

REASONABLY ACCOMMODATING NONMITIGATING PLAINTIFFS AFTER THE ADA AMENDMENTS ACT OF 2008

Abstract: The passage of the ADA Amendments Act of 2008 (“ADAAA”) has significantly changed the landscape of disability law in the United States. Prior to the ADAAA, the Supreme Court narrowed the definition of “disability” under the ADA in the landmark case *Sutton v. United Air Lines, Inc.* Superseding *Sutton*, the ADAAA broadens the definition of “disability” by indicating that measures used to successfully mitigate a plaintiff’s impairment may not be considered when determining whether a plaintiff is “disabled.” The ADAAA does not, however, expressly address plaintiffs who fail to use these mitigating measures, and there has been confusion among district courts on how to address these nonmitigating plaintiffs. Because the ADAAA expands the definition of “disability,” it will shift the focus of many ADA cases to the subsequent determination of whether a plaintiff, who could perform his job with or without a “reasonable accommodation, is a “qualified individual” under the ADA. This Note proposes that a nonmitigating plaintiff must establish that the burdens imposed on the plaintiff to mitigate the effects of his disability are not substantially less than the burdens imposed on the employer to accommodate the plaintiff’s disability in order to show that an accommodation is reasonable. This proposal screens out cases where a plaintiff’s decision not to mitigate is plainly unreasonable, yet allows most nonmitigating plaintiffs to survive summary judgment. In providing coverage in most cases, this proposal comports with the spirit of ADAAA to broaden coverage under the ADA.

INTRODUCTION

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008 (“ADAAA”).¹ The ADAAA was enacted to “restore the intent and protections of the Americans with Disabilities Act of 1990” (“ADA”).² Title I of the ADA was designed to protect against discrimination of a “qualified individual with a disability” in

¹ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 29 U.S.C.S. § 705 (LexisNexis 2005 & Supp. 2009) and scattered sections of 42 U.S.C.A. (West 2005 & Supp. 2B 2008)); Lawrence Lorber et al., *Get Ready to Relearn the ADA: New Amendments Will Change the Workplace*, LEGAL TIMES, Oct. 20, 2008, at 26.

² ADA Amendments Act of 2008, 122 Stat. at 3553; see also Joseph A. Sciner, *Pleading Disability*, 51 B.C. L. REV. (forthcoming Jan. 2010).

the employment context.³ A “qualified individual” is defined as “an individual . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁴ But the intended result of broad protection for disabled individuals was curbed when the Supreme Court narrowly interpreted the definition of “disability” in a series of cases in 1999 and 2002.⁵

The most dramatic effect of these Supreme Court cases was that individuals who commonly had been considered disabled were no longer protected against discrimination under the ADA if they had successfully ameliorated the symptoms of their impairment using medication or other assistive devices (“mitigating measures”).⁶ Consider the example of a person with epilepsy.⁷ An epileptic suffers from seizures, but medication (a mitigating measure) may reduce or nearly eliminate the chance of seizures.⁸ According to the Supreme Court’s reasoning, epileptics who successfully managed their epilepsy with medication would no longer be considered “disabled.”⁹

One of the most significant changes of the ADAAA was to reject the holdings of the Supreme Court cases that had narrowed the scope of coverage under the ADA by limiting the interpretation of “disability.”¹⁰ By broadening the scope of “disability” in the ADAAA, Congress has directed the focus of future litigation to whether an individual is a “qualified individual”—the inquiry courts engage in after determining

³ 42 U.S.C. § 12112(a) (2000) (amended 2008).

⁴ *Id.* § 12111(8).

⁵ See ADA Amendments Act of 2008, sec. 2(a)(4)–(5), (b)(2), (b)(4)–(5), 122 Stat. at 3553–54; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197–98 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁶ See *Albertson’s*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482.

⁷ Epilepsy, as well as diabetes, is often used in scholarship as an example of a disability that can be corrected by medication. See, e.g., NAT’L COUNCIL ON DISABILITY, RIGHTING THE ADA 45 (2004), available at http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf; Lorber et al., *supra* note 1 (using the example of diabetes).

⁸ See NAT’L COUNCIL ON DISABILITY, *supra* note 7, at 45.

⁹ See *Sutton*, 527 U.S. at 482; NAT’L COUNCIL ON DISABILITY, *supra* note 7, at 45.

¹⁰ See ADA Amendments Act of 2008, sec. 2(b)(2), (4), 122 Stat. at 3554.

whether the plaintiff is “disabled.”¹¹ Although “reasonable accommodation” is a key element of determining if someone is a “qualified individual,” existing case law has provided little guidance on the definition, and the ADAAA does not further define this term.¹² By significantly expanding the definition of “disability,” but not providing additional clarification regarding the definition of “reasonable accommodation,” Congress has effectively shifted the scope of future ADA claims generally toward the “qualified individual” inquiry, and specifically toward the “reasonable accommodation” element.¹³ Because the ADAAA has no retroactive language, it will likely be some time before courts have the opportunity to interpret the new amendments.¹⁴

It is unclear how courts should address plaintiffs who choose not to use available mitigating measures (“nonmitigating plaintiffs”), because the Supreme Court only addressed mitigating plaintiffs, and because the ADAAA does not directly address this issue.¹⁵ An example of a nonmitigating plaintiff is a diabetic who has not properly managed his disease with medication.¹⁶ Neither the Supreme Court nor the circuit courts of appeal have directly addressed whether such individuals are “qualified individuals,” but this issue will become more commonly litigated in light of the recent amendments.¹⁷ District court judges are divided over whether nonmitigating plaintiffs can be afforded coverage under the ADA.¹⁸ Some district court judges have concluded that plaintiffs who fail to avail themselves of available mitigating measures are not covered under the ADA, reasoning that nonmitigating plaintiffs have a legal duty to mitigate before they can seek protection under the ADA.¹⁹

¹¹ See Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U. L. REV. COLLOQUY 217, 228 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/44/>.

¹² See *id.* at 228–29.

¹³ See *id.*

¹⁴ See ADA Amendments Act of 2008, sec. 8, 122 Stat. at 3559.

¹⁵ See *id.* sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; *Albertson's*, 527 U.S. at 565 (plaintiff's brain subconsciously compensated for visual impairment); *Murphy*, 527 U.S. at 519–20 (plaintiff used blood pressure medication); *Sutton*, 527 U.S. at 475 (plaintiffs used corrective lenses).

¹⁶ See, e.g., NAT'L COUNCIL ON DISABILITY, *supra* note 7, at 45; Kimberly Atkins, *New Law Could Spur Spike in ADA Suits*, MINN. LAW., Sept. 22, 2008, available at 2008 WLNR 18063864; Lorber et al., *supra* note 1.

¹⁷ See *Albertson's*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482; Lorber et al., *supra* note 1.

¹⁸ See *Sever v. Henderson*, 381 F. Supp. 2d 405, 414–15 (M.D. Pa. 2005) (listing conflicting decisions regarding the issue), *aff'd*, 220 F. App'x 159 (3d Cir. 2007).

¹⁹ See *id.*

Other district court judges have concluded that nonmitigating plaintiffs may be protected under the ADA.²⁰

This Note focuses on the “reasonable accommodation” element of the “qualified individual” inquiry.²¹ Specifically, this Note argues that the determination of whether an “accommodation” is “reasonable” should include consideration of the actions of the employee.²² For nonmitigating plaintiffs, this means the plaintiff’s decision not to mitigate must be taken into account.²³ In order to show that an accommodation is reasonable, the plaintiff should be required to establish that the burdens imposed on the plaintiff to mitigate the effects of his disability are not substantially less than the burdens imposed on the employer to accommodate the plaintiff’s disability.²⁴ This proposal provides courts that previously found a nonmitigating plaintiff not to be “disabled” under the ADA an intellectually honest framework for evaluating ADA protections for such individuals because this proposal is consistent with the ADAAA and public policy.²⁵

Part I of this Note addresses the statutory basis for the interpretation of the ADA.²⁶ Part II addresses the Supreme Court’s interpretation of the ADA.²⁷ Part III discusses the ADAAA and how it shifts the focus of future inquiries to the “qualified individual” definition.²⁸ Part IV reviews the different approaches that district court judges have used to address nonmitigating plaintiffs and evaluates those approaches in light of the ADAAA.²⁹ Part V proposes an analysis for addressing nonmitigating plaintiffs after the ADAAA.³⁰

I. STATUTORY BASIS FOR INTERPRETING THE ADA

The ADA is designed to prevent discrimination against a “qualified individual with a disability.”³¹ Prior to the ADAAA, most ADA case law focused on the definition of “disability,” and consequently, many cases

²⁰ *See id.*

²¹ *See infra* notes 239–345 and accompanying text.

²² *See infra* notes 239–345 and accompanying text.

²³ *See infra* notes 239–345 and accompanying text.

²⁴ *See infra* notes 239–345 and accompanying text.

²⁵ *See infra* notes 239–345 and accompanying text.

²⁶ *See infra* notes 31–55 and accompanying text.

²⁷ *See infra* notes 56–109 and accompanying text.

²⁸ *See infra* notes 110–132 and accompanying text.

²⁹ *See infra* notes 133–238 and accompanying text.

³⁰ *See infra* notes 239–345 and accompanying text.

³¹ 42 U.S.C. § 12112(a) (2000) (amended 2008).

were decided on this issue alone.³² In order to show a prima facie case of discrimination under the ADA, a plaintiff must show that “(1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of the job either with or without [reasonable] accommodation and (3) she suffered an adverse employment action because of her disability.”³³ If the plaintiff meets her burden of establishing a prima facie case, then the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for its actions.³⁴ If the defendant meets that burden, then the plaintiff must prove by a preponderance of the evidence that the defendant’s proffered reasons are only a pretext for the real discriminatory motive.³⁵

A. Definition of “Disability”

Prior to the ADAAA, “disability” was the key focus of most disability discrimination cases under the ADA.³⁶ “Disability” was defined to include “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”³⁷ Prior to the enactment of the ADAAA, the ADA did not define “physical or mental impairment,” “substantially limits,” or “major life activities.”³⁸ Consequently, the definition of “disability” and its elements became the focus of much of the litigation that followed the enactment of the ADA.³⁹

³² See Lorber et al., *supra* note 1.

³³ Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926, 928 (N.D. Ill. 2002).

³⁴ Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 188 (N.D.N.Y. 2001) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), within the context of the ADA).

³⁵ *Id.*

³⁶ See Lorber et al., *supra* note 1.

³⁷ 42 U.S.C. § 12102(2) (2000). The ADA provides three ways to meet the definition of “disabled”: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.* This Note will not address the second or third prongs of this definition. For a discussion of the effect of the ADAAA on these prongs, see Long, *supra* note 11, at 223–25, 227.

³⁸ See 42 U.S.C. §§ 12102–12111.

