3d 717 (8th Cir. Oct. 12, 2016), <i>cert. den'd</i> , 2017 WL 661743 (April 3, 2017) .....	17, 104
<i>Pegues v. Mississippi State Veterans Home</i> , 736 Fed. Appx. 473 (5th Cir. 2018) .....	81
<i>Popeck v. Rawlings Company, LLC</i> , No. 19-5092 (6th Cir. 2019).....	43
<i>Provenzano v. Thomas Jefferson Univ. Hosp.</i> , 115 AD Cas. (BNA) 1112 (E.D. Pa. 2004) .....	88
<i>Pryor v. Americold Logistics, LLC.</i> , 2019 WL 5722223 (S.D. Ind. 2019).....	36
<i>Pugliese v. Ariz.</i> , No. 98 16448, 1999 U.S. App. LEXIS 38031 (9th Cir. 1999) (unpublished).....	63
<i>Rascon v. US West Comms.</i> , 143 F.3d 1324 (10th Cir. 1998).....	84
<i>Richard Turner v. Phillips 66 Company</i> , No. 19-5030 (10th Cir. Oct. 16, 2019) .....	104
<i>Richardson v. Chi. Transit Auth.</i> , No. 1:16-cv-03027 (N.D. Ill. 2017).....	17, 49
<i>Riley v. Fry</i> , No. 98 C 7584, 2000 U.S. Dist. LEXIS 14541 (N.D. Ill. 2000) (unpublished) .....	86
<i>Ruggiero v. Mount Nittany Med. Cntr.</i> , 736 Fed. Appx. 35 (3d Cir. 2018) .....	82
<i>Saley v. Caney Fork, LLC</i> , 2012 U.S. Dist. LEXIS 112862 (M.D. Tenn. 2012) .....	49
<i>Sch. Bd. of Nassau Cnty. v. Arline</i> , 480 U.S. 273 (1987) .....	50
<i>Schmidt v. Safeway, Inc.</i> , 864 F. Supp. 991 (D. Or. 1994).....	63
<i>Sechler v. Modular Space Corp.</i> , 2012 U.S. Dist. LEXIS 54478 (S.D. Tex. 2012).....	24

<i>Sepulveda-Vargas v. Carribean Restaurants, LLC</i> , 888 F.3d 549 (1st Cir. 2018) .....	34
<i>Sessoms v. Trustees of Univ. of Pennsylvania</i> , 739 Fed. Appx. 84 (3d Cir. 2018) .....	70
<i>Shaver v. Indep. Stave Co.</i> , 350 F.3d 716 (8th Cir. 2003) .....	98
<i>Shell v. Burlington Northern Santa Fe Railway Company</i> , 941 F.3d 331 (7th Cir. Oct. 29, 2019) .....	22
<i>Shell v. Smith</i> , No. 14-2958 (7th Cir. 2015) .....	32
<i>Smith v. Flying J</i> , No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010) .....	2
<i>Smith v. Midland Brake, Inc.</i> , 180 F.3d 1154 (10th Cir. 1999) .....	64
<i>Sutton v. United Airlines, Inc.</i> , 527 U.S. 471, 119 S. Ct. 2139 (1999) .....	26
<i>Taylor v. Pepsi Cola Co.</i> , 196 F.3d 1106 (10th Cir. 1999) .....	84
<i>Terrell v. USAir</i> , 132 F.3d 621 (11th Cir. 1998) .....	64
<i>Tex. Dept. of Transp.</i> , 577 S.W.3d 641 (Tex.App.—Austin, May 9, 2019, pets. for rev. granted Aug. 28, 2020) .....	78
<i>Toyota Motor Mfg. v. Williams</i> , 534 U.S. 184 (2002) .....	23
<i>Tyndall v. National Education Centers, Inc.</i> , 31 F.3d 209 (4th Cir. 1994) .....	95
<i>Vande Zande v. State of Wisconsin Department of Administration</i> , 44 F.3d 538 (7th Cir. 1995) .....	95
<i>Vaughn v. Parkwest Med. Ctr.</i> , 716 F. App'x 428 (6th Cir. 2017) .....	61
<i>Velez v. Sprint/United Mgmt. Co.</i> , No. 6:19-cv-00987 (M.D. Fl. Dec. 15, 2020) .....	55

<i>Waggoner v. Olin Corp.</i> , 169 F.3d 481 (7th Cir. 1999).....	85
<i>Walsh v. United Conveyor Corp.</i> , No. 01 C 2279, 2002 U.S. Dist. LEXIS 4387 (N.D. Ill. 2002) (unpublished) .....	84, 85
<i>Walsh v. United Parcel Serv.</i> , 201 F.3d 718 (6th Cir. 2000).....	84
<i>Wernick v. Fed. Reserve Bank</i> , 91 F.3d 379 (2d Cir. 1995).....	64
<i>Williams v. United Parcel Services, Inc.</i> , 2012 U.S. Dist. LEXIS 23080 (D.S.C. 2012) .....	32, 38
<i>Yochim v. Carson</i> , 935 F.3d 586 (7th Cir. Aug. 15, 2019).....	76
<i>Zenor v. El Paso Healthcare Sys.</i> , 176 F.3d 847 (5th Cir. 1999).....	15

## **I. INTRODUCTION**

The Americans with Disabilities Act of 1990 (the “Act” or the “ADA”) protects individuals with disabilities from discrimination in employment, access to facilities, and access to services. Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities (“QID’s”) in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.

