FUTURE DISABILITIES AND EMPLOYMENT DISCRIMINATION LAW

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I. INTRODUCTION

The Americans With Disabilities Act ("ADA") was enacted in 1990 "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability."[1] Title I of the ADA prohibits employers from discriminating against a disabled individual who is otherwise qualified for the position in question because of that individual's disability.[2] A qualified individual will meet the disabled requirement if the individual is "regarded as" having an impairment.[3] While Congress intended for ADA claims to focus on whether discrimination occurred as opposed to an extensive analysis of whether there is a disability, courts still continue to adjudicate the interpretation of "disability" and thus, their decisions have denied protections to individuals "regarded as" disabled.[4]

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[1] Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101); *see also* ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 48 (1995) (stating that the ADA is captioned as "[a]n Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.").

[2] *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); *see also* 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."); *see also Title 1 Guidelines*, Florida Courts, https://www.flcourts.org/Administration-Funding/Court-Administration-About-Us/Title-1-Guidelines (last visited Dec. 31, 2021).

[3] *See* 42 U.S.C. § 12102(1)(C) (defining disability as including an individual who is "regarded as" having a disability).

[4] *See* Richardson v. Chi. Transit Auth., 926 F.3d 881, 887–88 (7th Cir. 2019) (joining the Second, Sixth, and Eighth Circuits holding that obesity is not a disability protected under the ADA); *see also* Linda Dwoskin & Melissa Squire, *The Top FMLA And ADA Decisions Of 2019: Part 1*, LAW360 (Jan. 9, 2020 at 1:01 PM), https://www.law360.com/articles/1231688/the-top-fmla-and-ada-decisions-of-2019-part-1 ("The courts continue to be active in the FMLA and ADA areas.").

Title I specifically prohibits employers, employment agencies, and labor unions from discriminating against qualified individuals with a disability in hiring, firing, demotion, or promotion in the workplace.[5] A qualified individual is one who can perform the essential functions of the job with or without reasonable accommodation.[6] Under the ADA, a qualified individual will meet the disabled requirement if: (1) "a physical or mental impairment" exists "that substantially limits one or more of the major life activities[;]" (2) the individual has "a record of such an impairment[;]" or (3) the individual is "[']regarded as[']having such an impairment[.]"[7] An individual is "regarded as" having a disability when he or she is subjected to adverse employment action based on "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[8]

Two recent ADA cases have held that the ADA's "regarded as" prong does not cover a situation where an employer views an applicant as at risk for potentially developing a future disability.[9] In *Shell v. Burlington Northern Santa Fe Railway Co.*, the court held that the ADA "regarded as" prong does not cover a situation where an employer takes adverse action against an applicant based on the risk that he or she may develop a qualifying disability in the future.[10] Throughout his 33 years employed at the Chicago's Corwith Rail Yard ("railyard"), Ronald Shell ("Shell") performed different positions including groundsman, driver, and crane operator.[11] Burlington Northern Santa Fe Railway Co.

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[5] *See* 42 U.S.C. § 12111(2) (defining the term "covered entity"); *see also* BURGDORF, *supra* note 1, at 53 (discussing what entities must comply with the ADA and stating the general rule that those entities may not discriminate against an individual on the basis of a disability in regards to the privileges of employment).

[6] *See* 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."); *see also The ADA: Your Employment Rights as an Individual with a Disability*, THE U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N (Jan. 1, 1992), https://www.eeoc.gov/facts/ada18.html (discussing that a qualified individual must first "satisfy the employer's requirements for the job, such as education, employment experience, skills or licenses" and second, "must be able to perform the essential functions of the job with or without reasonable accommodation"). *But see* 42 U.S.C. § 12113(b) (explaining that a reasonable accommodation is not required if the individual with a disability "shall not pose a direct threat to the health or safety of other individuals in the workplace").

[7] 42 U.S.C. § 12102(1); *see also* JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 954 (2019) (listing the prohibited acts employers must refrain from in complying with the ADA provisions).

[8] *See* 42 U.S.C. § 12102(3)(A) (defining the "regarded as prong"); *cf.* Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 336 (2019) (defining the "regarded as prong" but holding that having a physical or mental impairment only encompasses current impairments, not future ones).

[9] *See Shell*, 941 F.3d at 336 (holding that the "regarded as" prong only encompasses current impairments); *see also* EEOC v. STME, LLC, 309 F. Supp. 3d 1207, 1213 (2018) (declining "to expand the 'regarded as' disabled definition in the ADA to cover cases . . . in which an employer perceives an employee . . . only [with] the potential to become disabled in the future due to voluntary conduct").

[10] *See Shell*, 941 F.3d at 336 (finding that the risk of future disabilities is not protected under the ADA).

[11] *See id.* at 333–35 (discussing the background and facts of Shell's case).

("BNSF") became the owner of the railyard in 2010 and, shortly after, assumed the railyard's operations.[12] Subsequently, Shell was laid off but was invited to apply for new positions, subject to a medical evaluation.[13] Shell applied to work as an "intermodal equipment operator."[14] Although this new position was considered a "safety-sensitive" position, it required Shell to complete essentially the same work Shell performed in his previous 33 years at the railyard, that of groundsman, a hostler, and a crane operator.[15]

Interestingly, BNSF denied Shell the employment opportunity because of his risk of developing future qualifying disabilities under the ADA.[16] Specifically, Shell had a body-mass index of 47.5, categorizing him as having Class III obesity.[17] BNSF's policy forbids hiring applicants for safety-sensitive positions if the applicant's BMI was 40 or greater because of the associated higher risk of developing certain future conditions such as sleep apnea, diabetes, and heart disease, which could cause sudden incapacitation while operating dangerous equipment on the job.[18] For these reasons, Shell was denied the position.[19] Accordingly, Shell sued BNSF alleging that its refusal to hire him constituted discrimination under the "regarded as" prong.[20]

Despite the EEOC's contrary position and many doctors opining otherwise, several circuits have held that obesity alone does not qualify as a disability under the ADA unless it is caused by an underlying physiological disorder.[21]

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[12] *See id*. at 333 (stating that BNSF owned the Corwith Rail Yard by 2010 and assumed its operations itself later that year).

[13] *See id*. at 334 (noting that although BNSF's takeover ended the employment of a lot of employees, like Shell, who worked for the operations company prior to BNSF's takeover, BNSF invited those employees to apply for new positions).

[14] *See id*. (stating that Shell applied to work as an intermodal equipment operator, which is classified as a safety-sensitive position "because it requires working on and around heavy equipment").

[15] *See id*. (defining a groundsman as one "who climbs on railcars to insert and remove devices that interlock the containers; a hostler as one "who drives the trucks that moves trailers; and a crane operator as one "who operates the cranes used to load and unload containers").

[16] *See* Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 336 (2019) (stating that after BNSF applied their own hiring policy for safety-sensitive positions, BNSF decided that Shell was not medically qualified for the job).

[17] *See id*. (asserting that although the medical history questionnaire described Shell's overall health as very good and did not report any medical conditions, "the physical exam revealed that Shell was 5' 10" tall and weighed 331 pounds, translating to a body-mass index of 47.5").

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> BNSF does not hire applicants for safety-sensitive positions . . . if their BMI is 40 or greater . . . . BNSF says that the reasoning behind its BMI policy is that prospective employees with class III obesity are at a substantially higher risk of developing certain conditions like sleep apnea, diabetes, and heart disease and the unpredictable onset of those conditions can result in sudden incapacitation.

See id.

[19] *See id*. (noting that although Shell was disqualified, he was told that he could be reconsidered for the position "if he lost at least 10% of his weight, maintained the weight loss for at least 6 months, and submitted to further medical evaluations if requested").

[20] *See id*. (alleging that BNSF's refusal to employ Shell was a clear indication of prejudice on the basis of a perceived disability in violation of the ADA).