³⁹ Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981, 1991–92 (2002). In addition, the text of the ADAAA reflects Congress’s desire to shift the focus of litigation away from the definition of “disability.” See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (codified at 42 U.S.C.A. § 12101 note (West 2005 & Supp. 2B 2008)). For a discussion of the historical basis for the definition of “disability” and why Congress was surprised by the significant ADA litigation over this term, see Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 256–58 (2008), and *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act: Hearing on P.L. 101-36, Focusing on S. 1881 Before the S. Comm.*

Although the ADA did not define the elements of “disability,” the Equal Employment Opportunity Commission (“EEOC”) issued regulations establishing those definitions.⁴⁰ The Supreme Court cast doubt on the authority of the EEOC regulations to define “disability” and its elements,⁴¹ but the ADAAA has now clarified that the EEOC has authority to define these terms.⁴²

The EEOC previously defined a “physical or mental impairment” as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems” or “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁴³ The EEOC defined “substantially limits” as “[u]nable to perform a major life activity that the average person in the general population can perform” or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . [an] average person in the general population”⁴⁴ Finally, the EEOC defined a “major life activity” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁴⁵ These definitions were designed to fulfill the purpose of the ADA “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁴⁶

B. Definition of “Qualified Individual” and “Reasonable Accommodation”

In addition to proving that he is “disabled,” a plaintiff must also prove that he is a “qualified individual” within the meaning of the ADA.⁴⁷ The ADA defined a “qualified individual” as “an individual . . .

on Health, Education, Labor, & Pensions, 110th Cong. 5–9 (2007) (written testimony of Chai R. Feldblum, Professor of Law & Director, Federal Legislation Clinic, Georgetown University Law Center), available at http://help.senate.gov/Hearings/2007_11_15_b/Feldblum.pdf.

⁴⁰ See 42 U.S.C. §§ 12102–12111; 29 C.F.R. § 1630.2(h)–(j) (2008), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁴¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479–80 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The Supreme Court noted that although the EEOC was given authority by Congress to issue implementing regulations for much of the ADA, it was not given explicit authority to issue regulations interpreting the term “disability.” See *id.* at 478–79.

⁴² ADA Amendments Act of 2008, sec. 6(a)(2), tit. V, § 506, 122 Stat. at 3558.

⁴³ 29 C.F.R. § 1630.2(h).

⁴⁴ *Id.* § 1630.2(j) (i)–(ii).

⁴⁵ *Id.* § 1630.2(i).

⁴⁶ 42 U.S.C. § 12101(b)(2).

⁴⁷ *Id.* § 12112(9).

who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁴⁸ “Reasonable accommodation” was not defined in the ADA, but rather illustrated by a non-exhaustive list.⁴⁹ Possible reasonable accommodations included “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 . . . and other similar accommodations for individuals with disabilities.”⁵⁰ For example, an employee with diabetes may request a lunch break at a regularly scheduled time each day to monitor her blood sugar levels as a reasonable accommodation.⁵¹

The definition of “reasonable accommodation” is relevant not only as an element of the definition of “qualified individual,” but also because the failure of an employer to provide a reasonable accommodation may itself be a ground for liability for discrimination.⁵² The ADA allows an employer to refuse to provide a “reasonable accommodation” if the employer can show that the accommodation would impose an “undue hardship” on the employer’s business.⁵³ An “undue hardship” is defined by the ADA as “an action requiring significant difficulty or expense.”⁵⁴ Some plaintiffs have argued that the only limitation on whether an “accommodation” is “reasonable” is whether it poses an “undue hardship” on the employer, but the Supreme Court refuted this proposition.⁵⁵

⁴⁸ *Id.* § 12111(8).

⁴⁹ *Id.* § 12111(9).

⁵⁰ *Id.*

⁵¹ *See, e.g.,* *Nawrot v. CPC Int’l*, 277 F.3d 896, 901 (7th Cir. 2002) (employee with diabetes requested frequent, short breaks to monitor blood sugar).

⁵² 42 U.S.C.A. § 12112(b)(5)(A) (West 2005 & Supp. 2B 2008). The ADAAA only makes very minor changes to this section of the ADA. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 5(a), § 102(a)–(b), 122 Stat. at 3557; *id.* sec. 6(a)(2), tit. V, § 506, 122 Stat. at 3558.

⁵³ 42 U.S.C.A. § 12112(b)(5)(A).

⁵⁴ *Id.* § 12111(10)(A). The ADAAA only makes very minor changes to this section of the ADA. *See* ADA Amendments Act of 2008, sec. 6, § 506, 122 Stat. at 3558. The ADA provides a number of factors that should be considered to determine whether an accommodation would pose an undue hardship, such as the cost of the accommodation, the financial resources of the employer, and the impact of the accommodation on business operations. *See* 42 U.S.C.A. § 12111(10)(B).

⁵⁵ *See* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 399–400 (2002); *see also infra* notes 91–108 and accompanying text.

II. THE SUPREME COURT'S INTERPRETATION OF THE ADA

The Supreme Court's interpretation of the ADA has had a profound influence on the treatment of mitigating plaintiffs, and, indirectly, on the treatment of nonmitigating plaintiffs.⁵⁶ The Court has provided guidance regarding the treatment of mitigating plaintiffs on the "disability" definition, but no direct guidance on the treatment of nonmitigating plaintiffs.⁵⁷ In addition, the Court has provided only limited guidance on the definition of "reasonable accommodation."⁵⁸

A. *The Supreme Court Narrowly Defines "Disability" in Sutton v. United Air Lines, Inc.*

The steps taken by the Supreme Court prior to the ADAAA are important to understanding why the ADAAA was passed and ascertaining what impact it will have.⁵⁹ In the years following the enactment of the ADA, a circuit split arose over the treatment of mitigating measures in the consideration of the definition of "disability."⁶⁰ Specifically, circuit courts disagreed about whether mitigating measures used by a plaintiff should be taken into account when determining whether a plaintiff was "substantially limited" under the ADA definition of "disability."⁶¹ In 1999, the Supreme Court addressed this issue in a trilogy of cases decided on the same day.⁶² The result in the lead case, *Sutton v. United Air Lines, Inc.*, and its companion cases was to narrow the definition of "disability" by taking into account mitigating measures when determining whether an individual was "substantially limited" in a "major life activity."⁶³

⁵⁶ See, e.g., *Williams v. Thresholds, Inc.*, No. 02 C 9101, 2003 WL 22232835, at *5 (N.D. Ill. Sept. 22, 2003); *Hooper v. Saint Rose Parish*, 205 F. Supp. 2d 926, 929 (N.D. Ill. 2002); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037–38 (D. Ariz. 1999).

⁵⁷ See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (plaintiff's brain subconsciously compensated for visual impairment), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (plaintiff used blood pressure medication), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (plaintiffs used corrective lenses), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁵⁸ See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400–02 (2002); Long, *supra* note 11, at 228.

⁵⁹ See ADA Amendments Act of 2008, sec. 2(a)–(b), 122 Stat. at 3553–54.

⁶⁰ *Sutton*, 527 U.S. at 477.

⁶¹ *Id.*

⁶² *Albertson's*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 477.

⁶³ See *Albertson's*, 527 U.S. at 565; *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482. In *Murphy*, the Court held that an employee's high blood pressure did not substantially limit

In *Sutton*, severely myopic twin sisters applied to United Air Lines for employment as commercial airline pilots.⁶⁴ Each sister had uncorrected visual acuity of 20/200 or worse in the right eye and 20/400 or worse in the left eye.⁶⁵ After using corrective lenses, each attained vision of 20/20 or better.⁶⁶ The airline declined to offer either sister employment due to their failure to meet the company's minimum visual acuity requirement of 20/100 or better uncorrected.⁶⁷ The sisters sued United under the ADA, arguing that they were discriminated against on the basis of their disability, because they met United's visual requirement after using mitigating measures—namely, corrective lenses.⁶⁸

The *Sutton* Court concluded 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.”⁶⁹ Because the plaintiffs in *Sutton* used corrective lenses (mitigating measures) to cor-

his major life activities when he was medicated. 527 U.S. at 521. Referencing its decision in *Sutton*, the Court said that the same rule applied: the determination of whether an individual is substantially limited must be made with reference to the mitigating measures he uses. *Id.* Because the plaintiff used blood pressure medication that effectively managed his high blood pressure, he was not considered “disabled.” *Id.*

In *Albertson's*, the plaintiff was fired from his job as a truck driver after his employer determined that the plaintiff failed to meet the basic Department of Transportation visual standard. 527 U.S. at 560. Weak vision in one eye left the plaintiff with the effect of monocular vision. *Id.* at 559. Evidence demonstrated that the plaintiff's body had developed subconscious mechanisms to compensate for this visual impairment. *Id.* at 565. The Court concluded that it could find “no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.” *Id.* at 565–66. Thus, this case stands for the proposition that even mitigating measures resulting from the body's own compensation will be considered. *See id.*

In 2002, the Supreme Court further narrowed the scope of “substantially limits” in *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184, 197–98 (2002). The Court concluded that the phrases “substantially limited” and “major life activities” needed to be “interpreted strictly to create a demanding standard for qualifying as disabled” in order to prevent the ADA from classifying more individuals than Congress intended with its finding that 43 million Americans have disabilities. *See id.* The Court concluded that in order to be substantially limited in a major life activity, an individual must be impaired in such a way that “prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.” *Id.* at 198.

⁶⁴ 527 U.S. at 475.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 476.

⁶⁸ *Id.*

⁶⁹ 527 U.S. at 482.

rect their vision, the Court considered the plaintiffs in their actual, mitigated states when determining whether the plaintiffs were “substantially limited” in any “major life activity.”⁷⁰ Because the plaintiffs’ vision was fully corrected when using their corrective lenses, the Court held that they were not “substantially limited” in any major life activity and therefore not “disabled.”⁷¹

Although the Court’s conclusion was at odds with ADA legislative history, the Court determined that the statute was unambiguous, and therefore there was no need to consider legislative history.⁷² The Court instead reached its decision based on three separate provisions of the text of the ADA.⁷³ First, the Court explained that the phrase “substantially limits” appeared in the present indicative verb form.⁷⁴ The Court concluded that this required that the person be presently substantially limited, rather than potentially or hypothetically substantially limited.⁷⁵ The Court stated that “[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.”⁷⁶

Second, the Court considered that the definition of “disability” requires that disabilities be evaluated “with respect to an individual.”⁷⁷ The Court concluded that whether an individual has a “disability” therefore necessitates an individualized inquiry.⁷⁸ The Court determined that evaluating a plaintiff in a hypothetical unmitigated state would require viewing individuals with the same condition as part of a group, rather than as individuals.⁷⁹ According to the Court, treating persons as members of a group of people with similar impairments, rather than as individuals, was contrary to the purpose of the ADA.⁸⁰

Finally, the Court placed great emphasis on a congressional finding that 43 million Americans have a disability.⁸¹ The Court considered various other sources for the estimated number of disabled Americans and concluded that allowing plaintiffs to be considered in their unmitigated

⁷⁰ See *id.* at 488–89.

⁷¹ *Id.*

⁷² See *id.* at 482; *id.* at 499–502 (Stevens, J., dissenting).

⁷³ *Id.*

⁷⁴ *Sutton*, 527 U.S. at 482.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 483.

⁷⁸ *Id.*

⁷⁹ *Sutton*, 527 U.S. at 483–84.

