WORKING TO DESTIGMATIZE MENTAL ILLNESS: A CRITIQUE OF FEDERAL EMPLOYMENT LAW

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INTRODUCTION

The American federal law’s ability to eliminate general employment discrimination is deficient. 1 Inequities rooted in

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1 E.g., KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 24-26, 192-194 (2007) (addressing the law’s inability to afford complete solutions in the discrimination context); FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY, 1-21 (2009) (discussing the insufficiency of a weak state to regulate workplace discrimination).

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prejudice—conscious or unconscious—remain pervasive throughout the workplace, unfairly burdening women and minorities, despite federal provisions intended to eradicate discriminatory behavior.

The federal law has proven particularly inept at ameliorating workplace bias against mental illness. The primary federal statute prohibiting disability-based employment discrimination is Title I of the Americans with Disabilities Act of 1990 (ADA), which was modified under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) to overrule certain judicial interpretations and provide better legal protections for disabled employees. However, plaintiffs with psychological disorders remain largely obstructed from satisfying the elements necessary to establish a prima facie case under the ADAAA. The burden of proof on employees is especially onerous for those with mental illness, and the federal courts have interpreted the law in such a restrictive manner as to practically negate the statute’s protective capacity. Though the words of the

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5 Executive Legal Summary 407, Mental Disabilities in the Workplace, December 2015, Westlaw EXCLSUM 407.
7 Id.
8 See infra, Section III.
9 Id.
10 Id.
ADAAA appear to promise bountiful safeguards, the statute’s application in the courts has proven inadequate, leaving mentally ill employees with little recourse in the face of fierce societal stigma.

In this paper, I consider the ways in which the ADAAA expands coverage to those with psychiatric disorders and the reasons why this coverage remains insufficient to protect employees with mental illness. I begin the paper with a discussion of the stigma of mental illness in Part I. In Part II, I examine the ADAAA and changes made by Congress to help individuals with psychological disabilities, and in Part III, I identify the inadequacies of the ADAAA in protecting employees with mental disorders from discrimination. In Part IV, I conduct a literature review of legal scholarship concerning ways to reform mental disability-based antidiscrimination law, and I conclude by endorsing many of the recommendations drawn from legal scholarship, while encouraging an additional, more progressive avenue of reform. Throughout this paper, I use synonymously the terms mental illness, mental disorder, psychiatric disorder, and psychological disability to refer to the broad spectrum of mental

11 Id.
12 Id.
health issues included in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).\textsuperscript{14}

I. THE SOCIETAL STIGMA OF MENTAL ILLNESS

A. AN INTRODUCTION TO STIGMA

In 1963, Erving Goffman delineated societal tendencies that produce the phenomenon of stigma.\textsuperscript{15} He explained that societies develop systems of social organization, complete with defined categories and traits to be expected of each group.\textsuperscript{16} Individuals rely on these systems, using context clues to anticipate those likely to be encountered in particular settings, and the routines of social interaction in predictable environments allow people to navigate such atmospheres without particular attention.\textsuperscript{17} People process strangers by filtering them through a catalog of social categories, identifying their “fit,” and filling in unknown blanks with information typical of their designated group.\textsuperscript{18} Occasionally, one will meet a stranger with a trait different and less desirable than those expected of his or her group. Goffman illustrated that in these scenarios, the individual “reduces” the stranger “from a whole and usual person to a tainted, discounted one.”\textsuperscript{19} Goffman characterized the unfavorable attribute as a “stigma,” a “blemish[] of individual character”\textsuperscript{20} that has the effect of severely “discrediting” the stranger. People impute a wide range of deficiencies on the owner

\textsuperscript{14} \textit{Diagnostic & Statistical Manual of Mental Disorders} (DSM-5), \textit{American Psychiatric Association} (2013).
\textsuperscript{15} \textit{Goffman}, supra note 13, at 2.
\textsuperscript{16} \textit{Id}.
\textsuperscript{17} \textit{Id}.
\textsuperscript{18} \textit{Id}.
\textsuperscript{19} \textit{Id} at 3.
\textsuperscript{20} \textit{Id} at 4.
\textsuperscript{21} \textit{Id} at 3.
of a stigma on the basis of his or her undesirable trait, and any imperfect behavior on the part of the owner is assumed by others to be a direct manifestation of his or her defect.

B. THE STIGMATIZATION OF MENTAL ILLNESS

The general public brands mental disorders with such a stigma, discrediting mentally ill individuals in extreme and harmful ways. The first nationally representative study in the United States on cultural conceptions of psychiatric disorders was conducted in 1950. The study found that popular belief perceived mental illness as a “very threatening” and “fearful thing,” a “loss of . . . the distinctively human qualities of rationality and free will,” and a “kind of a horror in dehumanization.” The data revealed that “people want[ed] to keep [mental illness] as far from themselves as possible.”

Unfortunately, the public has maintained this vision of psychological disorders over the past six decades. Comprehensive studies in 1996 and 1999 measured public belief about (1) the dangerousness of people with mental illness; and (2) the amount of

22 Id. at 5.
23 Id. at 6.
24 Id. at 4; see also, e.g., Kay Redfield Jamison, An Unquiet Mind: A Memoir of Moods and Madness 180 (1996) (discussing the stigmatizing public attitudes toward people with mental illness).
26 Id. at 6.
27 Id.
28 See Link et al., supra note 13, at 1331-32 (citing Jo C. Phelan et al., Address at the 124th Annual Meeting of the American Public Health Association: Have Public Conceptions of Mental Health Changed Over the Past Half Century? Does it Matter? (November 17-21, 1996)).
social distance people desired to keep from those with a mental disorder. Although empirical studies of violence uniformly show that only a minority of people with psychiatric disorders is violent, the 1996 study found that the public stereotype of dangerousness actually increased between 1950 and 1996. Similarly, the 1999 study found that when symptoms of mental illness were presented in vignettes, people’s fears dramatically increased, despite no mention of violent behavior. In 1999, many more people expected violence from those with mental disorders (depression, 33%; schizophrenia, 61%) than from the average troubled person (17%), and these results demonstrated public fears that were “out of proportion with reality.” The 1999 study further confirmed the appreciable correlation between this fear and people’s willingness to interact with individuals with psychological disorders, concluding that the public continued to exhibit a strong desire for social distance from those with mental disabilities.

The U.S. Surgeon General’s 1999 report on mental health reflected these conclusions and identified stigma as a core obstacle preventing access to adequate treatment and important life opportunities for people with psychiatric illnesses. The White House echoed that concern in the same year at its conference on mental illness, during which the Mental Health Policy Advisor to the

\[39\] Link et al., supra note 13, at 1330-31.
\[40\] Id. at 1332.
\[41\] Id. (citing Phelan et al., supra note 28). This study was able to achieve a direct comparison with Star’s 1950 results by replicating one of her open-ended questions.
\[42\] Link et al., supra note 13, at 1332.
\[43\] Id.
\[44\] Id.
\[45\] Id.
President made the destigmatization of mental disorders a key issue for social change.\(^{37}\)

Several studies describing stigma and testing explanatory models followed the government’s advocacy efforts,\(^ {38}\) and this body of research focused on first-person approaches, collecting the perspectives of those labeled “mentally ill” about their experiences with stigma.\(^ {39}\) The research revealed that a majority of individuals with mental illness are stigmatized by others,\(^ {40}\) treated poorly because of the stigma,\(^ {41}\) and subjected to demoralization and low


\(^{39}\) Corrigan et al., *supra* note 38.


self-esteem due to internalization of the stigma. In a nationwide study focusing on personal experiences with discrimination against mental disorders, almost eighty percent of the sample reported direct experience with stigma, for example, “overhear[ing] people making offensive comments about mental illness.” Moreover, seventy percent of the sample had been treated as “less competent” by others once aware of their illness, sixty percent had been “shunned or avoided,” and twenty-six percent reported frequently facing extreme rejection. These results suggest that millions of people with mental disorders may be experiencing painful and demeaning events, such as exclusion, intolerance, insensitivity, and discrimination.