[21] *See* Richardson v. Chicago Transit Auth., 926 F.3d 881 (7th Cir. 2019) (holding that obesity alone

Consequently, in a motion for summary judgment, BNSF argued that Shell's Class III obesity was not a disability within the meaning of the ADA because his obesity was not a qualifying impairment and no evidence suggested that BNSF regarded him as presently having such an impairment.[22] Alternatively, BNSF argued that even if denying Shell employment constituted discrimination, its BMI policy fell within the ADA's business-necessity defense.[23] The district court denied BNSF's motion because even though obesity is not a disability under the ADA, a question of whether BNSF regarded Shell as having the allegedly obesity-related conditions of sleep apnea, heart disease, and diabetes (all of which qualify as disabilities under the ADA) remained.[24] The court then concluded that the plain language of the ADA prohibits discrimination only on the basis of an *existing or current impairment* and thus, Shell's disqualification based on BNSF's fears of Shell developing *future* impairments was not a violation of the ADA, even though he was presently qualified to perform the job.[25]

Afterward, relying on the outcome in *Shell*, the court in *Equal Employment Opportunity Commission v. STME,* also declined to expand the "regarded as" definition in the ADA to cover instances where an employer perceives an employee to be presently healthy but takes an adverse employment action due to the potential that the applicant may become disabled in the future.[26] In *STME*, Kimberly Lowe ("Lowe") was employed as a massage therapist by Massage Envy for two years when she requested time off to visit her sister in Ghana,

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is not a physical impairment under the ADA unless accompanied by evidence that the obesity is caused by an underlying physiological disorder or condition). *But see* Natascha B. Reisco, *Obesity is a Disability. Wait: Is Obesity a Disability?*, SEYFARTH (Jan. 16, 2014), https://www.laborandemploymentlawcounsel.com/2014/01/obesity-is-a-disability-wait-is-obesity-a-disability/ (discussing that the American Medical Association declared obesity is a disease and not just a medical condition, and this "would encourage a change in the way people perceive, and that the medical community deals, with obesity. Obesity for adults is defined as having a body mass index (BMI) of 30 or higher."); *see also* Brief for Casey Taylor, et al. As Amicus Curiae Supporting Appellants at 6, Taylor v. Burlington N. R.R. Holdings, Inc., 904 F.3d 846 (9th Cir. 2018) (No. 16-35205) (quoting a sentence from a previous EEOC which correctly interpreted the EEOC guidelines).

[22] *See Shell*, 941 F.3d at 333 (discussing BNSF arguments in its summary judgment motion).

[23] *See id.* at 334 ("BNSF asserted that even if its refusal to hire Shell reflected discrimination, its BMI policy fit within the ADA's business-necessity defense.").

[24] *See id.* (denying BNSF's motion for summary judgment and determining that although Shell's disability was not a qualifying impairment, a disputed factual question existed as to whether BNSF "regarded Shell as having the allegedly obesity-related conditions of sleep apnea, heart disease, and diabetes," which are covered impairments under the ADA).

[25] *See* EEOC v. BNSF Ry. Co., 902 F.3d 916, 923 (9th Cir. 2018) (noting that the parties must have regarded the employee as having a current impairment); *see also* Adair v. City of Muskogee, 823 F.3d 1297, 1306 (10th Cir. 2016) (stating that the employer must have perceived the impairment at the time of the adverse action); *see also* EEOC v. STME, LLC, 938 F.3d 1305, 1315 (11th Cir. 2019) (discussing that the ADA does not cover a case where an employer perceives a person to be presently healthy with only a potential to become ill).

[26] *See STME, LLC*, 938 F.3d at 1315 (holding that the "regarded as" prong does not include cases where an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct).

West Africa.[27] Her request was approved by the manager.[28] However, three days prior to her trip, her manager and one of the establishment's owners terminated Lowe out of fear that she would contract the Ebola virus abroad and spread the virus to employees and clients after returning.[29] Lowe traveled to Ghana.[30]

In November 2014, Lowe filed a charge of discrimination with the EEOC.[31] Two years later and after an investigation, "the EEOC issued a Letter of Determination finding that there was 'reasonable cause' to believe that Massage Envy terminated Lowe's employment because it 'regarded' her as disabled, in violation of the ADA."[32] Massage Envy maintained that the EEOC did not state a valid claim of disability under the "regarded as" provision because at the time of Lowe's termination, the manager did not perceive Lowe as presently having Ebola, and that viewing Lowe to be "predisposed" to becoming disabled in the future does not fall under the protection of the ADA.[33] The EEOC countered that employers can violate the ADA even when they discriminate against an "otherwise healthy individual based upon misconceptions about that person's potential to become disabled in the future."[34] The EEOC relied on various cases which the court found misplaced because all the employers in those cases believed that their employees were *presently* impaired.[35] Accordingly, the court

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[27] *See id*. at 1311 (discussing the background and facts of Lowe's ADA case).

[28] *See id*. (explaining that Lowe's manager had initially approved Lowe's time off request).

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> Owner Wuchko was concerned that Lowe would become infected with the Ebola virus if she traveled to Ghana and would 'bring it home to Tampa and infect everyone.' At that time in 2014, there was an Ebola epidemic in Guinea, Liberia, and Sierra Leone, three other nearby countries in West Africa. According to Wuchko, he was worried about the 'potentially catastrophic consequences that an outbreak of Ebola could pose to America.'

Id.

[30] *See id*. (explaining that Lowe "traveled to Ghana as planned.").

[31] *See id*. (discussing when Lowe filed an action against Massage Envy with the EEOC).

[32] *Id*. (explaining what happened after the EEOC conducted an investigation into Lowe's charge against Massage Envy).

[33] *See STME, LLC*, 938 F.3d at 1311 (stating that Massage Envy contended that the EEOC did not assert a valid claim of disability because the manager perceived Lowe as having the potential to become infected with Ebola in the future, and not has presently having the disease).

[34] Opening Brief for Appellant at 22, EEOC v. STME, 309 F. Supp. 3d 1207 (M.D. Fla. 2018) (No. 18-12277-GG) (arguing that the "regarded as" protections are "particularly necessary to guard employees against misperceptions regarding communicable diseases, given that '[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.' Given this prohibition, Massage Envy undisputedly could not have lawfully terminated Lowe based on a mere belief — whether correct or incorrect — that she had *already* contracted Ebola" when she had not.").

[35] *See* School Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 at 289 (stating that the employer's fears were based on its misperception that her diagnosis of tuberculosis was currently contagious); *see also* EEOC v. Am. Tool & Mold, Inc., 21 F. Supp. 3d 1268, 1270 (M.D. Fla. 2014) (finding that the job applicant fit the definition of being "regarded as" disabled because after the employer found out about the applicant's prior back surgery, the employer regarded the applicant as currently unfit to perform the job). *But see* Valdez v. Minnesota Quarries, Inc., No. 12-CV-0801 PJS/TNL, 2012 WL 6112846 (D. Minn. Dec. 10, 2012) (holding that the employee did not fit the "regarded as" definition

concluded that the ADA does not protect against discrimination based on the perception of a potential future disability.[36]

Other cases such as *Sutton* have given a narrow interpretation to the ADA's "regarded as" prong and have shielded employers from liability for their discrimination on the basis of a disability.[37] Congress amended the ADA in 2008 to reverse Supreme Court decisions, like *Sutton*, that narrowly interpreted the term "disability," which in turn made it extremely difficult or impossible for individuals to bring a claim under the "regarded as" provision.[38] The holdings in *Shell* and *STME* are problematic because they allow an employer to argue the person doesn't presently have a disability and yet base its decision on that very concern.[39]

This Article will first discuss the purpose of the ADA, the importance of the 2008 ADA Amendments, and how recent decisions will once again deny protections to individuals who are "regarded as" disabled.[40] Part II describes the evolution of disability law in the form of the Rehabilitation Act, the ADA (Title I – Employment), and its amendments.[41] Part III analyzes the "regarded as" prong of the ADA, the *Sutton* case which narrowly construed the protections afforded by the ADA, how the *Sutton* decision negatively impacted individuals discriminated against on the basis of a "disability," and how the 2008 ADA amendments reversed these decisions to broaden the scope of the ADA and reinstate its purpose.[42] This section also discusses the impacts *Shell* and *STME*

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when the employer terminated him based on a perception that the employee was currently infected with swine flu, a "objectively transitory and minor" disease, which was not considered a disability).

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> The district court declined to expand the ADA's 'regarded as having' prong of the disability to cases like this one, in which an employer fires an employee at a time when it 'perceives [the] employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct.'

See STME, LLC, 938 F.3d at 1313

[37] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999) ("If a person is 'disabled' within the meaning of the Act, she still cannot prevail on a claim of discrimination unless she can prove that the employer took action 'because of' that impairment, 42 U.S.C. § 12112(a), and that she can, 'with or without reasonable accommodation, . . . perform the essential functions' of the job of a commercial airline pilot. . . . Even then, an employer may avoid liability[.]").

[38] *See id*. (explaining the narrow interpretation of the term "disabled").

[39] *See Shell*, 941 F.3d at 336 (holding that the ADA's "'regarded as' prong covers a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future. We hold that it does not."); *see also STME*, 938 F.3d at 1323 (explaining that the United States Court of Appeals for the Eleventh Circuit affirmed the district court's final judgment in favor of Massage Envy because the EEOC failed to state a "regarded as" disabled claim as it did not allege that the employer perceived that the employee had an existing impairment at the time it terminated her employment, and the EEOC failed to state an association discrimination claim under the ADA because it did not plausibly allege that the employer knew that the employee had an association with a specific disabled individual in Ghana when it terminated her employment).

[40] *See infra* Part II–V.

[41] *See infra* Sections II.A–C.