⁸⁰ *Id.*

⁸¹ *Id.* at 484.

states would dramatically raise the number of disabled individuals.⁸² The Court concluded that Congress therefore intended courts to consider plaintiffs in their mitigated states when determining whether they were “substantially limited.”⁸³ As a result, the Court narrowed the scope of ADA coverage for mitigating plaintiffs like the myopic sisters in *Sutton*.⁸⁴ As discussed later in this Note, the holding and underlying reasoning in *Sutton* have been used by many district court judges to address the proper treatment of nonmitigating plaintiffs under the ADA.⁸⁵

B. *The Supreme Court’s Limited Guidance on “Reasonable Accommodation” in US Airways, Inc. v. Barnett*

The determination of whether an individual is a “qualified individual” under the ADA includes a determination of whether the plaintiff could perform the essential aspects of the job with the use of a “reasonable accommodation.”⁸⁶ The employer is obligated to provide such an accommodation unless doing so would impose an “undue hardship” on the employer’s business.⁸⁷ The ADA does not provide a clear definition for “reasonable accommodation,” but rather illustrates it with examples of how an employer can accommodate a disabled employee.⁸⁸ Consequently, interpretation of the term has been largely left open to judicial determination.⁸⁹

Although the Supreme Court has provided significant guidance on the interpretation of “disability” in *Sutton* and other cases,⁹⁰ it has provided only basic guidance regarding the definition of “reasonable accommodation.”⁹¹ One of the few cases to address this issue is *US Airways, Inc. v. Barnett*.⁹² In *Barnett*, the plaintiff suffered a back injury and used his seniority to transfer to a less physically demanding mailroom position.⁹³ The plaintiff asked for a reasonable accommodation to remain in that position after learning that more senior employees in-

⁸² *Id.* at 484–87.

⁸³ *Id.* at 487.

⁸⁴ See *Sutton*, 527 U.S. at 475.

⁸⁵ See *infra* notes 133–195 and accompanying text.

⁸⁶ See 42 U.S.C. § 12111(8) (2000) (amended 2008).

⁸⁷ See *id.* § 12112(b)(5)(A).

⁸⁸ *Id.* § 12111(9).

⁸⁹ See Long, *supra* note 11, at 228.

⁹⁰ See *Sutton*, 527 U.S. at 482; see also *Toyota Motor*, 534 U.S. at 197–98; *Albertson’s*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 521.

⁹¹ See *Barnett*, 535 U.S. at 400–02; Long, *supra* note 11, at 228.

⁹² See *Barnett*, 535 U.S. at 400–02; Long, *supra* note 11, at 228.

⁹³ 535 U.S. at 394.

tended to bid on the position.⁹⁴ The defendant denied the request, and the employee sued under the ADA.⁹⁵ The Supreme Court granted certiorari to determine whether a requested accommodation may trump a seniority system.⁹⁶ The Court concluded that if a requested accommodation conflicts with a seniority system, then the accommodation is ordinarily presumed not to be “reasonable.”⁹⁷

The reasoning behind the decision in *Barnett* sheds some light on the proper way to interpret “reasonable accommodation” in the context of nonmitigating plaintiffs.⁹⁸ The plaintiff in *Barnett* argued that “reasonable accommodation” meant only “effective accommodation.”⁹⁹ Rejecting this argument, the Court indicated that “reasonable” does not mean “effective” in ordinary English.¹⁰⁰ Furthermore, the Court noted that the word “accommodation,” not the word “reasonable,” conveys the need for effectiveness.¹⁰¹ The Court also indicated that “reasonable accommodation” is not a mirror image of “undue hardship.”¹⁰² Noting that “undue hardship” focuses on “the operation of the business,” the Court stated that an effective accommodation could prove unreasonable because of its impact on factors other than business operations, such as its impact on fellow employees.¹⁰³

The Court also expressed its approval for the manner in which lower courts have reconciled the terms “reasonable accommodation” and “undue hardship” with a practical burden test.¹⁰⁴ In order to defeat a defendant’s motion for summary judgment, the plaintiff “need only show that an ‘accommodation’ seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”¹⁰⁵ After the plaintiff has made this showing, the defendant “must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”¹⁰⁶

Barnett demonstrates that proving the existence of an undue hardship on the employer’s business operations is not the only limitation on

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 393–94.

⁹⁷ *Id.* at 394. An employee may present evidence to refute this presumption. *Id.*

⁹⁸ *See Barnett*, 535 U.S. at 400–01.

⁹⁹ *Id.* at 399.

¹⁰⁰ *Id.* at 400.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Barnett*, 535 U.S. at 400–01.

¹⁰⁴ *Id.* at 401.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 402.

a requested accommodation's reasonableness.¹⁰⁷ Rather, factors other than the potential detrimental impact on the employer's business may be considered when determining whether an "accommodation" is "reasonable."¹⁰⁸ As this Note argues in Part V, courts should consider the plaintiff's decision not to mitigate as one of those factors.¹⁰⁹

III. ADAAM SHIFTS FOCUS FROM "DISABILITY" TO "REASONABLE ACCOMMODATION"

A. ADAAM Expands the Definition of "Disability"

The most obvious effect of the ADAAM is to dramatically expand the scope of the definition of "disability."¹¹⁰ The ADAAM leaves essentially unchanged the actual definition of the first prong of "disability": "a physical or mental impairment that substantially limits one or more major life activities of such individual."¹¹¹ Despite keeping the same definition for "disability," the ADAAM expands the interpretation of the definition of the elements of disability; this interpretation in turn expands the scope of "disability."¹¹² This expansion is consistent with the

¹⁰⁷ See *id.* at 400–01.

¹⁰⁸ See *Barnett*, 535 U.S. at 400–01; see also *Shaw*, *supra* note 39, at 2036 n.333 ("On different facts, the Court might expand its description of the reasonableness analysis to include other considerations.").

¹⁰⁹ See *infra* 239–345 and accompanying text.

¹¹⁰ See *Long*, *supra* note 11, at 218–19.

¹¹¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1)(A), 122 Stat. 3553, 3555 (codified at 42 U.S.C.A. § 12102(1)(A) (West 2005 & Supp. 2B 2008)); Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (2000) (amended 2008). The original ADA language included "one or more of the major life activities." 42 U.S.C. § 12102(2)(A) (emphasis added).

¹¹² See ADA Amendments Act of 2008, sec. 2(b), 122 Stat. at 3554. Congress also indicated that the EEOC definition of "substantially limits" as "significantly restricted" expresses a higher standard than that intended by Congress. *Id.* sec. 2(a)(8), 122 Stat. at 3554; 29 C.F.R. § 1630.2(j)(ii) (2008). The ADAAM expressly indicates that the EEOC should revise its regulations to modify the definitions for these terms to make them consistent with the statute. ADA Amendments Act of 2008, sec. 2(b)(6), 122 Stat. at 3554. As of the publication of this Note, the EEOC has not yet made these requested changes. See *id.*; 29 C.F.R. § 1630.2(j)(ii). In addition, the ADAAM also expands the definition of "major life activities" to include "operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." ADA Amendments Act of 2008, sec. 4(a), § 3(2)(B), 122 Stat. at 3555. Both of these changes expand the definition of "disability." See *Long*, *supra* note 11, at 218–20.

ADAAA's stated desire to provide "broad coverage" under the ADA to the maximum extent permitted by the amendments.¹¹³

One major change addressed in the ADAAA is the rejection of *Sutton*'s holding that mitigating measures must be considered when determining whether an impairment "substantially limits a major life activity."¹¹⁴ The ADAAA provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures"¹¹⁵ This means that if a judge considers whether a plaintiff who has successfully managed his epilepsy with medication is "disabled," the judge will have to speculate on the extent of the plaintiff's impairment as if he was not using medication.¹¹⁶ The ADAAA therefore allows for speculation about a plaintiff's unmitigated state even when that plaintiff actually mitigates.¹¹⁷

On its face, the ADAAA arguably prevents consideration of mitigating measures whether the plaintiff mitigates or not.¹¹⁸ The ADAAA's legislative history, however, shows that mitigating measures are intended to be excluded from consideration by courts only in situations where the plaintiff has actually mitigated.¹¹⁹ The relevant committee reports and floor debates demonstrate that legislators were concerned about the catch-22 situation that arose when mitigating plaintiffs were so successful in managing their disabilities that they were not "substan-

¹¹³ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(A), 122 Stat. at 3555 ("The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.").

¹¹⁴ *Id.* sec. 2(b)(2), 122 Stat. at 3554; *id.* sec. 4(a), § 3(4)(E), 122 Stat. at 3556; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481–82 (1999).

¹¹⁵ ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

¹¹⁶ See *id.*

¹¹⁷ See *id.* Another change made in the ADAAA is to reject the standard set forth in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that "substantially limits" means that an impairment must "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives." *Id.* sec. 2(b)(4), 122 Stat. at 3554 (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553). Congress also rejected *Toyota Motor*'s declaration that the terms must be "interpreted strictly to create a demanding standard for qualifying as disabled." *Id.* sec. 2(b)(4), 122 Stat. at 3554 (quoting *Toyota Motor*, 534 U.S. at 197). Congress concluded that the effect of these standards outlined in *Toyota Motor* was to reduce the broad scope of coverage intended to be available under the ADA. *Id.* sec. 2(b)(4), 122 Stat. at 3554. Like those in *Sutton*, the *Toyota Motor* standards narrowed the broad definition of "disability" that Congress had intended. See *id.* sec. 2(a)(4)–(5), 122 Stat. at 3553; *Toyota Motor*, 534 U.S. at 197–98.

¹¹⁸ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

¹¹⁹ See H.R. REP. NO. 110-730, pt. 1, at 15–16 (2008); *id.* pt. 2, at 10; 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of the managers).

tially limited” under *Sutton*.¹²⁰ Those plaintiffs were discriminated against because of their impairments, but they were not disabled enough to get ADA protection.¹²¹ For example, the House of Representatives Committee on Education and Labor Report gave examples of five cases that would be decided differently if considered after overturning *Sutton*.¹²² In all of the five cases, the plaintiffs who were denied coverage had mitigated their impairments.¹²³

At no time did legislators indicate any concern for nonmitigating plaintiffs being denied coverage.¹²⁴ In fact, testimony was given that disapproved of the incentives that *Sutton* gave for plaintiffs not to mitigate.¹²⁵ As Cheryl Sensenbrenner, Chairman of the American Association of People with Disabilities, stated, “[T]he last message we would want to send to Americans with disabilities . . . is the less you manage your disability, the less you try, the more likely you are to be protected under civil rights laws.”¹²⁶ The ADAAA, thus, is designed to prevent the consideration of mitigating measures in the determination of “disability” for mitigating plaintiffs only.¹²⁷

B. ADAAA Shifts Spotlight to “Reasonable Accommodation”

Although the ADAAA does not address the definition of “reasonable accommodation,” it nonetheless shifts the focus of post-amendment case law to analysis of that term.¹²⁸ In an ADA claim, the plaintiff must first prove that he is “disabled,” then prove that he is a “qualified individual” under the ADA.¹²⁹ The ADAAA substantially broadens the scope of the definition of “disability,” so many more cases will survive summary judgment on that initial element of a plaintiff’s prima facie case.¹³⁰ Because the definition of “disability” has been dramatically expanded by the ADAAA, the next issue plaintiffs must prove is that they satisfy the requirements of a “qualified individual,” which includes the

¹²⁰ See H.R. REP. NO. 110-730, pt. 1, at 15–16; *id.* pt. 2, at 10; 154 CONG. REC. S7957 (daily ed. July 31, 2008) (statement of Sen. Harkin).

¹²¹ See H.R. REP. NO. 110-730, pt. 1, at 15–16; *id.* pt. 2, at 10; 154 CONG. REC. S7957 (daily ed. July 31, 2008) (statement of Sen. Harkin).

¹²² See H.R. REP. NO. 110-730, pt. 1, at 15–16.

¹²³ See *id.*

¹²⁴ See generally *id.*

¹²⁵ See *id.* pt. 2, at 10.

¹²⁶ *Id.*

¹²⁷ See H.R. REP. NO. 110-730, pt. 2, at 10.

¹²⁸ See Long, *supra* note 11, at 228.