C. COPING WITH THE STIGMA OF MENTAL ILLNESS

Surviving stigmatization requires the use of extensive coping mechanisms. Those dealing with a stigma tend to be intimately aware of what others view to be their defect, and this knowledge inevitably leads to elevated self-consciousness, causing stigmatized individuals to be particularly calculating about their behavior and self-image and, often times, feel shame. Outsiders feel

43 Wahl, supra note 40, at 470.
44 Id.
45 Id. at 475.
46 See Goffman, supra note 13, at 87-88; Yoshino, supra note 1, at 16.
47 Goffman, supra note 13, at 14.
48 Id. at 7.
 unjustifiably entitled to inquire about one’s stigmatic condition, and the more one’s traits deviate from the norm, the more he or she feels an obligation to volunteer private information to others, regardless of the costs of candor. The management of information is, therefore, critical to the lives of those with mental illness. The disorders’ invisibility creates a puzzle, impelling unintentional acceptance rooted in false suppositions by otherwise unaccepting individuals who are unaware of one’s mental illness. Thus, coping with mental illness involves a regular decision of disclosure, whether to reveal the condition and suffer further stigma, or attempt to conceal the attribute and “pass for normal.”

1. Passing Demands

The potential ramifications of disclosing one’s psychological disability create immeasurable pressures to pass. Risks of disclosure include “being rejected and stigmatized by others,” which could have devastating effects on one’s social life or professional

49 Id. at 16.
50 Id. at 64. See JAMISON, supra note 24, at 200 (“I began to feel the usual discomfort I tend to experience whenever a certain level or friendship or intimacy has been reached in a relationship and I have not mentioned my illness. . . . Not talk about manic-depressive illness . . . generally consigns . . . a certain inevitable level of superficiality.”).
51 See, e.g., Joachim & Acorn, supra note 13, at 245.
52 GOFFMAN, supra note 13, at 48.
53 Id. at 42.
54 Joachim & Acorn, supra note 13, at 243. See GOFFMAN, supra note 13, at 42 (“When his differentness is not immediately apparent, and is not known beforehand . . . . the issue is . . . that of managing information about his failing. To display or not to display; to tell or not to tell; to let on or not to let on; to lie or not to lie; and in each case, to whom, how, when, and where.”).
55 GOFFMAN, supra note 13, at 74; JAMISON, supra note 24, at 202; Joachim & Acorn, supra note 13, at 245.
career. Other risks involve facing “difficulty in handling the responses of others.” Individuals with mental disorders fear that disclosure will result in negative responses from their peers, especially having experienced adverse reactions in the past. Moreover, many people with mental disorders view their illness as private information. Others with psychological disabilities feel guilt and shame because of their disorder, and they prefer to avoid calling attention to their illness or becoming the focus of care.

Professor Kay Redfield Jamison is the leading academic and clinical psychologist on mood disorders, and Jamison herself has severe manic-depressive disorder. In her autobiography, Professor Jamison described her personal reluctance to reveal her condition, stressing that “there is no easy way to tell other people that you have manic-depressive illness.” In the following excerpt, Professor Jamison summarized the combination of personal and professional concerns underlying her hesitancy to disclose:

There are many reasons why I have been reluctant to be open about having manic-depressive illness . . . . The personal issues revolve, to a large extent, around issues of family privacy—especially because the illness under consideration is a genetic one—as well as a general belief that personal matters should be kept personal. Too, I have been very concerned, perhaps unduly so, with how knowing that I have manic-depressive illness will affect people’s perception of who I am and what I do. There is a thin line between what

56 Joachim & Acorn, supra note 13, at 245.
57 Id.
58 Id. at 245-46.
59 Id.
60 Id. at 245-46.
61 JAMISON, supra note 24, at 199.
is considered zany and what is thought to be . . . “inappropriate,” and only a sliverish gap exists between being thought intense, or a bit volatile, and being dismissively labeled “unstable.” And, for whatever reasons of personal vanity, I dread the fact that my suicide attempt and depressions will be seen by some as acts of weakness or as “neurotic.” Somehow, I don’t mind the thought of being seen as intermittingly psychotic nearly as much as I mind being pigeonholed as weak and neurotic. Finally, I am deeply weary that . . . by putting myself in the position of speaking too freely and too often . . . the experiences will become remote, inaccessible, and far distant, behind me; I fear that the experiences will become of someone else rather than my own.

My major concerns about discussing my illness, however, have tended to be professional in nature. Early in my career, these concerns were centered on fears that the California Board of Medical Examiners would not grant me a license if it knew about my manic-depression. As time went by, I became less afraid of such administrative actions—primarily because I had worked out such an elaborate system of clinical safeguards, had told my close colleagues, and had discussed ad nauseam with my psychiatrist every conceivable contingency and how to best mitigate it—but I became (202) increasingly concerned that my professional anonymity in teaching and research, such as it was, would be compromised. . . . I cringe at the thought that . . . residents and interns may, in deference to what they perceive to be my feelings, not say what they really think or not ask the questions that they otherwise should and would ask.

Many of these concerns carry over into my research and writing. . . . Will my work not be seen by my colleagues as somehow biased because of my illness? . . . Will my question be treated as though it is coming from someone who has
studied and treated mood disorders for many years, or will it instead be seen as a highly subjective, idiosyncratic view of someone who has a personal ax to grind? It’s an awful prospect, giving up one’s cloak of academic objectivity.62

Overall, Professor Jamison did not want the stigma of manic-depressive disorder to color her interactions. In terms of her personal life, Professor Jamison worried about her family and the way she would be understood—or misunderstood—by others due to the stigma of her psychiatric disorder.63 Professor Jamison was also concerned about how the stigma of her illness would affect her career.64 She feared that fellow teachers would doubt the legitimacy of her research, and she dreaded that students would censor their academic contributions in order to avoid offending her.65 Finally, Professor Jamison avoided disclosure because of the “cruelty, intentional or otherwise, that [she] [has] now and again experienced from colleagues or friends that [she] [has] chosen to confide in.”66

Law Professor Lisa T. McElroy similarly explained her reluctance to disclose her severe anxiety disorder before achieving tenure.67 She recalled:

I had spent all of my adult life “passing,” pretending to be someone who is calm and confident, competent and clear-

62 Id. at 201-03.
63 Id. at 201-02.
64 Id. at 202.
65 Id. at 203.
66 Id. at 199.
headed, when in my mind I was terrified for just about every waking moment.

Why did I hide my disability? Because I was convinced that passing for “normal” was the only way I could succeed in my career.68

Throughout her career, Professor McElroy felt certain that she could only succeed professionally if others remained unaware of her illness. Like Professor Jamison, Professor McElroy only chose to publically disclose her psychiatric disorder after achieving a substantial level of professional success and earning job security with academic tenure.

It is unsurprising that most individuals with mental disorders feel obligated to pass; outsiders presume that they do not have a mental illness, and there are severe consequences to disclosure.69 For this reason, most people with psychiatric disabilities experience the “natural cycle of passing,” which begins with “unwitting passing that the passer never learns he is engaging in,” followed by instances of “unintended passing that the surprised passer learns about in mid-passage.”70 The cycle continues to “passing during routine daily occasions,” such as at work, and concludes with “disappearance,” or “complete passing.”71

At any phase, an individual may decide to voluntarily disclose his or her mental illness.72 Passing is strenuous, as Professor Jamison described upon her personal decision to disclose: “I am tired of hiding, tired of misspent and knotted energies, tired of the hypocrisy,

68 McElroy, supra note 67, at 1420.
69 See GOFFMAN, supra note 13, at 74.
70 Id. at 79.
71 Id.
72 Id. at 100.
and tired of acting as though I have something to hide.” 73 Nonetheless, every new person and social environment forces those with mental illness to revisit the question of disclosure, and in many contexts, passing to at least some degree seems unavoidable.74

2. Information Management

Passing, deliberately or not, causes an individual with mental illness to lead a form of double life,75 which necessitates meticulous management. Concealing and disclosing the disorder becomes central to one’s identity,76 and one must maintain an accurate memory to monitor the flow of personal information shared with peers, co-workers, and family members.77 This type of identity control requires extensive energy and attentiveness, as one may feel the need to conceal the illness from acquaintances, but later reveal more details as friendships develop.78 Relationships oblige both time spent together and the exchange of personal information to demonstrate trust and mutual commitment.79 The more time and information shared, however, the more likely a colleague is to discover one’s psychological disorder,80 and the more guilt and

73 JAMISON, supra note 24, at 7.
74 Cf. YOSHINO, supra note 1, at 16-17 (“While closeted, I micromanaged my gay identity, thinking about who knew and who did not . . . . It was impossible to come out and be done with it, as each new person erected a new closet around me”).
75 GOFFMAN, supra note 13, at 76. See also id. at 87 (“. . . the passer will feel torn between two attachments. He will feel some alienation from his new ‘group,’ for he is unlikely to be able to identify fully with their attitude to what he knows he can be shown to be. And he will suffer feelings of disloyalty and self-contempt when he cannot take action against ‘offensive’ remarks made by members of the category he his passing into . . . ”).
76 Id. at 65.
77 Id.
78 See id. at 109.
79 Id. at 86.
80 Id.
anxiety one feels for not having already disclosed his or her mental disorder.  