[42] *See infra* Sections III.A–C.

will have on individuals seeking protection under the "regarded as" prong.[43] Part IV proposes amending the ADA to reaffirm the broad scope of the ADA by including protection of future disabilities and creating an affirmative action program to increase the employment rates for Americans living with disabilities.[44] Part V concludes by demonstrating how this solution is consistent with the ADA's purpose.[45]

II. BACKGROUND

A. REHABILITATION ACT

The first major comprehensive federal law which sought to protect the rights of individuals with disabilities was the Rehabilitation Act of 1973 ("Rehab. Act").[46] The Rehab. Act, as amended, prohibits discrimination on the basis of disability by federal employees, federal contractors, and any program receiving federal financial assistance.[47] Notably, the Rehab Act shares the same standards for determining employment discrimination with Title I of the ADA discussed in a subsequent section.[48] Specifically, Section 504 of the Rehab Act states "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]"[49]

Under the Rehab. Act, an individual with a disability is defined as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities," "has a record of such an impairment," or "is [']regarded as['] having such an impairment."[50] An individual is qualified if "the person satisfies the job-related requirements of the position he or she holds (or is applying for) and can perform the essential functions, with or

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[43] *See infra* Section III.D.
[44] *See infra* Part IV.
[45] *See infra* Part V.
[46] *See* LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 31 (Jon Starr et al. eds., 1992) (noting that "[i]n 1973, the first major comprehensive federal law involving rights of people with disabilities went into effect[,]" referring to the Rehab Act).
[47] *See* FRIEDMAN, *supra* note 7, at 953 ("This statute, however, was of limited usefulness because it applies only to the federal government, U.S. Postal Service, federal contractors and entities receiving federal funds."); *see also* Castellano v. City of N.Y., 946 F. Supp. 249. 252 (S.D.N.Y. 1996), *aff'd* 142 F.3d 58 (2d Cir. 1998). (asserting that the Rehab Act prohibited discrimination by employers or agencies receiving federal financial assistance).
[48] *See The Rehabilitation Act of 1973 (Rehab Act)*, EARN, (Apr. 20, 2020, 3:14 PM), https://askearn.org/topics/laws-regulations/rehabilitation-act/ ("The standards for determining employment discrimination under the Rehab Act are the same as those used in Title I of the ADA; it protects 'qualified individuals with disabilities.'").
[49] 29 U.S.C. § 794 (2021); *see also* BURGDORF, *supra* note 1, at 48 (outlining the protections and requirements under Section 504 of the Rehab Act).
[50] 29 U.S.C. § 705(20)(A)–(B) (2021).

without reasonable accommodation."[51] Still, the Rehab Act only applied to programs receiving federal funding and as a result, many individuals in the private sectors were left without protections against disability-based employment bias.[52] This limitation prevented protection to disabled individuals in the private sector for many years and it was not until the ADA was enacted in 1990 that broader protection became available.[53]

B. THE AMERICANS WITH DISABILITIES ACT

There were many attempts throughout the mid-1980s to amend the Civil Rights Act of 1964 to expand its coverage to people with disabilities.[54] However, these efforts were opposed due to fear that amending the Civil Rights Act would open the bill to weakening changes.[55] In 1983, the U.S. Commission on Civil Rights noted that although the previous disability protections were modeled on earlier civil rights statutes, the remedies for discrimination on the basis of disabilities "differ in important ways from other types of discrimination."[56] The first proposal in the legal literature which recommended addressing these important differences through a comprehensive federal statute was written in 1984.[57] Two years later, the National Council on Disability ("NCD"), an independent federal agency charged with presenting legislative recommendations to Congress regarding Americans with disabilities, described the many deficiencies of existing civil rights protections for people with disabilities.[58]

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[51] *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979) ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."); *see also The Rehabilitation Act of 1973 (Rehab Act)*, *supra* note 48 ("'Qualified' means the person satisfies the job-related requirements of the position he or she holds (or is applying for) and can perform its essential functions, with or without a reasonable accommodation.").

[52] *See* FRIEDMAN, *supra* note 7, at 953 (expressing how the Rehab Act left employees of a large portion of the private sector without any federal statutory protection against disability-based employment bias).

[53] *See* ROTHSTEIN, *supra* note 46, at 32 (discussing how "a great deal of the private sector was not covered by any comprehensive federal mandate of nondiscrimination on the basis of handicap [including the Rehab Act until the ADA was enacted almost 20 years later].").

[54] *See* BURGDORF, *supra* note 1, at 43 (noting three failed attempts to implement protections for Americans with disabilities).

[55] *See id*. ("[E]fforts were opposed, privately at least, by traditional civil rights groups who feared that opening up the 1964 statute to any substantive amendments might also risk reopening the bill to weakening changes by civil rights opponents and might endanger previous hard-fought legislative victories.").

[56] *Id*. at 44; *see also* Garrity v. Gallen, 522 F. Supp. 171, 206 (D.N.H. 1981) ("Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole[.]").

[57] *See* BURGDORF, *supra* note 1, at 45 (finding the first proposal in the legal literature for a comprehensive federal statute prohibiting disability-bias discrimination was in 1984 and the article recommended to Congress a prohibition of discrimination against individuals with disabilities in all the contexts where "Congress has seen fit to outlaw other forms of discrimination.").

[58] *See id*. at 44 (recognizing key concepts that are necessary to redress disability discrimination, including: "reasonable accommodations, the removal of architecture, transportation, and communication barriers in buildings and other facilities, and different legal standards regarding qualification

The first recommendation made by the NCD declared: "Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of [disability]."[59] The Council suggested the proposed statute to be named the American's with Disabilities Act, which although well received by the President and members of Congress, did not result in any prompt legislative response.[60] To the public's detriment, the 100th Congress expired before any action was taken on the proposed Act.[61]

Subsequently, several revisions and amendments were made to reflect certain compromises and clarifications necessary for approval.[62] And finally, after approval by both the House and Senate, the ADA was enacted on July 26, 1990.[63] President Bush described the Act as a "historic new civil rights Act . . . the world's first comprehensive declaration of equality for people with disabilities."[64] It is imperative to mention that the ADA does not preempt Section 504 of the Rehab Act.[65] In fact, the legislative history of the ADA makes clear that

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standards and statistical disparities."); *see also*, *Righting the Americans with Disabilities Act*, (Dec. 1, 2004), NAT'L COUNCIL ON DISABILITY, https://ncd.gov/publications/2004/dec12004 [hereinafter *Righting the ADA*] (stating that the council is "[a]n independent federal agency working with the President and Congress to increase inclusion, independence, and empowerment of all Americans with disabilities.").

[59] BURGDORF, *supra* note, 1 at 45.

[60] *See NCD: Toward Independence*, THE ADA NAT'L NETWORK, (Mar. 10, 2020, 1:40 PM), https://adata.org/ada-timeline/ncd-toward-independence (mentioning that "[t]he National Council . . . issued its report *Toward Independence* . . . [which included] recommendations . . . of a 'comprehensive' equal opportunity law [and] . . . the title 'Americans With Disabilities Act of 1986.'"); *see also* BURGDORF, *supra* note 1, at 45–46 (discussing the National Councils' recommendation to Congress regarding the ADA).

[61] *See* BURGDORF, *supra* note 1, at 46 (noting that the proposal was not enacted in the 100th Congressional session).

[62] *See id*. at 47 (discussing the two major differences between the House and Senate's revisions, including (1) the Senate bill that made the ADA applicable to Congress in an equal manner to covered entities under the statute, and the House bill that exempted Congress; and (2) the Senate's "food handlers' amendment[,]" which allowed employers to transfer employees with HIV infection from food handling positions so long as it did not result in a loss of pay or benefits); *see also ADA Revised, Introduced: 101th Congress ADA Passed Senate*, THE ADA NAT'L NETWORK, (Mar. 10, 2020, 1:40 PM), https://adata.org/ada-timeline/ada-revised-introduced-101th-congress-ada-passed-senate (demonstrating that a revised version of the ADA was introduced by Sen. Harkin and Sen. Durrenberger, Rep. Coelho and Rep. Fish in the 101st Congress which resolved the conflicts between the parties and passed the Senate).

[63] *See* Americans With Disabilities Act, Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101).

[64] George Bush, *Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990* 2 (Jul. 26, 1990), *reprinted in* RECORDS OF THE WHITE HOUSE OFFICE OF COUNSEL TO THE PRESIDENT (GEORGE H. W. BUSH ADMINISTRATION), 1/20/1989 – 1/20/1993.

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> The legislative history of the ADA makes clear that Congress intended that judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA. In many cases, the regulations promulgated pursuant to the ADA have specifically incorporated § 504 regulatory requirements. In the interest of consistency between the two statutes, the Department of Justice has been mandated to ensure consistency in both requirements and enforcement[.]