¹²⁹ See *Hooper v. Saint Rose Parish*, 205 F. Supp. 2d 926, 928 (N.D. Ill. 2002).

¹³⁰ See Long, *supra* note 11, at 228.

element of “reasonable accommodation.”¹³¹ Because there is less guidance from Congress and the judiciary on the determination of “reasonable accommodation,” its definition will become a key issue in future ADA cases.¹³²

IV. TREATMENT OF NONMITIGATING PLAINTIFFS BEFORE AND AFTER THE ADAAA

Many courts attempting to address the proper treatment of nonmitigating plaintiffs before the ADAAA relied heavily on the Supreme Court’s 1999 decision in *Sutton v. United Air Lines, Inc.*¹³³ The holding in *Sutton* applied to plaintiffs who used mitigating measures, like the myopic sisters in that case, but it did not directly address the proper treatment of nonmitigating plaintiffs.¹³⁴ After *Sutton*, lower courts have exhibited substantial confusion regarding the proper treatment of nonmitigating plaintiffs under the ADA.¹³⁵ Although circuit courts of appeals have yet to directly address this issue, numerous federal district court judges have done so, with conflicting results.¹³⁶ District court judges have approached this issue in one of two ways, referred to in this Note as the “Prohibition on Speculation” approach and the “Duty to Mitigate” approach.¹³⁷ This Note synthesizes these approaches and their underlying analyses in this way for the first time.¹³⁸ Each of these approaches fails after the ADAAA, and a new approach must be established.¹³⁹

A. Prohibition on Speculation Approach

The judges who follow the Prohibition on Speculation approach conclude that *Sutton* prohibits speculation, so nonmitigating plaintiffs

¹³¹ See *id.*

¹³² See *id.*

¹³³ See, e.g., *Williams v. Thresholds, Inc.*, No. 02 C 9101, 2003 WL 22232835, at *5 (N.D. Ill. Sept. 22, 2003); *Hooper v. Saint Rose Parish*, 205 F. Supp. 2d 926, 929 (N.D. Ill. 2002); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032, 1037–38 (D. Ariz. 1999); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

¹³⁴ See 527 U.S. at 482.

¹³⁵ See *Sever v. Henderson*, 381 F. Supp. 2d 405, 414–15 (M.D. Pa. 2005) (listing conflicting decisions regarding the issue), *aff’d*, 220 F. App’x 159 (3d Cir. 2007).

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *infra* notes 140–223 and accompanying text.

¹³⁹ See *infra* notes 156–165, 191–195, 220–223 and accompanying text.

must be considered in their unmitigated states.¹⁴⁰ The Court in *Sutton* stressed that the ADA requires an individualized inquiry, so mitigating individuals must be viewed in their actual mitigated states, and therefore a court cannot speculate as to a plaintiff's hypothetical unmitigated state.¹⁴¹ The Court also stated that "[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."¹⁴² Although the holding in *Sutton* does not directly apply to nonmitigating plaintiffs,¹⁴³ judges employing the Prohibition on Speculation approach reason that *Sutton* requires even nonmitigating plaintiffs to be viewed in their actual (unmitigated) states.¹⁴⁴ In essence, this approach indicates that a court cannot evaluate a nonmitigating plaintiff's disability by guessing how mitigating measures would impact the nonmitigating plaintiff's condition.¹⁴⁵ As a result, nonmitigating plaintiffs are more likely to fall within the ADA's scope of protection.¹⁴⁶ This approach has been followed by some district court judges in the Seventh, Ninth, and Tenth Circuits.¹⁴⁷

For example, in *Williams v. Thresholds, Inc.*, the judge considered a plaintiff who suffered from sarcoidosis, a chronic disorder of unknown cause.¹⁴⁸ The plaintiff initially refused to take prednisone as recommended by his physician.¹⁴⁹ The defendant argued that the plaintiff did not have a "disability" because, when he later took prednisone, it helped his symptoms.¹⁵⁰ The judge disagreed, citing *Sutton* for the proposition that courts should not speculate as to whether treatment not used by plaintiffs would have relieved their symptoms.¹⁵¹

¹⁴⁰ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi v. County of Placer*, 135 F. Supp. 2d 1105, 1113 (E.D. Cal. 2001); *Finical*, 65 F. Supp. 2d at 1038.

¹⁴¹ 527 U.S. at 482–83.

¹⁴² *Id.* at 482.

¹⁴³ See *id.*

¹⁴⁴ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁴⁵ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁴⁶ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁴⁷ See, e.g., *EEOC v. Centura Health Corp.*, No. 05-cv-01826-WDM-MJW, 2007 WL 2788836, at *3 (D. Colo. Sept. 21, 2007); *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113.

¹⁴⁸ 2003 WL 22232835, at *1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *5.

¹⁵¹ *Id.*

Similarly, in *Finical v. Collections Unlimited, Inc.*, the judge concluded that nonmitigating plaintiffs must be considered in their actual, unmitigated states.¹⁵² In *Finical*, a hearing-impaired plaintiff refused to wear a hearing aid.¹⁵³ The defendant argued that the plaintiff was not “substantially limited” when mitigating measures—namely, the use of a hearing aid—were considered.¹⁵⁴ The judge disagreed, indicating that focusing on whether the plaintiff would be “substantially limited” if she used a hearing aid was speculative and therefore prohibited by *Sutton*.¹⁵⁵

The Prohibition on Speculation approach enables judges to reach a conclusion regarding how to treat nonmitigating plaintiffs that is consistent with the text of the ADAAA.¹⁵⁶ The conclusion resulting from the Prohibition on Speculation approach is that nonmitigating plaintiffs must be viewed in their unmitigated states for the determination of “disability.”¹⁵⁷ This conclusion is consistent with the ADAAA because the amendments state that mitigating measures may not be taken into account in the determination of “disability.”¹⁵⁸

The Prohibition on Speculation approach, however, allows judges to base their conclusion on reasoning inconsistent with the ADAAA.¹⁵⁹ The reasoning underlying the Prohibition on Speculation approach is based on the theory that *Sutton* prohibits any speculation about a plaintiff’s condition, so the plaintiff must be considered in his actual state.¹⁶⁰ The ADAAA, however, explicitly overturns *Sutton*’s holding that mitigating plaintiffs must be viewed in their mitigated states and instead provides that the determination of “disability” must be made without reference to mitigating measures.¹⁶¹ In doing so, the ADAAA also implicitly rejects *Sutton*’s prohibition on speculation because requiring courts to consider mitigating plaintiffs in their unmitigated states necessarily re-

¹⁵² 65 F. Supp. 2d at 1037–38.

¹⁵³ *Id.* at 1037.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1037–38.

¹⁵⁶ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038; see also ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(4)(E)(i), 122 Stat. 3553, 3556 (codified at 42 U.S.C.A. § 12102(4)(E)(i) (West 2005 & Supp. 2B 2008)).

¹⁵⁷ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁵⁸ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

¹⁵⁹ See *id.*; see also *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁶⁰ See, e.g., *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁶¹ ADA Amendments Act of 2008, sec. 2(b)(2), 122 Stat. at 3554; *id.* sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

quires courts to speculate about how severe a plaintiff's symptoms would be if they were hypothetically not mitigated.¹⁶² The ADAAA thus requires the courts to speculate, which is inconsistent with the foundational reasoning of the Prohibition on Speculation approach.¹⁶³

Consequently, although the conclusion of the Prohibition on Speculation approach is consistent with the the text of ADAAA, its reasoning is not, so a new proposal is needed.¹⁶⁴ Furthermore, considering the effect of the ADAAA to shift the focus from "disability" to "qualified individual," this approach does nothing to shed light on how these courts should address the determination of the "qualified individual" analysis with respect to nonmitigating plaintiffs.¹⁶⁵

B. Duty to Mitigate Approach

Under the Duty to Mitigate approach, district court judges conclude that nonmitigating plaintiffs have a duty to mitigate their impairments; these plaintiffs are thus less likely to be protected by the ADA.¹⁶⁶ The courts that follow the Duty to Mitigate approach tend to rely on one or both of two lines of reasoning,¹⁶⁷ each of which stems from the misconstrued understanding of a particular case's holding.¹⁶⁸ One line of reasoning broadens the holding of *Sutton* to conclude that nonmitigating plaintiffs are not "substantially limited" if their impairments can be corrected by mitigating measures.¹⁶⁹ The other line of reasoning, which stems from the misinterpretation of case law by the judge in *Tangires*, has led many judges to conclude that a nonmitigating plaintiff who has not used available treatment to mitigate his condition

¹⁶² See *id.* sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; *Sutton*, 527 U.S. at 482–83.

¹⁶³ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; *Sutton*, 527 U.S. at 482–83; see also *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁶⁴ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; see also *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁶⁵ See Long, *supra* note 11, at 228; see also *Williams*, 2003 WL 22232835, at *5; *Capizzi*, 135 F. Supp. 2d at 1113; *Finical*, 65 F. Supp. 2d at 1038.

¹⁶⁶ See, e.g., *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros v. City of W. Miami*, 111 F. Supp. 2d 1338, 1356–57 (S.D. Fla. 2000); *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000).

¹⁶⁷ See, e.g., *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; *Tangires*, 79 F. Supp. 2d at 596.

¹⁶⁸ See *Sutton*, 527 U.S. at 482; *Roberts v. County of Fairfax, Va.*, 937 F. Supp. 541, 548 (E.D. Va. 1996).

¹⁶⁹ See *Monterroso v. Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 578 (S.D.N.Y. 2008); *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; see also *Sutton*, 527 U.S. at 482.

is not a “qualified individual.”¹⁷⁰ As a result of the conflict with the language of the ADAAA or flawed reasoning, courts should not use either analysis underlying the Duty to Mitigate approach after the ADAAA.¹⁷¹

In addition, the language of some Duty to Mitigate cases suggests that the judges who followed this approach simply felt that the nonmitigating plaintiff’s decision not to mitigate was unreasonable.¹⁷² After deciding the ends desired—that nonmitigating plaintiffs should not be afforded protection under the ADA—these judges simply adopted reasoning to meet those ends.¹⁷³ This suggests these judges thought there were public policy reasons for denying ADA coverage to plaintiffs who do not mitigate.¹⁷⁴

1. Broadening-of-*Sutton* Analysis

Some courts have justified the Duty to Mitigate approach by broadening the holding of *Sutton*.¹⁷⁵ The holding of *Sutton* indicates that if a plaintiff uses mitigating measures, the effect of those mitigating measures must be considered when determining whether a plaintiff is “substantially limited in a major life activity.”¹⁷⁶ Courts following this broadening-of-*Sutton* analysis have incorrectly extended the holding of *Sutton* to stand for the proposition that if mitigating measures *could* correct the nonmitigating plaintiff’s disability, the plaintiff is not “substantially limited,” and therefore not “disabled,” because the plaintiff did not use those mitigating measures.¹⁷⁷ Rather than applying *Sutton* only when the plaintiff actually uses mitigating measures, these courts are applying *Sutton* if the nonmitigating plaintiff *could* have used effective mitigating measures.¹⁷⁸ The result of this subtle, but significant, broadening of *Sutton* is that nonmitigating plaintiffs have been denied cover-

¹⁷⁰ See *Gibbon v. City of New York*, No. 07 Civ. 6698(NRB), 2008 WL 5068966, at *5 (S.D.N.Y. Nov. 25, 2008); *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001); see also *Tangires*, 79 F. Supp. 2d at 596.

¹⁷¹ See *infra* notes 175–223 and accompanying text.