Accordingly, people with mental illness “necessarily pay a great psychological price, a very high level of anxiety, in living a life that can be collapsed at any moment.” As Professor Jamison recalled, “I lived in terror that someone would find out how I had been, how fragile I still was.” Passing also leaves open the possibility that a “discrediting” may occur through the later discovery of one’s mental illness, and many with disorders find themselves uncertain as to how far their personal information has travelled. Thus, certain social situations become particularly overwhelming, for example, when a stranger detects one’s mental illness, or when a select number of people in a group know about the illness, while others remain unaware. Additionally, passing leads to the experience of “in-deeper-ism,” the pressure to continue expanding upon lies to avoid disclosure, as well as the ever-looming fear of potential confrontation following any exposure. Individuals with mental disorders are likely to elaborate upon earlier lies in order to protect their identities, and as their misrepresentations become further

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81 Id. at 74.
82 Id. at 87 (“A statement by a wife of a mental patient will illustrate: ‘. . . and suppose after George gets out [of the hospital] everything is going well and somebody throws it up in his face. That would ruin everything, I live in terror of that—a complete terror of that.’”) (internal citation omitted).
83 JAMISON, supra note 24, at 142.
84 GOFFMAN, supra note 13, at 75.
85 Id. at 84.
86 Id. at 85 (“The presence of fellow-sufferers [] introduces a special set of contingencies in regard to passing, since the very techniques used to conceal stigmas may give the show away to someone who is familiar with the tricks of the trade[].”).
87 Id. at 83.
88 Id. at 85. One may also become subject to blackmail out of fear of exposure. See id. at 75.
entrenched in their relationships, the lies become increasingly difficult to manage.\textsuperscript{89}

3. Social Distance

The stress-inducing nature of navigating relationships in the context of frequent passing often motivates individuals with mental illness to create social distance from others.\textsuperscript{90} In terms of emotional distance, one may limit conversation to superficial subjects in order to avoid the obligation to divulge information.\textsuperscript{91} An individual might also maintain physical distance, restricting the amount of time spent with others to inhibit others from deducing personal information and discovering the disorder.\textsuperscript{92} For example, “By staying indoors and not answering the phone or door the discreditable individual can remove himself from most of those contacts in which his disgrace might be established.”\textsuperscript{93} Thus, those with mental disorders may construct physical and emotional barriers to evade managing the stigma of their disorder, retreating to self-isolation in search of security.\textsuperscript{94}

D. Mental Disability-Based Employment Discrimination

The stigma of mental illness has particularly troubling effects in the employment context, directly and indirectly impeding people with mental illness from access to fair treatment.\textsuperscript{95} Employment often serves as a socially integrating force and key determinant of mental

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\textsuperscript{89} Id. at 83.
\textsuperscript{90} COFFMAN, supra note 13, at 99; Bruce G. Link et al., The Social Rejection of Former Patients: Understanding Why Labels Matter, 92 AM. J. SOC. 1461, 1463 (1987).
\textsuperscript{91} See COFFMAN, supra note 13, at 99.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 100.
\textsuperscript{94} Perlick et al., supra note 38, at 1631.
\textsuperscript{95} Heather Stuart, Mental Illness and Employment Discrimination, 19 CURRENT OPINION PSYCHIATRY 522, 522 (2006).
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health. Work is a “normalizing factor” that provides daily structure and opportunities to set and achieve meaningful goals, increase finances, build relationships, obtain social support, and raise self-esteem. Discrimination and exclusion from the labor market is therefore especially devastating for people with mental disorders. Rejection from the workplace is recognized to be a “key risk factor for mental disability,” leading to material deprivation, self-esteem degradation, and social isolation for people with mental disorders.

Although some individuals with serious mental disorders are unable to work, most people with such disabilities are willing and able to participate in the workforce; however, “their unemployment rates remain inordinately high.” Population surveys have consistently estimated the unemployment rate among people with mental disorders as three to five times higher than their nondisabled counterparts. For example, a 2005 study found that in 1994 and 1995, sixty-one percent of working age adults with mental health disabilities are outside of the labor force, compared to only twenty percent of working-age adults in the general population.
While the stigma of mental illness makes it more difficult to gain competitive employment, unemployed individuals with mental disorders suffer an additional stigma for their lack of occupation.\textsuperscript{104} The prejudicial attitudes of employers and co-workers often prevent those with psychiatric disorders who are able to work from active participation in the competitive workforce.\textsuperscript{105} First, employers’ stigmatizing views about mental illness make it challenging for individuals with psychological disabilities to enter the competitive labor market.\textsuperscript{106} Employers are often more likely to hire employees with physical disabilities than employees with mental disorders,\textsuperscript{107} and surveys of American employers show that fifty percent are reluctant to hire someone receiving treatment for depression or with past psychiatric history.\textsuperscript{108} Approximately seventy percent of

\begin{footnotesize}
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\item \textsuperscript{104} G. W. Ackerman \& C. J. McReynolds, \textit{Strategies to Promote Successful Employment of People with Psychiatric Disabilities}, 36 \textit{J. APPLIED REHABILITATION. COUNSELING} 35, 36 (2005); Morgan, \textit{supra} note 100.
\item \textsuperscript{105} See \textit{Stuart, supra} note 95.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} See Kay Wheat et al., \textit{Mental Illness and the Workplace; Conceal or Reveal?}, 103 \textit{J. ROYAL SOC’Y MED.} 83, 83 (2010); cf. Ed Long \& Bette Runck, \textit{Combating Stigma Through Work for the Mentally Restored}, 34 \textit{HOSPITAL \& CMTY. PSYCHIATRY} 19, 19 (1983) (finding increased hiring of physically disabled employees compared to mentally disabled employees in the restaurant industry).
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American employers are disinclined to hire someone taking antipsychotic medication,\textsuperscript{109} half would “rarely employ someone with a psychiatric disability,”\textsuperscript{110} and thirteen percent would dismiss someone who had not disclosed a mental illness.\textsuperscript{111} Second, having a psychiatric diagnosis can also seriously limit career advancement because employers are less likely to hire those with mental illnesses into executive positions.\textsuperscript{112} Therefore, people with such diagnoses are likely to be underemployed, in lower paying menial jobs that are incommensurate with their skills and interests.\textsuperscript{113}

Individuals with mental disorders identify employment discrimination as one of their most persistent encounters with stigma.\textsuperscript{114} The majority of people with mental disabilities (twice as many as those with physical disabilities) expect to experience employment-related stigma,\textsuperscript{115} and one in three people with mental illness report having been turned down for a job when their psychological status became known to employers.\textsuperscript{116} In some cases, job offers were rescinded when an individual’s psychiatric history was revealed.\textsuperscript{117} Additionally, fear of stigma and rejection by