Congress intended that the judicial interpretation of the Rehab Act be incorporated by reference when interpreting the ADA to prevent "imposition of inconsistent or conflicting standards for the same requirements."[66]

Furthermore, the ADA is categorized into five titles: Title I, Employment; Title II, Public Services; Title III, Public Accommodations and Services Operated by Private Entities; Title IV, Telecommunications Relay Services; and Title V, Miscellaneous Provisions.[67] It is described as an "equal opportunity" act for individuals with disabilities which extends those opportunities or protections in the private sector.[68] The statute lists numerous factual findings for the basis of the Act which closely resembles the findings of the U.S. Commission on Civil Rights.[69] Importantly, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally[,]" and have often had no legal recourse to redress this discrimination.[70]

In accordance with these findings, Congress affirms four purposes for the Act.[71] First, the statute provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"[72] Second, the Act establishes "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]"[73] Thirdly, the Act's function is "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities[.]"[74] The last stated purpose describes the sources of congressional

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See ROTHSTEIN, *supra* note 46.

[66] *See* 42 U.S.C. § 12117(b).

[67] *See An Overview of the Americans with Disabilities Act*, ADA NAT'L NETWORK, https://adata.org/factsheet/ADA-overview (last visited Dec. 31, 2021) ("The ADA is divided into five titles (or sections) that relate to different areas of public life"); *see also Structure of the ADA*, LEGAL ALMANAC: THE AMERICANS WITH DISABILITIES ACT § 1:2 (2012) ("The ADA is divided into five sections, known as "Titles." It provides for equal opportunity for all persons in the areas of employment (Title I); public services (Title II); public accommodations (Title III); and telecommunications (Title IV)").

[68] *See* 42 U.S.C. § 12111(2) (defining covered entities to include the private sector); *see also Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm (last visited Dec. 31, 2021) (describing the ADA as an equal opportunity act for individuals with disabilities by providing the "same opportunities as everyone else to participate in the mainstream of American life – to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services.").

[69] *See* BURGDORF, *supra* note 1 (stating that "[t]he wording of these congressional findings closely tracks findings of the U.S. Commission on Civil Rights" and noting two major factual foundations for the ADA); *see also* 42 U.S.C. §§ 12101(a)(2)–(3) (stating that society has discriminated "against individuals with disabilities" in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services[]").

[70] 42 U.S.C. §§ 12101(a)(4), (6).

[71] *See* 42 U.S.C § 12101(b) (listing the purpose of the ADA Chapter).

[72] *Id*. § 12101(b)(1).

[73] *Id*. § 12101(b)(2).

[74] *Id*. § 12101(b)(3).

authority Congress utilized in enacting the statute, including the Fourteenth Amendment and the Commerce Clause.[75]

i. Title 1: Employment

Title I was implemented in 1992 to provide protection to individuals with disabilities in employment settings and is enforced by the U.S. Equal Employment Opportunity Commission ("EEOC").[76] With few exceptions, employers with 15 or more employees must comply with the ADA.[77] The statute prohibits employers from discriminating against a qualified individual on the basis of a disability in all phases of the employment process.[78] This title was also designed so that individuals with disabilities are not excluded from jobs that they are equally or more qualified to perform than individuals without disabilities.[79] A "qualified individual with a disability" is a person with a disability who can fulfill, with or without reasonable accommodation, the "requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, [who]... can perform the essential functions

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[75] *Id*. § 12101(b)(4); *see also* BURGDORF, *supra* note 1, at 52 (demonstrating that each of the provisions embedded in the Act regulates only activities that are "(1) in an industry that affects commerce, (2) whose operations affect commerce, or (3) engaged in an entity that is covered if the operations of such entity affect commerce.").

[76] *See* ROTHSTEIN, *supra* note 46, at 114 (discussing the history of Title I of the ADA and stating that "[T]itle I of the ADA became effective on July 26, 1992.").

[77] *See* 42 U.S.C. § 12111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."); *see also* 42 U.S.C. §§ 12111(5)(B)(i)–(ii) ("The term 'employer' does not include the United States, corporations wholly owned by the United States government, or an Indian tribe or a bona fide private membership clubs (other than labor organizations) that are tax-exempt organizations under § 501(c) [of the Internal Revenue Code, Title 26.]"); *see also* BURGDORF, *supra* note 1, at 114 ("When Title I of the ADA became effective on July 26, 1992, employers with 25 or more employees were covered under the law" as opposed to "employers with 15 or more employees [who] were covered under the law as of July 26, 1994.").

[78] *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); *see also* 42 U.S.C. § 12211(b) ("[T]he term 'disability' shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."). *But see* Lindsey Conrad Kennedy, *Does ADA Cover Accommodations For Transgender Workers?*, LAW360 (Jan. 16, 2019, 1:53 PM), https://www.law360.com/articles/1119202 ("Gender dysphoria . . . is distinct from the other exceptions listed in Section 12211(b); it qualified as a disability under the ADA because, unlike the condition of simply identifying with a different gender, it can be disabling.").

[79] SUSAN PRINCE, J.D., MSL, FLSA EMPLOYEE EXEMPTION HANDBOOK ¶ 830 (2021), Westlaw 35466122 (discussing the purpose and protections afforded by Title I of the ADA).

of such position."[80] "The possibility of future incapacity, by itself, does not make a person unqualified."[81]

Moreover, the covered entity must make a reasonable accommodation to the individual's disability, except under circumstances where the individual is only "regarded as" having a disability.[82] But before a reasonable accommodation can be made, "an employer first must know the specific tasks the individual will be required to accomplish on the job, the qualification standards and the physical and mental requirements necessary to perform those tasks."[83] Job descriptions are not required by the ADA but are the most common means to provide evidence of what the essential functions of a job are and whether an individual is qualified.[84] These job descriptions cannot aim to exclude an individual with a disability from the job unless the selection criteria used are job related and consistent with business necessity.[85] While the job standards do not need to apply only to the essential functions of the job, the standards are job related when they are a legitimate measure for the specific job for which it is used.[86]

In addition, if an individual's disability or perceived disability impedes their ability to meet these job standards, then the ADA requires the employer to evaluate the individual's qualifications solely on his or her ability to perform the essential functions of the job, with or without reasonable accommodation.[87] Employers are not required to "lower existing production standards applicable to the quality or quantity of work for a given job in considering the qualifications of an individual with a disability" and are not required to hire an individual with a disability over a more qualified applicant without a disability.[88] An employer

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[80] 29 C.F.R. § 1630.2(m) (2021); *see also* 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

[81] PRINCE, *supra* note 79.

[82] *See* 42 U.S.C. § 12111(9) (stating that reasonable accommodations include: "making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."); *see also Title 1 Guidelines, supra* note 2 ("However, an employer only needs to make a reasonable accommodation after the applicant or employee notifies the employer that a disability exists, and accommodation is needed.").

[83] *See* PRINCE, *supra* note 79.

[84] *See id*.

[85] *See id*.

[86] 29 C.F.R. § 1630.2(n)(2)–(3).

[87] PRINCE, *supra* note 79.

[88] *See* FRIEDMAN, *supra* note 7 at 954 (discussing that beyond avoiding adverse action on an individual with a disability, the statute requires a covered entity to make "a reasonable accommodation to the individual's disability. . . that does not impose an undue hardship upon the employer."); *see also The ADA: Questions and Answers*, THE U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N, https://www.eeoc.gov/facts/adaqa1.html (last visited Dec. 31, 2021).

> An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to the existence or consequence of a disability. For example, if two persons apply for a job opening as a typist, one a person with a disability who

is also not required to provide a reasonable accommodation if that action creates an undue hardship on the employer or in circumstances where the person is "regarded as" having a disability.[89]

On the other hand, an employer may require as part of the qualification standards that an individual not pose a direct threat to the health and safety of others or himself, and this standard must apply uniformly to all individuals.[90] If an individual does pose a direct threat, the employer must determine whether a reasonable accommodation would eliminate this risk.[91] If not, the employer may fire or refuse to hire that individual.[92] However, an individual may not be denied an employment opportunity because of a slight risk.[93] When determining whether an individual poses a significant risk of substantial harm to others, the employer should identify the specific risk posed and consider the following four factors: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the

> accurately types 50 words per minute, the other a person without a disability who accurately types 75 words per minute, the employer may hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Id. *But see* Linda Carter Batiste, *Giving Hiring Preference To People With Disabilities*, JOB ACCOMMODATION NETWORK, https://askjan.org/articles/Giving-Hiring-Preference-to-People-with-Disabilities.cfm (last visited Dec. 31, 2021) (quoting an EEOC guideline letter which stated: "Favoring an individual with a disability over a non-disabled individual for purposes of affirmative action in hiring or advancement is not unlawful disparate treatment based on disability, and therefore does not violate Title I of the ADA.").

[89] *See* 42 U.S.C. § 12111(10) ("The term 'undue hardship' means an action requiring significant difficulty or expense."); *see also Title 1 Guidelines, supra* note 2.