¹⁷² See *infra* notes 224–238 and accompanying text.

¹⁷³ See *infra* notes 224–238 and accompanying text.

¹⁷⁴ See *infra* notes 224–238 and accompanying text.

¹⁷⁵ See, e.g., *Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; see also *Sutton*, 527 U.S. at 482.

¹⁷⁶ 527 U.S. at 482.

¹⁷⁷ See *id.*; see also *Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57.

¹⁷⁸ See *Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; see also *Sutton*, 527 U.S. at 482.

age under the ADA more frequently.¹⁷⁹ As many judges who follow the Prohibition on Speculation approach have noted, this view misconstrues the reasoning of *Sutton* because it permits speculation about the effect of mitigating measures not used by a plaintiff.¹⁸⁰ The broadening-of-*Sutton* analysis has been followed by some district court judges in the Second, Seventh, Tenth, and Eleventh Circuits.¹⁸¹

In *Hooper v. Saint Rose Parish*, a district court judge concluded that when a plaintiff's impairment can be treated by mitigating measures, those mitigating measures must be taken into account when deciding if the plaintiff has a "disability."¹⁸² The judge cited *Sutton* for this rule, even though *Sutton* only directly applies to mitigating plaintiffs.¹⁸³ The plaintiff in *Hooper* had a voice impairment that limited her ability to speak normally.¹⁸⁴ The court was presented with evidence that Botox injections would have alleviated the plaintiff's symptoms, yet the plaintiff "inexplicably" did not use this treatment.¹⁸⁵ Concluding that the plaintiff's symptoms would have been alleviated by the use of Botox injections, the court held that the plaintiff was not "substantially limited" in the major life activity of talking, and therefore not "disabled."¹⁸⁶

In *Mont-Ros v. City of West Miami*, a district court judge concluded that a police officer who failed to treat his sleep apnea was not "substantially limited in a major life activity."¹⁸⁷ The plaintiff did not use mitigating measures, but his physicians testified that various measures could have been used to alleviate his symptoms.¹⁸⁸ The doctors all agreed that the plaintiff's condition was directly related to his obesity and that weight reduction, use of a nasal machine at night, and a surgi-

¹⁷⁹ See, e.g., *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225, 1232–33 (D. Kan. 1999).

¹⁸⁰ See, e.g., *Centura Health*, 2007 WL 2788836, at *3 (“*Sutton* does not require that mitigating factors be considered when they are not used by plaintiff.”); *Williams*, 2003 WL 22232835, at *5 (“The *Sutton* court explicitly stated that courts should not engage in counter-factual hypothesizing, guessing whether a course of treatment would have alleviated a plaintiff's disability.”); *Fimical*, 65 F. Supp. 2d at 1038 (“[A]n individualized inquiry into the limitations faced by a claimant who does not use corrective devices is inconsistent with an evaluation focusing on the limitations the claimant would face in a corrected state.”).

¹⁸¹ See, e.g., *Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57; *Spradley*, 68 F. Supp. 2d at 1232–33.

¹⁸² 205 F. Supp. 2d at 929.

¹⁸³ See *id.* (citing *Sutton*, 527 U.S. at 482).

¹⁸⁴ *Id.* at 928.

¹⁸⁵ *Id.* at 929.

¹⁸⁶ *Id.*

¹⁸⁷ 111 F. Supp. 2d at 1356–57.

¹⁸⁸ *Id.* at 1356.

cal procedure would all have helped mitigate his symptoms.¹⁸⁹ The judge cited *Sutton*, but applied it to the plaintiff's situation despite the fact that the plaintiff had not used mitigating measures as had the plaintiffs in *Sutton*.¹⁹⁰

The broadening-of-*Sutton* analysis is inconsistent with the ADAAA.¹⁹¹ The district court judges who follow the broadening-of-*Sutton* analysis extend *Sutton*'s holding—that mitigating plaintiffs must be considered in their mitigated states for the determination of “disability”—to nonmitigating plaintiffs to conclude that nonmitigating plaintiffs must be considered in a hypothetical mitigated state.¹⁹² In essence, this analysis dictates that all plaintiffs, both mitigating and nonmitigating, must be considered in a mitigated state.¹⁹³ The ADAAA expressly overrules this conclusion by stating that whether an individual is “substantially limited in a major life activity” shall be determined without regard to mitigating measures.¹⁹⁴ And because the broadening-of-*Sutton* analysis addresses only the construction of “disability,” the judges who used this analysis will need to develop an appropriate way to address nonmitigating plaintiffs in the determination of whether a nonmitigating plaintiff is a “qualified individual” after the ADAAA.¹⁹⁵

2. Erroneous “Qualified Individual” Analysis

In this analysis, district court judges have erroneously held that plaintiffs who do not use mitigating measures that would alleviate their symptoms are not “qualified individuals” under the ADA.¹⁹⁶ Other than simply stating that the plaintiff cannot be a “qualified individual,” these cases have not provided any analysis to show which element of “qualified individual” the plaintiff has failed to prove.¹⁹⁷ This analysis originated from a 2000 decision by the U.S. District Court for the District of

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*; *see also Sutton*, 527 U.S. at 475.

¹⁹¹ *See infra* notes 192–195 and accompanying text.

¹⁹² *See Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1355–57; *see also Sutton*, 527 U.S. at 482.

¹⁹³ *See, e.g., Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57.

¹⁹⁴ *See* ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

¹⁹⁵ *See id.*; *see also Monterroso*, 591 F. Supp. 2d at 578; *Hooper*, 205 F. Supp. 2d at 929; *Mont-Ros*, 111 F. Supp. 2d at 1356–57.

¹⁹⁶ *See, e.g., Gibbon*, 2008 WL 5068966, at *5; *Hewitt*, 185 F. Supp. 2d at 189; *Tangires*, 79 F. Supp. 2d at 596.

¹⁹⁷ *See, e.g., Gibbon*, 2008 WL 5068966, at *5; *Hewitt*, 185 F. Supp. 2d at 189; *Tangires*, 79 F. Supp. 2d at 596.

Maryland in *Tangires v. Johns Hopkins Hospital*.¹⁹⁸ *Tangires* relied on the reasoning of *Roberts v. County of Fairfax, Virginia*, a 1996 case in the U.S. District Court for the Eastern District of Virginia that was decided pre-*Sutton*, but *Tangires* erroneously created a duty to mitigate that did not exist in *Roberts*.¹⁹⁹ Essentially, the erroneous “qualified individual” analysis is the result of a game of telephone, where *Tangires* misconstrued *Roberts*, and subsequent cases relied on this error.²⁰⁰

In *Roberts*, the plaintiff suffered from mental and personal problems and was encouraged on numerous occasions by supervisors to obtain treatment at a community health center and an employee assistance program.²⁰¹ After initially seeking treatment, the plaintiff refused further treatment for thirteen months, despite his supervisors’ urging.²⁰² After a number of performance problems, the plaintiff was demoted, and he sued, claiming he had clinical depression and was demoted in violation of the ADA.²⁰³ The court rejected the plaintiff’s claims, relying on an EEOC regulation that provides that if a plaintiff rejects a reasonable accommodation, and as a result cannot perform the essential functions of the position, the plaintiff is not considered a “qualified individual.”²⁰⁴ The court concluded that because the plaintiff failed to accept the reasonable accommodations offered to him, namely treatment for depression, he was not a “qualified individual” under the ADA.²⁰⁵ This reasoning in *Roberts* is sound.²⁰⁶

Tangires subsequently misconstrued the reasoning of *Roberts*.²⁰⁷ In *Tangires*, the plaintiff sued her employer for failure to provide a reasonable accommodation for her disability.²⁰⁸ The plaintiff suffered from asthma, yet failed to use inhaled steroids as recommended by her doctors.²⁰⁹ Relying mostly on the broadening-of-*Sutton* analysis, the court

¹⁹⁸ See 79 F. Supp. 2d at 596.

¹⁹⁹ See *Roberts*, 937 F. Supp. at 548; *Tangires*, 79 F. Supp. 2d at 596.

²⁰⁰ See *Roberts*, 937 F. Supp. at 548; *Tangires*, 79 F. Supp. 2d at 596; see also *Gibbon*, 2008 WL 5068966, at *5; *Sarkissian v. W. Va. Univ. Bd. of Governors*, No. 1:05CV144, 2008 WL 901722, at *2 (N.D. W. Va. Mar. 31, 2008); *Hewitt*, 185 F. Supp. 2d at 189; Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 767 (2009) (noting the game of telephone).

²⁰¹ 937 F. Supp. at 543.

²⁰² *Id.*

²⁰³ *Id.* at 544.

²⁰⁴ *Id.* at 547–48; 29 C.F.R. § 1630.9(d) (2008).

²⁰⁵ See *Roberts*, 937 F. Supp. at 548.

²⁰⁶ See *id.*

²⁰⁷ See *Tangires*, 79 F. Supp. 2d at 596; see also *Roberts*, 937 F. Supp. at 548.

²⁰⁸ 79 F. Supp. 2d at 589.

²⁰⁹ *Id.* at 595–96.

concluded that the plaintiff was not “substantially limited in a major life activity.”²¹⁰ In addition, the court included a single sentence that cited, but misinterpreted, *Roberts*: “A plaintiff who does not avail herself of proper treatment is not a ‘qualified individual’ under the ADA.”²¹¹ The plaintiff in *Roberts* lost his case because he failed to accept a reasonable accommodation offered by his employers,²¹² but the *Tangires* court erroneously translated that into a duty to mitigate by denying the plaintiff ADA protection because she failed to accept treatment recommended by her doctor.²¹³ Thus, the *Tangires* court placed a new burden on non-mitigating plaintiffs to mitigate their impairments, therefore making it more difficult for nonmitigating plaintiffs to be protected by the ADA.²¹⁴

A number of district court judges from the Second and Fourth Circuits have found *Tangires* persuasive.²¹⁵ Like *Tangires*, these cases have flatly stated that a plaintiff’s failure to use available mitigating measures means the plaintiff is not a “qualified individual.”²¹⁶ Most cases have relied on the broadening-of-*Sutton* analysis in conjunction with the erroneous *Tangires* analysis to address both the “disability” and “qualified individual” elements.²¹⁷ But a recent case relies exclusively on the *Tangires* error while explicitly rejecting the broadening-of-*Sutton* analysis.²¹⁸ This exclusive reliance on the *Tangires* error creates just one more mistake in the telephone chain.²¹⁹

Because the ADAAA addresses mitigating measures in the context of “disability,” it does not directly invalidate the *Tangires* analysis, which

²¹⁰ See *id.*

²¹¹ See *id.* at 596.

²¹² See *Roberts*, 937 F. Supp. at 548.

²¹³ See *Tangires*, 79 F. Supp. 2d at 596.

²¹⁴ See *id.* at 595–96; see also, e.g., *Gibbon*, 2008 WL 5068966, at *5; *Sarkissian*, 2008 WL 901722, at *2; *Hewitt*, 185 F. Supp. 2d at 189.

²¹⁵ See, e.g., *Gibbon*, 2008 WL 5068966, at *5; *Sarkissian*, 2008 WL 901722, at *2; *Hewitt*, 185 F. Supp. 2d at 189.

²¹⁶ See, e.g., *Gibbon*, 2008 WL 5068966, at *5; *Sarkissian*, 2008 WL 901722, at *2; *Hewitt*, 185 F. Supp. 2d at 189.