On September 25, 2008, President Bush signed the ADA Amendments Act (“ADAAA”). The ADAAA reversed various Supreme Court decisions interpreting Title I of the ADA and required a broader application of the ADA. Among other things, the ADAAA bans lawsuits by non-disabled individuals for reverse disability discrimination, clarifies the Equal Employment Opportunity Commission’s authority under the ADA to develop and implement binding regulations, and amends the definition of disability for claims under the Rehabilitation Act. The amendments, which significantly change the ADA, became effective on January 1, 2009.

In September 2009, the EEOC issued proposed regulations implementing the ADAAA. On March 25, 2011, the EEOC published final regulations in the Federal Register. The regulations became effective on May 24, 2011.

The ADAAA’s broad coverage mandate, the expanded definition of “major life activity,” the virtual elimination of mitigating measures and the easing of the burden of plaintiffs to meet the “regarded as disabled” standard, have contributed to a surge in disability discrimination claims filed with the EEOC and the courts. See Appendix A, which shows that since the passage of the ADAAA, disability-based charges have remained at higher levels than prior to the ADAAA. Between 2015 and 2017, the average number of disability-based claims brought per year was at its highest levels, between 26,838 and 28,073. In the most recent three years (2018-2020), however, the annual average has been slightly lower, between 24,237 and 24,065, approximately 14 percent below the all-time high of 28,073 in 2016.

## **II. EEOC REGULATIONS IMPLEMENTING THE ADAAA**

The EEOC issued final rules implementing the ADAAA on March 25, 2011. The EEOC also concurrently issued a fact sheet, questions and answers regarding the final rule, and guidance for small businesses. The following is a summary of the significant provisions of the rule:

### **A. Construction (29 C.F.R. § 1630.1(c)(4))**

Under this section, the EEOC emphasizes that the ADA now has “broad application”:

- a. The purpose of the amendments was to make it easier for people with disabilities to obtain protection under the ADA.
- b. Consistent with the purpose of reinstating a broad scope of protection, the definition of “disability” is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.
- c. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

d. The question of whether an individual meets the definition of disability should not demand extensive analysis.

## **B. Definition of Disability (29 C.F.R. § 1630.2(g))**

This section explains that the definition of the term “disability” was preserved, but “redefined”, by the ADAAA. For clarity, the EEOC refers to the first prong as “actual disability” to distinguish it from the other two prongs—a record of a disability and “regarded as” disabled. This section clarifies that:

a. Being “regarded as” having an impairment means that the individual “has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both ‘transitory and minor.’”

b. An individual may establish coverage under any one or more of the three prongs.

c. Where claims do not involve a failure to accommodate or the need for a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Claims not involving reasonable accommodation can be made solely under the “regarded as” prong, which requires no showing of an impairment that substantially limits a major life activity or a record of such an impairment.

## **C. Definition of Physical or Mental Impairment (29 C.F.R. § 1630.2(h))**

In this section, the EEOC emphasized that the enumeration of bodily systems provided is not exhaustive, just as the list of mental impairments is not exhaustive. The EEOC has also supplemented these definitions by:

a. Adding the immune and circulatory systems to the list of major bodily functions.

b. Changing the term mental retardation to “intellectual disability.”

## **D. Definition of Major Life Activities (29 C.F.R. § 1630.2(i))**

In this section, the EEOC emphasized that the list of major life activities enumerated is not exhaustive. Changes in this section include:

a. The inclusion of the following additional enumerated major life activities: eating, sleeping, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating, and interacting with others. Some of these activities were rejected by the courts as not constituting a major life activity (see *Smith v. Flying J*, No. 09-433, 2010 U.S. Dist. LEXIS 131393 (D.N.M. 2010) (“As an initial matter, ‘concentration’ is not considered a major life activity by the Tenth Circuit.”); *Battle v. Mineta*, 387 F. Supp. 2d 4 (D.D.C. 2005) (holding that the ability to interact positively with others is not a major life activity, being generally “too undefined, indistinct, and unlike the sort of activities that have been held by other courts to be major life activities”)).

b. The inclusion of “major bodily functions” (including the operation of an individual organ within a body system) as a major life activity, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

c. Indicating that the term “major” as a descriptive of life activities is not to be interpreted strictly to create a demanding standard for disability.

d. Emphasizing that whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

#### **E. Definition of “Substantially Limits” (29 C.F.R. § 1630.2(j))**

The EEOC declined to follow the instructions of Congress to affirmatively define “substantially limits.” Instead, the EEOC set out the parameters in nine rules of construction “that must be applied in determining whether an impairment substantially limits a major life activity.” The nine rules are summarized below:

a. The term must be broadly construed in favor of expansive coverage, to the maximum extent permitted under the ADA. “Substantially limits” is not meant to be a demanding standard.

b. An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. However, not every impairment will constitute a disability.

c. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

d. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” must be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” that applied prior to the ADAAA.

e. The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in the regulation is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

f. The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses may be considered.

g. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

h. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

i. The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage does not apply to the definition of disability under the “actual disability” prong or the

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