> An undue hardship is an action that requires significant difficulty or expense in relation to the size of the employer, the resources available, and the nature of the operation. Whether an accommodation will impose an undue hardship must always be determined case by case. Factors which will be considered are whether the action is: unduly costly, extensive, substantial, disruptive, or would fundamentally alter the nature or operation of the court.

Id.; *see also* § 1630.2(o)(4) ("A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the 'actual disability' prong . . . or 'record of' prong . . . but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the 'regarded as' prong.").

[90] *See* 42 U.S.C. § 12113(b) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."); *see also* 42 U.S.C. § 12111(13) ("The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.").

[91] § 1630.2(r) ("Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.").

[92] *See id*. ("[T]he employer may refuse to hire an applicant or may discharge an employee who poses a direct threat."); *see generally* PRINCE, *supra* note 79.

[93] *See id*. ("An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk.").

imminence of the potential harm."[94] These considerations must rely on objective, factual evidence and are made on a case to case basis.[95]

III. DISCUSSION

There is no doubt that the ADA has positively impacted many areas of life for individuals with disabilities.[96] The ADA has especially improved public accommodations, "access to transportation, access to independent and community living, and [the] public['s] awareness" about disability etiquette since its enactment.[97] Collectively, the ADA's prescriptions have enabled disabled individuals to be more actively engaged in the community, which ultimately improves their self-esteem and how they are perceived by the general public.[98] Even though the ADA has successfully fulfilled its purpose of providing equal

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[94] § 1630.2(r)(1)–(4) (listing the relevant factors in making the determination of whether a substantial risk exists).

[95] § 1630.2.

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Id.

> Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally. Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

29 C.F.R. app. § 1630; *see generally* PRINCE, *supra* note 79.

[96] *See* Jean Crockett, *Fulfilling the Promise of the Americans with Disabilities Act*, THE CONVERSATION (Jul. 24, 2017 at 2:25 PM), https://theconversation.com/fulfilling-the-promise-of-the-americans-with-disabilities-act-81426 ("As we celebrate 27 years of ADA, we can see the significance of this law. It has challenged discrimination and helped remove many barriers so that roughly 56.7 million Americans with disabilities can lead independent lives."); *see also* Lex Frieden, *The Impact of the ADA in American Communities*, THE UNIV. OF TEX. HEALTH SCI. CTR. AT HOUS. 4 (Jul. 23, 2015), http://southwestada.org/html/publications/general/20150715%20ADA%20Impact%20Narrative%20(Rev-Final%20v2).pdf ("[F]rom the perspective of those for whom the law was intended to have the greatest impact – many expectations have been achieved; some would even say the impact of the ADA has exceeded their expectations.").

[97] Frieden, *supra* note 96 at 6 (noting that the greatest ADA impacts have been improvements in access to public accommodations and mentioning other significant improvements, including: "transportation, access to independent and community living, and public awareness about the ADA and disability etiquette.").

[98] *See id*. ("It also was suggested that by enabling individuals with disabilities to be more actively engaged in the ubiquitous retail economy, the ADA is helping to improve both the self-esteem of individuals with disabilities, and how they are perceived by others.").

opportunities for individuals with disabilities in most areas, there is still much work to be accomplished in the employment sector.[99]

It is true that individuals with disabilities now have easier access into buildings, are more likely to get a promotion, and their pay is equal to non-disabled co-workers.[100] However, the unemployment rate for individuals with disabilities remains significantly higher compared to those without a disability.[101] And while the general quality of life for disabled individuals has been improved by the ADA, difficulties obtaining employment coupled with increasing expenses have left in place difficult barriers for those individuals to raise their standard of living.[102]

Moreover, although the ADA is a widely accepted federal law with bipartisan support, the protection afforded individuals with disabilities in employment settings was limited by several Supreme Court decisions.[103] The protections found under the "regarded as" prong were so limited by certain decisions, they required reversal via The Americans with Disabilities Amendment Act of 2008 ("ADAA").[104] In doing so, the ADAA reiterated Congress' desire that the "regarded as" prong is to be interpreted and applied broadly.[105] Additionally,

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[99] *See id*. ("The biggest disappointment among the disability leaders surveyed remains the lack of progress by individuals with disabilities toward reaching goals of economic independence vis-a-vis equal employment opportunities.").

[100] *See The ADA at 25: Important Gains, But Gaps Remain*, WHARTON (Aug. 7, 2015), https://knowledge.wharton.upenn.edu/article/the-gaps-that-remain-as-the-ada-turns-25/ ("[T]he quality of work now available to Americans with disabilities has also improved in the last 25 years. 'It is easier [for people with disabilities] to get into the building, they are more likely to get a promotion, and their pay is more on par with those of their colleagues.'").

[101] *See* Karina Hernandez, *People with Disabilities Are Still Struggling to Find Employment – Here Are The Obstacles They Face*, CNBC.COM (Mar. 30, 2020, 9:35 AM), https://www.cnbc.com/2020/03/02/unemployment-rate-among-people-with-disabilities-is-still-high.html ("The Bureau of Labor Statistics reported on Feb. 26 an unemployment rate of 7.3% among people with disabilities in 2019, a slight decrease from the 8% reported in 2018. Yet, people with disabilities are still twice as likely to be unemployed, compared to those without a disability."); *see also* Freiden, *supra* note 96 ("Although there has been significant improvement in employment rates, retention and workplace accommodations for individuals with disabilities since 1990, there continues to be large disparities between Americans with disabilities and without, as evidenced by the employment rates of 17.6 percent and 64 percent, respectively.").

[102] *See* Freiden, *supra* note 96 ("There seems to be a sense that while general quality of life has been improved by the ADA, difficulties obtaining employment and ever-increasing expenses have prevented most individuals with disabilities from raising their standard of living.").

[103] *See Righting the ADA*, *supra* note 58 (analyzing multiple Supreme Court decisions and determining that while some liberated individuals with disabilities, others have departed from the core principles and objectives of the ADA).

[104] *See The Americans with Disabilities Act Amendments Act of 2008*, U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/statutes/adaaa_info.cfm (last visited Dec. 31, 2021) ("The Act makes important changes to the definition of the term 'disability' by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations.").

[105] *See id*. ("The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis.").

the ADAA required the courts to focus their analysis on whether there was discrimination and not on whether the person has a disability.[106]

By analyzing the history of the "regarded as" prong and the impacts of the decisions prior to the ADAA, we'll see that the decisions in *Shell* and *STME* produce the same affect to limit and narrowly interpret the "regarded as" prong.[107] Ultimately, this creates more barriers for individuals with disabilities to secure employment while opening the door for employers to discriminate on basis that civil rights laws prohibit.[108]

A. "REGARDED AS" PRONG

The "regarded as" prong was first established in Section 504 of the Rehab. Act, which was subsequently codified in the ADA regulations.[109] The third prong is an extremely broad element of the disability definition that extends the statutory protection to anyone who had been subject to adverse action by a covered entity on the basis of a physical or mental impairment, whether real or perceived.[110] Legislative history provides two examples of an individual "regarded as" having a disability, including: "(1) a severe burn victim who is denied employment based on the employer's personal discomfort with disfigurement; and (2) an individual whose pre-employment physical reveals a back anomaly, and who is denied employment despite the absence of any symptoms of actual back impairment because of the employer's fear of injury and increased insurance or worker's compensation costs."[111] In both examples, the Rehab Act and the ADA still require the individual to be able to fully perform the essential functions of the job to receive statutory protection.[112]

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[106] *See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 (last visited Dec. 31, 2021) ("In keeping with Congress' direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.").

[107] *See* Risa M. Mish, *"Regarded As Disabled" Claims Under the ADA: Safety Net or Catch All?*, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1006&context=jbl. (last visited Dec. 31, 2021).

[108] *See* Mish, *supra* note 107.

[109] Mish, *supra* note 107 (stating that the "regarded as disabled" provision derived from similar language in the ADA's precursor statute, the Rehabilitation Act of 1973).

[110] *See Righting the ADA*, *supra* note 58 ("It was conceived as an extremely broad element of the definition that would extend statutory protection to anyone who had been excluded or disadvantaged by a covered entity on the basis of a physical or mental impairment, whether real or perceived.").

[111] *See* Mish, *supra* note 107 (listing two examples of scenarios that fall under the "regarded as" prong).

[112] *See id*.