²¹⁷ See, e.g., *Sarkissian*, 2008 WL 901722, at *2; *Johnson v. Maynard*, No. 01 Civ. 7393(AKH), 2003 WL 548754, at *4 (S.D.N.Y. Feb. 25, 2003); *Hewitt*, 185 F. Supp. 2d at 188–89.

²¹⁸ See *Gibbon*, 2008 WL 5068966, at *4–5. The district court judge in *Gibbon* found that the plaintiff was not a “qualified individual” because he failed to treat his correctible impairment with medication “without good cause.” *Id.* at *5. Furthermore, the judge rejected the plaintiff’s argument that *Sutton* barred speculation as to whether the medication would have corrected his impairment. *Id.* at *4.

²¹⁹ See *id.*

relies on whether a plaintiff is a “qualified individual.”²²⁰ But the reasoning underlying the *Tangires* analysis is faulty regardless of the ADA because *Tangires* distorted the reasoning in *Roberts* to create a duty to mitigate that does not exist under the ADA.²²¹ As a result, this analysis should no longer be used by courts.²²² This Note provides a proposal consistent with the ADA that allows courts to reach the desired outcome without resorting to the faulty logic of the *Tangires* analysis.²²³

3. Purported Unreasonableness of Plaintiff’s Decision Not to Mitigate

The language that many judges employed to justify the Duty to Mitigate approach suggests that those judges felt that the nonmitigating plaintiff’s decision not to mitigate was unreasonable, and therefore that providing ADA protection would be against public policy.²²⁴ Ironically, many of these decisions were not based on the “reasonable accommodation” element of “qualified individual,” which would seem to be a natural place to consider unreasonable behavior.²²⁵ Rather, these decisions turned on either the definition of “disability” or the definition of “qualified individual” with no mention of the “reasonable accommodation” element.²²⁶

For example, in *Hooper*, the judge concluded that a nonmitigating plaintiff with difficulty speaking was not “disabled” under the ADA.²²⁷ The judge noted that the plaintiff “had an opportunity to mitigate her symptoms and inexplicably did not do so.”²²⁸ After determining that the plaintiff could have effectively treated her symptoms with Botox, the judge stated that “there is no reason I can see why she could not have been and was not taking injections of Botox”²²⁹ The use of “inexplicable” and “no reason” suggests that the judge felt that the plaintiff’s decision not to mitigate was unreasonable.²³⁰ Similarly, in

²²⁰ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; *Tangires*, 79 F. Supp. 2d at 596.

²²¹ See *Roberts*, 937 F. Supp. at 548; *Tangires*, 79 F. Supp. 2d at 596.

²²² See *Roberts*, 937 F. Supp. at 548; *Tangires*, 79 F. Supp. 2d at 596.

²²³ See *infra* notes 239–345 and accompanying text.

²²⁴ See *Gibbon*, 2008 WL 5068966, at *4; *Hooper*, 205 F. Supp. 2d at 929; *Tangires*, 79 F. Supp. 2d at 596.

²²⁵ See *Gibbon*, 2008 WL 5068966, at *4; *Hooper*, 205 F. Supp. 2d at 929; *Tangires*, 79 F. Supp. 2d at 596.

²²⁶ See *Gibbon*, 2008 WL 5068966, at *4; *Hooper*, 205 F. Supp. 2d at 929; *Tangires*, 79 F. Supp. 2d at 596.

²²⁷ 205 F. Supp. 2d at 929.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

Gibbon, the judge concluded that a nonmitigating plaintiff was not protected by the ADA.²³¹ The judge stated that “it makes little sense to provide special accommodation for individuals who have access to treatments that would ameliorate their impairments but who inexplicably choose not to employ those treatments.”²³²

Likewise, in *Tangires*, the court concluded that a nonmitigating plaintiff with asthma should be denied ADA protection.²³³ When describing how the plaintiff refused her doctor’s recommended treatment, the court went out of its way to quote the doctor’s statement that when he counseled the plaintiff about the advantages of the proposed medication, the plaintiff “almost went into a panic and developed very childish behavior.”²³⁴ Concluding that the plaintiff’s asthma was correctable with medication and that the plaintiff “voluntarily refused the recommended medication,” the court denied the plaintiff ADA protection.²³⁵ This language indicates that the judge concluded that the plaintiff acted not only unreasonably, but also in a manner that warrants no protection under the ADA.²³⁶ These cases wrongly focus on the plaintiff’s actions without balancing the plaintiff’s burden of mitigation with the burden on the employer in accommodating an unmitigated plaintiff.²³⁷ The appropriate place to consider these burdens is in the interpretation of “reasonable accommodation.”²³⁸

V. PROPOSAL FOR DEFINING “REASONABLE” IN “REASONABLE ACCOMMODATION”

The ADA Amendments Act (ADAAA) addresses mitigating measures in the context of the construction of “disability.”²³⁹ According to the ADAAA, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures”²⁴⁰ Although this statement was made with the ex-

²³¹ 2008 WL 5068966, at *4.

²³² *Id.*

²³³ 79 F. Supp. 2d at 596.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *See id.*

²³⁷ *See Gibbon*, 2008 WL 5068966, at *4; *Hooper*, 205 F. Supp. 2d at 929; *Tangires*, 79 F. Supp. 2d at 596.

²³⁸ *See* Debra Burke & Malcolm Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 813 (2001).

²³⁹ *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(4)(E)(i), 122 Stat. 3553, 3556 (codified at 42 U.S.C.A. § 12102(4)(E)(i) (West 2005 & Supp. 2B 2008)).

²⁴⁰ *Id.*

press intent to overturn the holding in *Sutton*—which only addressed mitigating plaintiffs—the statement is worded in such a way as to also implicate nonmitigating plaintiffs.²⁴¹ This change in the ADAAA makes clear that mitigating measures may never be considered when determining if an individual has a “disability.”²⁴² Nonetheless, it remains unclear how to address a plaintiff’s failure to mitigate in the determination of the “qualified individual” analysis.²⁴³

Because the ADAAA shifts the focus of the ADA inquiry from whether the claimant has a “disability” to whether the claimant is a “qualified individual,” the proper treatment of nonmitigating plaintiffs under the definition of “qualified individual” remains unanswered.²⁴⁴ This Part argues that the failure to mitigate by a plaintiff must be considered when evaluating whether a plaintiff is a “qualified individual.”²⁴⁵ Specifically, the actions of the nonmitigating plaintiff as they relate to the employer’s burden in accommodating are most appropriately addressed in the determination of “reasonable accommodation.”²⁴⁶ This Note provides the first comprehensive proposal for addressing the treatment of nonmitigating plaintiffs after passage of the ADAAA.²⁴⁷

A. A Suggested Proposal: The “Substantially Less” Burden

Courts should balance the burdens of accommodation versus mitigation when addressing the “reasonable accommodation” element of “qualified individual” with nonmitigating plaintiffs.²⁴⁸ In order to make out a prima facie claim that one is a “qualified individual,” a plaintiff must show that “with or without reasonable accommodation, [the plaintiff] can perform the essential functions of the employment position that such individual holds or desires.”²⁴⁹ In the case of nonmitigating plaintiffs, the plaintiff should bear a small burden to reasonably mitigate his condition before being allowed to require an employer to provide a reasonable accommodation because plaintiffs should be given some in-

²⁴¹ See *id.* sec. 2(b)(2), 122 Stat. at 3554; *id.* sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

²⁴² See *id.* sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

²⁴³ See *id.*

²⁴⁴ See Daniel O’Toole & Jovita Foster, *ADA Amendment Expands Protection*, MO. LAW. WKLY., Oct. 13, 2008, available at 2008 WLNR 19612997.

²⁴⁵ See *infra* notes 248–345 and accompanying text.

²⁴⁶ See Burke & Abel, *supra* note 238, at 813.

²⁴⁷ See *infra* notes 248–345 and accompanying text.

²⁴⁸ 42 U.S.C. §§ 12111(8), 12112(a) (2000) (amended 2008); see, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400–01 (2002) (discussing the ordinary English meaning of the word “reasonable” and factors that can make something unreasonable).

²⁴⁹ 42 U.S.C. §§ 12111(8), 12112(a).

centive to practice self-help before imposing a burden on their employers to accommodate.²⁵⁰ In order to show that an accommodation is reasonable, the plaintiff should be required to establish that the burdens imposed on the plaintiff to mitigate the effects of his disability are not substantially less than the burdens imposed on the employer to accommodate the plaintiff's disability.²⁵¹ This will be referred to as the "substantially less" test to distinguish it from proposals by other commentators.²⁵²

Consider the example of an employee with asthma who works as a delivery truck driver.²⁵³ Assume the asthma could be treated effectively with the use of medication via an inhaler, but the employee refuses to use the medication.²⁵⁴ Instead, the employee requests as an accommodation a reduction in the number of daily deliveries to allow for frequent breaks for the employee to recover from asthma attacks.²⁵⁵ Here, the burden on the employee to use medication is substantially less than the burdens imposed on the employer to both reduce the plaintiff's deliveries and shift that work to other employees.²⁵⁶ As this illustration demonstrates, the "substantially less" test places a small burden on the plaintiff designed to capture outlier situations where the burden on the plaintiff to mitigate is substantially less than the burden on the employer to accommodate.²⁵⁷

²⁵⁰ See *infra* notes 263–272 and accompanying text.

²⁵¹ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The use of "substantially" in balancing tests has been implemented by courts in other contexts. See, e.g., FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

²⁵² See *infra* notes 253–345 and accompanying text.

²⁵³ A number of cases have addressed situations where plaintiffs have failed to mitigate the symptoms of their asthma. See, e.g., *Monterroso v. Sullivan & Cromwell, LLP*, 591 F. Supp. 2d 567, 578 (S.D.N.Y. 2008) (plaintiff refused her doctor's repeated recommendations that she use medication to manage her asthma); *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 2d 587, 595 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (plaintiff used only one of two recommended medications to control her asthma).

²⁵⁴ See *supra* note 253 and accompanying text.

²⁵⁵ For the purposes of this example, assume that the expense for the employer to modify the driving deliveries (such as shifting this work to other employees) would not be high enough to qualify as an "undue hardship," nor would the plaintiff's reduced schedule allow the employer to show that the plaintiff was unable to perform the "essential functions" of the employment position. See 42 U.S.C. §§ 12111(8), 12111(10). Assume further that the lower productivity of the employee after the proposed accommodation causes the employer to experience reduced profitability or efficiency.

²⁵⁶ See *infra* notes 260–261 and accompanying text.

²⁵⁷ See *supra* notes 248–252 and accompanying text.

A benefit of this test is that it allows the court to consider the reasons underlying the plaintiff's behavior in relation to its impact on the employer.²⁵⁸ Rather than comparing the plaintiff to a reasonable person, this is a subjective test.²⁵⁹ When identifying the burdens on the plaintiff to mitigate, the court should consider a number of factors, including, but not limited to, the employee's justifications for not mitigating, doctors' recommendations for treatment, and side effects and risks of proposed treatment.²⁶⁰ When identifying the burdens on the employer to accommodate, the court should consider factors including, but not limited to, the expense of the proposed accommodation, the difficulty of the proposed accommodation, and the effect of the proposed accommodation on other employees and business operations.²⁶¹

The result of the "substantially less" test is that nonmitigating plaintiffs who can very easily mitigate their symptoms will not meet their showing that an accommodation is "reasonable" if the accommodation would place a significantly higher burden on the employer. On the other hand, so long as the plaintiff's burden is not substantially less than the burden on the employer, the plaintiff will meet the "reasonable accommodation" element and therefore survive summary judgment on that issue.²⁶²

B. Proposal Consistent with the ADAAA, Barnett, and Public Policy

The "substantially less" test is consistent with the intent and language of the ADAAA.²⁶³ Specifically, this test balances two seemingly conflicting congressional intents: to reverse the disadvantage *Sutton* placed on mitigating plaintiffs, and to provide broad coverage to all disabled individuals.²⁶⁴ The ADAAA addressed mitigating measures with the express purpose to overturn *Sutton*.²⁶⁵ Legislative history shows

²⁵⁸ See *infra* notes 252–257 and accompanying text.