\textsuperscript{109} Id. at 87.
\textsuperscript{111} Manning & White, supra note 110, at 543.
\textsuperscript{113} Wahl, supra note 40. See also Robert Rosenheck et al., \textit{Barriers to Employment for People with Schizophrenia}, 163 \textit{AM. J. PSYCHIATRY} 411-17 (2006).
\textsuperscript{114} Carol Roeloffs et al., \textit{Stigma and Depression Among Primary Care Patients}, 25 \textit{GEN. HOSP. PSYCHIATRY} 311, 313 (2003).
\textsuperscript{115} Id.
\textsuperscript{116} Wahl, supra note 40, at 471; OTTO F. WAHL, TELLING IS RISKY BUSINESS 80 (1999).
\textsuperscript{117} WAHL, supra note 116, at 82.
prospective employers may undermine one’s confidence and result in poorer performance during job interviews.\footnote{118}

When successful in obtaining employment, some people with mental disorders find the work environment unfriendly, as twenty-eight percent of individuals with mental illness indicate that co-workers and supervisors were seldom or never supportive and accommodating after they learned about the employee’s disorder.\footnote{119} For example, upon returning to work after medical leave due to mental illness, workers report being socially marginalized by mean-spirited comments from co-workers who had previously been supportive and friendly.\footnote{120} The same employees also report returning to positions of reduced responsibility, with enhanced supervision.\footnote{121} This discrimination contributes to why many competitive jobs acquired by people with severe psychiatric conditions end as a result of interpersonal difficulties.\footnote{122} Over time, individuals with mental disorders may come to view themselves as unemployable and stop seeking work altogether.\footnote{123}

\footnote{118} Id. at 133.
\footnote{119} Wahl, supra note 40, at 471.
\footnote{120} WAHL, supra note 116, at 85-86.
\footnote{121} Id. at 84.
\footnote{123} Bruce G. Link, Mental Patient Status, Work, and Income: An Examination of the Effects of a Psychiatric Label, 47 AM. SOC. REV. 202, 204 (1982); see also STEEL, supra note 3, at 91-93 (discussing stereotype threat).
II. **CONGRESS’S EFFORTS TO ADDRESS MENTAL DISABILITY-BASED WORKPLACE DISCRIMINATION THROUGH THE ADAAA**

A. **THE ORIGINS OF THE ADA**

In 1973, Congress passed the Rehabilitation Act, prohibiting recipients of federal funding from disability-based discrimination. The Rehabilitation Act provided that “[t]he term ‘handicapped individual’ means any . . . person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.” On July 26, 1990, after seventeen years of lobbying, disability rights advocates finally succeeded in persuading the government to enact the Americans with Disability Act (ADA), which adopted the Rehabilitation Act’s language of “mental limitations.” The ADA intended to offer legal protections to individuals with physical or mental disabilities from disability-based discrimination. Specifically, Title I of the ADA aimed to safeguard the financial self-sufficiency of disabled individuals, prohibiting employment discrimination against “qualified individuals with . . . disabilities.”

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127 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job trainings, and other terms, conditions, and privileges of employment.”).
128 Id. *See also* Befort, *supra* note 126.
129 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring,
B. Establishing a Prima Facie Case for Mental Disability Under the ADA

The ADA requires employers to accommodate individuals who prove that they are “disabled,” as defined by the statute, as long as such employees are “qualified” for the job, either with or without a “reasonable accommodation.” 130 Accommodation is necessary, unless such accommodation would impose an “undue hardship” on the employer. 131 To establish a prima facie case of disability discrimination under Title I, a plaintiff must demonstrate that he or she “(1) [is] a disabled person as defined by the ADA; (2) is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.” 132

C. The Narrowing of the ADA in Federal Court

The ADA states that a person is disabled if he has “(A) a physical or mental impairment that substantially limits one or more major life activities ... ; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment.” 133 Despite the intentions of Congress to protect people with mental disabilities, the federal courts interpreted the term “disabled” so narrowly as to preclude the majority of plaintiffs with mental illness from establishing a prima

advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”).

facie case.\textsuperscript{134} Most plaintiffs with mental disorders were unable to prove that their illnesses “substantially limited a major life activity” and therefore failed to meet the statutory definition of “disabled.”\textsuperscript{135} The federal courts held that plaintiffs who suffered from cancer, depression, epilepsy, and muscular dystrophy were not “disabled” under the ADA, undermining the intended effect of the statute.\textsuperscript{136}

The United States Supreme Court had an especially important role in cabining the definition of disability, deciding two cases in 1999 and 2002 that significantly limited the protective reach of the ADA.\textsuperscript{137} First, in \textit{Sutton v. United Air Lines, Inc.}, the Court affirmed a lower court’s ruling that one’s disability should be examined “with references to measures that mitigate the individual’s impairment” for the sake of ADA analysis.\textsuperscript{138} The plaintiffs in \textit{Sutton} suffered from severe myopia, but they had 20/20 vision with corrective lenses.\textsuperscript{139} The plaintiffs were denied jobs as pilots on account of their uncorrected vision;\textsuperscript{140} however, the Court relied on the plaintiffs’ corrected vision, determining that the plaintiffs were not “disabled” because their eyesight was normal in its mitigated state.\textsuperscript{141} The Court also found that the plaintiffs were not “regarded as” disabled under the (C) prong of the ADA’s disability definition. Since the plaintiffs were merely unable to perform the particular duties required of an airline pilot, the Court was not persuaded that the plaintiffs’
employer needed to perceive their impairments as “substantially limiting their ability to work.”\textsuperscript{142}

Three years later, the Supreme Court further restricted the definition of disabled in \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams}.\textsuperscript{143} The plaintiff was unable to do her job on an assembly line without an accommodation because she suffered from carpal tunnel syndrome. The Court narrowly construed the terms “substantially limiting” and “major life activity,” holding that a “substantially limiting” impairment must be such that it “prevent[s] or severely restrict[s]” an individual from doing an activity that is of “central importance to most people’s daily lives.”\textsuperscript{144} The Court determined that the plaintiff was not disabled because the activities required for an assembly line job were not integral to most people’s daily lives.\textsuperscript{145}

As a result of the decisions in \textit{Sutton} and \textit{Toyota}, plaintiffs almost never prevailed in employment discrimination actions filed under the ADA,\textsuperscript{146} losing ninety-seven percent of Title I ADA workplace discrimination suits. Plaintiffs were either “too disabled to qualify” or keep employment pursuant to the statute, or “not disabled enough to merit protection under the ADA.”\textsuperscript{147} Consequently, plaintiffs slowly stopped filing ADA discrimination claims.\textsuperscript{148} The Supreme Court’s restrictive interpretation of the ADA effectively “negated

\begin{itemize}
\item \textsuperscript{142} \textit{Id}. at 490-91.
\item \textsuperscript{143} See \textit{Toyota Motor Mfg., Ky. v. Williams}, 534 U.S. 184, 187 (2002).
\item \textsuperscript{144} \textit{Id}. at 196-98.
\item \textsuperscript{145} \textit{Id}. at 200-02.
\item \textsuperscript{147} Debbie N. Kaminer, \textit{Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?}, 26 HEALTH MATRIX 205, 211 (2016).
\item \textsuperscript{148} Befort, \textit{supra} note 126, at 2037-38.
\end{itemize}
Congressional intent” and left victims of disability-based employment discrimination “with little recourse.” 149

D. THE ENACTMENT OF THE ADAAA

In response to the Court’s limited reading of the ADA, Congress amended the law on September 25, 2008, passing the ADAAA to specifically overturn the Supreme Court decisions in Sutton and Toyota. 150 Congress hoped to redirect the focus of ADA cases to the question of discrimination and away from the definition of disability. 151 Ultimately, Congress was successful in broadening the term “disability” so as to remove much of the litigation focused on that issue from the courts. 152 Following the enactment of the ADAAA, federal courts have significantly extended their interpretation of the term “disability” in ADAAA cases. 153

Congress broadened the interpretation of “disability” in the ADAAA by including statutory instructions within the law, determining how the courts should interpret the amendments. 154 The Statement of Purpose of the ADAAA asserts that “the question of whether an individual’s impairment is a disability under the ADAAA should not demand extensive analysis.” 155 The Rules of

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149 Kaminer, supra note 147, at 211.
151 See Befort, supra note 126, at 2029.
152 Kaminer, supra note 147, at 207.
153 Americans with Disabilities Act Amendments Act § 2(b)(2)-(5). See also Barry, supra note 150, at 26.
Construction emphasize that “the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act.”