> Significantly, neither example offered by Congress includes an employee who is not only perceived as disabled, but is also in fact unable to perform the essential functions of the job in question . . . Both the legislative history and the actual language of the ADA make clear that the "regarded as disabled" provision is intended to benefit only those employees *erroneously* perceived to be disabled, and who are in fact fully able to perform the

This broad interpretation of the "regarded as" prong was first validated in *School Board of Nassau County v. Arline*.[113] In that case, an elementary school teacher was fired after suffering a third relapse of tuberculosis within two years despite being in remission for the previous twenty years.[114] The District Court determined that "although there was '[n]o question that she suffers a handicap,' [she] was nevertheless not 'a handicapped person under the terms of the [Rehab Act].'"[115] The Court of Appeals reversed holding that persons with contagious diseases are covered under Section 504.[116] Then, the Supreme Court affirmed, and elaborated on Congress' intention for including the "regarded as" provision in the definition of disability.[117]

The legislative history indicates that Congress acknowledged that society's accumulated myths and fears about disabilities are as handicapping as the physical limitations that may accompany a disability.[118] The court also notes that Congress was concerned with protecting the disabled against discrimination "not only simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that American people are unfamiliar with and insensitive to the difficulties individuals [with disabilities face.]'"[119] To combat these concerns and

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essential functions of that job.

Id.

[113] *See Righting the ADA*, *supra* note 58

> Such a broad interpretation was embraced in Section 504 regulations and validated by the Supreme Court in its decision in *School Board of Nassau County v. Arline*. Subsequently, ADA committee reports endorsed the broad interpretation of being "regarded as" having a disability and this approach was codified in ADA regulations.

Id.

[114] *See* Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 274–75 (1987) (discussing the facts of the case).

[115] *Id*. at 277.

[116] *Id*.

[117] *See id*. (stating that "[t]he court remanded the case 'for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position' or in some other position[]" and ultimately affirmed the Court of Appeals decision).

[118] *See id*. at 279 ("Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."). The ADA's "regarded as disabled" provision:

> was intended by Congress to provide relief to individuals who are discriminated against because of the "myths, fears, and stereotypes associated with disabilities." In short, the "regarded as disabled" provision was designed as a safety net for the individual who, though not in fact disabled from performing a particular job, was nevertheless discriminated against based upon the erroneous assumptions of others about such individual's ability to perform that job.

Mish, *supra* note 107 (citing H.R. REP. NO 101–485(III), at 30–31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 452, 452–53).

[119] *Arline*, 403 U.S. at 279.

effects of erroneous perceptions, Congress included the "regarded as" prong.[120] The decision in *Sutton v. United Airlines,* however, disregarded the expansive view of the third prong and narrowly interpreted its broad scope.[121] Because of the incorrect and very high burden on the petitioner created by the *Sutton* decision, fewer "regarded as" cases were pursued.[122] Consequently, opportunities for justice were denied to individuals who were discriminated against in the workplace on the basis of a disability.[123]

B. *SUTTON V. UNITED AIR LINES, INC.*

In this case, twin myopic applicants were denied positions as global airline pilots because they failed to meet the airlines minimum visual requirements.[124] The Court found that they were not disabled within the meaning of the ADA because they could fully correct their visual impairment.[125] The Court specifically disregarded the expansive view of the "regarded as" prong and instead narrowed its scope by: "(1) its rulings on mitigating measures, (2) its requirement that proving one was 'regarded as' substantially limited in working must show that the employer considered the person as unable to perform either a class of jobs or a broad range of jobs in various classes, and (3) its redirection of the

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[120] *See id.* Congress expressed concern that:

> [i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment. Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U.S.C. § 706(7)(B)(iii), to those individuals who are simply 'regarded as having' a physical or mental impairment.

Id.

[121] *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding three rulings that incorrectly and narrowly interpreted the protections found under the "regarded as" prong of the ADA).

[122] *See Righting the ADA*, *supra* note 58.

> The EEOC reported that, while it always had been reserved in its use of the third prong, after Sutton, "we tend to rely on the theory even less, in part because of the proof element that the employer must regard the individual as being substantially limited in a major life activity, and evidence of this perception is difficult to obtain."

Id.

[123] *See Righting the ADA*, *supra* note 58.

> The revised finding stresses that normal human variation occurs across a broad spectrum of human abilities and limitations, and makes it clear that all Americans are potentially susceptible to discrimination on the basis of disability, whether they actually have physical or mental impairments and regardless of the degree of any such impairment.

Id.

[124] *See Sutton*, 527 U.S. at 471 (discussing the facts of the case).

[125] *See id.*

focus from whether the covered entity treated the person as having a substantially limiting condition to whether the covered entity was motivated by certain kinds of mistaken beliefs or misperceptions."[126]

i. Mitigating Measures

First, *Sutton* held that mitigating measures must be considered when determining if there is a disability because an impairment does not substantially limit a major life activity if it is corrected.[127] In coming to this decision, the Court analyzed the definition and verb form of "substantially limits" to determine that the substantial limitation requires a person to be "presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability."[128] However, the issue with excluding instances where a person might or could have a substantially limiting disability if mitigating measures are not considered is addressed in the "Right to ADA" proposal prior to the ADAA.[129] There, the NCD discussed that this ruling excluded large groups of individuals with disabilities from the ADA's protection.[130] For example, if a covered entity could successfully demonstrate that an individual with epilepsy, diabetes, or a mental

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[126] *See Righting the ADA*, *supra* note 58, at 52.

[127] *See Sutton,* 527 U.S. at 482.

> Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.

Id. The court also noted that "a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity." *Id*.

[128] *See id*.

> A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. 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.

Id.

[129] *See Righting the ADA*, *supra* note 58 (discussing the impacts of the *Sutton*'s mitigating measures ruling).

[130] *See id*. The illustrative example applies broadly:

> [T]o diabetes, various psychiatric disabilities, hypertension, arthritis, and numerous other conditions that, for some individuals, can be controlled by medication. Moreover, the same problems arise with conditions for which techniques and devices other than medication provide an avenue for mitigation. Thus, a company that discriminates against people who use hearing aids will be insulated from challenge by people for whom the hearing aids are effective in offsetting, to some degree, diminution of functional ability to hear.

Id.

health condition, may effectively control their symptoms by medication, the individual would be unable to challenge the discriminatory actions of the employer.[131] Congress maintains though, that mitigating measures must be disregarded in determining the eligibility under the ADA or else "much discrimination on the basis of disability will be shielded from effective challenge."[132]

ii. Substantially Limited

In respect to this factor, the Court ignored the purpose or legislative history of the ADA and instead relied on the Oxford English Dictionary definition to find an outcome favorable to employers.[133] Specifically, the Court stated that "substantial" suggests "considerable" or "specified to a large degree" and also noted the EEOC's interpretation defining the term as "unable to perform" or "significantly restricted."[134] Relying on these definitions, the Court held that "substantially limited in the major life activity of working" requires that the individual be precluded from a broad range of jobs, not just a specified job.[135]

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> This is true even if the employer or other covered entity has an express policy against the hiring of people with epilepsy; puts up signs that say, "epileptics not welcome here"; inaccurately assumes that all persons with epilepsy are inherently unsafe; or has the irrational belief that epilepsy is contagious. The unfairness or irrationality of the covered entity's actions and motivations, including stereotypes, fears, assumptions, and other forms of prejudice, cannot be challenged by a person whose condition is mitigated. The end result is that it is a rare plaintiff who is in a position to challenge even the most egregious and outrageous discrimination involving a condition that can be mitigated.

Id.

132 *See id*. at 44 ("Congress to take a contrary position—that unless you disregard mitigating measures in determining eligibility for ADA protection, you shield much discrimination on the basis of disability from effective challenge."); *see also* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110–325, § 4, 112 Stat. 3553 (2008) (showing proper ADA eligibility determination relies on ignoring mitigating measures).

133 Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (relying on the Oxford English Dictionary where "'substantial'" is defined as "'[r]elating to or proceeding from the essence of a thing; essential'" and "'of ample or considerable amount, quantity or dimensions'").

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> The ADA does not define "substantially limits," but "substantially" suggests "considerable" or "specified to a large degree" and quoting the EEOC's definition of "substantially limits" as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id.

135 *See Sutton*, 527 U.S. at 492.

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Hence, the petitioners in *Sutton* were unable to prove their poor eyesight was "regarded as" a disability because the "global airline pilot" position was a single job.[136]

iii. Mistaken Belief or Misperceptions Standard

Lastly, without support or justification for its ruling, the *Sutton* Court also created a more difficult burden on an individual pursuing a case under the "regarded as" prong.[137] The Court stated:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.[138]

This ruling contradicts the ADA and Rehab Act's position.[139] The ADA and Section 504 of the Rehab Act remove the subjective element of what the employer thinks and focuses on how individuals are treated by the covered entities.[140] Under this interpretation, if a covered entity treats a person as having a substantial limiting condition, that should be enough to establish a disability under the third prong.[141] It should not matter whether the person actually has the condition or whether the condition actually results in a substantial limitation

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Id.

[136] *See id*. at 493 ("Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment.").

[137] *See Righting the ADA*, *supra* note 58 ("The Supreme Court offered no support or justification for deviating from the language of the regulations and the expressed intent of Congress, to arrive at its narrow reading of the basic thrust of the third prong in the *Sutton* decision.").