²⁵⁹ See *infra* notes 260–261 and accompanying text.

²⁶⁰ For a discussion of whether economic need should be a factor considered in relation to mitigating measures, see generally Christine M. Tomko, Note, *The Economically Disadvantaged and the ADA: Why Economic Need Should Factor into the Mitigating Measures Disability Analysis*, 52 CASE W. RES. L. REV. 1033 (2002).

²⁶¹ In addition to considering the factors taken into account for an "undue hardship" analysis, the factors considered in the "substantially less" test encompass a broader range of factors consistent with *Barnett*. See Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12111(a)(10)(B) (West 2005 & Supp. 2B 2008); *Barnett*, 535 U.S. at 400–01.

²⁶² See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(A), 122 Stat. at 3555; *Barnett*, 535 U.S. at 400–01.

²⁶³ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556.

²⁶⁴ See *id.* sec. 2(a)(4), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

²⁶⁵ *Id.* sec. 2(b)(2), 122 Stat. at 3554.

that this change was designed to prevent mitigating plaintiffs who worked to improve their situation from being excluded from ADA protection.²⁶⁶ In all five of the illustrative cases that the House of Representatives Committee on Education and Labor Report used to demonstrate the injustice of *Sutton*, the plaintiffs who were denied coverage had mitigated their impairments.²⁶⁷ Conversely, it was not intended that nonmitigating plaintiffs would be encouraged to forgo self-help in the treatment of their impairments in order to obtain ADA coverage.²⁶⁸

On the other hand, Congress clearly intended for the ADA to result in broad coverage for Americans with disabilities.²⁶⁹ The ADA states that Congress intends for the primary focus of ADA cases to be not whether the plaintiff is “disabled,” but “whether entities covered under the ADA have complied with their obligations.”²⁷⁰ By placing a modest burden on plaintiffs to mitigate, the “substantially less” test reduces the incentives for plaintiffs not to mitigate consistent with congressional intent.²⁷¹ And by only capturing outlier situations with the “substantially less” language, this test will allow the majority of nonmitigating plaintiffs to survive summary judgment, which is consistent with the purpose of the ADA to provide broad coverage to disabled Americans.²⁷²

This proposal is also consistent with the limited guidance that the 2002 case *US Airways, Inc. v. Barnett* provides for the determination of “reasonable accommodation.”²⁷³ The Court in *Barnett* indicated that in order for a plaintiff to defeat a defendant’s motion for summary judgment, the plaintiff “need only show that an ‘accommodation’ seems reasonable on its face”²⁷⁴ But the Court did not define the term “reasonable.”²⁷⁵ The Court did indicate that the correct interpretation of “reasonable accommodation” lies somewhere between the extremes of meaning simply “effective accommodation” and the redundant mir-

²⁶⁶ See H.R. REP. NO. 110-730, pt. 1, at 15–16 (2008); *id.* pt. 2, at 10; 154 CONG. REC. S8346 (daily ed. Sept. 11, 2008) (statement of the managers).

²⁶⁷ See H.R. REP. NO. 110-730, pt. 1, at 15–16.

²⁶⁸ See *id.* pt. 2, at 10. Indeed, that result would create perverse incentives for disabled individuals to not seek to improve their conditions through self-help. See *id.*; *supra* note 126 and accompanying text.

²⁶⁹ ADA Amendments Act of 2008, sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

²⁷⁰ *Id.* sec. 2(b)(5), 122 Stat. at 3554.

²⁷¹ See *supra* notes 264–268 and accompanying text.

²⁷² ADA Amendments Act of 2008, sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

²⁷³ See 535 U.S. at 400–01.

²⁷⁴ See *id.* at 401.

²⁷⁵ See *id.* at 400–01.

ror image of the term “undue hardship.”²⁷⁶ The plaintiff argued that “reasonable accommodation” meant only “effective accommodation,” otherwise “reasonable accommodation” would simply be a mirror image of “undue hardship.”²⁷⁷ Rejecting this argument, the Court noted that an effective accommodation may be unreasonable because of factors other than its impact on business operations, which is the consideration under “undue hardship.”²⁷⁸ In the case of nonmitigating plaintiffs, the decision of the plaintiff not to mitigate should weigh in courts’ reasonableness analysis.²⁷⁹

In addition, this proposal is consistent with public policy and the practical burdens that courts face on limitations of time and resources.²⁸⁰ Plaintiffs should be required to help themselves to a modest degree before requiring accommodation from their employers in order to prevent unwanted disincentives to mitigate.²⁸¹ The Supreme Court in *Sutton* and the district court judges in addressing nonmitigating plaintiffs sought to interpret the definition of “disability” narrowly in order to stem the tide of ADA cases.²⁸² Courts working in a post-ADAAA world will look for ways to contain the increase of additional ADA cases that will be brought.²⁸³ The “substantially less” test provides a practical way for courts to dismiss on summary judgment cases where the plaintiff has not met a modest burden of self-help, therefore allowing judges to focus on the legitimate cases brought by the plaintiffs that Congress intended the ADAAA to cover.²⁸⁴

C. Analysis and Critique of Other Proposals

Prior to the passage of the ADAAA, various proposals had been made regarding the proper treatment of nonmitigating plaintiffs.²⁸⁵

²⁷⁶ See *id.* at 400.

²⁷⁷ *Id.* at 399.

²⁷⁸ See *Barnett*, 535 U.S. at 400–01.

²⁷⁹ See *id.*

²⁸⁰ See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 358 (2001); Long, *supra* note 11, at 228.

²⁸¹ See H.R. REP. NO. 110-730, pt. 2, at 10.

²⁸² See Issacharoff & Nelson, *supra* note 280, at 358; Long, *supra* note 11, at 228–29.

²⁸³ See Issacharoff & Nelson, *supra* note 280, at 358; Long, *supra* note 11, at 228–29.

²⁸⁴ See ADA Amendments Act of 2008, sec. 2(a)(4), 122 Stat. at 3553; *id.* sec. 4(s), § 3(4)(A), 122 Stat. at 3555.

²⁸⁵ See Burke & Abel, *supra* note 238, at 813; Joshua C. Dickinson, *Will the Supreme Court Allow Employers to Consider Reasonable Mitigating Measures Not Presently Utilized by Employees When Determining Whether a “Disability” Exists Under Section A of the ADA?*, 68 UMKC L. REV. 389, 409 (2000); Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103

Most advocated weighing the reasonableness of the nonmitigating plaintiff's decision not to mitigate,²⁸⁶ although a few argued that a nonmitigating plaintiff's decision not to mitigate cannot be considered at all.²⁸⁷ An analysis of these arguments highlights why the proposal suggested in this Note provides a preferable test.²⁸⁸

Commentators have proposed various tests addressing the reasonableness of a nonmitigating plaintiff's decision not to mitigate.²⁸⁹ One proposal suggests allowing the employer, after the nonmitigating plaintiff has met his prima facie case, to show that the use of mitigating measures by the plaintiff "is a more reasonable alternative to an accommodation by the employer."²⁹⁰ This proposal will be referred to as the employee/employer balancing test. Others argue that a plaintiff seeking ADA protection should have a duty to mitigate that requires using mitigating measures that could reduce the need for an accommodation and that a reasonable person in the same circumstances would use.²⁹¹ This proposal will be referred to as the employee/reasonable person balancing test.

MICH. L. REV. 217, 219 (2004); Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodations,"* 48 HASTINGS L.J. 75, 96 (1996); Shaw, *supra* note 39, at 1987.

²⁸⁶ See, e.g., Burke & Abel, *supra* note 238, at 813; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 96.

²⁸⁷ See Shaw, *supra* note 39, at 1984–87; see also Dickinson, *supra* note 285, at 409. Shaw argued that any proposal to take into account a nonmitigating plaintiff's reasons for failing to mitigate was inconsistent with *Sutton's* prohibition on speculation and *Barnett*. See Shaw, *supra* note 39, at 2034–36, 2039. As discussed previously, however, the ADAAA requires speculation in some cases, which overrides *Sutton's* prohibition on speculation. See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(E)(i), 122 Stat. at 3556; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. In addition, *Barnett* leaves open the door for factors other than impact on the employer's business operations to be taken into account in the "reasonable accommodation" analysis. See 535 U.S. at 400–01; Shaw, *supra* note 39, at 2036 n.333.

²⁸⁸ See *infra* notes 289–345 and accompanying text.

²⁸⁹ See, e.g., Burke & Abel, *supra* note 238, at 814; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 96.

²⁹⁰ See Burke & Abel, *supra* note 238, at 817. Burke and Abel advocate an approach that balances the burden on the employer to accommodate against the burden on the employee to mitigate. *Id.* at 814. By placing the burden on the employer to prove that the use of mitigating measures by the employee would be more reasonable than accommodation by the employer, this proposal denies ADA protection to an employee even where the employer can prove that mitigation by the employee is only slightly more reasonable than accommodation by the employer. See *id.* at 816–17. This excludes too many plaintiffs from ADA protection. See *infra* notes 295–345 and accompanying text.

²⁹¹ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 96–97. Hasday proposes that plaintiffs should have the same duty to mitigate that a reasonable person in the same circumstances would have and that could reduce the need for an accommodation. See Hasday, *supra* note 285, at 219. Hasday uses the proposed duty of reasonable mitigation to

The benefit of both these tests is that they seek to alleviate the burden on the employer to accommodate if the employee's decision not to mitigate is unreasonable.²⁹² These tests tend to reference strong public policy reasons for placing a burden on impaired employees to improve their situations.²⁹³ For example, one commentator argues that employees may not have the incentive to mitigate their impairments if their employers must make an accommodation regardless of the employee's actions.²⁹⁴

The problem with both these proposals is that they are overly exclusive, in that they exclude too many plaintiffs from ADA coverage in middle ground cases.²⁹⁵ In the employee/reasonable person balancing test, if an employee has taken some steps to mitigate his impairment but is determined not to have taken all steps that a reasonable person in the same circumstances would have taken, then the employee is excluded from full protection of the ADA.²⁹⁶ For example, what if a plaintiff takes one of two recommended drugs, and it is determined that a reasonable person would have taken both?²⁹⁷ The plaintiff is denied full coverage under the employee/reasonable person balancing test.²⁹⁸ It is also problematic that the employee/reasonable person balancing test does not directly take into account the burden on the employer.²⁹⁹ The employee/employer balancing test also is overly exclusive because the plaintiff is denied coverage even if the burden on the plaintiff is

allow a judge to consider a wide range of reasons why a nonmitigating employee may choose not to mitigate, including risk, difficulty, or expense. *See id.* at 239. Similarly, Key recommends that an employee be required to take similar steps to mitigate his disability that a reasonable person would take in the same circumstances before requiring an employer to provide an accommodation. *See Key, supra* note 285, at 96–99. If it would be reasonable for the plaintiff to mitigate, then the employer would be required to provide an accommodation only to the extent required given the mitigated state of the employee. *Id.* at 97. As an exception, Key indicates that if it would be reasonable for the employee to mitigate, but a “viable accommodation” could be made, the employee could forego mitigation and pay the cost of the accommodation by the employer. *Id.*

²⁹² *See* Burke & Abel, *supra* note 238, at 814; Hasday, *supra* note 285, at 239; Key, *supra* note 285, at 97.