Most significantly for employees with mental illness, the ADAAA considers episodic disorders as disabilities; requires courts to consider disabilities in their unmitigated state; expands the definitions of “substantially limits” and “major life activity;” and lowers the burden of proof on employees for the “regarded as” prong. The ADAAA protects individuals whose mental illnesses are episodic, determining that an episodic disorder is considered a disability “if it would substantially limit a major life activity when active.” Before the enactment of the amendments, federal courts were inconsistent about their interpretation of the status of episodic illnesses under the ADA. Moreover, Sutton seemed to exclude episodic disorders. The Court stated that one must be “presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability,” and this holding apparently refused legal protections to employees who were discriminated against because of their mental illness but who were not currently suffering from a psychiatric episode. Psychiatric disorders tend to be

\[\text{References}\]

157 42 U.S.C. § 12102(4). See also Befort, supra note 126, at 2043-44.
159 Compare, e.g., Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1999), with, e.g., Garrett v. Univ. of Ala. at Birmingham Bd. of Tr., 507 F.3d 1306, 1315 (11th Cir. 2007); Todd v. Acad. Corp., 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999). See also Concannon, supra note 13, at 103-04.
160 Sutton, 527 U.S. at 471 (noting that the Court was not specifically considering the issue of episodic impairments). See also Concannon, supra note 13, at 104.
161 Sutton, 527 U.S. 471, at 482-83
162 Id.
episodic in nature, and upon the passage of the ADAAA, courts have consistently included episodic illnesses as protected disabilities.

The ADAAA’s provisions on mitigating measures are particularly relevant to people with psychiatric disabilities because employees with mental disorders often take medication or attend therapy to mitigate the harmful effects of their illness. In the ADAAA, Congress explicitly rejected the holding in *Sutton* and provided 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,” defining mitigating measures as to include “medication” and therapy. This new interpretation has been consistently applied by the federal courts and should increase the number of employees with mental illness who have standing in federal court pursuant to the ADAAA. Before the ADAAA, people treating their manic-

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166 See also 29 C.F.R. § 1630.2(j)(v) (2012) (listing “psychotherapy” and “behavioral therapy” as mitigating measures).


168 Kaminer, *supra* note 147, at 225.
depressive disorder,\textsuperscript{169} schizophrenia,\textsuperscript{170} or depression\textsuperscript{171} were not considered disabled for the purposes of employment discrimination and therefore could be terminated because of their mental illness.\textsuperscript{172} Now, individuals undergoing treatment are not necessarily blocked from legal protection,\textsuperscript{173} although they are still required to prove that their unmitigated disability satisfies the statutory definition of disability.\textsuperscript{174}

Congress also instituted broad interpretations of “substantially limits” and “major life activity,” overruling Toyota’s ruling for narrow readings.\textsuperscript{175} Congress added “concentrating, thinking, communicating and working”\textsuperscript{176} to the list of major life activities and including “neurological” and “brain” functions as “major bodily functions.”\textsuperscript{177} These expansive illustrations of “substantially limits” and “major life activity” are more likely to protect employees with mental disorders.\textsuperscript{178} As a result of the amendments, most employment discrimination cases pursuant to the ADAAA have

\textsuperscript{170} Concannon, supra note 13, at 111.
\textsuperscript{171} See Befort, supra note 126, at 2038-39. See also, \textit{e.g.}, Allen v. BellSouth Telecommunications Inc., 483 F. App’x 197, 200 (6th Cir. 2012); Spades v. City of Walnut Ridge, 186 F.3d 897, 900 (8th Cir. 1999); McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1288-89 (D. Wyo. 2004).
\textsuperscript{172} Kaminer, supra note 147, at 225-26.
\textsuperscript{174} See, \textit{e.g.}, O’Donnell, 2013 WL 1234813.
\textsuperscript{176} 42 U.S.C. 12102(2)(A).
\textsuperscript{177} 42 U.S.C. § 12102(2)(B).
\textsuperscript{178} See Kaminer, supra note 147, at 230.
found that employees with psychological disorders have at least raised a genuine issue of material fact as to whether they are substantially limited in a major life activity.\footnote{179}

Finally, Congress significantly expanded the “regarded as” prong, further extending the definition of disabled.\footnote{180} Prior to the ADAAA, employees were required to demonstrate that an employer believed that the impairment substantially limited a major life activity, \footnote{181} obligating employees to “get inside the head” of employers to prove employers’ motivations. \footnote{182} Furthermore, employees were not protected against animus-based discrimination when employers acted “out of deep antipathy for the diagnosed condition, rather than any mistaken perception of its effects on an individual’s ability to work.” \footnote{183} The legislative history of the


\footnote{180}See Sharona Hoffman, The Importance of Immutability in Employment Discrimination Law, 52 William & Mary L. Rev. 1483, 1496 (2011) (“The revised ‘regarded as’ prong of the disability definition is likely to be the most transformative improvement for ADA plaintiffs.”). For general discussion of the ADAAA’s broad coverage under the “regarded as” prong, see Matthew Diller, Judicial Backlash and the ADA, and the Civil Rights Model, 21 Berkeley J. Emp. & Lab. L. 19, 23-37 (2000). See also Carol J. Miller, EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does “Substantially Limit” Mean?, 76 Mo. L. Rev. 43, 68 (2011).

\footnote{181}Concannon, supra note 13, at 105-06.

\footnote{182}Id. at 95.

\footnote{183}Stefan, supra note 163, at 298-99. See also Hoffman, supra note 180, at 1496-97. In cases before the ADAAA, some courts held that employees who suffered from anxiety and depression were not “regarded as” disabled since they were unable to show that their employer believed they were substantially limited in a major life activity. See, e.g.,
ADAAA reveals Congress’s intention to address animus-based discrimination by modifying the “regarded as” clause. Pursuant to the ADAAA, a person is “regarded as” disabled “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” Thus, employees are no longer required to prove that their employer considered them functionally limited in performing a major life activity. The federal courts have applied the new definition in a consistent manner, which is likely to help employees with mental illnesses fight the pervasive stigma of their disorders. Plaintiffs with psychiatric disorders have been able to at least raise a genuine issue of material fact as to whether they were “regarded as” disabled by their employer. Plaintiffs must nonetheless show that they were subjected to an adverse

Michelle Parikh, Note, Burning the Candle at Both Ends, and there is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness, 89 CORNELL L. REV. 721, 753-56 (2004); Concannon, supra note 13, at 112; Stefan, supra note 163, at 276; Schwartz v. Comex, No. 96 CIV. 3386 LAP, 1997 WL 187353, at 2 (S.D.N.Y. Apr. 15, 1997).

184 Stefan, supra note 163, at 303-06.
186 See Befort, supra note 126, at 204. See also 154 Cong. Rec. S8342-46 (daily ed. Sept. 11, 2008).
187 Kaminer, supra note 147, at 233.
188 See supra, Section I.
employment action “because of” the perceived impairment,\textsuperscript{190} and in certain instances, plaintiffs with mental disabilities have been unable to meet this next burden.\textsuperscript{191}

III. LIMITATIONS OF THE ADAAA IN PROTECTING INDIVIDUALS WITH MENTAL ILLNESS

The ADAAA’s expanded definition of disability has increased the availability of legal protections against disability-based employment discrimination for individuals with psychiatric disorders. Courts are granting summary judgment to employers far less frequently on the basis of disability status alone,\textsuperscript{192} and the shift of the ADAAA has moved the federal courts’ focus away from the “disability” inquiry and onto the second and third prongs of a prima facie case: whether the individual “is qualified, with or without a reasonable accommodation, to perform the essential functions of the job held or desired;” and whether the individual “suffered discrimination by an employer or prospective employer because of that disability.”\textsuperscript{193} Nonetheless, many obstacles continue to inhibit individuals with mental disorders from establishing a prima facie case under the second and third prongs of the ADAAA.\textsuperscript{194}

A. THE DEFINITION OF “QUALIFIED” UNDER THE ADAAA

Although Congress lowered the bar for individuals with mental disorders to satisfy the “disability” prong of a prima facie case, historically the “qualified” prong has proven most problematic for

\textsuperscript{190}29 C.F.R. 1630.2(g)(1)(iii).
\textsuperscript{192}Befort, supra note 126, at 2031-32.
\textsuperscript{193}EEOC v. Picture People, Inc., 684 F.3d 981, 985 (10th Cir. 2012).
\textsuperscript{194}Kaminer, supra note 147, at 207.
those with mental disabilities. While two-thirds of plaintiffs with physical disabilities failed to establish their prima facie case because they were not found to be “disabled,” two-thirds of plaintiffs with mental disabilities failed to establish legal protection because they were not found to be “qualified” under the terms of the ADA.