[138] *Sutton*, 527 U.S. at 489.

[139] *See generally Righting the ADA*, *supra* note 58 (comparing the *Sutton* ruling to regulatory language used by the ADA and Rehabilitation Act of 1973).

[140] *See id.* (noting that the definition of the third prong in ADA regulations and Section 504 regulations focus on how individuals are treated by covered entities and "[b]y interpreting being 'regarded as' as equivalent to being 'treated as,' the formulation in the regulations removes the extremely subjective element of what was in the mind of the covered entity and instead looks at how the individual was treated.").

[141] *See id*. ("If a covered entity treats the person as having a substantially limiting condition, that should be sufficient to establish disability under the third prong.").

of a major life activity.[142] On the contrary, the *Sutton* ruling established a subjective element and went beyond a showing of an employer's mental state by also requiring a proof that the belief or perception was wrong.[143] This standard creates a nearly impossible burden for the petitioner to meet and therefore, was rejected by the ADAA.[144]

C. THE ADA AMENDMENTS

To combat the narrow effects of decisions like *Sutton*, Congress enacted the ADAA.[145] On September 25, 2008, Congress enacted "an Act to restore the intent and protections of the Americans with Disabilities Act of 1990."[146] Congress originally expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehab Act.[147] However, this expectation was not fulfilled.[148] Among other decisions, Congress points to the holdings of the Supreme Court in *Sutton*, which narrowed the broad scope of protection intended to be afforded by the ADA, as one instance where protection for individuals

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[142] *See id*.

> [W]henever a covered entity excludes a person or treats a person worse than it otherwise would because of a physical or mental condition the person has or is believed to have, the covered entity has treated the person as having a substantially limiting impairment. In such circumstances the person has been "regarded as" having a disability, and it should not matter whether the person actually has the condition, or whether the condition actually results in a substantial limitation of a major life activity.

Id.

[143] *See id*.

> The difference between the Court's standard and that of the regulations is significant. The *Sutton* description calls for a showing of something in the mental state of a covered entity—a belief or perception. In addition, it is necessary to show that the belief or perception is wrong. Proving what an employer, state or local government agency, or the operator of a private business believes, thinks, or perceives is a difficult proposition. Unless the covered entity makes the mistake of articulating the depths of its prejudices or the exact nature of its motivation, it will be difficult to produce evidence of its state of mind.

Id.

[144] *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110–325, § 2(a)(4), 112 Stat. 3553 (2008) ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect[.]").

[145] *See id*. (discussing the *Sutton* court's problematic, narrow scope of protection).

[146] *See id*. (quoting introductory paragraph of the Act).

[147] *See id*. at § 2(a)(3) ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled[.]").

[148] *See id*.

with disabilities was not upheld.[149] Consequently, the ADAA reinstated the broad scope of protection under the "regarded as" prong of the ADA to be more aligned with the ADA's purpose "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination.'"[150]

The ADAA fulfilled this purpose by rejecting (1) the requirement that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; (2) the narrow interpretation with regard to coverage under the third prong of the definition of disability in *Sutton* and reinstating the broad view of the third prong of the definition of handicap under the Rehab Act found in *School Board of Nassau County v. Arline*; and (3) the EEOC's definition of "substantially limits" as "significantly restricted" and requiring the EEOC to revise that portion to be consistent with the ADAA.[151] Congress reiterated the need for the "regarded as" prong and amended the "regarded as" definition to state:

> An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity . . . [this] 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.[152]

D. IMPACT OF THE *SHELL* AND *STME* RULINGS

"Regarded as" discrimination may occur when an individual does not have an impairment but is nonetheless treated by an employer as if he or she does.[153] Holding that the ADA does not protect future disabilities, allows employers to treat individuals as if they presently have a disability when they do not, and then allowing that same employer to avoid liability by just stating they do not actually believe the person has a current disability.[154] In order to combat this effortless defense, the petitioner would have to prove that the employer did in fact

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[149] *See id.* at § 2(a)(4) ("[T]he holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect[.]").

[150] Americans with Disabilities Act Amendments Act, Pub. L. No. 110–325, § 2(b)(1), 112 Stat. 3553 (2008).

[151] *See id.* at § 2(b)(2)–(3), (6) (listing the main purposes for the amendments).

[152] *Id.* at § 4(a).

[153] *See id.* at § 3(1).

[154] *See* EEOC v. STME, LLC, 938 F.3d 1305, 1316 (11th Cir. 2019).

believe the individual had a current disability.[155] This result is once again changing the analysis of a "regarded as" claim to the higher standard found in *Sutton*, which focuses on what the employer's mental state was, and not on how the individual was treated by the employer.[156]

The ADA and Rehab. Act remain focused on whether an individual was treated differently on the basis of a disability.[157] So, focusing on the fact that BNSF refused to hire Shell due to a fear that sleep apnea, diabetes, or heart disease may develop, it is apparent that Shell was treated differently on the basis of a covered disability.[158] Likewise, it is also clear that firing an employee based on a fear that the person will contract a disease is discrimination on the basis of a disability, regardless of whether the employer believed the disability to be present or not.[159] In a dissenting opinion regarding this issue, Judge Wood states:

> [I]t is not at all clear . . . that as a matter of law the ADA permits an employer to refuse to hire a person who is fully qualified to perform certain work, simply because that individual might at some unspecified time in the future develop a physical or other disability that would render her unable at that later date to meet the employer's reasonable expectations. This smacks of exactly the kind of speculation and stereotyping that the statute was designed to combat.[160]

Furthermore, like the Court in *Sutton*, *Shell* and *STME* relied heavily on the definition and literal or plain language of terms found in the ADA to support arguments that create a favorable outcome for employers.[161] Here, *Shell* and *STME* focused in on the term "having a disability" to reach its decision that a disability is required to be current or present to qualify under the ADA, a similar argument which was rejected and overturned by Congress in *Sutton* regarding

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[155] *See id*. ("In 'regarded as' cases, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action.").

[156] *See id*. at 1317–18 ("Rather, by its terms, for an employee to qualify as 'being regarded as' disabled, the employer must have perceived the employee as having a current existing impairment at the time of the alleged discrimination.").

[157] *See id*. at n.3 ("The Rehabilitation Act of 1973 . . . applies the same standards and follows the same analysis as claims under the ADA.").

[158] *But see* Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 335–36 (2019) (holding that the ADA's "regarded as" prong does not cover situations "where an employer views an applicant as at risk for developing a qualifying impairment in the future.").

[159] *But see id*. at 337 ("With only proof that BNSF refused to hire him because of a fear that he would one day develop an impairment, Shell has not established that the company regarded him as having a disability or that he is otherwise disabled. Absent this showing, he cannot prevail on his claim of discrimination, and BNSF is entitled to summary judgment.").

[160] EEOC v. Rockwell Int'l Corp., 243 F.3d 1012, 1019 (7th Cir. 2001) (Wood, J., dissenting).

[161] *See Shell*, 941 F.3d at 336 (beginning an analysis of the issue by looking to the text of the ADA); *see also STME, LLC*, 938 F.3d at 1316 ("In interpreting the ADA, we are guided by the traditional canons of statutory construction. 'Our "starting point" is the language of the statute itself.'").

mitigating measures.[162] Instead, *Shell* and *STME* should have looked to the legislative history and purpose of the ADA, which support a broad interpretation of the "regarded as" prong and seeks to protect any individual who is treated differently on the basis of a disability.[163] While the ADA intended to provide equal opportunity for individuals with disabilities in employment settings, these holdings will make it difficult to fulfill that goal and will most likely lower the unemployment difference between individuals with disabilities and those without.[164]

Lastly, the ADA protects individuals if they have a physical or mental impairment that substantially limits a major life activity.[165] The ADA also extends to individuals with a history of such a disability, or if an employer believes that you have such a disability, even if you do not.[166] Many individuals who have disabilities have illnesses that are likely to worsen, and these individuals are currently protected by the ADA.[167] Thus, "[i]ndividuals with an increased health risk, currently not protected by the ADA, would be covered by the ADA if they became symptomatic with an impairment that constitutes a substantial limitation of a major life activity."[168] The EEOC also provides that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[169] Holding that an employer may discriminate against an individual due to a fear or heightened risk of a future

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[162] *See Shell* at 336 ("'Having' means presently and continuously. It does include something in the past that has ended or something yet to come. To settle the technical debate, it is a present participle, used to form a progressive tense."); *see also STME, LLC*, 938 F.3d at 1315 ("It is well settled that 'impairment' in the first 'actual disability' prong . . . is limited to impairments that exist at the time of the adverse employment action and does not include impairments that manifest after the alleged discrimination."). *But see* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (holding that a person's mitigating measures "must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.").