²⁹³ *See* Hasday, *supra* note 285, at 224; Key, *supra* note 285, at 84–85. For a proposal of how the rule of avoidable consequences from tort law could influence the treatment of nonmitigating plaintiffs, see Key, *supra* note 285, at 98–103.

²⁹⁴ Key, *supra* note 285, at 84–85.

²⁹⁵ *See infra* notes 323–345 and accompanying text.

²⁹⁶ *See* Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

²⁹⁷ *See Tangires*, 79 F. Supp. 2d at 595 (plaintiff occasionally used one of two drugs recommended by her doctor but refused use of the second drug).

²⁹⁸ *See* Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

²⁹⁹ *See* Hasday, *supra* note 285, at 239; Key, *supra* note 285, at 97.

slightly less than the burden on the employer.³⁰⁰ These proposals fail to fulfill the ADAAA's purpose to "provide broad coverage" to individuals with disabilities.³⁰¹

D. Hypothetical Cases

The following illustrative cases are designed to compare and contrast the "substantially less" test with other proposals, as well as highlight how the "substantially less" test is consistent with the ADAAA.³⁰²

1. Easier Cases: Large Difference Between Burdens

Consider a hypothetical where the plaintiff suffers from asthma, which is aggravated by a move to a new office within the same building that has a stronger and colder air flow from the air system.³⁰³ The purpose of the move was to have the plaintiff's work group in proximity to new team members, and moving the entire group to another location or modifying the air system would be expensive.³⁰⁴ The plaintiff's doctor advises her to use two medications to treat her asthma, both of which should almost fully treat her symptoms despite the changed air flow.³⁰⁵ The medications have minimal side effects and are easy to administer.³⁰⁶ The plaintiff uses one of the medications occasionally but refuses to use the other based on an incorrect belief that it will adversely impact another, unrelated impairment, despite assurances from her doctor to the contrary.³⁰⁷ After the plaintiff experiences several extended absences from work due to complications from her asthma, the employer fires the employee.³⁰⁸

Under the "substantially less" test, the burden on the plaintiff to mitigate her symptoms by using both medications is substantially less than the burden on the employer to pay to modify the air system or to move the plaintiff's work group to another location in the building.³⁰⁹

³⁰⁰ See Burke & Abel, *supra* note 238, at 816–17.

³⁰¹ See ADA Amendments Act of 2008, sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

³⁰² See *id.* sec. 2(a)(4)–(5), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

³⁰³ This hypothetical is based largely on the facts from *Tangires*. See 79 F. Supp. 2d at 589–92.

³⁰⁴ See *supra* note 303.

³⁰⁵ See *supra* note 303.

³⁰⁶ See *supra* note 303.

³⁰⁷ See *supra* note 303.

³⁰⁸ In *Tangires*, the plaintiff was placed on medical layoff rather than fired. 79 F. Supp. 2d at 591–92.

³⁰⁹ See *supra* notes 248–261 and accompanying text.

Therefore, the accommodation is not reasonable, and the plaintiff is not a “qualified individual” and may not obtain ADA protection.³¹⁰ This result intuitively makes sense because the plaintiff should be required to take simple steps to mitigate her disability before obligating her employer to make a much more difficult accommodation to her unmitigated disability.³¹¹ This situation is exactly the outlier type of case that the “substantially less” test is designed to capture and exclude from ADA coverage.³¹²

Similarly, under the employee/reasonable person balancing test, the plaintiff would be denied full ADA coverage.³¹³ A reasonable person would use both of the medications recommended by the doctor in this situation, but the plaintiff refused to do so.³¹⁴ Likewise, under the employee/employer balancing test, the employer would be able to show that it is more reasonable for the employee to take mitigating measures than for the employer to accommodate.³¹⁵

With changed facts that elevate the burden on the plaintiff and lower the burden on the employer, all three tests would allow the plaintiff past summary judgment.³¹⁶ In the original hypothetical, assume that the employer could easily modify the force and air flow in the plaintiff’s new office.³¹⁷ Assume also that although the second medication is recommended as the next treatment option for the plaintiff’s asthma, the medication has a 25 percent chance of seriously negatively affecting the plaintiff’s unrelated impairment.³¹⁸ Under the “substantially less” test and the two balancing tests, the plaintiff would survive summary judgment.³¹⁹ The plaintiff’s risk of using the second medication is not substantially less than the burden on the employer to modify the air flow.³²⁰ A jury could find that a reasonable person in the same situation as the plaintiff would elect to forgo the second medication, so the plaintiff

³¹⁰ See *supra* notes 248–261 and accompanying text.

³¹¹ See Key, *supra* note 285, at 81–85.

³¹² See *supra* notes 248–261 and accompanying text.

³¹³ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³¹⁴ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³¹⁵ See Burke & Abel, *supra* note 238, at 816–17.

³¹⁶ See *id.*; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97; see also *supra* notes 248–261 and accompanying text.

³¹⁷ This hypothetical is based loosely on the facts from *Tangires*, but with a number of changes. See 79 F. Supp. 2d at 589–92.

³¹⁸ See *supra* note 317.

³¹⁹ See Burke & Abel, *supra* note 238, at 816–17; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97; see also *supra* notes 248–261 and accompanying text.

³²⁰ See *supra* notes 248–261 and accompanying text.

would survive the employee/reasonable person balancing test.³²¹ Finally, a jury could find that accommodation by the employer would be more reasonable than the plaintiff using the second medication, so the employee would survive the employee/employer balancing test.³²²

2. Middle Ground Case: Almost Equal Burdens

The following hypothetical is designed to highlight the situations where the “substantially less” test and the other proposals diverge.³²³ Consider the prior hypothetical, but with some changed facts.³²⁴ Instead of moving the plaintiff’s entire work group with some expense, the plaintiff could switch offices with one other employee and still have an office on the same floor as her work group, but down the hall.³²⁵ The two offices are comparable except for the difference in air flow.³²⁶ The plaintiff now regularly uses the first medication recommended by her physician but refuses to use the second medication because of her previous unsubstantiated concerns.³²⁷

In this hypothetical, the burden on the plaintiff is moderately low, but the burden on the employer is likewise moderately low.³²⁸ The ADA imposes a duty of reasonable accommodation on employers, and the ADAAA stresses the need for “broad coverage” under the ADA.³²⁹ Consequently, the presumption should be toward coverage except in cases where the burden on plaintiffs to mitigate is substantially less than the burden on employers to accommodate.³³⁰ Under the “substantially less” test, the burden on the employee to mitigate would not be substantially less than the burden on the employer to accommodate.³³¹ Therefore, the plaintiff would (and should) survive summary judgment.³³²

³²¹ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³²² See Burke & Abel, *supra* note 238, at 816–17.

³²³ See *id.*; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97; *supra* notes 248–261 and accompanying text.

³²⁴ This hypothetical is based loosely on the facts from *Tangires*, but with a number of changes. See 79 F. Supp. 2d at 589–92.

³²⁵ See *supra* note 324.

³²⁶ See *supra* note 324.

³²⁷ See *supra* note 324.

³²⁸ See *supra* notes 260–261 and accompanying text.

³²⁹ See ADA Amendments Act of 2008, sec. 2(a)(1), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555; 42 U.S.C. § 12112(b)(5)(A).

³³⁰ See ADA Amendments Act of 2008, sec. 2(a)(1), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555; 42 U.S.C. § 12112(b)(5)(A).

³³¹ See *supra* notes 248–261 and accompanying text.

³³² See *supra* notes 248–261 and accompanying text.

Conversely, the employee/reasonable person balancing test imposes a duty on a nonmitigating plaintiff to mitigate to the extent that a reasonable person would in the same circumstances.³³³ This test does not recognize the distinction between this and the prior hypothetical because it does not take into account the plaintiff's burden compared to the employer's burden.³³⁴ Here, the plaintiff still fails to act as a reasonable person would and therefore would be denied ADA coverage under the employee/reasonable person balancing test.³³⁵ Although this test is consistent with the congressional intent to only help mitigating plaintiffs, it does not fulfill the congressional intent to provide broad coverage under the ADA.³³⁶

The employee/employer balancing test raises different problems in this situation.³³⁷ This test places the burden on the employer to show that mitigation by the plaintiff would be a more reasonable alternative than accommodation by the employer.³³⁸ In a case where the burdens are exactly equal, the employer would fail to meet this burden.³³⁹ Although the facts of this hypothetical suggest that the burdens on the plaintiff and employer may be relatively equal, significantly more fact finding would be required before such a determination could be made.³⁴⁰ In close cases, therefore, the employee/employer balancing test does not reach a clear decision, nor does it promote judicial efficiency or consistency.³⁴¹ In contrast, the "substantially limits" test resolves this problem clearly in favor of the employee, which is consistent with the ADAAA's mandate for broad coverage.³⁴²

The "substantially less" test strikes the appropriate balance between congressional intent to aid only mitigating plaintiffs and the intent to provide broad coverage to all disabled individuals.³⁴³ This test is similarly consistent with the guidance *Barnett* provides on the appropriate boundaries for the "reasonable accommodation" definition.³⁴⁴ And

³³³ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³³⁴ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³³⁵ See Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³³⁶ See ADA Amendments Act of 2008, sec. 2(a)(4), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555; Hasday, *supra* note 285, at 219; Key, *supra* note 285, at 97.

³³⁷ See Burke & Abel, *supra* note 238, at 816–17.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See *supra* notes 260–261 and accompanying text.

³⁴¹ See Burke & Abel, *supra* note 238, at 816–17.

³⁴² See ADA Amendments Act of 2008, sec. 2(a)(1), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

³⁴³ See *id.* sec. 2(a)(4), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555.

³⁴⁴ See 535 U.S. at 400.

as demonstrated by the hypothetical cases, this test best complies with the spirit and letter of the ADAAA and *Barnett* when compared to other proposals.³⁴⁵

CONCLUSION

The ADAAA has resulted in dramatic changes to the ADA that will push the question of how to treat nonmitigating plaintiffs to the forefront of litigation. Most pre-ADAAA cases were determined on the issue of “disability,” but after the significant expansion of the interpretation of this term in the ADAAA, courts will be forced to grapple with the uncertainty of defining what constitutes a “reasonable accommodation.” Both Congress and the Supreme Court have provided limited guidance on the interpretation of “reasonable accommodation.” In addition, the current confusion of lower courts over the correct way to address a plaintiff’s failure to mitigate must be addressed, particularly because none of the courts’ reasoning is valid after the ADAAA. Requiring the plaintiff to establish that the burdens imposed on him to mitigate the effects of his disability are not substantially less than the burdens imposed on the employer to accommodate the plaintiff’s disability is an appropriate way to show that an accommodation is reasonable. This approach provides guidance on the proper treatment of nonmitigating plaintiffs that is consistent with the legislative intent, case law, and public policy.

REAGAN S. BISSONNETTE

³⁴⁵ See ADA Amendments Act of 2008, sec. 2(a)(4), 122 Stat. at 3553; *id.* sec. 4(a), § 3(4)(A), 122 Stat. at 3555; *Barnett*, 535 U.S. at 400.