Because the ADAAA made no significant changes to the definition of “qualified,” the increased access to legal protections under the ADAAA is more pronounced for physically disabled employees.

This conclusion was confirmed by a recent study examining federal court rulings before and after the ADAAA, comparing the litigation results of physically disabled employees with those of employees with mental illnesses. The summary judgment win-rate for employers on disability grounds dropped from over seventy-eight percent to twenty percent in cases involving physically disabled employees. In contrast, the same win-rate dropped from sixty percent to forty percent in cases involving employees with mental disorders. Plaintiffs with physical disabilities have thus benefitted at a much greater rate than plaintiffs with psychiatric illnesses under the amendments.

One reason that employees with mental disabilities have experienced a comparatively minimal benefit from the ADAAA is the increased role of the definition of “qualified” in court

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196 Id.
198 Concannon, supra note 13, at 113.
199 See generally Befort, supra note 126.
200 Id. at 2054.
201 Id.
proceedings.\textsuperscript{202} Since the enactment of the ADAAA, the percentage of district court summary judgment rulings based on qualified status has increased from twenty-eight percent to forty-seven percent.\textsuperscript{203} As more federal courts reach the question of qualification, more employees with mental illness are found to be not “qualified” under the ADAAA.\textsuperscript{204} For this reason, “the more plaintiff-friendly outcomes engineered by the ADAAA with respect to disability status are being partially offset by the increase in employer-friendly outcomes with respect to qualified status.”\textsuperscript{205}

The vague terminology used in the qualification prong is partly to blame for the inadequate protection offered to employees with psychological disabilities.\textsuperscript{206} The word “qualified” is ambiguous and the definition of “essential functions” is unclear. The ADAAA states that “consideration shall be given to the employer’s judgment as to what functions of a job are essential,”\textsuperscript{207} and courts tend to give deference to employers’ personnel decisions.\textsuperscript{208} Without a distinct standard, many courts have held that regular attendance, for example, is always an essential job function, while other courts are less willing to make such a determination without an individualized inquiry.\textsuperscript{209}

\begin{footnotes}
\footnotetext{202}{Id. at 2054-55.}
\footnotetext{203}{Id. at 2055 (noting that while summary judgment was granted to the employer in 47.9% of cases that ruled on the “qualified” issue in ADA cases, this number increased to a 69.7% employer win-rate in cases after the ADAAA that ruled on this issue).}
\footnotetext{204}{Id. at 2068.}
\footnotetext{205}{See Kaminer, \textit{supra} note 147, at 239-240.}
\footnotetext{206}{42 § U.S.C. 12111(8) (2012).}
\footnotetext{207}{Ward v. Mass. Health Research Inst. Inc., 209 F.3d 29, 34 (1st Cir. 2000); Mason v. Avaya Commc’ns Inc., 357 F.3d 1114, 1119 (10th Cir. 2004); Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006).}
\footnotetext{208}{Concannon, \textit{supra} note 13, at 97.}
\end{footnotes}
The term “reasonable accommodation” is also problematic because the ADAAA fails to define the phrase and the federal courts have been inconsistent in its application. As a baseline, the United States Supreme Court held in 2002 that an accommodation would generally not be considered reasonable if it calls for the violation of a seniority system. Additionally, a majority of lower courts have decided that reasonable accommodations do not include creating new positions, providing personal items (such as medications or hearing aids), or monitoring employees’ health needs. Otherwise, there is little guidance on the issue. Lower courts are split as to whether employers need to provide employees work-related transportation; whether employers must reassign employees to vacant positions if there are other more qualified employees to vacant positions if there are other more qualified


211 42 U.S.C. § 12111(9) (2012) (failing to define “reasonable accommodation” and instead offering a list of possible reasonable accommodations, including “job restructuring, part-time or modified work schedules, reassignment to a vacant position [and] acquisition or modification of equipment or devices”).

212 See Porter, supra note 210, at 546-52.


214 See Porter, supra note 210, at 546-47 (citing cases).

215 For a discussion of lower court cases interpreting the accommodation provision of the ADA, see id. at 543-58; Weber, supra note 210, at 1152-60.

employees available;\(^{217}\) and whether accommodations are required at the expense of other employees.\(^ {218}\)

**B. “REASONABLE ACCOMMODATION” AS APPLIED TO MENTAL ILLNESS**

In the case of employees with mental illness, much of the inquiry as to one’s qualification depends on whether the employee can perform the job with a reasonable accommodation. The murky definition of “reasonable accommodation” is compounded by further complications particular to the context of psychological disabilities, such as the likelihood for employees with mental disorders to pass or avoid disclosure of their illness,\(^ {219}\) making it improbable for employers to be aware of one’s need for an accommodation.

1. *Interpersonal Conflicts*

   A common issue for employees with mental illness, such as depression or anxiety, is interpersonal conflict with certain colleagues.\(^ {221}\) In these scenarios, employees usually request to be transferred away from a co-worker who is exacerbating the

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\(^{218}\) Porter, supra note 210, at 552 (citing cases).

\(^{219}\) See supra, Section I.

symptoms of their illness. Employees have also requested that their employer instruct the co-worker to modify his or her behavior. The federal courts tend to be unsympathetic to these employees’ needs, however, finding the suggested accommodations to be unreasonable.222 Courts have elaborated that the ADA does not grant employees the right to demand a “work environment without aggravation”223 or to select his or her co-workers.224

2. Scheduling

Workers with psychiatric disorders face scheduling obstacles when their illnesses make their current work routine unsustainable. This is particularly relevant to employees with episodic disorders. Employees with episodic disorders typically ask for a modified schedule during psychiatric episodes, which may include a request for reassignment to a position with different hours or permission to work remotely.225 The federal courts have routinely held that employers have no obligation to create new positions for disabled employees, so employees with mental illness tend to lose the legal battle when they request a shortened or part-time work week and no such positions are available.226 Many courts have also ruled that regular attendance and punctuality are essential job functions and that employers are not obligated to accommodate an employee’s

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222 For the denial of transfer, see Palmerini, 2014 WL 3401826, at *8; Bear, 2013 WL 4099196; Schwarzkopf, 833 F. Supp.2d at 1123; Prichard, 2006 WL 1836017 at *44; Gaul, 134 F.3d at 581. For the denial of changing the supervisor’s instruction, see Tomlinson v. Wiggins, No. 12-CV-1050, 2013 WL 2151537 at *11-12 (W.D. Ark. May 16, 2013); Schwarzkopf, 833 F. Supp.2d at 1122-23.
224 Prichard, 2006 WL 1836017 at *44.
225 Kaminer, supra note 147, at 244-45.
inability to satisfy those functions on account of his or her illness.\textsuperscript{227} It is unclear whether an employer needs to reassign an employee with psychological disorders to a vacant position if there are other more qualified employees available, or whether an employer must allow an employee with mental illness to work at home.\textsuperscript{228}