[163] *See* 42 U.S.C. § 12101(b) (providing the purpose for which the ADA was promulgated); *see e.g.*, 154 CONG. REC. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Tom Harkin) ("The Supreme Court decisions further imposed an excessively strict and demanding standard to the definition of disability, although Congress intended the ADA to apply broadly to fulfill its purpose.").

[164] *See* § 12101(a).

[165] *See The ADA: Your Employment Rights as an Individual With a Disability*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/ada18.cfm (discussing who the ADA protects) (last visited Dec. 31, 2021).

[166] *See id.*

[167] *See* Mark A. Rothstein, *Predictive Health Information and Employment Discrimination under the ADA and GINA*, 48 J. OF L., MED. & ETHICS 595–602 (2020).

> Individuals with an increased health risk, currently not protected by the ADA, would be covered by the ADA if they became symptomatic with an impairment that constitutes a substantial limitation of a major life activity. It makes little sense that such individuals can be legally denied employment at a time when they are able to work, but when they become ill and are finally covered by the ADA, they might require accommodations or they might be unable to work at all.

Id.

[168] *Id.*

[169] 29 C.F.R. § 1630.2(j)(1)(vii).

disability is inconsistent with other provisions of the ADA and opens the door for employers to discriminate on any basis.[170]

IV. PROPOSAL

First, other opinions correctly propose expanding the ADA's "regarded as" provision to specifically include future disabilities.[171] Not only would this solution better align with other federal anti-discrimination laws, but it would align with the ADA's own purpose.[172] For example, the Pregnancy Discrimination Act provides that pregnant women "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."[173] Hence, despite the fact that a pregnant woman would likely take maternity leave at some time in the future, she would be protected as long as she was currently able to perform job-related functions safely and efficiently.[174] Likewise, the Age Discrimination in Employment Act prohibits discrimination in employment against individuals at least 40 years old, regardless of their age or future health risks so long as they are currently able to perform job-related functions safely and efficiently.[175] Finally, the Genetic Information Nondiscrimination Act protects all individuals against discrimination based on genetic information, including individuals who are perfectly healthy but who are believed to be at risk of future disabilities because of genetic abnormalities.[176]

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[170] *See* Rothstein, *supra* note 167, at 597.

[171] *See id.* at 599 (stating that "[p]ublic policy should facilitate the employment of all individuals with the present ability to perform specific job-related tasks with or without reasonable accommodation and regardless of their future health risks" and "Professor Sharona Hoffman has argued persuasively that Congress should broaden the ADA's 'regarded as' provision to include individuals who 'are perceived as likely to develop physical or mental impairments in the future.'"); *see also* Sharona Hoffman, *Big Data and the Americans with Disabilities Act: Amending the Law to Cover Discrimination Based on Data-Driven Predictions of Future Illnesses*, CASE W. RSRV. UNIV. SCH. OF L. 1, 10 (2017).

> The easiest fix would be to amend the ADA's "regarded as" provision. The provision should be broadened to cover individuals who are perceived as likely to develop physical or mental impairments in the future. Thus, the law would reach not only people who are considered to be currently impaired, but also those who are thought to be at risk of impairment in later years based on information about their habits, purchases, biomarkers, or other indicators.

Id.

[172] *See* Hoffman, *supra* note 171, at 10 (arguing that "the ADA's broad coverage would be consistent with that of many other federal anti-discrimination laws" such as Title VII of the Civil Rights Act of 1964 and the Equal Pay Act).

[173] 42 U.S.C. § 2000e(k).

[174] *See* Rothstein, *supra* note 167, at 599 ("Even though a pregnant woman would likely take maternity leave at some time in the future she would be protected as long as she was currently able to perform job-related functions safely and efficiently.").

[175] *See* 29 U.S.C. §§ 621(b), 631(a).

[176] *See* Hoffman, *supra* note 171, at 10 ("GINA protects all individuals against discrimination based

Taking into account the employer's concerns, it is imperative to address the issue of courts interpreting this proposal as requiring employers to hire individuals whose disability will for sure worsen.[177] It is unequitable to require an employer to invest time and money into training an employee who, based on reliable medical evidence, will become unable to work in the upcoming months.[178] This scenario may be addressed under the "transitory and minor impairment" definition of the ADA.[179] "Applying this standard to predictive health risks, an individual should be protected under the ADA's 'regarded as' prong if the individual is 'regarded as' having a future health risk that would not manifest for at least six months."[180] Still, future disabilities which are uncertain as to when or even if they will develop must be protected under the ADA, provided the individual is qualified and presently able to perform the essential functions of the job.[181]

Furthermore, there is no duty to provide reasonable accommodation to an individual whose coverage is under the "regarded as" prong of the definition of an individual with a disability.[182] "Nevertheless, many individuals at heightened risk of future illness would benefit from reasonable accommodations to reduce their risks, such as using respirators or other personal protective equipment when working with toxic substances, reducing certain physically demanding

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on genetic information. This includes individuals who are perfectly healthy but who are believed to be at risk of future ailments because of genetic abnormalities.").

[177] *See* Rothstein, *supra* note 167, at 595 (discussing "comprehensive solutions to the lack of anti-discrimination protection for individuals with an increased risk of future impairment").

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> If the ADA's coverage is extended to individuals with future health risks, a question arises as to whether all future health risks should be covered regardless of their likely time of onset. For example, suppose an applicant seeks employment today, but there is medical evidence that the individual will only be able to work for a few months before becoming seriously ill. If the individual is seeking employment for a job with a long training period, it would be unreasonable to require the employer to hire and train the individual, only to have that person resign for health reasons before being able to perform the job.

See id. at 599.

[179] *See The Americans with Disabilities Amendments Act of 2008*, *supra* note 104; *see also* 42 U.S.C. § 12102(3)(B) ("A transitory impairment is an impairment with an actual or expected duration of 6 months or less.").

[180] Rothstein, *supra* note 167, at 599 (discussing how this standard would extend the protection of the ADA without creating unreasonable burdens on the employers).

[181] *See id*. (noting that expanding the ADA's coverage to include individuals "regarded as" having an increased risk of future disability is consistent with other federal anti-discrimination laws).

[182] The C.F.R. states as follows:

> A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong . . . or "record of" prong . . . but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

29 C.F.R. § 1630.2(o)(4).

activities, or limiting exposure times in extreme environments (e.g., heat, cold, high altitude)."[183] Therefore, it would be beneficial to amend the ADA to also require providing reasonable accommodations to individuals "regarded as" disabled.[184]

In addition to expanding the coverage under the "regarded as" prong, Congress should implement some type of affirmative action for employers.[185] Currently, the ADA is voluntary to employers.[186] As such, contrary to other civil rights laws, employers do not need to track and report their compliance.[187] Having an affirmative action program may help bridge the unemployment gap between individuals with disabilities and those without.[188]

V. CONCLUSION

Refusing protection to individuals who have a future health risk is inconsistent with the purpose and other interpretations of the ADA.[189] It should be illegal to refuse employment opportunities to individuals with the present ability to perform the essential functions of the job on the basis of future health risks.[190] Congress did not envision that the ADA would one day allow employers to deny employment opportunities on the basis of a potential disability that may or may not occur, while also requiring the employer to refrain from discriminating

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[183] Rothstein, *supra* note 167, at 599.

[184] *See* Hoffman, *supra* note 171, at 10.

[185] *See The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/facts/ada17.html (last visited Dec. 31, 2021).

[186] *See id*. ("The ADA does not interfere with your right to hire the best qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits you from discriminating against a qualified applicant or employee because of her disability.").

[187] *See* Julian Cardillo, *The Americans with Disabilities Act: 25 Years Later*, BRANDEISNOW (July 23, 2015), https://www.brandeis.edu/now/2015/july/parish-ada-qanda.html ("First, the ADA is a voluntary compliance law. That is, employers are simply expected to voluntarily comply – they do not have any reporting requirements. This is different from other civil rights laws, in which employers must track and report their compliance, and in which compliance is mandatory.").

[188] *See id*. ("Even though the U.S. still has pervasive racism and employment discrimination, there is no doubt that affirmative action has transformed the employment landscape for people of color. I think that we need similar measures for people with disabilities.").

[189] Hoffman states as follows:

> Expanding the "regarded as" prong of the ADA's definition of "disability" is also consistent with the statute's central mission. The ADA declares that its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Moreover, the "regarded as" provision intends to combat "myths, fears, and stereotypes associated with disabilities." The law was enacted in 1990, long before the emergence of the big data phenomenon. Today, individuals' health vulnerabilities can increasingly be detected before their disabilities become apparent, and discrimination based on predictive data is just as pernicious as discrimination based on existing symptoms.

Hoffman, *supra* note 171, at 11.

[190] *See id*.

against an individual with that same disability presently.[191] Therefore, the ADA's "regarded as" prong should be amended to specifically include future disability coverage and implement an affirmative action to increase employment rates for individuals with disabilities.[192]

[191] *See id.*

[192] *See supra* Part IV (discussing this proposed solution).