

— This Note reviews the Amendments' new standard and suggests some best practices for colleges and universities.

## DISCUSSION:

### Background

The ADA prohibits employment discrimination against individuals based upon a disability. [2] It also makes it unlawful for a place of public accommodation such as a college or university to discriminate against persons with disabilities. [3] By its terms, the ADA protects "qualified individuals" who:

have a physical or mental impairment that substantially limits one or more major life activities;  
have a record of such an impairment; or  
are regarded as having such an impairment. [4]

In *Sutton v. United Air Lines, Inc.*, [5] *Murphy v. United Parcel Service, Inc.*, [6] and *Alberston's, Inc. v. Kirkingburg*, [7] the Supreme Court limited those protected under the ADA by excluding from the disabled those for whom "mitigating measures" helped control or cope with their impairments -- such as medications, assistive learning technology, and extra effort. [8]

Claimants also fared poorly under *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, in which the Supreme Court stated that "[m]erely having an impairment does not make one disabled for purposes of the ADA." [9] Rather, the Court required a plaintiff to prove that his impairment "prevents or severely restricts" him from performing a major life activity and admonished lower courts that the ADA "be interpreted strictly to create a demanding standard for qualifying as disabled." [10]



## Policies

Review any policies, forms and web pages to make sure they are consistent with the Amendments. Also, train personnel on who is covered under the ADA and how the Amendments broaden coverage. Because those who can claim protection under the “regarded as” standard is now greater, college and university officials should avoid alluding to an employee’s medical condition, unless the employee raises it first. Instead, they should focus on employee conduct and performance. Colleges should also consult in-house or outside counsel before taking an adverse action against an individual who may qualify as disabled under the ADA.

## Accommodation Requests

Given ADA’s expanded reach, administrators should presume that an employee with a physiological impairment is entitled to the Act’s protections. [\[22\]](#) Documentation of the impairment is still required, however. Colleges and universities should instead focus primarily on whether or not they can provide a reasonable accommodation that does not pose an undue hardship or fundamentally alter the nature of a service, program, or activity. The process of determining a reasonable accommodation remains unchanged.

## EEO/Diversity Offices

EEO/Diversity Offices should not close a discrimination case investigation unless it is clear that an individual would not be disabled under the statute. Prudent administrators should not rely on older internal cases regarding similar impairments. Instead, the primary analysis should focus on whether discrimination occurred.

## Litigation

The Amendments will probably have their greatest impact on the types of issues lit

**FN5.** 527 U.S. 471, 482 (1999).

**FN6.** 527 U.S. 516, 521 (1999).

**FN7.** 527 U.S. 555, 565-66 (1999).

**FN8.** See *McGuinness v. Univ. of N. M. Sch. of Med.*, 170 F.3d 974, 978-79 (10th Cir. 1998) (“Mr. McGuinness admits that, in the past, he has been able to mitigate his anxiety in chemistry and math by altering his study habits. . . . Under the law of this circuit, we must consider the plaintiff’s ability to mitigate his impairment in determining if that impairment substantially limits a major life activity. . . . Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety.”); *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 630 (6th Cir. 2000) (“Even if self-accommodations enhanced Plaintiff’s performance to that of most people, he is not disabled under the ADA. Recently, the Supreme Court ruled that in determining whether individuals are disabled under the ADA they should be examined in their corrected state.”).

**FN9.** 534 U.S. 184, 195-96 (2002).

**FN10.** *Id.* at 196-97.

**FN11.** ADA Amendments at § 4.

**FN12.** *Contra McGuinness*, 170 F.3d at 979; *Gonzales*, 225 F.3d at 630.

**FN13.** ADA Amendments at § 3(2)(A).

**FN14.** *Id.* at § 3(2)(B).

**FN15.** *Id.* at § 3(3)(D).

**FN16.** 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. *Sutton*, 527 U.S. at 489.

**FN17.** ADA Amendments at § 3(A).

**FN18.** *Id.* at § 3(B).

**FN19.** Legislative enactments “will not be construed to have retroactive effect unless their language requires this result.”

Civil Action No. 07-4621 (DSD/JJG), 2009 WL 169403, at \*5 n.7 (D. Minn. Jan. 26, 2009)(the ADA Amendments apply prospectively only); Supinski v. United Parcel Service, Inc., C.A. No. 3:CV-06-0793, 2009 WL 113796, at \*5 n. 6 (M.D. Pa. Jan. 16, 2006)("[I]t appears that every court that has addressed the issue has concluded that the 2008 Amendments cannot be applied retroactively to conduct that preceded its effective date."); Rudolph v. U.S. Enrichment Corp., No. 5:08-CV-0046-TBR, 2009 WL 111737, at \*5 (W.D. Ky. Jan. 15, 2009)(Amendments apply prospectively only).

**FN20.** ADA Amendments at § 8.

**FN21.** Jenkins v. Nat'l Bd. Med. Exam'rs, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009)(The ADA Amendments apply retroactively to a case seeking prospective relief that had been pending on appeal when the Act was passed.)

**FN22.** "[T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act §2(b)(5).

## AUTHORS:

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## RESOURCES:

### Statutes:

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