3. Misconduct or Inappropriate Behavior

Mental disorders are more likely to manifest in conduct that may be considered inappropriate behavior by employers.\textsuperscript{229} Federal courts are unsympathetic to employees with such symptoms, holding that employers are not required to accommodate misbehavior, even if such conduct results from a mental disability.\textsuperscript{230} One court was particularly unmoved by a plaintiff who was terminated for egregious misconduct when the employer was unaware of the employee’s illness.\textsuperscript{231} The court held that the ADAAA was not violated because the employee was fired for his conduct, not his disease,\textsuperscript{232} emphasizing that ignoring or excusing employee misconduct is not a reasonable accommodation, regardless of the employee’s underlying illness.\textsuperscript{233}

In terms of the level of inappropriate behavior, federal courts agree that violence, or threats of violence, need not be tolerated from

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Langon v. Dep't of Health & Human Servs., 959 F.2d 1053, 1061 (D.C. Cir. 1992).
\item See id. at 679-80 (citing cases); Jane Byeff Korn, \textit{Crazy (Mental Illness Under the ADA)}, 36 U. MICH. J. L. REFORM 585, 643-46 (2003).
\item Id.
\item Id. at *5.
\end{enumerate}
\end{footnotesize}
any employees.234 As the United States Second Circuit Court of Appeals stated, an “employer may discipline or terminate an individual who, because of a disability, makes a threat against other employees if the same discipline would be imposed on a non-disabled employee engaged in the same conduct.”235 Individuals with mental illness who engage in violent conduct are not protected from termination under the ADAAA, as “the ADA does not require an employee whose unacceptable behavior threatens the safety of others to be retained, even if the behavior stems from a mental disability.”236

4. Direct Threat

The issue of “direct threat” mostly becomes relevant to individuals with psychiatric disorders in the context of stigma.237 The ADAAA asserts that employees who pose a “direct threat to the health or safety of other individuals in the workplace”238 fail to meet the statute’s qualification provision; the federal courts are obligated, however, to perform individualized assessments to judge whether an employee is legitimately a direct threat in the working environment.239 The ADAAA legislators emphasized the importance of the individualized assessment because they were concerned that employers would discriminate against employees with mental illness

235 Sista, 445 F.3d at 171.
236 Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2013).
237 Kaminer, supra note 14, at 246.
239 Sista, 445 F.3d at 170.
by alleging that they posed a direct threat merely because of their psychiatric disorder.\textsuperscript{240} The direct threat provision is often wrongly conflated with the concept of employee misconduct.\textsuperscript{241} The direct threat clause is not intended for cases of “threatening behavior.”\textsuperscript{242} Instead, the direct threat defense applies to the “discriminatory application of qualification standards” that “screen[s] out” disabled applicants.\textsuperscript{243} This distinction “maintains the necessary balance between ‘protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear’ . . . and permitting employers to protect themselves and their employees and customers from potentially violent employees.”\textsuperscript{244} Nonetheless, the stigma of mental illness causes employers to inaccurately measure the perceived threat of individuals with psychiatric disabilities, and the courts’ conflation of the misconduct and direct threat clauses further stigmatizes mentally disabled plaintiffs as “direct threats” to their workplaces.

\textbf{C. BUT-FOR CAUSATION IN PROVING “ADVERSE ACTION”}

Under the ADAAA, a plaintiff must finally satisfy the third prong of a prima facie case in order to establish a legitimate claim of

\begin{footnotesize}
\textsuperscript{240} See H.R. Rep. No. 101-485(III), at 45 (“Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case. For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others.”).

\textsuperscript{241} See, e.g., Danforth, supra note 228, at 686 (“The Seventh Circuit, in Palmer v. Circuit Court, blurred the distinctions between firing an employee solely for misconduct that violates a nondiscriminatory workplace policy and deeming an employee ‘not otherwise qualified’ when he poses a direct threat.”).

\textsuperscript{242} See Sista, 445 F.3d at 170-73.

\textsuperscript{243} Id. at 171.

\textsuperscript{244} Id. at 172.
\end{footnotesize}
disability-based employment discrimination. 245 Thus, after employees prove that they are “disabled,” pursuant to the first prong, and “qualified,” pursuant to the second prong, they must demonstrate that they suffered an adverse employment action on account of their disability.246 Before the ADAAA, employees with psychological disabilities who reached this prong were usually unsuccessful, as federal courts generally determined that employers’ conduct did not constitute an “adverse action.”247 Unfortunately, the amendments have not seemed to impact the judicial landscape with respect to the third prong, and individuals with mental illness remain unprotected by the federal law.248

One of the greatest questions with respect to the third prong is whether individuals with psychological disabilities must prove that an adverse employment action was taken exclusively because of their disability.249 In discrimination claims under Title VII of the 1964 Civil Rights Act, a discriminatory act does not need to be based solely on a protected trait in order to be deemed unlawful.250 In contrast, under the Age Discrimination in Employment Act (ADEA) and the anti-retaliation clause of Title VII, a plaintiff must prove that the protected characteristic was the “but for” cause of the challenged adverse

245 Picture People, 684 F.3d at 985.
246 Id.
247 See Stefan, supra note 163, at 291. See also, e.g., Sullivan v. River Valley Sch. Dist., 197 F.3d 804 (6th Cir. 1999).
249 Miller, supra note 180, at 71-72.
employment action and not simply a “motivating factor.” The applicable standard under the ADAAA remains unresolved.

Although a “mixed motive” standard would help employees with mental illness more effectively seek recourse under the ADAAA, the majority of federal courts have ruled that the correct approach is the “but-for” standard. Before the ADAAA, many courts supported the “but-for” standard in ADA cases because the ADA prohibited discrimination “because of” a disability, which resembles the “because of” language of the ADEA. The United States Supreme Court construed the ADEA language as requiring “but-for” causation, and federal courts applied this reading to the similar language in the ADA. The ADAAA now denies discrimination “on the basis” of a disability, instead of “because of” that disability. Nonetheless, the United States Courts of Appeals for the Sixth and Seventh Circuits have interpreted that “on the basis

251 See, e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013); Gross v. FBL Fin. Services, Inc., 557 U.S. 167, 180 (2009). For a discussion about the basis of the “but-for” and “mixed motives” standards, see Kaminer, supra note 147, at 249 (“The Court reached the conclusion that the ‘but-for’ standard was appropriate in both [Title VII and ADEA] cases based in part on the fact that the anti-retaliation provision of Title VII and ADEA both make it unlawful to discriminate ‘because of’ certain criteria. . . . [T]he ‘mixed motive’ standard applies to claims of discrimination brought under Title VII since Title VII specifically prohibits discrimination based on protected classes ‘even though other factors also motivated’ the discrimination.”) (footnotes omitted).
252 Kaminer, supra note 147, at 249.
253 Id.
254 Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961-62 (7th Cir. 2010).
255 Id.
of” is equivalent to “because of,”257 and district courts have followed this reading.258

Since the ADAAA uses similar language to the ADEA and does not contain clauses that mandate a “mixed motive” standard, the federal courts will “in all probability continue to resolve the ambiguity in favor of the stricter but-for standard,”259 which will continue to make it difficult for employees with psychiatric disabilities to establish a prima facie case under the ADAAA.

IV. REFORMING MENTAL DISABILITY-BASED ANTIDISCRIMINATION LAW UNDER THE ADAAA

Despite significant developments in the ADAAA to protect people with mental disabilities from workplace discrimination, the available legal framework for redress remains largely inaccessible to employees with psychological disorders. Although the ADAAA has lowered barriers to the first prong of establishing a prima facie case, other legal obstacles continue to inhibit employees with mental illness from satisfying the second and third prongs, keeping such employees from defeating the summary judgment phase in litigation. There is limited legal scholarship from after the enactment of the amendments that focuses on reforming the legal landscape to afford better protections to employees with psychiatric disorders. This is

257 Nilles v. Givaudan Flavors Corp., 521 F. App’x. 364, 368 n. 3 (6th Cir. 2013); Fleishman v. Cont'l Cas. Co., 698 F.3d 598, 603-04 (7th Cir. 2012). See also Serwatka, 591 F.3d at 962 n.1 (7th Cir. 2010).
259 Kaminer, supra note 147, at 251. But see Miller, supra note 180, at 72 (“Whether the ADAAA’s general declaration that Congress intended broad protection for disability claims will be sufficient to withstand narrow judicial construction is another ambiguity for future interpretation.”).
likely because the case law under the ADAAA is only beginning to develop, and the legal community has only recently started to see the effects of the amendments. Nonetheless, some scholars suggest that the law would be more effective if Congress were to further clarify the definitions of “qualified” and “reasonable accommodation” to overrule the federal courts’ narrow interpretations that exclude the majority of employees with mental disorders from establishing a prima facie case. Scholars also propose that the federal courts adopt a “mixed motive” causation standard for the “adverse action” prong of the prima facie inquiry, or alternatively, that Congress direct such a standard by using language similar to that of Title VII. One scholar argues that the meaningful enforcement of the ADAAA could be accomplished through the addition of a compensatory damages remedy. He explains, “A more consistently available compensatory damages remedy would create the credible threat of litigation necessary to bring employers to the negotiating table . . . . [and] [t]he greater likelihood of damages liability . . . would incentivize settlement.” He also encourages a model of alternative dispute resolution for mental disability-based employment discrimination cases to protect employees who would suffer from disclosure of their illness

260 See Kaminer, supra note 147, at 222. Even though the statute was passed in 2008, it became effective on January 1, 2009, and the law does not apply retroactively to cases that were pending before 2009. Befort, supra note 126, at 2031.
261 See Befort, supra note 126, at 2071; Concannon, supra note 13, at 112-113; Danforth, supra note 228, at 677-78; Kaminer, supra note 147, at 238-248; Korn, supra note 229, at 643-46; Porter, supra note 210, at 543.
262 See Kaminer, supra note 147, at 251; Miller, supra note 180, at 71-72.
263 See Kaminer, supra note 147, at 251; Miller, supra note 180, at 71-72.
265 Id. at 1018.
266 Id. at 1012-13.
identifies several common-law approaches that employees with mental illnesses could use to obtain damages remedies.\textsuperscript{267} Namely, he suggests the common-law claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and wrongful discharge against public policy as “particularly appropriate for plaintiffs with psychiatric disabilities.”\textsuperscript{268}

I endorse these scholars’ recommendations that Congress should add specific language to the ADAAA to ensure access to legal protections for employees with psychiatric disabilities. Specifically, I believe that the words “qualified” and “reasonable accommodation” should be accompanied by further instructions in order to override the current restrictive interpretations of the federal courts.

I also agree that disability-based discrimination should be viewed through a “mixed motive” standard because no adverse employment decision motivated even in part by the stigma of mental illness should be supported by our government. Discrimination against individuals with psychiatric disorders creates insurmountable challenges for employees with mental illness, and the government should act to address this stigmatization, rather than permit discrimination as long as the bias serves as only one factor among others motivating an adverse employment action.

I see merit in the compensatory damages and alternative dispute resolution approaches. Implementing compensatory damages would hold employers accountable for their intentional or negligent acts of discrimination, and alternative dispute resolution would provide employees with an option to seek justice in a private, less distressing setting than public litigation. Although I am interested in exploring the concept of common-law claims in the antidiscrimination context, I am not persuaded that employees with mental illness would be

\textsuperscript{267} Id. at 1024.
\textsuperscript{268} Id.
more successful in their lawsuits through this approach, and I fear that the core issue of discrimination may be sacrificed in the pursuit of tort claims.

My own recommendation is to remodel the ADAAA to reflect the burden shifting available to whistleblowers under the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). SOX and Dodd-Frank are the two most recent federal employment discrimination statutes, and both afford employees substantial protection by shifting the burden of proof onto employers once plaintiffs establish, by a preponderance of the evidence, that the protected conduct was a “contributing factor” to the adverse employment action. Pursuant to SOX and Dodd-Frank, employers must demonstrate by “clear and convincing evidence” that they would have taken the same action regardless of the employees’ protected conduct. The burden on plaintiffs is far lower in the whistleblower setting than in the disability-based discrimination context, and once whistleblower plaintiffs meet this lower burden, the “clear and convincing evidence” onus on employers is much higher than that required to escape liability in the case of disability-based discrimination.

The government should offer employees with mental illness the elevated level of protection that it affords to whistleblowers. Employees with psychiatric disorders face a unique difficulty in establishing a prima facie case, despite the pervasive bias in the workplace against people with mental disabilities. If Congress

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261 See §§1514A; §78u-6; Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797 (6th Cir. 2015); see also §1980.104(b)(1).
262 §§1514A; §78u-6; Rhinehimer, 787 F.3d at 805.
263 §§1514A; §78u-6.
264 See supra, Section III.
265 See supra, Section I.
were to lower the burden of proof for plaintiffs in mental disability-based discrimination cases, individuals with mental illness would have more access to the intended protections of the ADAAA. The German civil procedure for disability-based employment discrimination, for example, offers more protection to employees by placing a heavier burden on employers.275 In Germany, when an employee is wrongfully terminated, he or she may file a claim of employment discrimination, and once a claim is filed, the employer carries the burden of proving that the employment action was complicit with German law.276

Regardless of potential legal remedies, academics from before and after the enactment of the amendments agree that “no matter how strongly a civil rights act is written nor how clearly its mandate is articulated, the aims of such a law cannot be met unless there is a concomitant change in public attitudes” about psychological disorders.277 As one scholar stated, “Legislation cannot dispel the

276 Jackson, supra note 274, at 543.
277 Michael L. Perlin, The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?, 8 J.L. & HEALTH 15, 20 (1994), Accord, e.g., Concannon, supra note 13, at 113 (discussing the “role of stigma in the granting of protected-class status” for individuals with mental disorders and “how the stigma of mental disabilities influence not only the general public . . . but judges performing judicial functions, as well”); Wendy F. Hensel, Interacting With Others: A Major Life Activity Under the Americans with Disabilities Act?, 2002 WIS. L. REV. 1139, 1168-75 (finding that judicial bias plays a role in the lower success rates of plaintiffs with mental disabilities in establishing that “interacting with others” is a major life activity); Hensel & Jones, supra note 195, at 78 (“The relatively high number of plaintiffs with psychiatric disorders . . . who failed to establish that they are qualified . . . seems to reflect the continuing belief that mental
myths surrounding mental illness and it cannot eradicate irrational fears of violence. Much of the work to be done to eliminate the stigma and misunderstanding surrounding mental illness is not amenable to a legal solution." 278 There is a conscious, unconscious, and institutional bias against psychiatric illness that pervades society, the employment sector as much as the federal courts. Social change is necessary for the law to be effective, and brave role models, such as Professors Jamison and McElroy, who speak out publically about their disorders, display one key to the destigmatization of mental illness. Disclosing one’s own mental disorder in the workplace can be an enormous risk and involve serious consequences.279 However, an increase in leading professionals “coming out” about their psychiatric disorders at work can foster more supportive employment environments for other individuals with mental disabilities.

CONCLUSION

Despite the statutory improvements of the ADAAA, the American federal law remains inadequate for employees with psychiatric disorders. The federal courts’ narrow construction of the law has created a burden too challenging to satisfy for plaintiffs with mental illness. The federal law must be more effective in protecting individuals with mental disorders from workplace bias. Congress

illness automatically renders individuals incompetent and incapable or performing in the workplace.”); Korn, supra note 229, at 647 ("... the law can only go so far. An anti-discrimination statute can affect behavior but it cannot eliminate the beliefs that underlie the behavior."); Stefan, supra note 163, at 805 ("[J]udicial assumptions about the nature of psychiatric disabilities and essential employment functions have resulted in the near-total failure of the ADA to protect individuals with psychiatric disabilities from employment discrimination ... .").

278 Korn, supra 229, at 647.
279 See supra, Section I.
should overrule restrictive court rulings, clarify ADAAA
terminology, add compensatory damages and a “mixed motive”
standard to disability-based employment discrimination claims, and
reform the law as to shift the burden of proof from employees to
employers earlier in legal proceedings. Nonetheless, simultaneous
social reform is necessary for changes in the law to have real effect.
Legal reform and social change can work together to destigmatize
mental illness in the employment sector and throughout society.